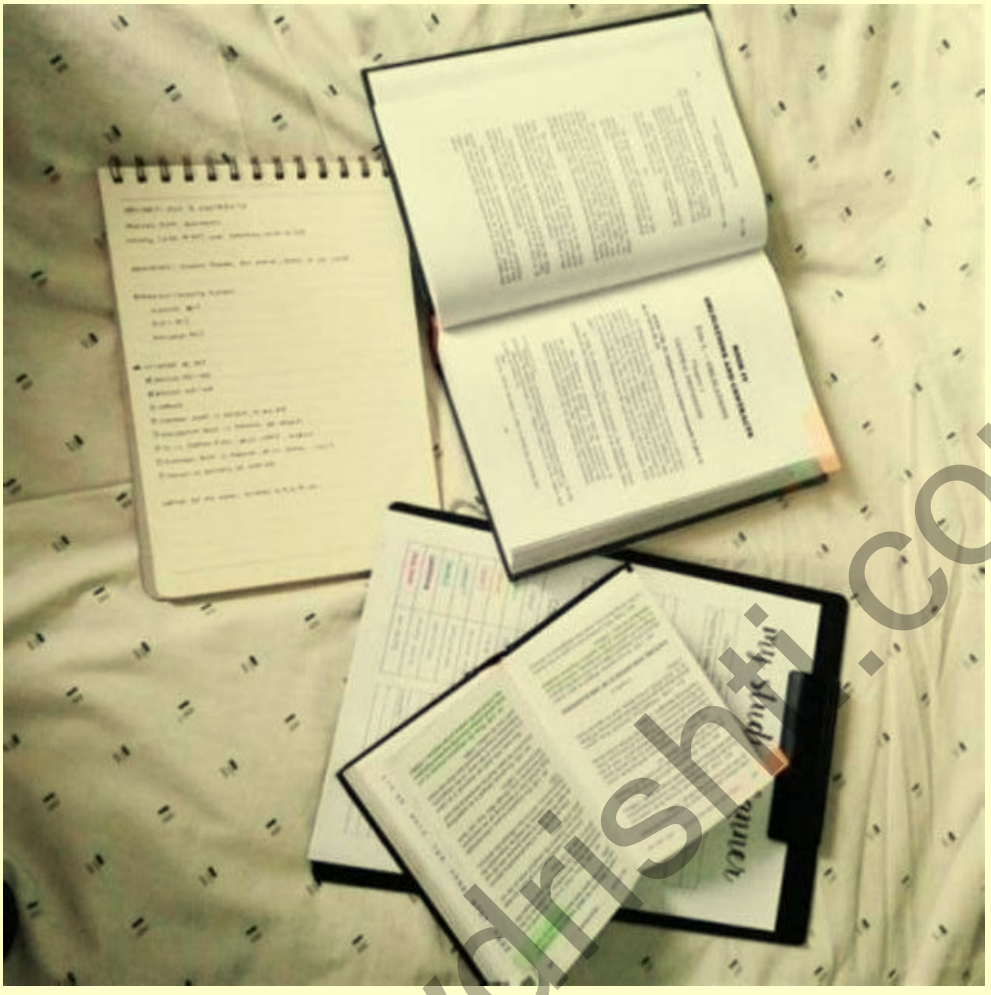

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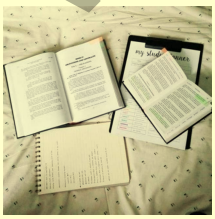

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CHAPTER 1

Nature of Crime

INTRODUCTION

Personal safety, particularly security of life, liberty and property, is of utmost importance to any individual. Maintenance of peace and order is essential in any society for human beings to live peacefully and without fear of injury to their lives, limbs, and property. This is possible only in states where the penal law is effective and strong enough to deal with the violators of law. Any state, whatever might be its ideology or form of government, in order to be designated as a state, should certainly have an efficient system of penal laws in order to discharge its primary function of keeping peace in the land by maintaining law and order. The instrument, by which this paramount duty of the government is maintained, is undoubtedly the penal law of the land. Penal law is an instrument of social control. Its approach is condemnatory and it authorises the infliction state punishment. To criminalise a certain kind of conduct is to declare that it should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it. Penal law does it by prohibiting 'undesired' and 'harmful' human conduct and 'punishing' the perpetrators thereof or posing threat of punishment to the prospective violators. It, therefore, defines and punishes 'acts' or 'omissions' that are perceived as:

(1) attacks on public order, internal or external;
(2) abuses or obstructions of public authority;
(3) acts injurious to the public in general;
(4) attacks upon the persons of individuals, or upon rights annexed to their persons; or
(5) attacks upon the property of individuals or rights connected with, and similar to, rights of property'.[1]

However, criminal law, which ultimately censures publicly an individual by labeling a person a criminal, has to balance between the 'collective (valued) interests' and 'individual interests'. And 'harmful conduct' or 'misconduct' to be condemned by criminal law needs to be judged in terms of its effect on valued interests, which may be individual interest or some form of collective interest. This essentially involves a few pertinent issues, namely, how the criminal law ought to be shaped, what its social significance should be, and when it should be used and when not. Answers and states' responses to these questions may not be uniform and precise. Criminal and penal policy of a state, which ostensibly varies from state-to-state and time to time, indeed dictates answers to these questions.

Nevertheless, it will be difficult to deny the great importance of this branch of law for the security of life, property and maintenance of law and order in the state. People in a state can indeed afford to be without a highly developed system of constitutional law, or property law, but they could ill afford to remain even a day without a system of penal law. Professor Wechsler, an eminent American authority on criminal law, has rightly said thus:

> Whatever views are held about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works gross injustice to those caught within its coils. The law that carries such responsibilities should surely be as rational and just as law can be.[2]

The study of the law of crimes is very interesting and highly beneficial for more reasons than one. It catches the imagination of people on account of its dramatic character. Very often, the incidents which constitute a crime become sensational on account of the vivid and violent nature of the act s--forcible interferences with property and liberty; with persons and life and the penalty imposed on those who commit such acts, naturally attract the attention of all people in a state. Every person in a society is interested in the maintenance of law and order, and is anxious to have security of life and property. Again, persons who may have to discharge the duties as either jurors or assessors, will also gain much by the knowledge of the fundamental principles relating to the administration of criminal justice. The comparatively high degree of importance and gravity of the criminal proceedings against a person, which may end in one's answering with one's own life, has naturally led to the high importance of this branch of law than others. The administration of criminal justice has also led people to think of greater problems, social and ethical, which would introduce a golden era in a state, where the law-abiding citizens would voluntarily abstain from crimes.

WHAT IS A CRIME?

It is very difficult to give a correct and precise definition of crime.[3] Glanville Williams, admitting the impossibility of having a workable content based definition of a crime, points out that the definition of crime is one of the thorny intellectual problems of law.[4] Russell also admitted that 'to define crime is a task which so far has not been satisfactorily accomplished by any wrier'.[5] JW Cecil Turner, who edited *Kenny's Outlines of Criminal Law*, in a similar tone, also conceded that 'the definition of crime has always been regarded as a matter of great difficulty' and 'the truth appears to be that no satisfactory definition has yet been achieved, and that it is, indeed, not possible to discover a legal definition of crime'.[6]

Such a 'difficulty', in ultimate analysis, arises due to the changing nature of 'crime', an outcome of the equally dynamic 'criminal and penal policy' of a state. A number of social and political forces and factors, individually or cumulatively, play a pivotal role in the formulation of criminal policy of a state. It obviously varies according to cultures, social values and beliefs, and ideology of the ruling social-political power. Only social values and culture in vogue and the existing power structure dictate the 'values' and 'social interests' that need 'protection' by using criminal law 'sanctions'. 'In fact criminal offences', observed by Russell, 'are basically the creation of the criminal policy adopted from time-to-time by those sections of the community who are powerful or astute enough to safeguard their own security and comfort by causing the sovereign power in the state to repress conduct which they feel may endanger their position'.[7] Professor Kenny, delving into the 'difficulty', however was more eloquent, who observed thus:

> Any conduct which a sufficiently powerful section of any given community feels to be destructive of its own interests, as endangering its safety, stability or comfort, it usually regards as especially heinous and seeks to repress with corresponding severity; if possible it secures that the forces which the sovereign power in the State can command shall be utilized to prevent the mischief or to punish anyone who is guilty of it. ...Of course a variety of factors may operate at the same time to produce this result, and it is rarely possible to identify them clearly: all that can be said is that an offence may become a crime as a result of the combined effect of a number of different social forces. ...Crimes therefore originate in the government policy of the moment; ....Since that policy is influenced by many considerations it is not easy to discover in any specific case of new law, what exactly and exclusively are the forces which have produced it; nor, of course, is the policy always followed consistently or logically. ...So long as crimes continue ...to be created by government policy the nature of crime will elude true definition.[8]

A pattern of human behaviour prohibited by criminal law at a given time in a given society, thus, depends upon the specific features of its organisation. Developments in science, especially in biology and medicine, and changes in the predominant moral and social philosophy also influence the making of penal law.[9] A human conduct that is believed to be inimical to the social interests is labeled as a crime. This explanation also enables us to understand why crimes change from age to age and differ from state to state. Whenever society comes to believe that conduct that was once held to menace any of the consciously recognised interests no longer act ually menaces them, it ceases to be a crime. Whenever society believes that a kind of conduct that was once thought to be indifferent to the welfare of the group actually threatens some of the cherished interests, it applies repressive methods, and that conduct becomes crime. Only political power of the day decides what human conduct deserves to be a crime. 'The domain of criminal jurisprudence', observed Lord Atkin, 'can only be ascertained by examining what act s at any particular period are declared by the State to

be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished'.[10] A truth is that a crime is an act or omission in respect of which legal punishment is inflicted on the person who is in default either by act ing or omitting to act and criminal law relates to crimes and their punishment.

W Friedman, approvingly quoting Professor Wechsler, observed: 'The purpose of criminal law is to express a formal social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it'. This observation, according to him, poses three important questions 'to which different societies give very different answers'. They are:

(1) What kind of conduct is 'forbidden'?
(2) What kind of 'formal' social condemnation is considered appropriate to prevent such conduct?
(3) What kind of sanctions are considered as best calculated to prevent officially outlawed conduct?

In examining what kind of conduct ought to be forbidden, it becomes necessary to recall some of the proclaimed purposes of criminal law. Nigel Walker[11] lists a number of 'purposes of criminal law', of which the following seem to be the most important for the present context. They are:

> The protection of the human person (and to some extent animals also) against intentional violence, cruelty or unwelcome sexual approaches.
>
> The protection of people against some forms of unintended harm (for example from traffic, poisons or infections).
>
> The protection of particularly vulnerable individuals (e.g. the young, the weak-minded, subnormal) against the abuse of their persons or property.
>
> The prevention of act s which, even if the participants are adult and willing, are regarded as 'unnatural' (for example, incest, sodomy or bestiality).
>
> The defence of the State (for example, espionage).
>
> The prevention of certain forms of behaviour which, if performed in public, might shock or corrupt other people (for example, nakedness, obscene language, or copulation between consenting adults in public).
>
> The protection of property against theft, fraud, or damage.
>
> The protection of social institutions, such as marriage and family (by prohibiting bigamy).

A human conduct that, according to the policy-makers, comes within the ambit of the above-mentioned catalogue of 'purposes of criminal law' can be labeled as 'crime'.

However, some sociologists, perceiving 'crime' as a 'social phenomenon', feel that criminal law, in a sense, protects certain 'social interests'. These interests, as classified by Roscoe Pound, are:

> Interests in general, including interests in general safety, general health, peace and public order, security of transactions, and security of acquisitions.

Interests in the security of social institutions. It includes interests in domestic institutions, religious institutions, and political institutions.

Interests in the general morals. This interest includes all social demands to be secured against acts or courses of conduct offensive to moral sentiments of the body of individuals at a given time. Hence, legal policies against dishonesty, corruption, gambling and other things of immoral tendencies may take form of 'crime'.

Interests in conservation of social resources. It is based on the idea that goods of existence shall not be wasted, which warrants that dependents, defectives, and delinquents are required to be trained, protected and reformed.

Interests in general progress. It includes interests in economic, political and cultural progress.

Interests in the individual life. This interest takes two forms. First, the interests, which demand that 'individual will', shall not be subjected arbitrarily to the will of another. Secondly, the interest resulting in the policy that all restraint and legal enforcement of the claims of others shall leave secured to the individual the possibility of human existence.[12]

Sociologists claim that these interests are preserved in every society, and any act that threatens or poses threat to their realisation finds place in the criminal law. The following crimes generally known to the human civilisation vis--vis the corresponding social interests listed above exhibit veracity of the claim of sociologists.

Crimes	*Corresponding Social Interests*
1 Crimes against human body and life	Out of interests of the community in life and limb of its members.
2 Crimes against property (e.g. theft, robbery, dacoity, etc.)	Out of interests of the society in general security. It is also partly out the individual of group interest in the welfare of and partly out of the social interest in the security of social institutions.
3 Crimes against public peace and order (e.g. treason, sedition, disturbance of public peace, etc.)	Developed partly out of demand for general security and partly out of the interest of the group in the stability of the institutions.
4 Crimes against religion	Developed out of the interests of the society in religious institutions as social institutions.
5 Crimes against the family (e.g. bigamy, adultery, neglect of children, desertion of family, etc.)	Conduct threatens the stability of the family as a social institution.
6 Crimes against morals of (e.g. cohabitation with a close relative, sodomy, obscenity, corruption of public morals, etc.) family institution.	Developed out of interests in the morals. Developed out of certain sentiments of the society, which feels outraged by such a conduct. Developed out of the interests in the outraged by such a conduct.
7 Crimes against conservation of resources of society (e.g. neglect of children and mentally challenged individuals)	The society not only looks at its own welfare but also welfare of the future generations. It therefore punishes waste of these natural resources.

It is needless to mention that social changes affect criminal law in many ways--through developments in science, especially in biology and medicine; through changes in the predominant moral and social philosophy; through changes in the structure of society, especially in its transition from a rural self-contained and relatively sparsely populated, to a highly urbanised and industrialised pattern. However, criminal offences dealing with the protection of life and liberty have essentially remained unchanged throughout the ages all over the world. But offences against property have undergone more profound changes, mainly as a result of the transformation of a primitive agricultural society into a commercial or industrial one. The original crime of theft has been gradually widened to include embezzlement and fraudulent conversion, so as to protect the

owners of commercial property against those entrusted with its handling. The growth of commercial and financial transactions has made the offence of fraud increasingly important in modern commercial society. Whereas theft predominantly penalises the lower classes of society for interference with the property of others, fraud has developed into a 'white collar crime'. Besides, the transformation in the type of modern privately owned assets has made it necessary to widen the concept of property from a physical thing to a variety of other assets such as electricity, shareholders claims, copyrights, patents, intellectual proprietary and the like.

Professor Andrew Ashworth[13] feels that the decision (of the legislature) whether or not criminalise should be influenced by the seriousness of the wrong rather than to create a formidable impression that certain misconduct has been taken seriously and dealt with appropriately. And criminal law, in principle, should be used against substantial wrongs and should not be used against non-serious wrongs. Criminalisation, which implies a labeling and punishment on conviction, of non-serious wrongs may weaken the significance of the label and the criminal law process. Arguing that without principled approach to criminalisation, criminal law is likely to remain something of a lost cause, he puts forward the following inter-linked four core principles of criminal law. They are:

1. The principle that criminal law should be used, and only used, to censure persons for substantial wrong doing.
2. The principle that criminal laws should be enforced with respect for equal treatment and proportionality.
3. The principle that persons accused of substantial wrongdoing ought to be afforded the protection appropriate to those charged with criminal offences.
4. The principle that maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing.[14]

Before criminalization of a human conduct, the legislature is expected to convince itself that:

(a) it is absolutely necessary to create an offence;
(b) the behaviour in question is sufficiently serious to warrant intervention by the criminal law;
(c) the mischief could be dealt with under existing legislation or by using other remedies;
(d) the proposed offence is enforceable in practice;
(e) the proposed offence is tightly drawn and legally sound; and
(f) the proposed penalty is commensurate with the seriousness of the offence.[15]

These factors, though indeed stipulate the criteria for the creation of new offences by a state, are hardly followed in practice.

CRIMINAL LAW AND MORALITY

Criminal law is narrower than morality. In no age or nation, has the attempt been made to treat every moral defect as a crime. The idea of crime involves the idea of some definite, gross, undeniable injury to someone, where some definite overt act is necessary. No one is punished for ingratitude, hard-heartedness, absence of natural affection, habitual idleness, avarice, sensuality and pride. Sinful thought and dispositions of mind might be the subject of confession and of penance, but not of criminal proceedings. Criminal law then, must be confined within narrow limits, and can be applied only to definite overt act s or omissions, capable of being distinctly proved, which acts or omissions inflict definite evils, either on specific persons or on the community at large. It is within these limits only, that there can be any relation at all between criminal law and morality.[16] With regard to offences like murder, rape, arson, robbery, theft or the like, there is common hatred towards them both by law and morality. Law and morals powerfully support and greatly intensify each other in this matter. Everything, which is regarded as enhancing the moral guilt of a particular offence, is recognised as a reason for increasing the severity of the punishment awarded to it. According to Sir James Fitzjames Stephen[17]:

> The sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment. The mere general suspicion or

> knowledge that a man has done something dishonest may never be brought to a point and the disapprobation excited by it may in time pass away, but the fact that he has been convicted and punished as a thief, stamps a mark upon him for life. In short, the infliction of punishment by law gives definite expression and solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral and popular sanction of morality, which is also sanctioned by criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.

LAW AND ETHICS

Law is concerned with relationships between individuals, rather than with the individual excellence of their characters. Ethics is a study of the supreme good, which concentrates on an individual. Law comes in only when ethics and morality fail. Ethics deal with absolute ideal, whereas positive morality deals with current public opinion.

DEFINITIONS OF CRIME

It is, as stated above, difficult to have a precise definition of 'crime'. Nevertheless, a few scholars, from time to time, focusing on one or the other dimension of a prohibited act, defined the term 'crime'. With a view to acquainting ourselves with nature and different facets of 'crime', it will be worthwhile to have an overview of some of the hitherto offered prominent definitions of 'crime'.

First of all, let us examine the two definitions given by Sir William Blackstone in his classical textbook of English law, *Commentaries on the Laws of England*. He has defined it first 'as an act committed or omitted in violation of public law forbidding or commanding it'.[18] However, the term 'public law' has different accepted connotations. Austin, for example, perceived 'public law' as identical with constitutional law. If this meaning is accepted, crimes would cover only political offences. This view not only narrows scope of the definition of crime but will also make the definition of no practical use. While some jurists equate 'public law' with 'positive law' or 'municipal law'--law made by the state. With this interpretation of 'public law', the definition given by Blackstone becomes too wide as it will take in its ambit every legal wrong or violation of (positive) law.

Perhaps Blackstone visualised the inadequacy of his first definition of crime, and he then defined crime in terms of public rights and duties. According to him, crime is 'a violation of the public rights and duties due to the whole community considered as a community'.[19] Sergeant Stephen, while editing *Blackstone's Commentaries*, slightly modified the definition and reconstructed it to read as: 'A crime is a violation of a right, considered in reference to the evil tendency of such violation as regards the community at large'. This definition is also inaccurate for the reason that the essential characteristic of crime is not the infringement of rights as in civil cases but, the doing of prohibited act s. Enforcement of rights belongs to the administration of civil justice. Instances of crimes which do not violate anyone's right may be found in offences, such as, being found in possession of housebreaking tools by night or possession of counterfeit coins.

Both Blackstone and Stephen have emphasised one aspect of crime in the above definitions, namely, harm or injury to the community. This aspect is true of many crimes, but not all. Even transactions of civil nature will injure the community. In a way, we can say that every illegal act, even a mere breach would usually injure the community. Again, there may be certain act ions of individuals, which harm a particular segment of the society, but would nevertheless not be criminal. For example, in today's world, a man may without committing any crime at all, bring about greater calamity to the society by breach of trust or by negligent management of a company's affairs, than by committing an act of theft, such as stealing a pocket handkerchief, though the former is a serious crime. Hence, it cannot be said with accuracy, that a legal wrong is a crime, if it tends to cause evil to the community.

John Gillin, a sociologist, also defined crime in terms of 'harm' to society. He said:

> ...[A]n act that has been shown to be actually harmful to society, or that is believed to be socially harmful by a group of people that has the power to enforce its beliefs, and that places such act under the ban of positive penalties.[20]

The next question is, can we define a crime in terms of morality? Can we limit the idea of crime to those legal wrongs which violently offend our moral feelings?[21]Here again, although most of the crimes are moral wrongs as well, there are many cases in which the test of morality will not stand scrutiny. For example, although treason is legally the gravest of all crimes, it has very often been applied in the past against great patriots and national leaders like George Washington and Mahatma Gandhi. A mere omission to keep a highway in repair shocks nobody, but it is a crime, whilst many grossly cruel and fraudulent breaches of trust are mere civil wrongs. Directors of a company may ruin the company by gross negligence, bringing many shareholders to poverty and yet incur no criminal liability. A conduct may, indeed be grossly cruel and yet be no breach of penal law at all. A man, for example, who is a good swimmer callously stands by and watches a child drowning in a pond, would be guilty of committing a grossly wicked immoral actwhich may arouse universal indignation but by no standards would he be criminally liable. Similarly, immoral act s like ingratitude, hard-heartedness, insensitivity to the sufferings of others have never been crimes. Drafters of the Indian Penal Code rightly observed:

> ...[W]e cannot admit that a Penal Code is by any means to be considered as a body of ethics; that the legislature ought to punish acts merely because those act s are immoral.... Many things, which are not punishable, are morally worse than many things, which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in passion, or breaks a window in a frolic, yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow-creature from death may be a far worse than the starving wretch who snatches and devours the rice; yet we punish the latter for theft, and we do not punish the former for hard-heartedness.[22]

Further, defining crime on the basis of purported immorality encounters with a problem having no convincing answer, i.e. whose morality should form the benchmark for criminalization? The issue of (de)criminalisation of consensual homosexuality, for example, has evoked different responses and answers by the liberal, the paternalist, and by the legal moralist. Criminalisation of an act *simply* on the ground of its immoral nature has been the subject of vigorous debate.[23]

Another important distinction between crimes and civil wrongs is said to lie in the different types of proceedings followed separately for each. The object of criminal procedure is always punishment, i.e. the convicted offender is made to suffer the punishment, which is inflicted on him not for the sake of redressal, but for the sake of example. The inevitability of punishment is its indelible imprint. The object of civil proceedings, on the other hand, is compensation or reparation. *Restitution in integrum*(restoration to the original position) is one of the basic principles of compensation in civil suits for damages. But it should be remembered that there are certain types of civil act ions in which exemplary damages are awarded against wrongdoers by courts by way of punishment.

A peculiar type of proceeding known as penal action, which formerly prevailed in England, belonged to the civil procedure, although its avowed object was punishment of the wrongdoer. Under this early system, pecuniary penalties can be recovered in some cases by any person who sues the doers of various prohibited act s. Although this practice was called penal action, for it was against persons who had committed certain specified criminal act s, it was essentially of a civil nature, for the action was for the recovery of money from the wrong doer by way of penalty.

The attempted distinction drawn between civil and criminal proceedings on the ground that the former enrich the individual, is also not true in all cases. In certain exclusively coercive civil act ions for the recovery of debts, debtors are imprisoned, although, it will not enrich the plaintiffs.

However, the difference between civil and criminal proceedings lie in the respective degrees of control exercised over them by the sovereign authority in the state, not so much in respect of their commencement as at their termination. In criminal prosecutions, the state is the controlling authority. The sovereign authority in the state alone exercises the high prerogative of giving pardon to the criminal. The sanctions of criminal law, such as punishments, are remissible by the Crown in England and by the President of India in the Republic of India.[24] Punishments are not remissible by private persons. Compromise is possible in civil suits, whereas in a criminal procedure, the wrongdoer can escape his liability only by suffering. Probably influenced by the degree of interference by the state in civil and criminal proceedings, some jurists defined crimes in terms of nature of the proceedings involved therein. John Austin, for example, said:

> A wrong which is pursued by the sovereign or his subordinates is a crime. A wrong which is pursued at the discretion of the injured party and his representatives is a civil injury.[25]

It is obvious that this definition is not of substance but of procedure. Further, it does not explain a number of crimes known to criminal law that allow the prosecution to initiate cases only at the instance of the injured party as in torts. No court, for example, will take cognisance of the offence of adultery and of criminal elopement, contrary to ss 497 and 498 of the Indian Penal Code (IPC), except upon a complaint made by the husband of the woman.

Professor Kenny, plausibly with a view to overcoming the lacuna, modified the Austinian perception of crime and stated: 'Crimes are wrongs whose sanction is punitive and is in no way remissible by any private person, but is remissible by the Crown alone, if remissible at all'. But even this definition of Kenny, which was till recently considered as a very good definition, has been criticised as highly technical, being based on mere procedure. Winfield thought it led to a vicious circle: 'What is a crime? Something that the Crown alone can pardon. What is that the Crown alone can pardon? A crime.'[26] It has been pointed out that if in a democratic state, like England or India, the Parliament takes away the powers of the Crown or of the Head of the State to give pardons, the definition loses its ground. It also fails when it is applied to the IPC which has incorporated a number of offences that are remissible by individuals without even the intervention of the court. Obviously, in such offences, private individuals, and not the state, are allowed to remit the punishment. However, the controlling power of the state with regard to the criminal prosecutions is an undeniable fact.

Other noteworthy modern definitions of a crime are discussed below.

According to Prof Paton: 'In crime we find that the normal marks are that the State has power to control the procedure to remit the penalty or to inflict punishment'. Similarly, Prof SW Keeton has stated that: 'A crime today would seem to be any undesirable act, which the state finds most convenient to correct by the institution of proceedings for the infliction of a penalty, instead of leaving the remedy to the discretion of some injured person'. Crime is any form of conduct which is forbidden by law under pain of punishment.

Section 40 of the rightly states that 'an offence denotes a thing made punishable by the Code'. An existing offence in the IPC will cease to exist, the moment the state repeals or invalidates it.

Professor Goodhart has defined crime as any act which is punished by the state. It is still the protection of the public welfare rather than the support of private interests, which is the dominant purpose of this branch of the law.

In *Halsbury's Laws of England*, crime is defined as follows: 'A crime is an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment'.[27]

Crime is a serious anti-social action to which the state reacts consciously by inflicting pain (either punishment or correctional measures).[28] Michael and Adler state that: 'the most precise and least ambiguous definition of crime is that which defines it as behaviour which is prohibited by the criminal code'.[29]

BA Wrotley combines moral and legal element in his definition of crime: 'A crime is an offence against the law, and is usually an offence against morality, against a man's social duty to his fellow members of society; it renders the offender liable to punishment'.

Russell in his classic work *On Crimes*, has said that crime is the result of human conduct which the penal policy of the state seeks to prevent.[30]

It is evident from these definitions of crime that it is difficult to have a precise definition of 'crime' that embraces the many act s and omissions which are criminal in nature and which at the same time excludes all those acts and omissions that are not. An act or omission, no matter what the degree of immorality, reprehensibility, or indecency, does not amount to a crime unless it is prohibited by penal law. Ordinarily, a crime is a wrong which affects the security and well-being of the public generally so that the public has an interest in its suppression. It, however, needs to stress that there cannot be a straightforward or determinate checklist of criteria for either identifying or defining the concept of 'crime' in universal terms. 'We', a scholar of repute advises, 'should resist the desire to find some single concept or value that will capture the essence of

crime or the essential characteristic in virtue of which crimes are properly punished--in favour of a pluralism that recognises a diversity of reasons for criminalisation, matching the diversity of kinds of wrong which can legitimately be the criminal law's business'.[31]

Nevertheless, these definitions enable us to describe 'crime' and to identify its prominent characteristics, and thereby to understand nature of crime. JW Cecil Turner has given the following description of a crime:

> ...[I]t is a broadly accurate description to say that nearly every instance of crime presents all of the three following characteristics: (1) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (2) that among the measures of prevention selected is the threat of punishment; (3) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so.[32]

An extensive and thorough analysis of crimes, according to Jerome Hall, leads to a description of the following seven interrelated and overlapping differentiae of crime. These are:

(1) There must be some external consequences or 'harm' to 'social interests'.
(2) The harm must be 'prohibited' by penal law.
(3) There must be 'conduct', i.e. intentional or reckless action or inaction that brings the prohibited 'harm'.
(4) There must be 'mens rea' or 'criminal intent'.
(5) There must be 'concurrence' of mens rea and conduct.
(6) There must be a 'causal' relation between the legally prohibited harm and the voluntary misconduct.
(7) There must be legally prescribed 'punishment' or threat of punishment.[33]

These definitions, nevertheless, afford us an adequate basis for a proper study of the subject.

1 Stephen, Sir James Fitzjames, *A History of the Criminal Law of England*, vol I, Burt Franklin, New York, 1883, pp 2-3.

2 Wechsler, 'The Model Penal Code ', in JL Edwards (ed.), *Modern Advances in Criminology*, 1965.

3 The earliest reference to the word 'crime' puts the date in the fourteenth century. It conveyed to the mind something disreputable or wicked. And in early law there was no clear distinction between criminal and civil wrongs. The two have been called a 'viscous intermixture'. See Sir Frederick Pollock and FW Maitland, *The History of English Law before the Time of Edward I*, vol II, second edn, 1911, p 465, Allen, *Legal* Duties,1931, p 222; Winfield, *Province of the Law of Tort*, 1931, p 190.

4 Glanville Williams, 'The Definition of Criminal Law' [1955] Contemporary Legal Problems 107, at p 130. He ended his search for a definition of crime with the conclusion that only a formal definition is sustainable, namely, 'a crime is an act capable of being followed by criminal proceedings having a criminal outcome.'

5 *Russell on Crime*, JW Cecil Turner (ed.), Stevens & Sons, London, vol 1, 12th edn, p 18.

6 *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, 1962, p 1. However, Professor Kenny, in the first edition of his book gave a definition of crime. It was reproduced as Appendix in the 16th edn of *Kenny's Outlines of Criminal Law*.

7 *Russell on Crime*, JW Cecil Turner (ed), vol 1, 12th edn., Stevens & Sons, London, p 18.

8 *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, pp 2, 4 and 5.

9 Decriminalisation, for e.g., euthanasia, assisted suicide, in some jurisdictions owes its much debt to recent developments in medical sciences.

10 *Proprietary Articles Trade Association v Attorney-General of Canada* [1931] AC 310, p 324.

11 Nigel Walker, *Sentencing in a Rational Society*, Penguin, 1972, p 41.

12 See John Gillin, *Criminology and Penology*, third edn, New York.

13 Andrew Ashworth, 'Is the Criminal Law a Lost Cause', vol 116, *Law Quarterly Review*, 2000, p 225.

14 For further elaboration of these principles see ibid., pp 253-256. See also Nigel Walker, *Sentencing in a Rational Society*, Penguin, 1972, pp 44-45.

15 Lord Williams of Mostyn, the then Minister of State at the Home Office, UK, stated in 1999 in writing on the floor of the House. See, HL Deb, vol 602, WA 57, 18 June 1999.

16 The relation of criminal law with morals is a mute question. It is perceived as two intersecting circles, the part inside the intersections representing the common ground between the two spheres and the parts outside representing the distinctive realms in which each holds exclusive sway. However, it is to be remembered that both, criminal law and morality, which supplement each other as a part of the social fabric, hold a broad common territory. Nevertheless, serious divergence between the two raises a pertinent question about their mutual priority and inter-relation. See generally, HMSO, 'Report of the Committee on Homosexual Offences and Prostitution', Cmnd 247, 1957, Devlin, *The Enforce- ment of Morals*, Oxford, 1965, and HLA Hart, *Law, Liberty and Morality*, Oxford, 1968.

17 Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol. II, Burt Franklin, New York, 1883, p 81.

18 Sir William Blackstone, *Commentaries on the Laws of England*, vol 4, 17th edn, 1830, p 5.

19 Sir William Blackstone, *Commentaries on the Laws of England*, vol 4, 17th edn, 1830, p 5.

20 John Gillin, *Criminology and Penology*, third edn, New York, p 9.

21 For example, Garafalo, an eminent sociologist, defined crime in terms of immoral and anti-social acts. 'Crime is an immoral and harmful act that is regarded as criminal by public opinion because it is an injury to so much of the moral sense as is possessed by the community a measure which is indispensable for the adaptation of the individual to society.' See, Garafalo, *Criminology*, Little Brown, Boston, 1914, p 59. For further insight see RA Duff, *Answering for Crime: Responsibility and Liability in Criminal Law*, 2007, chs 4 and 6.

22 Macaulay, Macleod, Anderson and Millett, *A Penal Code Prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note Q, p 174.

23 See, HMSO, 'Report of the Committee on Homosexual Offences and Prostitution', Cmnd 247, 1957, Devlin, *The Enforcement of Morals*, Oxford, 1965, and HLA Hart, *Law, Liberty and Morality*, Oxford, 1968. Also see, KI Vibhute, 'Consensual Homosexuality and the Indian Penal Code : Some Reflections on the Interplay of Law and Morality', vol 51*Jr of the Indian Law Institute*, 2009, p 3.

24 See the Constitution of India, art 72. Also see art 161, which confers similar power of pardon on a State Governor.

25 Austin, *Lectures on Jurisprudence*, students' edn, 1920, p 249.

26 Winfield, *Province of the Law of Tort*, 1931, p 197.

27 *Halsbury's Laws of England*, third edn, p 271.

28 WA Bonger, *Introduction to Criminology.*

29 Michael and Adler, *Criminal Law and Social Science*, 1933.

30 *Russell on Crime*, JW Cecil Turner (ed), vol 1, 12th edn, Stevens & Sons, London, p 39.

31 RA Duff, *Answering for Crime: Responsibility and Liability in Criminal Law*, 2007, p 139.

32 *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn., Cambridge, 1962, p 5.

33 For details see, Jerome Hall, *General Principles of Criminal Law*, second edn., Bobbs-Merrill, New York, 1960, pp 8-18. Also see Edwin Sutherland and Donald Cressey, *Principles of Criminology*, JB Lippincott, sixth edn, New York, 1960, pp 11-14.

[redacted]: Criminal Law,12th Edition/[redacted] Criminal Law 2014/CHAPTER 2 Penal Law in India

CHAPTER 2

Penal Law in India

CRIMINAL LAW OF THE HINDU SYSTEM

Arthasastra, *Manu Smriti* and *Yajnavalkya Smriti* are the three leading law codes of ancient India. However, it is *Manu Smriti* or the Code of Manu,[1] which has made a lasting impact on human behavior in India. It contains ordinances relating to law. It is a complete digest of the then prevailing religion, philosophy, custom and usages observed by the people in India. It lists the duties of the kings and rules, based on *Dharma*, of administration of justice by them.

In *Manu Smriti*, law was discussed under 18 principal heads,[2] covering both modern civil and criminal branches of law, which fell under heads such as gifts, sales without ownership, rescission of sale and purchase, partition, bailment, non-payment of debt, loans, wages or hire, breaches of agreements and contract, disputes between partners and between master and servant, boundary disputes, assault and slander, defamation, trespass of cattle, damage to goods and bodily injuries in general. It specifically recognised assault, defamation, theft, robbery, violence to body, adultery, altercation between husband and wife, and gambling; as crimes.[3] Later on, Manu added cheating, trespass or transgression and fornication to the list of offences.[4] These offences were subject to punishment such as censure, rebuke, fine, forfeiture of property, and corporal punishment including imprisonment, banishment, mutilation and death. The quantification of these punishments by the King was regulated by a set of principles laid down, and the factors indicated, in the Code itself. *Yajnavalkya*, following Manu, lays down that the King should inflict punishment upon those who deserve it after taking into consideration the nature of the offence, the time and place of occurrence of the offence, and the strength, age, avocation and wealth of the accused. As in other ancient communities, the practice of paying money compensation was also prevalent in ancient India. However, the Hindu law of punishment occupied a more prominent place than compensation.

However, *Manu Smriti* practiced distinction between the higher and lower castes in the matter of giving punishments. *Brahmins*, persons belonging to highest caste of the Indian society, and women were exempt from the death sentence. Instead of capital punishment, a *Brahmin* was to be banished, as it was considered a greater punishment for him than even the death penalty. He was to be given lesser punishment in some offences, even a quarter of the prescribed punishment for others. Till recently, this was the provision of the former Travancore State Penal Code . If a man belonging to a lower caste, i.e. if an *avarna* man committed adultery with a *Savarna's* wife, say a *Namboodiri* woman, the man would be awarded the death penalty. If a higher caste woman, i.e. *savarna*committed adultery with a lower caste man, she would be publicly humiliated or cast out of the house and city, or thrown to the dogs, and in some cases, burnt alive. Various tariffs of damages were provided for different types of assaults and defamation. These practices were common in Malabar until the Indian Penal Code 1860 came into force.

Hence, *Manu Smriti* was criticised for its unequal punishment and treating *Brahmins* above the law. However, a scholar of criminal law,[5] appreciating the scientific basis of this unequal punishment and its underlying basis, justifies such an unequal punishment treating *Brahmins* above the law.

A Hindu Code was compiled by the *Pandits* of Benaras at the instance of Warren Hastings, when the latter was the Governor-General of India. It was called the *Gentoo Code*. It provided death penalty for murder. Theft was divided into open theft and concealed theft, and different punishments were prescribed as in Roman law. The former was punished by fine and the latter by the most cruel punishment of cutting off the hand or foot at the discretion of the judge. Housebreaking and highway robbery were punished with the death sentence.

MOHAMMEDAN CRIMINAL LAW

Mohammedan criminal law, it is believed, originated from the Holy Koran. It was further expounded through *Hadis*, the sayings of the Prophet, *Ijmma*, i.e. analogical deductions from the text laid in the Holy Koran, and *Kiyas*, i.e. views of the learned scholars. Thus, the substantive Mohammedan criminal law has divine origin. What therefore remained for the human beings was only to prescribe the rules of procedure for its enforcement and administration.

When Mughal rule was established over major portions of India, naturally, Mohammedan criminal law supplanted the ancient Hindu penal law. It was Mohammedan criminal law, as expounded by the leading doctors of the *Suni* Mohammedans, Aboo Haneefa and his two disciples Aboo Yoosuf and Imam Mohammed, that was introduced by the Mughal conquerors whose power reached its zenith under Akbar (1556-1605).

Mohammedan criminal law classified all offences as incurring of one of these classes of punishments namely:

(1) *Kisas* or retaliation including *diyut*--the price of blood homicide;
(2) *Hud*--Specific penalties--theft, robbery etc.;
(3) *Tazeer* or discretionary punishment.

Kisas or retaliation applied principally to offences against the person; *hud* or specific punishment applied to robbery, mutilation, theft, adultery and some other offences; and *tazeer* also called *seasut* or discretionary punishment, applied to all other cases. Political offences were too vague and were put under the heading 'destruction of rebels', without giving any further details. But homicide was classified very minutely into five grades:

(1) *Katl-amd* or willful homicide by a deadly weapon--equivalent to our murder;
(2) *Katl-shabah-amd* or willful homicide caused with an instrument which was not likely to cause death;
(3) *Khatl-khata* or erroneous homicide, killing under a mistake either as to the person or to the circumstances;
(4) Involuntary homicide by an involuntary act, as where a man falls on another from the roof of a house;
(5) Accidental homicide by an intervenient cause, as where a man unlawfully dug a well into which another person fell and was injured.

For theft, hands were cut off. Stoning or scourging was the punishment prescribed for illicit intercourse. For various types of robbery, the punishment was mutilation, death, or both.

Mohammedan criminal law was defective in many respects. It gave no weight to the testimony of unbelievers. In cases where women were charged with sexual offences, their testimony was also rejected. In such cases, the law was not satisfied with less than the positive testimony of four men, who are eyewitnesses to the fact and of ascertained credit. It was undoubtedly very harsh and cruel in certain cases. Death sentence was awarded to a married man, who had sexual intercourse with a woman other than his wife. The result was, as was remarked by Stephen 'a hopelessly confused, feeble, indeterminate system, of which no one could make anything at all'.

Under Mughal rule, civil justice and revenue laws came under the authority known as *diwani*, whereas military and criminal justice came under *nizamat*. On 12 August 1765, Lord Clive obtained from the Emperor of Delhi, whose power was fast declining, a grant of the *Diwani* of Bengal, Bihar and Orissa, which gave the Company the power to collect the revenue of those provinces. By another treaty, entered with Nujm-ul-Dowla, the *subedhar*, in February 1765, the Company acquired the *nizamat* from him. Still, until 1790, his deputy, the *naib nazim* with his *nizamat adalat* at Murshidabad continued to administer criminal justice over the people. Finally, in 1790, the East India Company removed the *naib nazim* and directly assumed the duties of the administration of criminal justice.

Under the native system of administration that was in existence in the city of Calcutta, administration of criminal justice was as follows: There was a *nizam*, a supreme magistrate, invested with the power to try capital offenders. Just below him was the deputy *nizam*, who dealt with lesser offences such as affrays, riots, etc. Below him was the *Foujdar*, an officer of police who was the judge of all non-capital crimes. *Kotwal* was really the peace officer of the local unit dependant on *foujdar*.

Outside the capital, in the *mofussil* districts, the authority of the *zamindars* prevailed and each *zamindar* had his own civil and criminal courts in his district. Only in cases of death sentence, the matter had to be reported to the capital before actual execution.

DEVELOPMENT OF CRIMINAL LAW IN INDIA UNDER THE BRITISH RULE

Before the advent of the British, as stated above, the penal law prevailing in India for the most part was the Mohammedan Law.[6] With necessary modifications, it continued to govern the people of India for a considerable period of the East India Company's administration, as the latter did not interfere with the thitherto-prevailing penal law of the country. Provisions of the Mohammedan law, however, were superseded only in cases where the regulations[7] and the Mohammedan law prescribed distinct penalties for the same offence.[8]

The first major attempt to reform the criminal justice was made after passing of the Regulating Act 1773, under which new courts were set up. In each district, a criminal court, *Foujdaree Adalat*, was set up. It composed of Mohammedan officers, a *kazi*, a *mufti* and two *maulvis*, to try criminal cases in presence of a Collector, a European supervisor, whose duty was to see that the trial was fairly conducted according to the law by which it professed to be guided. A superior court of revision, *Nizamat Sadar Adalat*, was set up at Moorshedabad. It was composed of a *daroga*, the chief *kazi*, the chief *mufti* and three *maulvis*. It formed a court of revision as to the proceedings of the *Foujdaree Adalat*, and in capital cases signified their approval or disapproval of convictions. In 1793, another reform, in pursuance of the Lord Cornwallis's Judicial Regulations, was made. In each district or *zilla*, a court, composed of a European judge assisted by a Hindu law expert and a Mohammedan law expert, was set up. Four appellate courts, comprising three judges and three native experts of Hindu and Mohammedan law, namely a *kazi*, a *mufti* and a *pandit*, were set up at Calcutta, Dacca, Patna and Moorshedabad. All these courts were subject to the *Suddar Nizamat Adalat* or Supreme Criminal Court at Calcutta, which consisted of the Governor-General and his council, with principal native law officers. Thus, this was the first criminal court presided over by a English judge established under the authority of the Company for the administration of criminal justice to the natives of India. However, subsequently, the constitution of the *Suddar Nizamat Adalat* was completely changed. Instead of consisting of the Governor-General-in-Council, it was composed of civilian judges, and the district or *zilla* judges were empowered to act as criminal courts. During the same time, magistrates, who were also collectors, were authorised to hear and determine petty offences such as assaults, and to punish them with imprisonment up to fifteen days or fifteen strokes of *rattan*, subject or not to an appeal to the sessions judge.

Thus, the final form of the criminal courts of the East India Company was *Suddar Nizamat Adalat*, the sessions judges, and the magistrates.

These courts had jurisdiction over the native Indians only. Alongside this, existed a system designed for the double purpose of administering English law to the Europeans in India and of serving as a counterpoise in their interest to the great powers vested in the Governor-General and his council. These institutions were the Supreme Courts and Justices of the Peace.

The Regulating Act of 1773 authorised the Crown to establish a Supreme Court at Calcutta, consisting of a Chief Justice and three puisne judges. The court was to have power to hear and determine all complaints against any British subjects residing in Bengal, Bihar and Orissa for any 'crimes, misdemeanors, or oppressions committed' by them. The Charter granted under this Act gave to the Supreme Court within its limits all the authority of the Court of King's Bench in England. It also provided in reference to criminal justice that it should be administered 'in such or the like manner, and form, or as nearly as the condition and circumstances of the place and the persons will admit of as our courts of oyer and terminer and gaol delivery do or may in that part of Great Britain called England'. Supreme Courts similar in all respects to the Supreme Court of Calcutta were established in Madras in 1800 and in Bombay in 1823.

However, this reform in the administration of criminal justice led to a problem. The Britishers on these courts began gradually to refer to, and rely upon, the English law of crimes, while the criminal courts in the Presidency towns were obliged to follow their own system of law. Such a practice, obviously, resulted into a non-uniform law of crimes.

The Bombay Province was the first province in India to enact in 1827 a brief penal code, the Bombay Regulation of 1827 (the Bombay Code or the Elphinstone Code),[9] for the *mofussil*. The Bombay Regulation, incorporating almost all the penal law of the Bombay Presidency, issued by Mountstuart Elphinstone, the then Governor of Bombay, superseded the Mohammedan penal law. The Bombay Code, which was extremely

simple, short and written more in the style of treatise than in that of a law, remained in force until it was superseded by the Indian Penal Code 1860 (IPC).

In 1849, when Punjab was annexed to the British Empire by Lord Dalhousie on 29 March, a short Code was drawn up by the then Governor-General for the Punjab Province as, the Mohammedan penal law, which was in force in Bengal, was not recognised in the Punjab province.[10] The penal law of the Madras, Bengal, Bihar and Orissa provinces and of other territories acquired by the British, then known as North-West Provinces, was constituted by regulations.

Such was the position of criminal law in the most important parts of India when the government was taken over by the Crown from the East India Company in 1858. However, one needs to go back to the Charter Act of 1833 to trace and appreciate the development of penal law by the new government.

MAKING OF THE INDIAN PENAL CODE--HISTORICAL BACKGROUND[11]

The Charter Act of 1833, plausibly to achieve uniformity of laws and judicial systems in all the parts of British India, introduced a single legislature for the whole of British India. It made the Governor-General of India, for the first time, solely responsible for promulgating laws for all persons and the Presidency towns as well as for the *mofussil*.[12] This 'legislature' was authorised to enact all laws, whether of provincial[13]or all-India application. The Governor-General was assisted by an Executive Council. The Charter Act of 1833, however, provided for the appointment of a 'law member' to the Council of the Governor-General, who was only allowed to sit and vote 'at meetings for making laws and regulations'.[14] Thomas Babington Macaulay,[15] who had a firm conviction that India's salvation lay in her complete anglicisation, was appointed as the first law member on the Council. He assumed charge of his office on 27 June 1834.

The Charter Act of 1833 also provided for the appointment of a 'Law Commission'[16] for inquiring fully into, and reporting on, the state of laws in force in British India and the administration of justice.[17] Accordingly, in 1834, the First Indian Law Commission comprising Thomas Babington Macaulay, Sir John Macpherson Macleod, George William Anderson and F Millett as Commissioners was constituted. During 1834-36, the Law Commission, under TB Macaulay's supervision, prepared the Draft Penal Code .[18]In pursuance of orders of the Government of 15 June 1835, the Commission on 2 May 1837, submitted the Draft Penal Code to the Governor-General-in-Council, who on 5 June 1837 returned it to the Law Commission with an order to get it printed under its superintendence.[19] The Commission printed the Draft under its supervision. The Commission also carefully revised and corrected the Code, along with the Notes,[20] while it was in the press.

It is pertinent to note that the Law Commission did not base its Draft Penal Code on either the then penal law prevailing in different provinces or the penal law system premised on the Mohammedan or Hindu law. The Commission reasoned:

> The criminal law of the Hindus was long ago superseded...by that of the Mohammedans...The Mohammedan criminal law has in its turn been superseded, to a great extent, by the Regulations. Indeed, in the Territories subject to the Presidencies of Bombay, the criminal law of the Mohammedans, as well as that of the Hindus, has been altogether discarded, except in one particular class of cases; and even in such cases, it is not imperative on the Judge to pay any attention to it. The British Regulations, having been made by three different legislatures, contain, as might be expected, very different provisions.

'It appears to us', wrote the Commissioners to Lord Auckland on 14 October 1837, 'that none of the systems of penal law established in British India has any claim to our attention except what it may derive from its own internal excellence'. The Commission also did not think it fit to use the Bombay Code, owing to lack of its 'superiority' over the penal law of the Bengal and of the Madras Presidencies. Justifying its stand and disclosing its sources in preparing the Draft Code, the Commission observed:

> ...[W]e have not thought it desirable to take as groundwork of the Code any of [these] systems of law now in force in any part of India. We have, indeed, to the best of our ability compared the Code with all those systems, and we have taken suggestions from all; but we have not adopted a single provision merely because it formed a part of any of those systems. We have also compared our work with most celebrated systems of Western jurisprudence, as far as the very scanty means of information which were accessible to us in this country enabled us to do. We have derived much val-

> uable assistance from the French Code,[21] and from decisions of the French Courts of Justice on questions touching the construction of that Code. We have derived assistance still more valuable from the Code of Louisiana[22] prepared by the late Mr. Livingston. We are the more desirous to acknowledge our obligation to that eminent jurist, because we have found ourselves under the necessity of combating his opinions on some important questions.[23]

On 14 October 1837, the Law Commission submitted the printed Draft Penal Code, along with Notes, to Lord Auckland, the then Governor-General-in-Council.[24]The Governor-General-in-Council, who had a strong desire to take some steps to revise the Draft Penal Code, referred to the Law Commission opinions received from Presidencies for its careful consideration.The Draft Codewas revised clause by clause by the Commissioners, Charles Hay Cameron and D Elliot, who submitted their first report on 23 July 1846. These Commissioners submitted their second and concluding report on 24 June 1847. The Draft Penal Code was then in 1851 referred to the judges of the Supreme Court of the three presidencies, the Advocate-General of Madras and other judges and jurists for their opinion. Meanwhile, the Court of Directors in London, which was anxious to see thePenal Code enacted as early as possible,[25] added a fourth member, Sir Barnes Peacock, to the Commission. The Code was sent to a committee consisting of JP Grant, Sir Barnes Peacock, James William Colvile, D Elliot and UI Moffatt Willes. The Committee, after intensive deliberations in a series of meetings, decided to recommend to the legislative council that the Penal Codeoriginally proposed by the Commissioners under TB Macaulay should form the basis of the system of penal law to be enacted for India. However, the Committee considered all the suggestions and alterations proposed which they incorporated in the Draft Penal Code. But it did not intend to recommend any substantial alterations in either the framework or phraseology of the original. The final and revisedPenal Code was prepared and brought in by JP Grant, Sir Barnes Peacock, James William Colvile, D Elliot and Arthur Buller.

The revised Penal Code was read for the first time in the legislative council on 28 December 1856.[26]The Indian Penal Code Bill was read a second time on 3 January 1857. Thereafter it was referred to a select committee, which was to report thereon after 21 April 1857.[27]The Indian Penal Code Bill, after its second reading, was published in the Calcutta Supplementary Gazette on 21, 24 and 28 January 1857. It was then passed by the Legislative Council of India, and received assent of the Governor-General-in-Council on 6 October 1860. It was scheduled to come into force on 1 May 1861.[28] It was published in the Calcutta Gazetteon 13, 17 and 20 October 1860. However, the date of its enforcement, with a view to enabling the people, the judges and administrators to know the provisions of the new Penal Code, was deferred till 1 January 1862 by the Amending Act VI of 1861.

Thus, it is evident that the Indian Penal Code 1860,[29] which is an outcome of vision, and laborious efforts of about three decades (1834-1860) of the law commissioners, particularly of Lord TB Macaulay, the main architect of the Code, emerged as a codified the then prevailing English criminal law.[30]Sir James Fitzjames Stephen, paying tribute to Lord Macaulay and his co-commissioners for their efforts in designing the Indian Penal Code, observed:

> I am conscious of being partial critic of this work for many reasons. But it seems to me to be the most remarkable, as I think it bids fair to be the most lasting, monument of its principal author.--[T]he Penal Code has triumphantly supported the test of experience for upwards of twenty-one years [in 1883] during which time it has met with a degree of success which can hardly be ascribed to any other statute of anything approaching to the same dimensions. It is, moreover, the work of a man who, though nominally a barrister, had hardly ever (if ever) held a brief, and whose time and thoughts had been devoted almost entirely to politics and literature.--[I]t (Code) deserves notice as a proof of the degree in which the leading features of human nature and human conduct resemble each other in different countries.[31]

'The Draft and the revision', in his view, 'are both eminently creditable to their authors; and the result of their successive efforts has been to reproduce in a concise and even beautiful form the spirit of the law of England; the most technical, the most clumsy, and the most bewildering of all systems of criminal law'.[32]

None other than Sir Henry Maine felt that 'the admirable Penal Code ' was 'not the least achievement of Lord Macaulay's genius' and hoped that it (Code) 'undoubtedly destined to serve someday as a model for the criminal law of England'.[33]

However, its 'alien character' made some Indian scholars to resent the importation of the 'foreign penal law' in India.[34] Sir Hari Singh Gour, in his *Penal Law of British India*, though appreciating the fact that the Indian Penal Code is 'the most important piece of Indian legislation, was unwilling to join Sir James Fitzjames Ste-

phen in giving tribute to Lord Macaulay, the main architect of the Code, and to thePenal Code . He felt that the 'praise' was 'lavished upon it by discriminating critics without close examination', and 'solely from the charm of the great name of its reputed author'.[35] In 1929, he observed elsewhere[36]:

> The Penal Code is one of the much praised Act s of Indian Legislature and in spite of its many defects has served its purpose fairly well. Its sentences can hardly be said to be other than monstrous. No civilised country today imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion in England and the odour of sanctity and perfection attaching to the Penal Code should not deter indigenous legislatures to thoroughly revise the sentences and bring them into conformity with modern civilised standards.[37]

The contemporary public opinion of Indians was not favorable to the Code. The drafters of the Code, Indians accused, failed to honor their 'promises of simplicity, completeness and general intelligibility' of the Code, when it was brought to the 'test of' its 'practical application'.[38] But interestingly, this opinion seems to be unfounded when one recalls the following observation of Sir James Fitzjames Stephen made in 1883. He remarked:

> Till I had been in India I could not have believed it be to be possible that so extensive a body of law could be made so generally known to all whom it concerned in its minutest details. I do not believe that any English lawyer or judge has anything like so accurate and comprehensive and distinct knowledge of the criminal law of England as average Indian civilians have of the Penal Code. It is hardly an exaggeration to say that they know it by heart. Nor has all the ingenuity of commentators been able to introduce any serious difficulty into the subject. After twenty years' use it is still true that anyone who wants to know what the criminal law of India is has only to read the Penal Code with a common use of memory and attention.[39]

It is pertinent to note that the Indian Penal Code 1860, which has been amended only sparingly since its enactment in the post-British era, is in operation as a major substantive penal law of India since more than 150 years. Only three chapters, namely, offences relating to criminal conspiracy, election and cruelty to married women, have been added to its original 23 chapters.

Thematically, the Code may broadly be divided into four segments. Chapters I to V contain general matters relating to the extent, definitions, punishment, general exceptions, and principles of liability. Chapters VI to XV deal with public matters between individuals and the state. Chapters XVI to XXII are primarily concerned with offences committed by individuals against individuals or legal persons other than the state. The last chapter, ch XXIII, is residuary in nature, laying down the principle of punishment for attempt to commit an offence if no specific provision has been made therefor.

1 Its date according to Sir William Jones is 800 BC, while others place it at about 150 BC.

2 *Manu*, ch VIII, verse 1. Cited in RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 16.

3 *Yajnavalkya* and *Nilkanta* also recognised these crimes. *Mayukha law* that prevailed in Bombay also contains punishments for assault, theft, violence and adultery.

4 RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 16.

5 RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 18.

6 Mohammedan law, however, did not generally prevail in the Presidency of Bombay. Hindus were governed by their own criminal laws. Parsis and Christians were governed by English law. See, Herbert Cowell, *History and Constitution of the Courts and Legislative Authorities in India,* sixth edn, 1966, p 199.

7 Before 1833, in each of the three Presidencies--Bengal, Madras and Bombay--the Governor-General exercised legislative powers under authority from Acts of Parliament. Their enactments were called 'Regulations'.

8 Regulation VI of 1832 (art 5) absolved the people of Bengal, Bihar and Orissa not professing Mohammedan faith from the operation of the Mohammedan penal law.

9 Bombay Regulation XIV of 1827.

10 For details see Sir James Fitzjames Stephen, *A History of the Criminal Law of England,* vol III, Burt Franklin, New York, 1883, pp 295-297.

11 Heavily relied upon: Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, Burt Franklin, New York, 1883 ch XXXIII; AC Patra, 'Historical Introduction to the Indian Penal Code,' in Indian Law Institute,*Essays on the Indian Penal Code, Indian Law Institute, New Delhi, 2005, pp 33-44, and RC Nigam, Law of Crimes in India, Asia*, London, 1965, pp 20-24.

12 Charter Act of 1833, s 39.

13 The local governments either themselves sent legislative proposals to the Centre or, after 1854, got them introduced there through their sitting representatives. This state of things continued until 1861 when legislative power was restored to the Governments of Bombay, Madras and Bengal. [See Preamble to, and s 44 of, the Indian Councils Act 1861].

14 Charter Act 1833, s 40. Two decades after the Charter of 1833, a sort of Legislative Council, comprising members of the Supreme Council, one representative each from the local governments and two judges of the Supreme Court of Calcutta, was established to assist the Governor-General in discharging his legislative function [vide s 22 of the Charter Act of 1853].

15 It was initially offered to Sir James Stephen.

16 Charter Act of 1833, s 40.

17 By virtue of the Charters of 1833 and of 1853, Law Commissions were appointed in 1834, 1853, 1861 and 1879. Of these four Law Commissions, the first and the last worked in India while the second and the third had their sittings in England. No Indians were appointed as commissioners, and the law of England was used as a basis. The British Indian civil and criminal statutes, in consonance with this policy, had been enacted without owing to their origin to the institutions, texts or their commentaries of the pre-British India texts of Hindu or Mohammedan law. The Law Commissioners, though theoretically conscious of the importance of the relation of the Indian customs, usages, laws and institutions to the new laws to be enacted for the governance of the people in India, did not attach importance to the ancient customs, usages and laws in India while formulating new laws. See generally, BK Acharyya, 'Codification in British India', in *Physiognomy of the History of Codification in British India*, 1914, p 40.

18 Without injustice to any of colleagues of TB Macaulay on the Indian Law Commission, the Draft Penal Code may be attributed to Macaulay. 'The illness of two of the three colleagues threw the work entirely on me', wrote Macaulay on 15 June 1837. See Lady Trevelyan, *Miscellaneous Work of Lord Macaulay*, vol 1, Harper, 1880, p 417.

19 Officiating Secretary JP Grant's letter dated 5 June 1837 to the Law Commission, National Archives of India, Legislative Department Act of 1860, No. XLV, Part I.

20 Notes (lettered 'A' to 'R')--each itself an essay--appended to the Draft Penal Code explained and defended every

21 French Code 1810.

22 Code of Louisiana 1821.

23 Cited from AC Patra, 'Historical Introduction to the Indian Penal Code', in*Essays on the Indian Penal Code*, Indian Law Institute, New Delhi, 2005, p 33, at p 37. Sir George C Rankin supported the Commission's wisdom of taking the English law as a basis of the Penal Code on the ground that since the time of Cornwallis it had been *chose jugee*that the criminal jurisdiction could not be exercised without regard to British notions of justice, whether in substance or in method, and the Regulations had in fact introduced much law upon that footing--apart altogether from the fact that the Presidency towns had worked with English law since 1726. 'What profit was to be expected from going to other systems for a model?', he quipped. See GC Rankin, 'The Indian Penal Code', vol 60,*Law Quarterly Review*, 1944, p 37, at p 43.

24 Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India*, Pelham Richardson, 1838.

25 Letter-Legislative Department no 15 of 1854 dated 5 April 1854 addressed to the Governor-General-in-Council.chapter of the Draft Code .

26 National Archives of India, Legislative Department, Act No. XLV of 1860.

27 Supplement to the Calcutta Gazette, dated 28 January 1857.

28 Section 1 of the Penal Code originally enacted stood as: 'This Act shall be called the Indian Penal Code and shall take effect on and from the first day of May, 1861, throughout the whole of the territories which are or may become vested in Her Majesty by the Statutes 21 and 22 Victoria, Chapter 106, entitled 'An Act for the better government of India,' except the Settlement of Prince of Wales' Island, Singapore and Malacca.'

29 Act no. XLV of 1860. The Draft Penal Coderemained as a draft for no less than 22 years probably due to the 'extreme aversion to any changes which boldly and definitely replaced native by European institutions'. The great mutiny and unsettled condi-

tions that prevailed in India also contributed to the delay. The end of the mutiny and the transfer of the government from the company to the Crown gave an extraordinary impetus to legislation. As a result of that impetus, amongst other measures, the Penal Code was passed and was brought into force from the 1 January 1862.The Penal Code did not become the law precisely in the shape in which it was drawn as it was subsequently revised by the Legislative Council and by law commissioners. For details see Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, Burt Franklin, New York, 1883, pp 299-300.

30 The Indian Penal Code', observed by Sir James Fitzjames Stephen, 'may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India'. See Sir James Fitzjames Stephen,*A History of the Criminal Law of England*, vol III, Burt Franklin, New York, 1883, p 300. Whitley Stokes also opined that the Code's 'basis is the law of England, stripped of technicality and local peculiarities, shortened, simplified, made intelligible and precise'. See, Whitley Stokes, *Studies*, vol 1, p 126; see also GC Rankin, 'The Indian Penal Code ', vol 60,*Law Quarterly Review*, 1944, p 37.

31 Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol III, Burt Franklin, New York, 1883, at 299.

32 Lady Trevelyan, *Miscellaneous Work of Lord Macaulay*, vol 1, Harper, 1880, p 417.

33 Sir Henry Maine, *Village Communities in the East and West*, 1871, p. 115. Cited in GC Rankin, 'The Indian Penal Code, vol 60,*Law Quarterly Review*, 1944, p 37, at p 47.

34 See *Banga Darshan*, Pous, 1279 BS, December-January, 1872-73.

35 Hari Singh Gour, *Penal Law of British India*, vol 1, fourth edn, Introduction, at p CLXXXVIII.

36 Madras Law Journal, vol 57, p 60. Cited in GC Rankin, 'The Indian Penal Code ', vol 60,*Law Quarterly Review*, 1944, pp 49-50.

37 However, referring to Note 'A' to the Draft Penal Code wherein the commissioners in 1837 hinted that sentences might be decreased if prisons were better managed and expressed the hope that it would be shortly found practicable to reduce the terms of proposed imprisonment, Sir George C Rankin has not taken the criticism. Further, he reminded that the Code when prescribes punishments prescribes maximum amounts and that no court is in general obliged to pass any higher sentence than it thinks sufficient. Ibid, p 50.

38 Hindu Patriot, 29 January 1857. Cited in RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 24.

39 Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol III, Burt Franklin, New York, 1883, p 322.

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CHAPTER 3

Constituent Elements of Crime

INTRODUCTION

The fundamental principle of criminal liability is that there must be a wrongful act --actus reus,[1] combined with a wrongful intention--mens rea. This principle is embodied in the maxim, *actus non facit reum nisi mens sit rea*, meaning 'an act does not make one guilty unless the mind is also legally blameworthy'. A mere criminal intention not followed by a prohibited act cannot constitute a crime. Similarly, mere actus reus ceases to be a crime as it lacks mens rea. No act is per se criminal; it becomes criminal only when the actor does it with guilty mind. No external conduct, howsoever serious in its consequences, is generally punished unless the prohibited consequence is produced by some wrongful intent, fault or mens rea.[2]In juristic concept, act us reus represents the physical aspect of crime and mens rea, its mental aspect, which must be criminal and cooperate with the former.

Actus reus has been defined as 'such result of human conduct as the law seeks to prevent'. Mens rea, which is a technical term generally taken to mean some blameworthy mental condition or 'mind at fault', covers a wide range of mental states and conditions, the existence of which would give a criminal hue to actus reus.

The Penal Code has incorporated in it the maxim *actus non facit reum nisi mens sit rea* in two primary ways: (i) by express inclusion of the requisite mens rea in the definition of an offence, and (ii) through 'General Exceptions,' enumerated in ch IV of the Code, some of which, such as mistake of fact, accident, infancy, and insanity, deny the existence of mens rea.

General

From the maxim *actus non facit reum nisi mens sit rea* it is clear that there are two constituent elements of crime--actus reus and mens rea.[3] Actus reus connotes an overt act, the physical result of human conduct. It is an event that is distinguished from the conduct which produced the result. For instance, in a murder case, the victim's death is the event which is the actus reus. The death or the act us reus was probably caused by the firing of a gun, which is the conduct which produced the result. In other words, the crime is constituted by the event and not by the activity which caused the event. The vicious intention to cause the act us reus, i.e., death, is called mens rea. Every crime, which is legally specified and defined, generally involves the combined presence of both, actus reus and mens rea. To illustrate this further, let us take an instance of *A* firing a gun to kill *B*. While shooting, *A* holds the gun, places his finger on the trigger and pulls the trigger, as a consequence of which the bullet leaves the gun. In order to constitute an actus reus, there must be the further consequence of the bullet entering *B*'s body and thereby causing his death.

Act to be Voluntary

Act means a conscious or willed movement. It is a conduct, which results from the operation of the will. According to Austin, any movement of the body, which is not in consequence of the determination of the will, is not a voluntary act . It is only a voluntary act that amounts to an offence. Taking the earlier analogy of *A* pulling the trigger of a gun, as a result of which a bullet is lodged in *B*'s body causing his death, *A* is guilty only if the act of pulling the trigger was a voluntary and conscious act . If the gun had been triggered by mistake or accidentally, then it is not an offence and *A* is not guilty of murder. If a person is compelled by force of circumstances to perform an act forbidden by law, he cannot be said to do it voluntarily, and therefore, he will not be held liable for the consequences of that act . An act on the part of the accused is involuntary where it is beyond his control or beyond the control of his mind. The situation is known as automatism. Common examples of automatism are:[4] reflective movements of an external origin, somnambulism, epilepsy, hypnosis, and hypoglycemia.

In IPC, ss 32 and 33 define the term 'act'. S 32 provides that in every part of the Code (except where a contrary intention appears from the context), words, which refer to 'acts done extend to illegal omissions'. S 33 provides that the word 'act' includes 'a series of act s' and the word 'omission' denotes 'a series of omissions as a single omission'. A combined effect of ss 32 and 33 is that the term 'act' takes into its fold one or more acts or one or more illegal omissions. The IPC makes punishable omissions, provided they are illegal[5] and have caused, intended to cause, or likely to cause, like act s, an actus reus.[6] Death of a newly born child, for example, may be caused by a deliberate refusal to feed the baby. Here, the unlawful homicide--an act us reus--is caused not by any positive act (a deed of commission) but a negative act (an act of omission). It warrants criminal act ion as 'event' of the human conduct is not different from that caused by shooting. However, an act of omission attracts criminal liability only when a person is placed under duty to act recognised by the criminal law and he, with the requisite blameworthy mind, failed to fulfill it.[7]Such legal duties to act might arise out of relationship or contracts,[8] or might be imposed by statutes.[9]

In *Om Prakash v State of Punjab* ,[10] the Supreme Court was called upon to adjudge the propriety of conviction of the husband for attempting to kill his wife by deliberately failing to give her food. The accused, whose relations with his wife were strained, deliberately and systematically starved his wife and denied her food, for days together. With the help of his relatives, he also prevented her from leaving the house. Owing to continuous undernourishment and starvation, she was reduced to a mere skeleton. One day, however, she managed to escape from the house as her husband forgot to lock her room before leaving the house. She got herself admitted to a hospital. The doctor, who found her seriously ill, informed the police. After prolonged treatment and blood transfusion, she recovered. The police registered a case under s 307, IPC. The sessions court convicted him for the offence contrary to s 307 of the IPC. The Punjab High Court, confirming the conviction, observed:

> The food...was willfully and intentionally withheld to shorten the remaining span of her life. Law does not require an intention to cause death then and there. It is enough if the facts show that by withholding food to her, death would have resulted surely though gradually.[11]

The Supreme Court, appreciating the high court's reasoning, confirmed the conviction of Om Prakash on the ground of his illegal omission.

S 36, IPC stipulates that where an act or an omission constitutes an offence, the committing of the offence partly by an act and partly by an omission, would also constitute the same offence. Illustration to s 36 throws some light on the provision. *A* intentionally causes *Z's* death, partly by illegally omitting to give *Z* food, and partly by beating *Z*. *A* has committed murder.

The term 'voluntarily' is defined in s 39, IPC. It runs as under:

Section 39. "Voluntarily".--A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, *A* may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

The term 'voluntarily' as defined in this section shows that a person need not intend to cause the act ual effect caused, in order to be held to have voluntarily caused such an effect. If the effect is the probable consequence of the act done by him, then he is said to have caused it voluntarily. It, thus, makes no distinction between cases in which a person causes an effect *designedly* and cases in which he causes it *knowingly* or *having reason to believe* that he is likely to cause it.[12]Further, if a particular effect could have been avoided by due exercise of reasonable care and caution, then the effect of such negligent act is also said to have been 'voluntarily' caused.[13] The question whether the effect of a particular act was caused voluntarily, is a question of fact, to be determined on the basis of the facts and circumstances of each case. Some of the factors that may be taken into consideration are: the nature of injury caused; the weapon used; force used; the part of the victim's body affected etc.[14]

CONCOMITANT CIRCUMSTANCES

Act to be Prohibited by Law

In order to create criminal liability, it is not sufficient that there is mens rea and an act ; the actus must be reus. However harmful or painful an event may be it is not act us reus unless criminal law forbids it. In other words, the act must be one that is prohibited or commanded by law. For example, if *A* had shot at *B*, but it missed him and instead killed a rabbit, it does not constitute murder. Thus, though there was mens rea i.e., the intention to kill *B* and there was also the 'act' of shooting, the resultant actus reus for murder which is the death of *B*, is not present. Similarly, a duly appointed executioner, who hanged a condemned prisoner till death with the intention of killing him, will not be criminally liable for the 'intentional death' of the prisoner.

Act Should Result in Harm

However, it is not all crimes which require that the act should result in some harm. In homicide, the required result is a pre-requisite in order to constitute an offence. Offences like treason, forgery, perjury and inchoate or incomplete crimes are per se offences, irrespective of whether they actually result in any harm or not. Thus, the causing of act ual harm may nor may not be a part of the actus reus. For instance, in the example mentioned above, where *A* missed his shot and killed a rabbit instead of *B*, the act will amount to an offence under s 307 IPC, of attempt to commit murder.

Act to be Direct Cause of Harm

Where the causing of harm is a requisite of an offence, then such harm should have a causal effect to the act . In other words, the harm caused must be a direct result of the act. It must be *causa causans*--the immediate cause, and it is not enough that it may be *causa sine qua non*--the proximate cause.

Other Requirements of Law

Sometimes, for an act in order to constitute an offence, some additional circumstances may be required by law. For instance, for the offence of perjury, the accused must have been sworn as a witness; for the offence of bigamy, the person must have contracted an earlier marriage; for treason, the offender must be a citizen of India or owe allegiance to the Indian state; for receipt of stolen property the goods must have been already stolen. The circumstances required may be inferred even by a negative fact, such as absence of consent in rape and in theft.

ACTUS REUS

Meaning

The term actus reus has been given a much wider meaning by Glanville Williams in his *Criminal Law*. He says:

> When we use the technical term *actus reus* we include all the external circumstances and consequences specified in the rule of law as constituting the forbidden situation. *Reus* must be taken as indicating the situation specified in the *actus reus* as on that, given any necessary mental element, is forbidden by law. In other words, *actus reus* means the whole definition of the crime with the exception of the mental element and it even includes a mental element in so far as that is contained in the definition of an act . This meaning of *actus reus* follows inevitably from the proposition that all the constituents of a crime are either *actus reus* or *mens rea*.[15]

Actus reus includes negative as well as positive elements. For example, as stated earlier, the actus reus of murder is the causing of death of a person. It also includes circumstances, such as the person whose death has been caused, was not as a consequence of a sentence of death given to him or that the death was caused within the territorial jurisdiction of the state.

The requirements of act us reus varies depending on the definition of the crime. Actus reus may be with reference to place, fact, time, person, consent, the state of mind of the victim, possession or even mere preparation.

Place

In the offence of criminal trespass, house-breaking or in the aggravated forms thereof, the act us reus is in respect of place (ss 441-462, IPC).

Time

In the offences of lurking house-trespass or house-breaking by night in order to commit an offence or after preparation for hurt, assault or wrongful restraint etc (ss 456-458, IPC), the actus reus is in respect of both place and time.

Person

In offences of kidnapping and abduction, procuring of a minor girl etc., the act us reus is in respect of the person (ss 359-374, IPC).

Consent

In the offence of rape, consent is the actus reus.

State of Mind of the Victim

In offences relating to religion (ss 295-298, IPC), or where rape is committed when consent has been obtained by putting the victim in fear of death or of hurt (s 375, *thirdly*, IPC), the actus reus is with reference to the state of mind of the victim.

Possession

Possession of stolen property constitutes the act us reus in certain offences (ss 410-412, IPC).

Preparation

Section 399 , IPC, makes preparation to commit dacoity an offence; therefore, preparation itself constitutes the actus reus.

CAUSATION IN CRIME

An event is very often the result of a number of factors. A factor is said to have caused a particular event, if, without that factor, the event would not have happened. Thus, a man is said to have caused the act us reus of a crime, if, that actus would not have occurred without his participation in what was done. Some causal relationship has to be established between his conduct and the prohibited result. A man is usually held criminally liable only for the consequences of his conduct as he foresaw, (or in crimes of negligence, he ought to have foreseen).

As stated earlier, the act must be the *causa causans*, i.e., the immediate cause of the effect. When the facts are direct and simple, then establishing the causal nexus between the act and the effect may not be difficult,[16] as for instance, in a case of a person shooting another person and thereby killing him. The causation can also be without any direct physical act . If the victim asks his way on a dark night and the accused with the intention of causing his death, directs him to a path that he knows will bring him to a cliff edge, and the victim suffers a fatal fall, this is clearly murder, though the accused had done nothing more than utter words.[17] This can be true in cases of abetment, incitement and conspiracy. In the instances stated above, it is not difficult to establish the direct result between the cause and the effect. The difficulty arises only in cases of multiple causation, where it is difficult to establish the imputability.

The following example given by Harris in his *Criminal Law*[18] will make the principle clear.

> *A*, intending to kill *B*, shoots at *B* but only wounds him very slightly. *A* clearly has the requisite *mens rea* for murder, that is, he foresees and desires *B*'s death. Now let us assume that on his being taken to the hospital in an ambulance, a piece of masonry from a building falls on the ambulance and kills *B*; or, alternatively, that *B* has a rare blood disease which prevents his blood from coagulation so that the slight wound leads to his death, which it would not have done if he had not been suffering from this disease; or, alternatively, that *B* refuses to have the wound treated and dies of blood poisoning, which would not have occurred if *B* had the wound treated. In all these cases, a problem of causation arises, i.e. did *A* cause *B*'s death for the purposes of the criminal law so that he can be convicted of murder?

If the result is too remote and accidental in its occurrence, then there is no criminal liability.

Causation and Negligence

The difficulty of causation arises very often in cases of negligence. It has to be established that first, the conduct of the person was negligent and secondly, that but for the negligent act of the accused, the accident would not have occurred. In other words, the act us reus should be causally connected to the act, which should be proved to be negligent.

In order to impose criminal liability under s 304A, IPC, it is essential to establish that death is the direct result of the rash or (and) negligent act of the accused.[19] It must be *causa causans*---the immediate cause and not

enough that it may be *causa sine qua non*, i.e. proximate cause.[20] There can be no conviction when rashness or negligence of third party intervenes. In *Suleman Rahiman Mulani v State of Maharashtra* [21] and *Ambalal D Bhatt v State of Gujarat* ,[22] the Supreme Court has approved this rule.

In *Suleman Rahiman Mulani* the accused who was driving a jeep struck the deceased, as a result of which he sustained serious injuries. The accused put the injured person in the jeep for medical treatment, but he died. Thereafter, the accused cremated the body. The accused was charged under ss 304A and 201 of the IPC. As per s 304A, there must be a direct nexus between the death of a person and rash and negligent act of the accused that caused the death of the deceased.[23] It was the case of the prosecution that the accused had possessed only a learner's licence and hence was guilty of causing the death of the deceased. The court held that there was no presumption in law that a person who possesses only a learner's licence or possesses no licence at all, does not know driving. A person could for various reasons, including sheer indifference, might not have taken a regular licence. There was evidence to show that the accused had driven the jeep to various places on the previous day of the occurrence. So before the accused is convicted under s 304A, there must be proof that the accused drove in a rash and negligent manner and the death was a direct consequence of such rash and negligent driving. In the instant case, there was absolutely no evidence that the accused had driven in a rash and negligent manner. In the absence of such evidence, no offence under s 304A was made out. The accused was acquitted of the charges.

In *Ambalal D Bhatt* the accused was a chemist in charge of the injection department of Sanitax Chemical Industries Limited, Baroda. The company prepared glucose in normal saline, a solution containing dextrose, distilled water and sodium chloride. The sodium chloride sometimes contains quantities of lead nitrate, with a permissible limit (for lead nitrate) of five parts in one million. The saline solution which was supplied by this company was found to have lead nitrate, very much over the permissible limits and hence was dangerous to human life. The bottles which were sold by the company were purchased by different hospitals, nursing homes, etc., and were administered to several patients of whom twelve patients died. As per the Drugs Act 1940 and the rules made thereunder, a chemist of a chemical company has to give a batch number to every lot of bottles containing preparation of glucose in normal saline. The accused who was responsible for giving the batch numbers failed to do so. He gave a single batch number to four lots of saline. It was the contention of the prosecution that had the appellant given separate batch numbers to each lot as required under the rules, the chief analyst would have separately analysed each lot and the lot which contained heavy deposits of lead nitrate would have been rejected. As the accused had been negligent in confirming the rules, the deaths were the direct consequence of his negligence. The Supreme Court held that for an offence under s 304A, the mere fact that an accused contravened certain rules or regulations in the doing of an act which caused death of another, does not establish that the death was the result of a rash or negligent act or that any such act was a proximate and efficient cause of death. It was established in evidence that it was the general practice prevalent in the company of giving one batch number to different lots manufactured in one day. This practice was in the knowledge of the drug inspector and the production superintendent, who did nothing to prohibit the practice and instead turned a blind eye to a serious contravention of the drug rules. To hold the accused responsible for the contravention of the rule, would be to make an attempt to somehow find the scapegoat for the death of twelve persons. Accordingly, the conviction of the accused under s 304A was set aside.

Minimal Causation[24]

When the death of a person is caused after medical treatment, it cannot be said that the treatment was not proper or inadequate, or had better treatment been given, the death would not have taken place. This is because, the intervention of the doctor is in the nature of minimum causation and hence his intervention would have played only a minor part, if any, in causing death.

As far as the IPC is concerned, *explanation 2* of s 299 specifically states that if an act causes death, even if death could have been avoided by proper remedies and skilful treatment, the act shall be deemed to have caused death and the person will be criminally liable. If death results from an injury voluntarily caused, the person who causes the injury, therefore, is deemed to have caused the death, although the life of the victim might have been saved if proper medical treatment was given but was not the proper treatment, provided that it was administered in good faith by a competent physician or surgeon.[25]

In *Moti Singh v State of Uttar Pradesh* ,[26] the deceased Gayacharan had received two gunshot wounds in the abdomen which were dangerous to life (ie, which were life threatening). The injury was received on 9 February 1960. There was no evidence when he was discharged from the hospital and whether he had fully recovered or not. He, however, died on 1 March 1960. His body was cremated without any post mortem being done. The Supreme Court held that the mere fact that the two gunshot injuries were dangerous to life were not sufficient for holding that Gayacharan's death, which took place about three weeks after the incident, was on account of the injuries received by him. The court observed that in order to prove the charge of Gayacharan's murder, it was necessary to establish that he had died on account of the injuries received by him. Since, there was no evidence to establish the cause of death, the accused could not be said to have caused the death of Gayacharan. A crucial aspect highlighted by the court in this case was that the connection between the primary cause and the death should not be too remote.

In *Rewaram v State of Madhya Pradesh* ,[27] the accused had caused multiple injuries with a knife to his wife Gyanvatibai. She was admitted into the hospital and an operation was performed on her. Thereafter, she developed hyperpyrexia, ie, high temperature, as a result of which she died. This hyperpyrexia was a result of atmospheric temperature on weak, debilitated individuals, who already had some temperature. The doctor, who performed the post mortem, opined that the death was not as a result of multiple injuries, but because of hyperpyrexia. The Madhya Pradesh High Court placed reliance on expln *2* to s 299, IPC. It observed that if the supervening causes are attributed to the injuries caused, then the person inflicting the injuries is liable for causing death, even if death was not the direct result of the injuries. In the instant case, there was medical evidence to show that the hyperpyrexia or the running of high temperature was a result of her debilitated condition. Gyanvatibai fell into debilitated condition because of multiple injuries which she had sustained, the operation which she had to undergo and the post-operative starvation, which was necessary for her recovery. Thus, her death was a direct consequence of the injuries inflicted on her. Intervening or supervening cause of hyperpyrexia was a direct result of the multiple injuries and was not independent or unconnected with the serious injuries sustained by her. As a result, it was held that the accused 'had caused' her death and therefore his conviction for murder was upheld.

PRINCIPLE OF ORDINARY HAZARD

D attacks *V* intending to stab him to death; *V* runs away, but is struck by lightning and dies. One would say that *D* is not guilty of murder, though he is guilty of attempted murder. Why is he not guilty of murder? Is it because it was not he who killed *V*, but the lightning? But if *V* had jumped over a cliff or into a river in an effort to escape, or to commit suicide in despair, or had accidentally fallen over the cliff or into the river in his fight, *D* would have been accountable for the death, and we should not have said that it was not *D* who killed *V*, but the water or the hard ground. What is it that makes us feel that lightning is different?

The most obvious answer is that being struck by lightning is an ordinary risk of life. One is not more likely to be struck by lightning when one is running away from an attacker, than when one is taking a walk. The attacker has not substantially increased the victim's risk.

Another example of the ordinary hazard principle is where the victim of an attack dies in a traffic accident, when he is being conveyed by an ambulance to the hospital, or dies as a result of a fever which spreads throughout the hospital. Assuming that his death was not contributed to by his weak condition, the attacker is not guilty of it, because the effect of the attack was merely to place the victim in a geographical position, where another agency produced his death. The attack did not substantially increase the risk of the fatal result, because anyone may die in a traffic accident or epidemic.[28] Of course, a reasonable man, mulling over all the possible consequences of an attack, might think of these possibilities; but they would not be possibilities rendered any more likely by the fact of the attack. Even if it could be shown that there was slightly more risk of dying of fever in hospital than elsewhere (perhaps because of the presence in hospital of resistant bacteria), this would probably be accounted to be too insignificant to affect the decision.[29]

Another example is where the victim died of hospital fever, but a contributory factor was the weakness caused by his injuries, so that he would not have died if it had not been for his weakness. Probably, the attacker would then be guilty of criminal homicide (murder or manslaughter), for, on these facts, there is a

medical (and not merely a fortuitous) connection between the wound and death. It is like the case of a wound turning gangrenous and causing death, where the wounding is clearly the cause of death.[30]

PRINCIPLE OF REASONABLE FORESIGHT

A man is said to intend the natural consequences of his act . The principle of reasonable foresight is just a restatement of that principle. In IPC, the definition of 'voluntarily' itself embodies this principle, for a man is said to have voluntarily caused an effect, if, at the time of doing the act, he knew or had reason to believe that it is likely to be caused. The illustration to s 39, IPC, explains the principle.

This principle is also built into the IPC in the *thirdly* and *fourthly* of s 300. As per *thirdly*, a person who causes such bodily injury as is sufficient in the ordinary course of nature to cause death, is guilty of murder. *Fourthly* of s 300, IPC, states that if a man does an act which is imminently dangerous that in all probability it must cause death (and commits such act without any excuse for incurring the risk), and if death is caused, then he is guilty of murder.

The two basic tenets that have to be established in cases arising under this principle are: first to establish that death, grievous hurt or whatever the offence that is to be established is the natural consequence of the act of the offender; and secondly, it has to be established that any reasonable man would be able to foresee that the death, grievous injury, etc, is likely to be the natural consequence of his act.

UNEXPECTED INTERVENTIONS

Unexpected interventions or twists in the act s, which cause the result, can create complications while fixing causation. However, if otherwise, the culpability is clear, the mere fact that there were unexpected interventions or twists, cannot exonerate the person from criminal liability. But, it may have effect on the degree or gravity of culpability, depending on the facts and circumstances of the case.

D prepares a poisoned apple with the intention of giving it to his wife, *V*, to be eaten the next day. *V* finds the poisoned apple in the meantime, eats it and dies. Or *D* is cleaning his gun with the intention of shooting *V* the next day. The gun goes off accidentally and kills *V*.

It would obviously be too harsh to convict *D* of murder in the second case; his liability is for manslaughter. As to the first case, the answer may depend on the more detailed facts. If *D* had put the poison by his wife's bedside, intending to administer it to her when she awoke, the jury should be allowed to find that he has launched himself sufficiently far on his ghastly plan to be guilty of an attempt, and therefore (according to Smith's suggestion) to be guilty of murder, if, the wife unexpectedly woke up and drinks the poison herself. If, on the other hand, the poisoned drink is still in the kitchen, the result should probably be different.[31]

In *Joginder Singh v State of Punjab* ,[32] the deceased Rupinder Singh teased the sister of the accused. In retaliation, the two accused went to Rupinder's house and shouted that they had come to take away the sister of Rupinder Singh. In the meantime, the cousins of Rupinder Singh intervened. One of them was given a blow on the neck by the accused. Meanwhile, Rupinder Singh started running towards the field. The accused started chasing him as a result of which Rupinder Singh jumped into a well due to which he sustained head injuries which made him unconscious and thereafter he died due to drowning. The Supreme Court held that the accused were about 15 to 20 feet from Rupinder Singh, when he jumped into the well. There was no evidence to show that the accused drove Rupinder Singh into the well or that they left him no option but to jump into the well. Under these circumstances, it was held that the accused could not have caused the death of Rupinder Singh and hence, they were entitled to be acquitted of the charge of murder. 'If we were satisfied', their Lordships of the Supreme Court observed, 'that [Joginder Singh and Balwander Singh] the accused drove him to jump into the well without the option of pursuing any other course, the result might have been different'.

This aspect came up for consideration before the Supreme Court in *Harjinder Singh v Delhi Administration* .[33] In this case, the accused was trying to assault one Dalip Singh and the deceased intervened. The accused finding himself one against two, took out a knife and stabbed the deceased. At that stage, the deceased

happened to be in a crouching position presumably to intervene and separate the two. The knife pierced the upper portion of the left thigh. The stab wound was oblique and it cut the femoral artery and vein under the muscle, which are important blood vessels of the body, and the cutting of these vessels would result in great loss of blood and would lead to immediate death or death after a short duration. The Supreme Court held that from the evidence, it was proved that it was not the intention of the appellant to inflict that particular injury on that particular place. In view of this, it was held that *thirdly* of s 300, IPC, would not apply. The accused was convicted under s 304, IPC.

Intervention of an Innocent Person

A person will be held fully responsible if he had made use of an innocent agent to commit a crime. Examples are where *A* secretly puts poison into a drink which he knows or expects *B* will offer to *C* or where *A* recklessly leaves a dangerous machinery which may cause harm to person or property, through being moved inadvertently by someone else, or otherwise.[34] An engineer who deserted his post at a colliery, leaving an ignorant boy in charge of the engine, who declared himself incompetent to manage it, was held guilty of manslaughter of a collier who was killed because the boy failed to stop the engine properly.[35]

Intervention of Another Person

In cases, where another person has intervened and the latter's action was the immediate and direct cause of the crime, the original wrongdoer whose act had merely given rise to the occasion of the act of the criminal, will be absolved from liability. But there should be clear evidence to show that the first man's act had no direct bearing on the result. For example, if one person was engaged in murderously beating another to death and a stranger, without being requested, were to rush in and add some more blows so that the victim's death was more speedily brought about, both would be guilty of murder and the first man could not be allowed the defence that it was the second assailant's strokes that finally ended the victim's life. The case of *R v Hilton* [36] may be cited as an example, where the defence of intervention was successful. There, the accused was in charge of a steam-engine, but all of a sudden he stopped the engine and went away. During his absence, some unauthorised person set the engine in motion, resulting in the death of the deceased. The court held that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after the prisoner had gone away. Professor Kenny has pointed out that the stronger reason for acquittal would have been that the prisoner had not expected any harm from his breach of duty, as was really the case of a fireman in the London Fire Brigade, who was absent from his post in charge of a fire-escape when the deceased had lost his life in a fire.[37]

The accused will be acquitted even in cases where the victim had intervened against himself. Thus, in *R v Horsey* ,[38]where the accused had set fire to a stack of straw and the deceased was found burnt in another portion of the stack, the accused was set free. Justice B Bramwell told the jury that if they were not satisfied that the deceased was in the enclosure at the time the prisoner set fire to the stack, but came in afterwards, then as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act .

CONTRIBUTORY NEGLIGENCE

The doctrine of contributory negligence of the victim has no place in criminal law.[39] It does not play any role in the determination of the guilt of the doer. However, it can be a factor for consideration in determination of sentence. It may be a just mitigating factor. The plea that victim has contributed to the injury caused by his own negligence, therefore, affords no defence against a charge under s 279 or s 304A of the IPC.[40] A driver, therefore, is expected to anticipate reasonably foreseeable negligent act of road users.[41]

Occasionally, the contributory fault of the victim may be so great that the defendant's act is held not to be the imputable cause of the harm. An illustration is the 'exhaustion of danger' principle, where the risk created by the defendant is at the end before the victim commits the careless act. When, for example, a pedestrian suddenly crosses a road without taking note of the approaching vehicle, he takes the risk of being knocked down without the driver being aware of it. The driver, if he knocks him down, cannot be held guilty for his negligence.[42]A pedestrian, alighted from jeep, while crossing highway impatiently at night, collided with a

motor cycle and died. The accused was acquitted for causing death by rash and negligent act as the deceased was main contributory to the incident. The court further observed that on the highway, the vehicles have right of way and they legitimately move at the high speed and if a person desires to cross the highway, he has to be careful. If a person does a suicidal act, as the present one, the driver of the vehicle cannot be held responsible for the consequences.[43] Similarly, a tempo driver was acquitted of charges killing a cyclist, who, with a pillion rider, was cycling in center of the road.[44]

1 The expression '*actus reus*' has apparently been coined by Prof Kenny in the first edition of his *Outlines of Criminal Law* in 1902. See Jerome Hall, *General Principles of Criminal Law*, second edn, Bobbs-Merrill, New York, 1960, p 222, fn 24.

2 *Mahadeo Prasad v State of West Bengal* AIR 1954 SC 724. Exception to the rule is offences of strict liability.

3 However, a view has been expressed that a crime is made up of three ingredients, act us reus, mens rea and (a negative element) absence of a valid defence. See DJ Lanham, 'Larsonneur Revisited' (1976) *Criminal Law Review* 276.

4 See *Woolmington v DPP* [1935] AC 462; *R v Clarke* [1972] 1 All ER 219; *Hill v Baxter* [1958] 1 QB 277; *Bratty v Attorney General for Northern Ireland* [1961] 3 All ER 523(HL) ; *R v Quick & Padison* [1973] 3 All ER 347(CA) ; *R v Sullivan* [1983] 2 All ER 673(HL) ; *R v Burgess* [1991] 2 All ER 769(CA) and *Patraswar v State of Assam* (1989) Cr LJ 196(Gau) .

5 S 43 of the Penal Code stipulates that the word 'illegal' is applicable to everything which: (1) is an offence, (2) is prohibited by law, and (3) furnishes ground for a civil action. And a person is said to be 'legally bound to do' whatever it is 'illegal in him to omit'. Therefore, an illegal omission would apply to omissions of everything which is legally bound to do.

6 See, Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India*, Pelham Richardson, 1838, Note M, p 104.

7 *Benoychandra v State of West Bengal* (1984) Cr LJ 1038(Cal) .

8 See for example, s 491, IPC.

9 Code of Criminal Procedure 1973, s 125.

10 AIR 1961 SC 1782.

11 AIR 1959 Punj 134, para 45.

12 See *Abdul Majeed v State of Kerala* (1994) Cr LJ 1404(Ker) ; *Meeru BhatiaPrasad v State,* (2002) Cr LJ 1674(Del), 94 (2001) DLT 597.

13 *Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1, (1925) Cr LJ 431(PC) .

14 *Bhaba Nanda Sarma v State of Assam* AIR 1977 SC 2252, (1977) Cr LJ 1930(SC) .

15 Glanville Williams, *Criminal Law: The General Part*, second edn, Stevens & Sons, 1961, p 18.

16 For difficulties in identifying causation, see Glanville Williams, 'Criminal Law - Causation', Cambridge Law Journal, 1976, p 15; Jerome Hall, *General Principles of Criminal Law*, second edn, Bobbs-Merrill, New York, 1960, chapter on 'Causation', and Jerome Hall, *Studies in Jurisprudence and Criminal Theory*, Oceana, New York, 1958, ch X, 'Causation'.

17 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, 1983, p 378.

18 *Harris's Criminal Law*, Ian Mclean & Peter Morrish (eds), 22nd edn, Sweet & Maxwell, 1973, p 22.

19 *S N Hussain v State of Andhra Pradesh* AIR 1972 SC 685; *State of Gujarat v Haiderali* AIR 1976 SC 1012; *Binoy Chandra v State of West Bengal* (1984) Cr LJ 1038(Cal) ; *Balwant Singh v State of Punjab* 1994 SCC 844(Cri) ; *Prafulla Kumar Roat v State* (1995) Cr LJ 1277(Ori) ; *Shiv Dev Singh v State (Delhi)* (1995) Cr LJ 2142(Del) .

20 *Md Rangawalla v State of Maharashtra* AIR 1965 SC 1616.

21 AIR 1968 SC 829, (1968) Cr LJ 1013(SC) .

22 AIR 1972 SC 1150.

23 However, a driver is expected to anticipate reasonably foreseeable negligent act to road users as contributory negligence has no application in criminal law. See *Pyarejan v State* (1972) Cr LJ 404(Mys) .

24 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, 1983, p 385.

25 Re *San Pai*(1936) 14 Rang 643; Re *Abor Ahmed*(1937) Rang 384(FB) .

26 AIR 1964 SC 900, (1964) 1 Cr LJ 727(SC) .

27 (1978) Cr LJ 858 (MP); see also *Virsa Singh v State of Punjab* AIR 1958 SC 465; *Kishore Singh v State of Madhya Pradesh* AIR 1977 SC 2267.

28 *Bush v Commonwealth* (1880) 78 Ky 268, where the defendant was acquitted of unlawful homicide, even though the disease was communicated to the victim by a surgeon operating on a bullet wound inflicted by the defendant. See Jerome Hall, *Studies in Jurisprudence and Criminal Theory*, Oceana, New York, 1958, p 171.

29 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, 1983, p 387.

30 Ibid.

31 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, London, p 386.

32 AIR 1979 SC 1876, (1979) Cr LJ 1406(SC) .

33 AIR 1968 SC 867, (1968) Cr LJ 1023(SC) .

34 *R v Dant* (1865) L and C 567 *(TAC),* cited from *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, 1962, p 19.

35 *R v Lowe* (1850) 3 C and K 123(TAC), cited from, *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, 1962, p 20.

36 (1838) 2 Lew 214(TAC), *cited from Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, 1962, p 20.

37 *R v Rees* (1886) CCC Sess Pap CIV, 117 *(TAC)*, cited from, *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed) 18th edn, Cambridge, 1962, p 20.

38 (1862) 3 F and F 287 *(TAC)*, cited in *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, 1962, p 21.

39 *Blenkinsopp v Ogden* [1898] 1 QB 783; *Fagu Moharana v State of Orissa* AIR 1961 Ori 71. See also *Halsbury's Laws of England*, vol 11, fourth edn, Butterworths, London, p 628, para 1173.

40 *Eso Mathew v State of Kerala* (1967) ILR 1 Ker 352; *Padmacharan Naik v State of Orissa* (1982) Cr LJ NOC 192(Cri) .

41 *Pyarejan v State,* (1972) Cr LJ 404(Mysore) .

42 *Mahadeo v State of Maharashtra* (1972) Cr LJ 49(SC) and *PM Raju v State of Karnataka* (1977) Cr LJ 1545(Kant) .

43 *State v Mohammad Yusuf* (2001) Cr LJ 5(Kant) .

44 *State of Karnataka v Sadanand Parasharam Hosurkar* (2000) Cr LJ 2426(Kant) .

CHAPTER 4

Mens Rea

INTRODUCTION

Mens rea is a technical term, generally taken to mean some blameworthy mental condition, the absence of which on any particular occasion negatives the condition of crime. It is one of the essential ingredients of criminal liability. A criminal offence is committed only when an act, which is forbidden by law, is done volun-

tarily. The term mens rea has been given to the volition, which is the motive force behind the criminal act. An act becomes criminal only when it is done with guilty mind. Ordinarily, a crime is not committed, if, the mind of the person doing the act is innocent. There must be some blameworthy condition of mind before a person is made criminally liable. For instance, causing injury to an assailant in private defence is no crime but the moment injury is caused with intent to take revenge, the act becomes criminal. However, the requisite guilty state of mind varies from crime to crime. What is an evil intent for one kind of offence may not be so for another kind. For instance, in the case of murder, it is the intent to cause death; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible sexual connection with a woman without her consent; in the case of receiving stolen property, knowledge that the goods were stolen, and in the case of homicide by rash and negligent act, recklessness or negligence.

The underlying principle of the doctrine of mens rea is expressed in the familiar Latin maxim *actus non facit reum nisi mens sit rea*--the act does not make one guilty unless the mind is also guilty. The mere commission of a criminal act (or bringing about the state of affairs that the law provides against) is not enough to constitute a crime, at any rate in the case of the more serious crimes. These generally require, in addition, some element of wrongful intent or other fault.[1]

PART A

MENS REA

General Principles

The following illustration is given to enable better understanding of the scope of the principle of mens rea.

If *A* is walking down a crowded street, and if *B* accidentally steps on his foot, after the momentary anger and irritation, *A* is likely to graciously accept the word of apology and carry on walking. Even if *B* were not to offer an apology, as is wont to happen these days, the worst *A* would do is to mutter under his breath, rub his injured foot if possible, and keep walking. But suppose *C* who was not exactly in the best of terms with *A*, or for that matter even if *C* were a stranger and he walked up to *A* and stamped his foot deliberately, *A* is more likely to turn around and abuse him or stamp his foot in return. Why is there this difference in *A*'s reaction? After all, in both the instances, the nature of injury or hurt caused to *A* is the same--a person stamped his foot. The difference is in the fact that in the first instance, *A* felt *B* stamped his foot by mistake without intending to hurt *A* and hence is innocent. But in the second instance, *C* deliberately stamped *A*'s foot clearly, with the intention of hurting *A*. Hence, the difference in *A*'s reaction and justifiably so.

This is exactly the intention of law when it stipulates that mens rea or guilty intention is the *sine qua non* of a criminal act and is an essential element of a crime. Just as *A*'s reaction was different to the person who stamped his foot by mistake and the person who stamped his foot deliberately, the law also differentiates between persons who may have acted innocently or by mistake, and those who have act ed consciously with intent to cause harm. If *A* had turned around and slapped or abused *B*, who stamped his foot by mistake, one can be sure that friends or the general onlookers would have felt that *A*'s reaction and behavior was unjustified and that *A* lacked grace and decency. On the other hand, if *A* were to do that with *C* who walked up to *A* and stamped his foot deliberately, the reaction of slapping back or abuse would have been felt to be justified and *A*'s reaction and retaliation may even be applauded. Similarly, if law were to punish persons who acted innocently and who had no intention whatsoever to cause harm, then there would be no public acceptance of the same.

The fact that mens rea has been made central to criminal liability, also includes that every person has the capacity to choose between right and wrong. Once a person makes a choice, he has to take the responsibility for the same.

Every person is born free and has the freedom to live in a free manner. Every individual has the freedom to act freely. This freedom is not without its concomitant expectations and obligations. Freedom to act freely also means that every person has the capacity and ability to choose between right and wrong, good and evil. From this, it follows that every person who has the capacity to discern and discriminate, has a moral duty to

choose right over wrong and good over evil. Once a person exercises his free will to do or not to do an act, then he is also responsible and liable for the consequences.

Its Objective

The object of the law is always to punish a person with a guilty mind. It does not want to put behind bars an innocent person who may have had the misfortune of being involved in an incident and event, which he did not have the intention of participating in. That is why one would notice that many penal statutes, which define or describe what is an offence, very often bring in the mental element to the act by using the words, 'intentionally', 'voluntarily', 'willfully', 'knowingly', 'reason to believe' etc. These words have been used in the different definitions of crime to indicate the state of the mind of the person at the time of commission of the offence. The existence of the guilty mind or mens rea at the time of commission of the act us reus or the act alone will make the act an offence. For instance, the IPC is replete with words which indicate the mental state of the mind. Chapter XVI of the IPC defines offences affecting the human body. Culpable homicide[2] is defined as 'whoever, causes death by doing an act with the intention of causing death,...'. Culpable homicide becomes murder,[3]'if the act by which the death is caused is done with the intention of causing death'.

The importance of mens rea or intention can be understood when we consider its application to factual situations. For instance, *A* slipped as he walked and fell. As he fell, he lost balance and pulled down *B* with him. *B* hit his head against the wall, sustained head injuries and died. Is *A* guilty of murder? *A* satisfies one portion of the definition of murder, which is doing an act which causes death. But still it does not constitute the offence of murder because another essential ingredient of the offence of murder, viz, the intention to cause death, is absent. Hence *A* is not guilty of murder.

Similarly, if a person intends to dishonestly take a movable property out of the possession of a person without his consent, it amounts to theft.[4]But if a person takes a movable property from a person without his consent, but by mistake, the act does not constitute the offence of theft. For instance, *A* puts on *B*'s shoes by mistake, believing it to be his. Is *A* guilty of committing theft? *A* has satisfied one ingredient of the offence viz, taking away the moveable property of *B*, which is the pair of shoes, without *B*'s consent. However, there is another essential ingredient to constitute the offence of theft. The taking away of the moveable property must be accompanied by the mental element of dishonest intention. Only if dishonest intention is present, *A* will be guilty of committing theft.

Intentionally joining an unlawful assembly,[5] harbouring rioters knowing fully well that they are rioters,[6] fraudulently, dishonestly or with intent to injure, making a false claim in a court,[7] fraudulent use of weighing instrument knowing it to be false,[8] uttering words with deliberate intention to wound religious feelings,[9] are all offences under the IPC. It can be noticed that every overt or outward act or the act us reus has also to be accompanied by a guilty mind or mens rea, which is also an essential ingredient of a crime.

The element of mens rea as an essential ingredient of a crime is also approved by the growing modern philosophy of penology. Modern day criminal jurisprudence no longer accepts retribution as the main object of criminal law. Today's emphasis is on reforming the criminal and rehabilitating him. The object is that punishment should fit the offender and not merely the offence. Going back to the analogy of *B* who stamped *A*'s foot by mistake and *C* who did it on purpose, it may be noticed that *A*'s reaction was not based on the act or the act us reus, which is the injury to *A*'s foot, but on the basis of the intention of the offender, i.e., *B* or *C* as the case may be. Such an approach to sentencing of offenders is possible only if, apart from the crime or the actus reus per se, the mental element, the intention or the mens rea of the offender is also taken into consideration.

MENS REA IN THE INDIAN PENAL CODE 1860

The IPC sets out the definition of offences, the general conditions of liability, the conditions of exemptions from liability and punishments for the respective offences. Lord Macaulay and his colleagues have not used the common law doctrine of mens rea in defining these crimes. However, they preferred to import it by using different terms indicating the required evil intent or mens rea as an essence of a particular offence. Guilt in respect of almost all the offences created under the IPC is fastened either on the ground of intention, or knowledge or reason to believe. Almost all the offences under the IPC are qualified by one or the other words such as 'wrongful gain or wrongful loss',[10]'dishonestly',[11]'fraudulently',[12]'reason to believe',[13]'criminal

knowledge or intention'[14]'intentional cooperation',[15]'voluntarily',[16]'malignantly',[17]'wantonly',[18] maliciously.[19] All these words indicate the blameworthy mental condition required at the time of commission of the offence, in order to constitute an offence.[20] Thus, though the word mens rea as such is nowhere found in the IPC, its essence is reflected in almost all the provisions of the Penal Code . Every offence created under the IPC virtually imports the idea of criminal intent or mens rea in some form or other.[21]

Further, ch IV of the IPC deals with 'General Exceptions', wherein acts which otherwise would constitute offences, cease to be so under certain circumstances set out in this chapter. The chapter on General Exceptions, in ultimate analysis, enumerates the circumstances that appear incompatible with the existence of the required guilty mind or mens rea and thereby exempts the doers from criminal liability.[22] For instance, a crime committed by a person under mistake of fact, or by a child below seven, or a mentally deranged person and so on, does not constitute offence, because in all such cases, the mental element or the mens rea is absent. Thus, the chapter on General Exceptions, though negatively, recognises the common law doctrine of mens rea. In fact, all the General Exceptions are illustrations of the recognition of the concept of mens rea in the IPC.

Against this background, a question as to whether the maxim *actus non facit reum nisi mens sit rea*, in general, and of the common law doctrine of mens rea as an independent doctrine, in particular, is relevant in the interpretation of the provisions of the IPC deserves our attention. However, there seems to be no unanimity amongst jurists in their responses to the query.

Referring to *actus non facit reum nisi mens sit rea*, Mayne observed:

> Under the Penal Code such a maxim is wholly out of place. Every offence is defined and the definition states not only what the accused must have done, but the state of his mind with regard to the act when was doing it. It must have been done 'knowingly', 'voluntarily', 'fraudulently', 'dishonestly', or the like ....[23]

Ratanlal & Dhirajlal, in a tone similar to that of Mayne, observed:

> The maxim *actus non facit reum nisi mens sit rea*has, ... no application in its technical sense to the offences under the Penal Code, as the definitions of various offences contain expressly a proposition as to the state of mind of the accused.[24]

In *Ravule Hariprasada Rao v State* ,[25] the Supreme Court ruled that unless a statute either clearly or by necessary implication rules out mens rea as a constituent element of a crime, a person should not be held guilty of an offence unless he had guilty mind at the time of commission of the act. The Apex Court reiterated it in *State of Maharashtra v Mayer Hans George* ,[26] wherein it, inter alia, held that the common law doctrine of mens rea is not applicable to statutory crimes in India. However, K Subbarao J, after examining a plethora judicial dicta dealing with the applicability of the doctrine of mens rea to statutory crimes, in his dissenting opinion, observed that though it is a well settled principle of common law that mens rea is an essential ingredient of a criminal offence, a statute can exclude it. But it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. There is, thus, a presumption that mens rea is an essential ingredient of a statutory offence. It, nevertheless, may be rebutted by the express words of a statute creating the offence or by necessary implication.[27] Subsequently, Justice K Subbarao, speaking for the Supreme Court, reiterated this in *Nathulal v State of Madhya Pradesh* [28] and *Kartar Singh v State of Punjab* ,[29] wherein the court held that the element of mens rea must be read into statutory penal provisions unless a statute either expressly or by necessary implication rules it out.

However, this general or traditional rule that mens rea is an essential element in IPC offences is not without its exceptions. Like all other statutes, the deciding factor on whether mens rea is required or not, depends on the language of statute and the intention of the legislature as gathered from the statute. S 292, IPC makes the selling, hiring, distributing, publicly exhibiting, importing, exporting etc of obscene books, pamphlets, writings, drawings etc an offence. In the case of *Ranjit D Udeshi v State of Maharashtra* ,[30] a person was prosecuted for selling a book by the name *Lady Chatterley's Lover*, a popular book written by DH Lawrence.

The accused pleaded that he had no knowledge of the contents of the book and hence did not have the necessary mens rea. The court rejected this contention and held that as s 292 of the Code, unlike in several other sections, does not contain the words 'knowingly', knowledge of obscenity is not an essential ingredient of the offence under s 292.[31] It also ruled that the liability under the section is strict and hence no mens rea is required.

INTENTION

Meaning of Intention

Intention is a term, which is very difficult to define. It is not defined in the Penal Code . It is a common term known to everybody, but at the same time, it defies a precise definition. It can be variously said to mean the object, purpose, the ultimate aim or design behind doing an act . Intention is the conscious exercise of the mental faculties of a person to do an act, for the purpose of accomplishing or satisfying a purpose.[32] Intention, therefore, is usually used in relation to the consequences of an act, and not in relation to the act itself. A person clearly intends a consequence if he wants that consequence to follow from his act ion.[33]

The idea of 'intention' in law is not always expressed by the words 'intention', 'intentionally' or 'with intent to'. It is expressed also by words such as 'voluntarily', 'willfully', 'deliberately', 'deliberate intention', 'with the purpose of', or 'knowingly'. All these varied expressions find place in the various sections of the IPC.

Section 39 of the 1860 defines 'voluntarily' thus:

39."Voluntarily". -- A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, *A* may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

The definition itself is rather peculiar, as it defines the term in relation to the effect caused by the act rather than the act itself. The word 'voluntarily' is to be understood in relation to causation of effects and not to doing of act s from which those effects result.[34] The illustration to the section is self-explanatory.

The provision and the illustration thereof have not defined the word 'voluntarily' in the commonly understood meaning of the term. It has really imported the concept of English law that 'a man is presumed to intend the natural or probable consequences of his own act.' For example, if a man drives in a rash and reckless manner resulting in an accident causing the death of a person, he cannot plead innocence by stating that he never intended to cause the death of the person. It may be true in the strict sense of the term. But a reckless driver should know that reckless driving is likely to result in harm and can even cause death of the persons on the road. So, by virtue of the definition of the word 'voluntarily' in the IPC, a reckless driver, who causes the death of a person, can be presumed or deemed to have intended to cause the death of the person. However, the sweep of the word 'voluntarily' is bigger than that of the word 'intentionally'. The act voluntarily done in effect and substance means (a) act done intentionally, (b) act done with the knowledge of end result being a crime, (c) act done when the doer had reason to believe that the act us reus would be an offence.

Section 298 of the makes the uttering of words or making gestures or exhibitions with deliberate intent to wound the religious feelings punishable. The words 'deliberate intention' mean premeditated intention to wound the religious feelings.[35] On a plain reading of the section, however, the words 'deliberate' and 'intent' seem synonymous. Explaining the term 'deliberate intent', drafters of the Penal Code observed:

> We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbors by words, gestures or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by a person, not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause. The speech or gestures etc,

which is punishable as an offence by this clause must be advisedly and deliberately intended to wound the religious feelings of some person.[36]

So, while describing the scope of the words 'deliberate intent', authors of the IPC have clarified that there must not only be intent, but it should also be pre-planned, pre-conceived and not a momentarily caused intention. For instance if *A*, a Hindu, were to enter into a casual conversation with *B*, a Muslim and the conversation becomes heated and in the course of that heated debate, he is angered by some comments made by *B*, and passes a derogatory comment about Muslims in general. *A* has uttered a word with intent to wound the religious feelings of *B*, a Muslim. However, since his intention was not deliberate, or in other words, he did not start the conversation with *B* with the pre-meditated intention to hurt his feelings, it can be held that *A* did not commit an offence under this section, because though there was intent, it was not deliberate.

Yet another variation of the mental element of intention is knowingly and negligently doing or omitting to do an act. Sections 285, 286 and 287 make knowingly or negligently omitting to take sufficient care so as not to cause harm to human life in respect of possession of poisonous substance, fire, combustible matter and explosive substances an offence.

Intention and Motive

Intention and motive are often confused as being one and the same. The two, however, are distinct and have to be distinguished. The mental element of a crime ordinarily involves no reference to motive. A bad motive cannot be a reason for convicting a person. Similarly, a good motive cannot be an excuse for acquitting him. A person may act from a laudable motive, but if his intention causes wrongful loss, his crime is complete, irrespective of his motive.[37]Intention has been defined as the fixed direction of the mind to a particular object, or determination to act in a particular manner and it is distinguishable from motive that incites or stimulates act ion.[38]

Austin defined motive as the 'spring of action'. 'Intention', according to him, 'is the aim of the act, of which the motive is the spring.'[39] A motive is something which prompts a person to form an opinion or intention to do certain illegal acts or even a legal act by illegal means with a view to achieve the intention. Motive is the reason for an action i.e. what impels a person to act, such as ambition, envy, fear, jealousy, etc. It is a psychological phenomenon which impels a person to do a particular act.[40] It therefore is also called as 'ulterior intent'. Motive does not affect criminal liability. Motive by itself is either sufficient to prove guilt of accused[41] or relevant for determining his guilt or innocence. However, it, being a compelling force to commit a crime, becomes a relevant factor in determination of guilt of an individual or of the quantum of punishment.[42] It is of importance in aggravation or mitigation of sentence. If motive is clear, it becomes possible to infer the relevant intention. Evidence of motive, though it is often difficult for the prosecution to collect it,[43]reveals the nature of the intention for committing a particular act .

In criminal law, motive may be defined as that which leads or tempts the mind to indulge in a criminal act or as the moving power which impels to act for a definite result.[44] But the fact is that the motive for a crime lies locked in the heart of a person, and so, it becomes difficult to know the same. Failure to bring on record any evidence regarding motive does not, however, weaken a prosecution case, though existence of the same may strengthen the case.[45] It is not prudent to suggest that no criminal act can be presumed unless motive is proved. Where positive evidence against the accused is clear, cogent and reliable, the question of motive becomes insignificant.[46] In *Shamsher Singh v State of Haryana* ,[47] wherein evidence of eyewitnesses and the medical evidence disclosed that the death of the deceased was due to the injury caused by the accused, the Supreme Court upheld the conviction of the accused under s 302, IPC, even though there was no direct motive for causing the homicide. In *Om Prakash v State of Uttaranchal* ,[48] rejecting the plea that the prosecution could not indicate the motive for killing of three members of a family, the Supreme Court ruled that failure to prove motive is irrelevant in a case wherein guilt of the accused is proved.[49] Conversely, motive by itself cannot be proof of an offence.[50] The Apex Court in *State of Uttar Pradesh v Arun Kumar* [51] emphasised that proof of motive in the absence of proof of guilt of an accused does not warrant his conviction.

Knowledge as Mens Rea

Knowledge is awareness on the part of the person concerned, indicating his mind. A person can be supposed to know when there is a direct appeal to his senses.[52] Knowledge is an awareness of the consequences of the act . It is the state of mind entertained by a person with regard to existing facts which he has himself observed or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt. Knowledge is essentially subjective. However, in many cases, intention and knowledge merge into each other and mean the same thing, more or less, and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin, but it is not difficult to perceive that they connote different things.[53] Knowledge, as contrast to intention, signifies a state of mental realisation in which the mind is a passive recipient of certain ideas or impressions arising in it, while intention connotes a conscious state of mind in which mental faculties are summoned into action for the deliberate, prior conceived and perceived consequences.[54] Knowledge, obviously, is premised on knowledge of the facts and circumstances and the effects of one's conduct.

Negligence as Mens Rea

Mens rea is not a unitary concept. Depending on the nature of the crime, mens rea may be presence or existence of intention in some cases, or requirement of knowledge in some, and negligence in some others. Thus, law has developed various levels of mens rea or intent such as negligence, recklessness, knowledge and purpose. Based on the nature of the offence, the requirements of particular statutory provisions and the object of the particular statute, the courts have to decide what is the extent or level of criminal intent that is required to convict a person of an offence.

Negligence is a case of inadvertence. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against any injury either to public generally or to an individual in particular.[55] A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise. It is the failure of a person to act with the standard of care expected of a reasonable or a prudent person. Who then is this reasonable or prudent person? There is no real yardstick by which one can arrive at the precise definition of the prudent person. But in law, it generally means the law abiding, cautious, careful person, who is the personification of all virtues. Of course, if a survey of the average person is taken, it may be very hard to come across any person who may fit the description of this reasonable person. But nonetheless, courts blindly go by this fictional and mythical reasonable person standard.

Let us go back to the analogy of the person stamping *A*'s foot. Supposing *B* was running down the road instead of walking carefully at a moderate speed, which is what is expected of a reasonable person, then *B* who was running down the road was being negligent. *B* should have realised that by running down the crowded road, there is a likelihood of stumbling over or falling over somebody and injuring him or her. Taking this analogy further, if, it is presumed that *B* who was running down the crowded street was also carrying a sharp, long instrument which was getting in the way of people on the road and hurting them, and *B* was all the same running along unmindful of the consequences, then *B* is guilty of being reckless.

Strictly speaking, negligence may not be a form of mens rea. Negligence is not appropriate to inflict criminal liability as inadvertence, generally, cannot be equated with blameworthy mind. However, the IPC imposes criminal liability on the ground of negligence, particularly when a negligent act poses threat to life or personal safety of others.[56] Negligence is more in the nature of a legal fault. It is made punishable strictly for an utilitarian purpose of hoping to improve people's standards of behaviour.[57]

Intention and Knowledge as (alternative) Mens Rea

The IPC imposes liability on alternative bases of intention. A classic example is the liability for unlawful homicide. Both the terms 'intention' and 'knowledge' appear in ss 299 and 300 of the IPC, dealing respectively with culpable homicide and murder, and having different penal consequences. Intention and knowledge, though they connote different things, are used as alternate mens rea for the offences. Intention is the desire to achieve a certain purpose. It is the fore knowledge of the act coupled with the desire of it. Knowledge, on the other hand, is awareness of the consequences of the act . Questions of knowledge and intention are essentially questions of fact. Intention is difficult to legally establish by direct evidence, as it essentially is a manifestation of a person's mind and inner feelings, which requires going into a person's mind to determine

what intention the person had. It can be gathered from the attendant circumstances of the case, and more particularly from the actions of the accused.

Intention becomes very crucial in the offence of culpable homicide as it is the degree of intention of the accused determines the gravity of his crime. In other words, it is the mental element of the accused alone which is material to decide whether a particular homicide is culpable homicide amounting to murder or culpable homicide not amounting to murder.

As far as the offence of culpable homicide is concerned, there are three species or degrees of mens rea or intention present: (1) an intention to cause death; (2) an intention to cause injury as is likely to cause a death; and (3) knowledge that death is likely to happen.[58] *Illustrations* (a) and (b) to s 299 give examples of culpable homicide accompanied by the first or third species and *Illustration* (c) discloses that unless one or other of the three species is present there can be no culpable homicide.

Intention, in the context of definition of culpable homicide, does not always necessarily mean premeditation or preplanning to kill a person. The expectation that the act of a person is likely to result in death is sufficient to constitute intention. A man expects the natural consequences of his acts and therefore he is presumed to intend the consequences of his act s. So, if a person in performing some act, either: (1) expects death to be the consequence thereof; or (2) expects a dangerous injury to be the consequence of his act ; or (3) knows that death is a likely consequence of his act, and in each case death ensues, his intention in the first two cases, and his knowledge in the third, render the act homicide. A guilty intention or knowledge is thus essential to the offence under this section.[59] Further, death must be a likely result of the intended bodily injury in the second case, and also a likely result of the act in the third case. An effect is 'likely' to take place when there is a likelihood, which is distinguishable from mere possibility. A thing is possible when it may happen; likely when the chances are in favor of its happening. The difference between an intention to cause death (in the first case) and an intention to cause such bodily injury as likely to cause death (in the second case) is a difference of degree only. The latter is a degree lower in the scale of criminality than the former. If death is a likely result it is culpable homicide; and if death is most probable result it is murder.[60]

Intention and Consequence

The intention to commit an act must be differentiated from the consequences of an act. The distinction between intention and consequence had come up for consideration before the Supreme Court in cases arising under the Terrorist and Disruptive Act ivities (Prevention) Act 1987 (TADA).[61] In *Niranjan Singh v Jitendra Bhimraj* ,[62] the accused wanted to eliminate two persons by name Raju and Keshav for gaining supremacy in the underworld. They were charged for committing a terrorist offence under TADA. In this context, the Supreme Court held that from the evidence, it was clear that the intention of the accused persons was to eliminate the rivals and gain supremacy in the underworld, so that they may be known as the bullies of the locality and would be dreaded as such. But it cannot be said that their intention was to strike terror in the people or a section of the people. The consequence of such killing is bound to cause panic and fear, but the intention of committing the crime cannot be said to strike terror in the people or any section of the people. Therefore, in the absence of an intention to strike terror, even if the consequence of their act resulted in creating terror, it acquitted the accused. In *Hitendra Vishnu Thakur v State of Maharashtra* ,[63] the court once again emphasised that for an offence under TADA, an act must be committed with the intention and motive to create terror as contemplated under the Act . Where the causing of terror is only the consequence of the criminal act, but was not the intention, an accused cannot be convicted for an offence under TADA. To bring a charge under TADA, the terror or panic etc must be act ually intended with a view to achieve the result as envisaged under the Act and not by merely an incidental fall out or a consequence of the criminal act . Every crime, being a revolt against the society, involves some violent activity, which results in some degree of panic or creates some fear or terror in the people or a section thereof, but unless the panic, fear or terror was intended and was sought to achieve the objectives as defined under the TADA, an act would not come within the ambit of TADA.

These cases were followed in *State of Tamil Nadu v Nalini* .[64] This case was in respect of the assassination of Rajiv Gandhi, the former Prime Minister of India. The case of the prosecution was that killing of Rajiv Gandhi was a terrorist act. The Supreme Court held that the entire evidence on the record pointed towards the fact that the Liberation Tigers of Tamil Ealem (LTTE), a terrorist organisation act ive in Sri Lanka, had conspired to kill Rajiv Gandhi, because he had played a key role in the Indo-Sri Lankan Accord. So, the intention of the

accused was only to kill Rajiv Gandhi and not to commit a terrorist act by overawing the Government of India. Though, it could be said that terror was struck by the assassination of Rajiv Gandhi, there was no evidence to establish that it was the intention of the accused to strike terror. The court ruled that in order to be an offence under TADA, overawing the government cannot be the consequence, but it has to be a primary object.

Burden of Proof

Every person accused of a crime is presumed to be innocent, unless and until proved guilty by the prosecution. This means that in every criminal proceeding, the law starts off with a presumption in favor of the accused person that the concerned person is innocent of the crime accused of. Starting from this presumption of innocence of the accused, it is always for the prosecution to establish beyond reasonable doubt all the essential ingredients of the crime including the mens rea to prove the guilt of the accused. Thus, the burden of proving the guilt of the accused rests solely and entirely on the prosecution. This is what is meant when it is said that the burden of proof is on the prosecution. This burden generally does not shift. An accused person cannot be asked to prove his innocence.

But when a clause for presumption of mens rea exists in the statute, then the job of the prosecution is made easier. The prosecution only has to prove that the accused committed certain act s. Once that is proved, the statutory presumption of mens rea or guilty mind steps in and the accused is presumed to be guilty. But this presumption is always a rebuttable presumption, i.e., the accused person will be given an opportunity to prove that though he had committed certain acts, it was done innocently and without any criminal intent. To this extent, the burden on the prosecution to prove the guilt of the accused beyond reasonable doubt is shifted to the accused. It is for the accused to establish his innocence, though, the standard of proof required is not the same.

It is no doubt, very difficult to prove the existence of mens rea by direct or positive evidence. Courts have realised this difficulty and it has been held that it is not necessary for the prosecution to prove the existence of mens rea by positive evidence.[65] It is open to the prosecution to prove the guilty mind of the accused by the general conduct of the accused.[66]

There is no standard yardstick by which the application of the principle of strict criminal liability or the non-requirement of mens rea as an element of an offence is applied. It may not be quite possible to evolve any straight jacket formula for the requirement of mens rea. The considerations are many and may also vary depending on the nature of the legislation. One has to keep in mind the nature of the statute, the object of the statute, what is the mischief it sought to remedy and so on and so forth. However, like any legislative power, it is not without its limitations. Ultimately, every law has to be tested on the corner stone of the Constitution of India. Article 21 of the Constitution guarantees that no person shall be deprived of his life and liberty without following the procedure established by law. In *Maneka Gandhi v Union of India* ,[67] it has been held that procedure established by law does not mean any procedure, but a fair and just procedure. It is on the touchstone of art 21 that the fairness of any statute has to be tested.

PART B

PUBLIC WELFARE OFFENCES AND MENS REA

Mens rea as an essential element or ingredient of crime, though an universally accepted principle, is not without its limitations. In the last few decades, an entire range of social or public welfare legislations have been conceived in such a manner that the law makes the mere omission or commission of act s punishable. In other words, no mens rea or legal fault is required for imposing criminal liability.[68]

It must be appreciated that one is living in a world of machines. Industrialisation is widespread and growing rampantly. High-powered machines are the order of the day. Very often, these machines are dangerous and may pose a health hazard to the worker employed. The experience of the Bhopal Gas tragedy[69]showed the world that compromising on safety standards is the first thing that industries do to cut costs. In respect of hazardous industry, the threat may not be just to the workers of the factory as seen in Bhopal, but also to

persons residing in and around that area. So, it is in the interest of larger good that there are laws, which lay down standards and regulate the functioning of the industries. For instance, the Factories Act 1948, stipulates that machinery should be adequately fenced; there must be signboards which indicate danger areas etc. It further provides that minimum facilities like drinking water, separate toilets for men and women, dining rooms, rest rooms, safety clothing etc are provided to the workers employed in factories. ThisAct is labour welfare legislation and compliance with its provisions is essential. So, for a violation of the Act, mens rea is not necessary. The management of the factory is responsible to comply with the provisions of the Act and it is liable for breach, even if there is no mens rea or guilty mind. There are a host of other labour laws like the Minimum Wages Act 1948, the Payment of Wages Act 1936, the Employees Provident Fund Act 1952, the Employees State Insurance Act 1948, for which mens rea may not be necessary.

The state, in order to ensure that the public at large is not put to risk or cheated in the profit making ventures of the industries, has enacted Acts such as the Prevention of Food Adulteration Act 1954,[70]the Essential Commodities Act 1955.[71] Courts have held that mens rea is not essential for offences under these laws.

Courts have taken similar view in respect of the Foreign Exchange Regulation Act 1947,[72](Now Foreign Exchange Management Act, 1999 (42 of 1999)) designed to safeguard and conserve foreign exchange which is essential to safeguard the economy; the Protection of Civil Rights Act 1955,[73] and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989,[74] social legislations enacted to protect the rights of *dalits*or the Scheduled Castes and Scheduled Tribes; the Contempt of Courts Act, 1971,[75] which recognises the inherent power of courts to punish persons who obstruct or interfere with the administration of justice.

The necessity for mens rea has been dispensed with in respect of social or public welfare legislations. All these laws have been enacted for the larger good of the society. Insisting upon the existence of mens rea to punish persons for violation of these enactments, may frustrate the purpose of the Act s and the objects for which they have been enacted.

The IPC deals with the traditional common law offences that deal with offences against the person, property, state and public morals. All these offences consist of specific acts of aggression that have been recognised as crimes per se or mala in se. But these public welfare offences are creations of the statutes. The purpose of these Act s is regulatory. Imposing a penal liability is merely a mode of enforcing the regulations.

Courts have also justified the non-requirement of mens rea on the grounds that many of these Acts impose only payment of fines as punishment or even if imprisonment is provided, very rarely do courts award it. Moreover, conviction for committing these public welfare offences does not attach to itself the same kind of social stigma and damage to reputation that for example, a conviction under the IPC would attract.

It is quite interesting to note that the concept of strict liability or the liability for the negative consequences of any act, regardless of fault in criminal law, has grown parallel to the concept of strict liability and vicarious liability in civil law like under the Motor Vehicles Act 1988, the Workmen's Compensation Act 1923 etc.

It has always been the prerogative of the legislature to make laws, which includes obviously the power to define what constitutes a crime. It can decide what are the elements of a particular offence. In doing so, the legislature is well within its power to legislate that in respect of a particular offence, the existence of mens rea is not an essential requirement.

But curiously, the legislatures have taken the easy way out. In most of the public welfare statutes, nowhere is it stated that mens rea is not an essential element of the offence concerned. Nor is it stated that mens rea is an essential ingredient of the crime. This silence has left the field wide open for judicial interpretation. So, the creation of judge made law has not been without its share of confusions and contradictions.

However, it may be pointed out that the absence of mention of intent or mens rea in an enactment does not necessarily mean that the statute automatically excludes mens rea. Courts have held that mens rea, as an essential element of crime, is so much an integral part of the definition of crime itself that it needs no specific mention. A Court has to presume its requirement for imposing criminal liability, unless a statute, expressly or by necessary implication, excludes mens rea. Its exclusion cannot be inferred simply because a statute intends to combat a grave social evil or to attain socio-economic welfare. Delving into the implied exclusion of mens rea in s 7 of the Essential Commodities Act of 1955, the Supreme Court in*Nathulal v State of Madhya Pradesh* [76] held that:

> *Mens rea* is an essential ingredient of a criminal offence. ... [U]nless the statute expressly or by necessary implication excluded *mens rea*. The mere fact that the object of the statute is to promote welfare act ivities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. *Mens rea* by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated.

In determining whether a statutory provision does or does not create an offence of strict liability the following considerations seem to be relevant: (1) phraseology of the statutory provision creating an offence of strict liability, particularly expressions indicating or excluding the mental element required, (2) object of the statute, (3) the nature of public purpose purportedly preserved by the statute, and (4) the nature of the mischief at which the provision or statute is aimed and whether the imposition of strict liability will tend to suppress the mischief, although the strict liability should not be inferred simply because the offence is described as a grave social evil.[77]

PART C

VICARIOUS LIABILITY

The normal rule is undoubtedly to the effect that a man should be punished only for his misdeeds and not for that of others. But from time immemorial, we have read of instances of clan feuds or tribal feuds which for a wrong committed by say, *A*, belonging to a particular clan *X*, towards *B* belonging to a rival clan *Y*, vengeance will be taken by *B*, his relations and members of his clan not only upon the actual wrong-doer *A*, but upon his near relations such as his father, mother, brothers, sisters, and even upon members of his clan *X*. We need not condemn this as a barbarous practice which prevailed only in ancient times, for we can see its modern form in the group fines imposed upon the villages by modern state governments. For example, the Protection of Civil Rights Act 1955 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 provide for collective fines.

Notwithstanding these exceptions, it is now generally regarded as a compelling principle of justice that a man should not be penalised for the wrong of another. The principle of vicarious liability, which plays an important part in torts and civil law generally, should not be extended to criminal law. But to this rule of non-liability, two exceptions have been recognised in English common law:

(1) A master is vicariously liable for libel published by his servant. However, it is open to a master-proprietor to show in defence that the libel was published without his authority and with no lack of care on his part.
(2) A master is vicariously responsible for a public nuisance committed by his servant.[78]It would very often be difficult to check effectively act s of public nuisance by menial servants, unless their masters are made responsible.

Exceptions to General Rule of Vicarious Liability

As stated earlier, the rule of vicarious liability is not generally applicable in criminal law. The maxim *qui facit per alium facit per se* (he who acts through another act s through himself) or the law of agency is not a doctrine of criminal law, but of civil law, is not without its exceptions. Generally, a master is punishable under criminal law for acts of his servant only, where it is proved that he has instigated or otherwise abetted the act s of the person who actually committed the crime. This is based on the general principle of criminal law that there must be blameworthy condition of mind or mens rea in order to make a person criminally liable. The condition of mind of the servant cannot be imputed to the master. But, the following are exceptions to the general rule that a master is not criminally liable for the act s of his servants.

Liability under a Statute

It is within the power of the legislature to make a certain illegal act or omission penal and fix an absolute liability upon any person, if, a breach of a certain enactment is made. Once absolute liability is fixed, then a particular intent or state of mind is not the essence of the offence. In such cases, act s or defaults of a

servant or agent in the ordinary course of his employment may make the master or principal employer criminally liable, although, he was not aware of acts or defaults and even where they were against his orders.[79] However, such liability must be specifically imposed by the terms of the statute or at least the fact of implied liability must be sufficiently discernible from the provisions of the statute. No person can be vicariously liable if a provision to this effect does not exist in the statute concerned.[80]In fact, strict liability clauses in statutes might result in the agents being made liable for the act of the master. In *Sarjoo Prasad v State of Uttar Pradesh* ,[81]the appellant, who was an employee, was convicted under the Prevention of Food Adulteration Act 1954 for the act of the master in selling adulterated oil.

Responsibilities of Licensees

It is well-settled in England as well as in India that a licensee is responsible for the act s of his employee done within the scope of his authority, although, contrary to the instructions of the licensee. In order to fix a licensee with a liability for the acts of his servants, personal knowledge of the licensee is not always necessary. Otherwise, the very purpose of the enactments granting licenses to persons of good character would stand defeated.[82]

In *Emperor v Mahadevappa Hanmantappa* ,[83]the accused held a licence under the Indian Explosives Act 1884, to manufacture gunpowder. According to the license, the manufacturing could take place in a building exclusively meant for that purpose and separated from any dwelling place, highway, street, public thoroughfare or public place by a distance of 100 yards. The accused lived in a village and he constructed a building outside the village which complied with this condition and employed a woman to manufacture gun powder there. One day, the servant took the necessary material for the manufacture of gun powder, went to the house of the accused in the village and performed part of the process of manufacture there. At that time, there was an explosion. The accused was charged with breach of conditions of his license. The accused was held liable for the same, in view of the fact that what the servant did was in furtherance of her master's business and not in pursuance of any purpose of her own. What she had done was within the general scope of her employment and the breach of condition of the license was committed when she was so engaged.

NEGLECT IN PERFORMANCE OF DUTY

Where a person is under a duty to perform an act, which is likely to cause dangerous results, does not perform it himself, but entrusts it to some unskillful hands, as a result of which there is a loss of life or some injury is caused, he may be criminally liable for the same.[84]

RIOT AND UNLAWFUL ASSEMBLY

The IPC provides for vicarious liability under ss 154 and 155. The rationale seems to be premised on public policy and necessity. As per s 154, whenever any unlawful assembly or riot takes place in the land of any person, the owner or occupier of the land, or any person having or claiming any interest in the land is criminally liable, if the agent or manager of the owner fails to take necessary action in reporting the matter to the police or fails to use all lawful means to prevent, disperse or suppress the riot or unlawful assembly. Similarly under s 155, the person who has derived any benefit from the riot or for whose benefit it has been carried out, is made criminally liable.

This is an instance of the extension of the doctrine of *respondeat superior* to criminal law. It makes the master criminally liable for the act or omission of his servant. His liability does not depend upon his knowledge of the riot or of the acts and intention of his agent. Owners and occupiers of land have been invested by law with certain duties, which they are expected to discharge by virtue of their position as landholders.[85] They are not unconnected with the use of the land and their responsibility is based upon the assumption that as landholders, they possess the power of preventing the gathering of men upon their land, and to suppress or disperse disorderly gatherings if they so desire. Section 154 is not intended to punish the owner of the land for any riot committed upon it. It merely intends to punish the owner, who or whose agent or manager does any of the things specified in it.[86]

In addition to the above provisions, there are other statutes such as the Prevention of Food Adulteration Act 1954, the relevant shops and establishments Acts, the Standards of Weights and Measures Act 1956, and so on, in which vicarious liability is imposed upon masters even without mens rea.

Similar liability is imposed upon land owners and occupiers under the applicable municipal and corporation Act s for acts of nuisance and so on. Even a company which is a legal entity may be held criminally liable for the act s and defaults committed by its managers, directors or agents, for a corporation can act only through its officers, managers or directors.

The rationale basis for the imposition of vicarious liability, it seems, is that the person made responsible may prevent the commission of the crime and may help to bring the act ual offender to book.[87]

PART D

CRIMINAL LIABILITY OF A CORPORATION

Originally, the prevalent view was that a corporation or a body incorporate, which is separate legal entity, cannot be charged of offences because of procedural difficulties. The obvious reasons were that a corporation could not be either arrested or compelled to remain present during criminal proceedings. It, owing to the absence of 'mind', could not form the required 'intention' to commit a crime. No bodily punishment could be inflicted on it. 'A corporation is devoid not only of mind but also of body, and therefore it was incapable of the usual criminal punishment'. 'Can you hang its common seal?', asked an advocate in England during the Rule of James II in 1682. It does not have a soul to be condemned or a body to be hanged. It was believed to be atrocious to send a member of a corporation to jail or punish simply because he was its member when the corporation committed a 'crime'.

The evolution of corporate criminal responsibility is a striking instance of judicial change in law. The non-liability of a corporation soon gave way to the idea that it can be made liable for non-feasance, i.e. an omission to act. If a statutory duty is cast upon a corporation or a body incorporate, and not performed, the corporation or body incorporate can be convicted of the statutory offence. Over the decades, this principle has been well established. Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* ,[88] enunciating the so-called alter ego or organic theory of the corporate criminal liability, observed:

> A corporation is an abstraction. It has no mind of its own any more than it has a body of its own, its act ive and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very *ego* and centre of the personality of the corporation.... The Board of Directors are the brains of the company which is the body, and the company can and does act only through them.[89]

In modern times, intent of managers and agents of a corporation is attributed to the corporation. A governing body of a corporation is its alter ego. A corporation, therefore, can be held criminally responsible for committing an offence by a 'person' who, at the relevant time, was 'the directing mind and will' of the corporation.[90] Lord Reid, while delving into the question of criminal liability of a corporation, has ruled, rather constructed a contemporary principle of criminal liability of a corporation premised on the alter ego theory, as under:

> A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through a living a person, though not always one or the same person. Then the person who acts is not speaking or act ing for the company. He is acting as the company and his mind which directs his act is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persons of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.[91]

Courts in India have also taken a similar position. In *State of Maharashtra v Syndicate Transport Company Ltd* [92] the Bombay High Court did not see any reason for exempting a corporate body from liability for crimes committed by its directors, agents or servants while act ing for or on behalf of the corporation. The Supreme Court of India, in 2004 in *Assistant Commissioner, Assessment-II, Bangalore v Messers Velliappa Textiles Ltd* ,[93] delving into the question as to whether a company can be held criminally responsible by attributing it the mens rea of those who work or are working for it, has also unequivocally endorsed that the alter ego theory is applicable in India. It held that mens rea of the persons in-charge of the affairs of a corporation can be imputed to the corporation for imposing liability on it. However, it, by majority,[94] held that a company cannot be prosecuted for offences requiring imposition of imprisonment *only* or of mandatory term of imprisonment coupled with fine. And where punishment provided is imprisonment and fine, the court, according to it, cannot impose or does not have a choice to impose *only* a fine.

However, a year later in *Standard Chartered Bank v Directorate of Enforcement* [95] a five judge constitution bench of the apex court has overruled the *Velliappa Textiles* dictum. Reiterating that a corporation or a company, by virtue of ss 2 & 11 of the IPC, is a 'person' and it, theoretically, can be prosecuted for any offence punishable under law, the apex court ruled that there is no immunity to a company or corporation from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory punishment. A company or corporation, the court stressed, should not be allowed to go scot-free merely on the ground that it technically cannot be punished by way of imprisonment. The apex court ruled that a company or corporation can be charged with offence punishable with mandatory fine and a term of imprisonment, but the punishment can *only* be limited to a fine. The court can ignore the sentence of imprisonment as in respect of a company it is impossible to execute. It can be convicted for committing any offence that is not subjected to *only* custodial sentence.[96]

However, a corporation cannot be convicted for the offences, which by nature, cannot be committed by a corporation but can only be committed by an individual human being (e.g. sexual offences, bigamy, perjury, murder, treason). Similarly, it cannot be held criminally liable for committing the offences that are punishable only by mandatory corporal or capital punishment, as a corporation obviously cannot be subjected to such a punishment. The Supreme Court, by majority, ruled that a court cannot impose criminal liability on a corporation if penal provision provides for imprisonment only or a minimum term of imprisonment plus fine.[97]

In this regard, it may be noted that in most social legislations like the Essential Commodities Act 1955, the Prevention of Food Adulteration Act 1954, the Negotiable Instruments Act 1881, the Environment (Protection) Act 1986 and so on which provide that at the time of the commission of the offence, the company, as also every person who was responsible for the conduct or business of the company, shall be deemed to be liable for the offence, and if found guilty, they could be punished, not only with fine, but imprisonment as well.[98]

An important change introduced in these statutory offences is the shifting of the burden of proof from the prosecution to prove the charge or accusation, to the persons accused of committing the crime by virtue of the fact that they played a crucial role in the administration and management of the company. Thus, there is a presumption of guilt in respect of persons who are in charge of the company and the burden on the accused to show that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence.[99]

1 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, 1983, p 30.

2 Indian Penal Code 1860, s 299.

3 See ibid, s 300.

4 See the Indian Penal Code 1860, s 378.

5 Ibid, s 142.

6 Ibid, s 157.

7 Ibid, s 209.

8 Ibid, s 264.

9 Ibid, s 298.

10 See Indian Penal Code 1860, s 23.

11 Ibid, s 24.

12 Ibid, s 25.

13 Ibid, s 26.

14 Ibid, s 35.

15 Ibid, s 37.

16 Ibid, s 39.

17 Ibid, ss 153 and 270.

18 Ibid, s 153.

19 See ss 219 and 220.

20 For further details of these terms see Shamsul Huda, '*The Principles of Law of Crimes*', (Tagore Law Lectures 1902), Eastern Book Co, Lucknow, Reprint 2011, ch 5: Mens Rea, and ch 6: Words Used in the Code to Denote Mens Rea.

21 However, there are certain offences in the IPC which are silent about the required mens rea. For example, see the offences created under ss 283, 290 and 494.

22 For details see chs 6-15, below.

23 John D Mayne, *The Criminal Law of India*, fourth edn, Higginbotham, Madras, 1896, p 9. A similar view was expressed by MC Setalvad, a lawyer of repute and former Chairman of the First Law Commission of India, see MC Setalvad, *The Common Law in India* (Hamlyn Lectures), Stevens & Sons, London, 1960, p 139.

24 *Ratanlal & Dhirajlal's the Indian Penal Code*, VR Manohar & Avtar Singh (eds), thirty-third edn, LexisNexis Butterworths Wadhwa, Nagpur, 2010, Reprint 2011, p 114.

25 [1951] SCR 322.

26 AIR 1965 SC 722.

27 Ibid., para 13.

28 AIR 1966 SC 43.

29 (1994) 3 SCC 569.

30 AIR 1965 SC 881.

31 But see *CT Prim v The State* AIR 1961 Cal 177.

32 *Bhagwani Appaji v Kedari Kashinath* (1900) ILR 25 Bom 202; *Jai Prakash v Delhi Administration* (1991) 2 SCC 32, 1991 (1) SCALE 114.

33 *Ram Kumar v State,* AIR 1970 Raj 60; *Sorabjeet Singh v State of Uttar Pradesh* (1984) SCC (Cri) 151, AIR 1983 (SC) 529.

34 *Abdul Majeed v State of Kerala* (1994) Cr LJ 1404(Ker) .

35 *Kamala Kant Singh v Chairman, Bennetta Colman* (1988) 1 Crimes 106; *Narayan Das v State of Orissa* AIR 1952 Ori 149.

36 Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India*, Pelham Richardson, 1838, Note 'J'.

37 See Hari Singh Gour, *The Penal Law of India,* vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 232.

38 *S Raghubir Singh Sandhwala v Commr of IT* AIR 1958 Punj 250.

39 Austin, *Lectures on Jurisprudence*, Students' edn, 1920, p 165.

40 *Nathuni Yadav v State of Bihar* AIR 1997 SC 1808.

41 *Hardeep Singh Sohal v State of Punjab through CBI* (2004) Cr LJ 4627(SC) .

42 *Suresh Chandra Bahri v State of Bihar* AIR 1994 SC 2420, (1994) Cr LJ 3271(SC) .

43 *Dilip Kumar Sharma v State of Madhya Pradesh* AIR 1976 SC 133, (1976) Cr LJ 184(SC) .

44 *State of West Bengal v Mohammad Khalid* AIR 1995 SC 785.

45 *Meharban v State of Madhya Pradesh* (1996) 10 SCC 615, (1997) SCC (Cri) 118.

46 *Gurucharan Singh v State* AIR 1956 SC 460; *Brijpal Singh v State of Uttar Pradesh* AIR 1994 SC 1624,(1994) Cr LJ 2082 (SC); *Mani Kumar Thapa v State of Sikkim* (2002) 7 SCC 157, and *Yunis v State of Madhya Pradesh* (2003) 1 SCC 425.

47 (2002) 7 SCC 536.

48 (2003) 1 SCC 648.

49 The Supreme Court reiterated this principle in *Yunis v State of Madhya Pradesh* (2003) 1 SCC 425.

50 *Girja Shankar Misra v State of Uttar Pradesh* AIR 1993 SC 2618.

51 (2003) 2 SCC 202.

52 Hari Singh Gour, *The Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 240. See also *Joti Parshad v State of Haryana* AIR 1993 SC 1167, (1993) Cr LJ 413(SC) .

53 *Basdev v State of Pepsu* AIR 1956 SC 488.

54 *Jai Prakash v Delhi Administration* (1991) 2 SCC 32, 1991 (1) SCALE 114.

55 *Empress of India v Idu Beg* (1881) ILR 3 All 776. Quoted with approval in *Alister Anthony Pareira v State of Maharashtra* (2012) 2 SCC 648, 2012 Cr LJ 1160.

56 See, ss 279, 280, 282, 284, and 286-289, IPC.

57 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, 1983, pp 90-91.

58 *Jayaraj v State of Tamil Nadu* AIR 1976 SC 1519, (1976) Cr LJ 1186(SC) . See also Re *Thunicharan*(1991) Cr LJ 318.

59 See Hari Singh Gour, *The Penal Law of India*, vol 3, 11th edn, Law Publishers, Allahabad, 1998, pp 2377 2378.

60 *Ashok Kumar Barik v State of Orissa* (1992) Cr LJ 1849(Ori) .

61 TADA was a temporary enactment which lapsed in the year 1995.

62 AIR 1990 SC 1962, (1990) 4 SCC 76.

63 AIR 1994 SC 2623.

64 AIR 1999 SC 2640, (1999) Cr LJ 3124(SC) .

65 *Soni Vallabhdas v Asst Collector of Customs* AIR 1965 SC 481.

66 *Hukma v State of Rajasthan* AIR 1965 SC 476, (1965) 1 Cr LJ 369(SC) .

67 AIR 1978 SC 597.

68 See generally LH Leigh, *Strict and Vicarious Liability*, Sweet & Maxwell, 1982.

69 In 1984, there was a major gas leak from the Union Carbide factory situated in Bhopal. Thousands died in this largest industrialist disaster termed as '*Bhoposhima*' by VR Krishna Iyer J, former judge, Supreme Court of India. Even today, people are suffering as a result of the gas leak and continue to agitate for their rights, even 27 years after the incident.

70 *Sarjoo Prasad v State of Uttar Pradesh* AIR 1961 SC 631; *State of Orissa v K Rajeshwar Rao* AIR 1992 SC 240, (1992) 1 SCC 365.

71 *State of Madhya Pradesh v Narayan Singh* AIR 1989 SC 1789, (1989) Cr LJ 2101(SC) .

72 *Director of Enforcement v M /s MCTM Corpn Pvt Ltd*AIR 1996 SC 1100, (1996) 2 SCC 471, (1996) Cr LJ 1623(SC) .

73 *State of Karnataka v Appa Balu Ingale* (1995) Supp 4 SCC 469.

74 See K I Vibhute, 'Right to Live with Human Dignity of Scheduled Castes and Scheduled Tribes: Legislative Spirit and Social Response - Some Reflections', Journal of the Indian Law Institute, vol 44 (2002) p 469.

75 *Saibal Kumar Gupta v BK Sen* AIR 1961 SC 633; *Pritam Pal v High Court of Madhya Pradesh* (1993) Supp 1 SCC 529.

76 AIR 1966 SC 43, para 4.

77 See *State of Maharashtra v Mayer Hans George* AIR 1965 SC 722; *Nathulal v State of Madhya Pradesh* AIR 1966 SC 43; *Inder Sain v State of Punjab* AIR 1973 SC 2309; *Kartar Singh v State of Punjab* (1994) 3 SCC 569; *JK Industries Ltd v Chief Inspector Factories and Boilers* (1996) 6 SCC 665; *Gopaldas Udhavdas Ahuja v Union of India* (2004) 7 SCC 33.

78 A public nuisance is an act which causes obstruction, inconvenience or damage to the public. In the case of any private nuisance, a master will be held civilly liable and the same principle is applied to public nuisance also.

79 Hari Singh Gour, *The Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 145.

80 *Maksud Saiyed v State of Gujarat & Ors* (2008) 5 SCC 668, 2007 (11) SCALE 318; *SK Alagh v State of Uttar Pradesh* (2008) 5 SCC 662; AIR 2008 SC 1731.

81 AIR 1961 SC 631, 1961 Cri LJ 747. See also *State of Orissa v K Rajeshwar Rao* AIR 1992 SC 240, (1992) Cr LJ 300(SC) .

82 Hari Singh Gour, *The Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 146.

83 AIR 1927 Bom 209.

84 Hari Singh Gour, *The Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 148.

85 The Code of Criminal Procedure 1973, s 45, for example, casts upon the owners and occupiers of land the duty of preventing a riot on their lands.

86 *R v Prayag Singh* (1980) ILR 12 All 550 and *Kazi Zeamuddin Ahmed v R* (1901) ILR 28 Cal 504.

87 *Harakchand Ratanchand Banthia er Ors v Union of India er Ors* AIR 1970 SC 1453 (1466).

88 [1915] AC 705. This dictum is referred to, and relied upon, in: *HL Bolton Company v TJ Graham* [1956] 3 All ER 624 and *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413(PC) .

89 Ibid, at 713.

90 For comprehensive account, see Celia Wells, *Corporations and Criminal Responsibility*, Oxford, 2001. See also RS Welsh, 'Criminal Liability of Corporations', Law Quarterly Review, 1946, vol 62, p 345 and Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective', International and Comparative Law Quarterly, 1994, vol 43, p 493.

91 *Tesco Supermarkets Ltd v Nattrass* [1971] 2 All ER 127(HL) .

92 AIR 1964 Bom 195.

93 AIR 2004 SC 86, (2003) 11 SCC 405, (2004) Cr LJ 1221(SC) .

94 Majority opinion by S Rajendra Babu, B N Srikrishna, JJ. However, G P Mathur, J., opined that it is permissible for a court to impose fine on a corporation if it is held guilty under a penal provision providing for imprisonment *only*, or imprisonment *plus* fine.

95 AIR 2005 SC 2622, (2005) 4 SCC 530.

96 The *Standard Chartered Bank* proposition is relied upon and followed in *Iridium India Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, (2011) 1 SCC 74, and *CBI v Blue Sky Tie-Up Pvt Ltd* (2011) 6 SCALE 436, (2012) Cr LJ 1216(SC) .

97 *Arvind Navinchandra Mafatlal v Palakavayalli joseph Thomas* (2010) 112 Bom LR 1880; see also *State of Maharashtra v Syndicate Transport Company Ltd* AIR 1964 Bom 195 and *AK Khosla v TS Venkatesan (*1992) Cr LJ 1448 (Cal). However, GP

Mathur J, in the *Asst Commr, Assessment-II, Bangalore* case, opined that it is permissible for a Court to impose fine on a corporation if it is held guilty under a penal provision providing for imprisonment only, or imprisonment plus fine; contra *Municipal Corpn Delhi v JB Bottling Co* (1975) Cr LJ 1148(Del) and *Oswal Vanaspati & Allied Industries v State of Uttar Pradesh* (1993) Comp LJ 172(All) .

98 See s 16 of the Environment (Protection) Act, 1986 as a legislative formulation of the proposition.

99 See *Uttar Pradesh Pollution Control Board v Modi Distillery,* AIR 1988 SC 1128, 1987 SCR (3) 798, [Discussed under S 47 of the water (Prevention and Control of Pollution) Act, 1947].

[redacted]: Criminal Law,12th Edition/[redacted] Criminal Law 2014/CHAPTER 5 General ExceptionsAn Introduction

CHAPTER 5

General Exceptions--An Introduction

(Indian Penal Code 1860,Sections 76 to 106)

INTRODUCTION

Certain persons are exempt from the operation of the criminal law. Article 361 of the Constitution of India stipulates that the President of India, Governor of a State, or *Rajpramukh* are not answerable to any court for the matters pertaining to the exercise and performance of the powers and duties of their office. It provides further that no criminal (or civil) proceedings can be instituted or continued against the President or the Governor of a State in any court during their term of office. They are also immune from arrest or imprisonment during the term of their office.[1]

Chapter IV of the IPC captioned 'General Exceptions', comprising ss 76 to 106, exempts certain persons from criminal liability. An act or omission of an accused even though prima facie falls within the terms of a section defining an offence or prescribing a punishment therefor, does not constitute an offence if it is covered by any of the 'exceptions' enumerated in the ch IV. In other words, a wrongdoer, who has committed an act us reus with the requisite mens rea,[2] may escape from liability because he has a 'general exception' to offer as an answer to the prosecution. The 'general exceptions, in ultimate analysis, limit and override offences and penal provisions of the Code.[3] The title 'General Exceptions' is used to convey that these 'exceptions' are available to all offences.

EXCUSABLE AND JUSTIFIABLE EXCEPTIONS

A careful reading and closer analysis of the 'general exceptions' reveals that these 'exceptions' can be grouped under two broad categories of defences: excusable and justifiable. The first category is where the law excuses certain class of persons, even though their acts constitute an offence. The second category is where the act s committed, though are offences, are held to be justifiable under certain circumstances and hence exempted from the provisions of the IPC. Acts of infants, insane or intoxicated persons and act s done under mistake of fact or by accident fall under the first category of the exceptions. Acts done by a person justified in law; judicial act s; acts done out of necessity, under duress, with consent; act s causing slight harm or trivial incidents; and acts done in private defence of body or property, fall under the second category.

'Excuses' and 'justifications', though both of them ultimately exonerate an individual from liability, are conceptually distinct. First, in the excusable defences, the act is excused for want of the necessity of requirements of guilty mind, while in the latter the act done is justified on account of some other meritorious considerations neutralising the corresponding liability otherwise incurred. The first category of exceptions, thus, treats an act us reus as non-criminal because of the absence of the requisite mens rea, while the second

one considers an actus reus, though committed with the required mens rea, meritorious. Secondly, in determining whether conduct is justified, the focus is on the *act*, not the actor. 'Excuses' perceive that criminal liability is inappropriate because of some (legally recognised) characteristics of the act or. Their focus is on the *actor*. They, thus, do not destroy the blame or the undesirability of the act but they shift it from the act or to the excusing conditions.[4] The distinction between 'excuses' and 'justifications' defines the parameters of each of the general exceptions.

OBJECT OF THE CHAPTER

Every penal clause is subject to a number of limitations and no offence can be absolute without any exceptions. An offence committed by a child or by a mentally ill person cannot obviously be treated in the same manner as an offence committed by a sane adult. Similarly, liability cannot be fixed on persons who would have committed an offence by accident, under threat, by necessity or in private defence, in the same manner as a person who has committed an offence with an evil intention or design. However, the Code itself has been drafted upon the assumption that all exceptional and extenuating circumstances are absent. For instance, there is a presumption that all persons are sane and are not acting under the influence of alcohol. Such a presumption may be true of large number sections of the Code, but not without exception. There are a significant number of persons who may be insane, suffering from some mental illness, or alcoholics, who may fall outside the general presumption that everybody is sane and sober. Instead of qualifying every offence with the limitations or exceptions, a separate chapter has been enacted which is applicable to the entire Code. This is basically to avoid repetition. Objects of clustering all the exceptions in a single chapter as outlined by the Law Commissioners who drafted the Code are:

> *This chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations*. Some limitations relate only to a single provision, or to a very small class of provisions. ...But there are other exceptions which are common to all the penal clauses of the Code, or to a great variety of clauses dispersed over many chapters. Such are the exceptions in favour of infants, lunatics, idiots, persons under the influence of delirium, the exceptions in favour of act s done by the direction of law, of acts done in the exercise of the right of self defence, of act s done by the consent of the party harmed by them. *It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate chapter*, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision shall be construed subject to the provisions contained in that chapter.[5]

The last sentence, obviously, refers to s 6 of the Code. It provides:

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

Illustrations appended to the section further clarify the intent of the authors of the Code. Illustration (a), for example, reads:

> The sections, in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences, but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.[6]

Section 6, thus, mandates a court to read every definition of an offence or penal provision including the illustrations appended thereto subject to General Exceptions.[7] It also conveys that the IPC presumes the absence of any extenuating circumstances that have been incorporated in ch IV of the Code .[8] In order to understand or construe any provision of the Code, it is, therefore, not sufficient to read the concerned section alone. Every provision under the IPC has to be read along with the chapter on 'General Exceptions' before coming to any conclusion on the liability or culpability of a person accused of a crime.

APPLICABILITY OF THIS CHAPTER TO OFFENCES UNDER SPECIAL OR LOCAL LAWS

Section 40 (para 2) of the Code defines the word 'offence' as denoting a thing punishable under the IPC as well as under a special or a local law. By virtue of provisions of s 40, read with that of s 6, it follows that the chapter on general exceptions is applicable not only to the IPC, but also to penal provisions in other special and local Acts.[9] The title 'General Exceptions' is, therefore, adopted to convey that these 'exceptions' are available to accused of all offences.[10]

BURDEN OF PROOF

It is the fundamental rule of criminal jurisprudence that a person is innocent until proved guilty. This means that there is always a presumption of innocence in favor of an accused and the burden of proving every aspect of the crime--the act us reus, the mens rea, the causation, the motive--is solely on the prosecution. The standard of proof required is very high. The prosecution has to prove the guilt of the accused beyond reasonable doubt.[11]

Section 105of the Indian Evidence Act 1872 (Evidence Act) places the burden on the accused to prove that the case falls within one of the general exceptions. It provides that 'the court shall presume the absence of such circumstances', which may bring the accused within the exceptions set out in ch IV of the IPC. It calls upon the accused to show that the circumstances bringing the case within the exceptions are present, as the court cannot suo motu presume the existence of the circumstances. Further, s 103 of the Evidence Act provides that when a person wishes the court to believe in the existence of any particular fact, the burden of proof lies on the person who desires the court to believe in it, unless the law specifically provides that the burden lies on any other particular person.

STANDARD OF PROOF

Though, the burden of proof in respect of proving the existence of circumstances that might bring the case within the exceptions provided in ch IV of the Code is on the accused, the standard of proof required is not the same to that of the prosecution. The standard of proof required by the prosecution to prove guilt and the standard required by the defence to establish that the case is within the exceptions; are different. As stated earlier, the prosecution has to prove all elements of the crime beyond reasonable doubt and this burden on the prosecution never shifts.[12] After the prosecution has discharged this burden, and has established beyond reasonable doubts that the accused is guilty of the crime, then it is open to the accused to adopt a defence that his case falls under one or other of the general exceptions. If the accused takes such a defence then it is for him to prove the same. He can prove this in two ways. One way is, of course, to establish by positive and direct evidence that the exception pleaded by him existed. The second method is to bring on record sufficient material, so as to cast a doubt on the story of the prosecution and establish that there is reasonable possibility and probability that the circumstances and the defence as stated by the accused existed. The benefit of such doubt naturally goes to the accused. It displaces the initial presumption of non-existence of the circumstances in his favor. He is, therefore, not required to prove beyond reasonable doubt that his case falls under the relied on exception. He discharges his burden of proof as soon as he proves the preponderance of probability of the existence of the circumstance(s) bringing his case within the general exception(s).[13] Once a prima facie case of the existence of circumstances that brings the case within any of the general exceptions is made out, the burden once again shifts on the prosecution to prove beyond doubt the guilt of the accused and to establish that the general exception relied on by the accused does not exist. This primary burden on the prosecution never shifts.

However, it needs to be stressed here that the accused is not required to take up the plea specifically that his case falls within any of the general exceptions. By virtue of s 6 of the IPC, there is no imperative duty or obligation on an accused to take up a specific plea that his case falls under any of the general exceptions but a court is under duty to bear in mind that every penal provision needs to be interpreted subject to the general exceptions. It imposes a statutory duty on the court to consider as to whether the offence allegedly commit-

ted by an accused is covered by any of the general exceptions or not even though he has not taken the plea specifically.[14]

1 'The expression 'general defences' suggests something positive that must be put forward on behalf of the accused, but in truth it is more accurate', Blackstone observed, 'to regard these defences as *circumstances* where the prosecution has been unable to prove all the requirements of liability beyond reasonable doubt'. See *Blackstone's Criminal Practice 2003*, Peter Murphy (ed), Oxford, 2003, p 34.

2 Shamsul Huda, however, felt that 'general exceptions' are the circumstances that preclude the existence of mens rea. He, therefore, labeled them as 'conditions of non-imputability'. See, Shamsul Huda, *The Principles of the Law of Crime*',(Tagore Law Lectures, 1902), Eastern Book Co, Lucknow, Reprint 2011, ch 7: 'Conditions of Non-Imputability'.

3 'The expression 'general defences' suggests something positive that must be put forward on behalf of the accused, but in truth it is more accurate', Blackstone observed, 'to regard these defences as *circumstances* where the prosecution has been unable to prove all the requirements of liability beyond reasonable doubt'. See *Blackstone's Criminal Practice 2003*, Peter Murphy (ed), Oxford, 2003, p 34.

4 Paul Robinson, 'Criminal Law Defences: A Systematic Analysis', vol 82 Columbia Law Review, 1982, p 199; see also, Eric Colvin, 'Exculpatory Defences in Criminal Law', vol 10 Oxford Journal of Legal Studies, 1990, p 381; George P Fletcher, *Rethinking Criminal Law*, Little Brown, Boston, 1978, pp 798-800, and Glanville Williams, 'The Theory of Excuses', [1982] Criminal Law Rev 732.

5 Macaulay, Macleod, Anderson and Millett, *A Penal Code Prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note 'B'. Emphasis supplied.

6 The illustration is based on the general exception enumerated in s 82 of the IPC.

7 *Shankar Narayan Bhadolkar v State of Maharashtra* AIR 2004 SC 1966, (2005) 9 SCC 187..

8 *Bhupendrasinh A Chudasama v State of Gujarat* AIR 1997 SC 3790.

9 *King Emperor v Tustipada Mandal* AIR 1951 Ori 284.

10 *Shankar Narayan Bhadolkar v State of Maharashtra* AIR 2004 SC 1966, (2005) 9 SCC 187..

11 Before the Indian Evidence Act 1872 came into force, the prosecution had an additional burden of proving the absence of circumstances that might bring either the accused or the offence(s) committed by him within any of the General Exceptions provided in the Indian Penal Code 1860. See, Hari Singh Gour,*Penal Law of India*, vol 1, eleventh edn, Law Publishers, Allahabad, 1998, p 535.

12 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605; *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563; *State of Gujarat v Bai Fatima* AIR 1975 SC 1478.

13 *Harbhajan Singh v State of Punjab* AIR 1966 SC 97 and *Bhupendrasinh A Chudasama v State of Gujarat* AIR 1997 SC 3790.

14 *Munshi Ram v Delhi Administration* AIR 1968 SC 702; *Venketa Siva v State of Andhra Pradesh* (1970) Cr LJ 1004(SC), (1970) 1 SCC 235; *State of Gujarat v Bai Fatima* AIR 1975 SC 1478; *State of Uttar Pradesh v Md Musheer Khan* AIR 1977 SC 226; *State of Gujarat v Ghenu* (1978) Cr LJ 262(SC) ; *State of Assam v Abinash* (1982) Cr LJ 400(Gau) ; *Jaspal Singh v State (Delhi Administration)* (1986) 2 Crimes 338(Del) ; *Moti Singh v State of Maharashtra* (2002) 9 SCC 494; *Rizan v State of Chattisgarh* (2003) 2 SCC 661; *Sukhdev Singh v Delhi State (Govt of NCT of Delhi)* (2003) 7 SCC 441, AIR 2003 SC 3716.

CHAPTER 6

Mistake of Fact

(Indian Penal Code 1860,Sections 76 and 79)

ACTS DONE BY PERSONS BOUND BY LAW OR JUSTIFIED BY LAW

Section 76. Act done by a person bound, or by mistake of fact believing himself bound, by law.--

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

Illustrations

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

Section 79. Act done by a person justified, or by mistake of fact believing himself justified, by law.--

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

Illustration

A sees *Z* commit what appears to *A* to be a murder. *A*, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes *Z*, in order to bring *Z* before the proper authorities. *A* has committed no offence, though it may turn out that *Z* was acting in self-defence.

A plain reading of these two sections, which are analogous, reveals that they lay down the law relating to mistake as an exception to criminal liability. They, by implication, also distinguish between mistake of fact and of law and hold that the former and not the latter exonerates a wrongdoer. Section 76 excuses a person from criminal liability who is bound by law to do something and has done it, or who in good faith, owing to a mistake of fact, believes that he is bound by law to do something and does it. Whereas s 79 absolves a person, who believes, by reason of mistake of fact and not by reason of mistake of law, in good faith, that his act would be justified by law.

These two sections, though identical and accord the same immunity, are distinct from each other. Under s 76, a person believes himself bound by law to do a thing and thereby feels that he is under legal compulsion to do a thing, while under s 79 he acts because he thinks that he is justified in doing so and thereby believes that there is a legal justification for his act ion. The purpose of these two sections is, thus, to provide protection from conviction to persons, who are bound by law or justified by law in doing a particular act, but due to mistake of fact, in good faith, committed an offence.

NATURE OF MISTAKE AS AN EXCUSE

Mistake as an extenuating factor implies a rule that when a person who is ignorant of the existence of relevant facts or has mistaken them, does some wrongful act, he neither has intended nor foresaw the resulted unlawful consequences. His trial, therefore, should proceed on the fiction that the facts were as he had mistakenly believed them to be, and not as they really were. A court has to determine his guilt on the basis of the 'believed' facts and not on the 'real' facts. Mistake negatives the existence of a particular 'intent' or 'foresight', which penal law requires to make a person liable, rather than actus reus. Mistake as an absolving factor allows a court to look into mind's operation of the wrongdoer.[1]

However, mistake, as perceived and developed at Common Law, can be an extenuating factor provided: (1) that the state of things believed to exist would, if true, have justified the act done; (2) that the mistake must be reasonable; and (3) the mistake must relate to fact and not to law.[2]

The mistake must be of such a character, that had the supposed circumstances been real, they would have prevented liability from attaching to the person in doing what he did. Therefore, it is no defence to a burglar, who breaks into House no 5 to show that he mistook the house for House no. 6, for in these instances both the actus reus and mens rea would still have existed even in the circumstances supposed.[3] Similarly, on a charge for assaulting a constable in the discharge of his duty, the fact that the assailant did not know of his official character will not excuse him from criminal liability.

The second condition is that the mistake must be a reasonable one. Superstitious belief will be no defence. Even people, who break law in consequence of a belief that they are obeying a divine command, have been regarded as act uated by a mistake which is unreasonable. There have also been successful prosecutions of 'peculiar people' in England for withholding medical aid from their sick children.[4]

The third condition is that the mistake must pertain to a fact and not to law for ignorance of law is no excuse.[5]

Provisions of ss 76 and 79 of the IPC are not only primarily premised on these three provisos but have, in essence, also incorporated the principles derived therefrom. Mistake, under both the sections, must be in good faith. And the term 'good faith', as defined in the Code and interpreted by the courts in India, makes it clear that the mistake (of fact) must be bona fide, reasonable, and after exercise of due diligence. Both the sections, by incorporating the words 'by reason of a mistake of fact and not by reason of a mistake of law in good faith', not only distinguish between a 'mistake of fact' and a 'mistake of law' but also lay down that mistake must relate only to 'fact' and not to 'law'.

MISTAKE OR IGNORANCE[6] OF LAW

A plain reading of ss 76 and 79, with special attention to the words 'who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes' appearing therein, reveals that the protection of the sections applies only to mistake of fact and not to mistake of law. This is obviously based on the English Common Law maxim *ignorantia facti doth excusat, ignorantia juris non excusat*--ignorance of fact excuses, ignorance of law does not excuse. However, it is not easy to draw a logical distinction between a mistake of fact and a mistake of law.[7]

The principle 'ignorance of law is no excuse', which implies that it is not open to a wrongdoer to plead ignorance of law as a shield to avoid criminal responsibility, is based on the ground that everybody is presumed, rather duty bound, to know the law. Ignorance of those things, which one is bound to know, therefore, does not excuse him. It is merely a legal fiction, which has been created for the sake of convenience and out of necessity. Therefore, a mistake of law, reasonable or unreasonable, even in good faith, does not operate as an exonerating factor. However, it may operate as a mitigating factor.[8]

This presumption is, obviously, not based on ground realities. In fact, the sheer volume of statutory law makes it impossible for even lawyers to be familiar with all the provisions of law.

However, the legal fiction that *ignorantia juris non excusat* is justified in the public interest. If ignorance of law is admitted as an exonerating factor, it is argued, every accused will take the plea of mistake of law as a defence and it will be difficult for prosecution to refute it and to show affirmatively that the accused knew the law in question. Further, courts, in the absence of evidence, will be obliged to decide as to whether the accused was indeed ignorant of the law. It will also lead to endless complications making the administration of justice nearly impracticable and introducing an element of uncertainty in the administration of justice.[9] Allowing mistake of law will also lead to the encouragement of ignorance of the law.

Critiques of the maxim, however, are not convinced by the arguments for its existence. Shamsul Huda, for example, argued that 'ignorance of fact being an excuse, equally well should ignorance of law be an excuse for, both negative the existence of guilty mind'.[10] Justice Maule, doubting the maxim, stated:

> ...[T]here is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so... If there were not [such thing as a doubtful point of law], there would be no need of courts of appeal, the existence of which shows that judges may be ignorant of law.[11]

'The view that everyone is presumed to know law', Glanville Williams observed, 'is not a true proposition of law, and even if it were, it would only be a legal fiction not a moral justification'.[12] Lord Denning has also more than once urged its abandonment.[13]

It is also significant to note that some of the penal statutes have relieved themselves from rigorous application of the maxim *ignorantia juris non excusat* by making some inroads in its operation.[14] Similarly, some of the courts, doubting its existence and realising the implications of its rigorous application, have taken the position that mistake of law should be a defence.[15]

Mistake of law, as perceived in India, takes into its ambit both mistake as to the existence of any law on a relevant subject, as well as mistake as to what the law is.[16] Mistake of law, even in good faith, is not a defence.[17] It, nevertheless, may operate as mitigating factor.[18] However, if a statute provides that certain knowledge-involving elements of law on the part of the accused is an essential ingredient of the offence, mistake of law, in good faith, may be a good defence to a charge of a criminal offence.[19] Where the law prescribes a particular mode of its publication and that mode is not followed, ignorance of law will be a good defence. But if there is no such special mode of publication prescribed, the publication in the Government Gazette will be deemed to be enough publication to exclude the plea of ignorance of the law.

It is a matter of common knowledge that in India, where a majority of the population is illiterate, the presumption of knowledge of law seems not only to be illogical but also ridiculous and unjust. Even among the educated and literate, legal knowledge is very poor. It is impossible for them to know all the statutory laws. Even lawyers, judges, and law teachers, who are mainly concerned with law as their profession, do neither claim nor in fact know all the laws. Its rigorous application, in such a situation, may result in holding morally innocent persons criminally liable. It admits of no exception, not even in case of a foreigner who, in the circumstances in which he was placed, cannot be reasonably supposed in fact to know the law of the land.[20]Recalling implications of the rigorous application of the principle of mistake of law is no excuse and the relaxations made in other jurisdictions, Justice RL Narasimham, one of the Members of the Law Commission of India that submitted its Report on the Indian Penal Code in 1971, suggested that where the mistake of law relates to a provision of a rule, byelaw, order or notification made under an Act of the Legislature, and the accused person's mistake is of such a nature that he could not have avoided it by due diligence, then the mistake should be a defence, but the burden of proving it should be on the accused person.[21] He, accordingly, recommended insertion in the IPC of s 79A; which reads:

> 79A. Notwithstanding anything contained in sections 76 and 79, nothing is an offence where the act alleged against an accused is contravention of a provision of a rule, bye-law, order or notification made under an Act of Legislature, if at the time of such contravention the accused could not have with due diligence been aware of the said provision.[22]

MISTAKE OF FACT

Ignorance of fact is an excuse as it precludes the accused from forming the required mens rea.[23] It negatives the existence of mens rea. A good example to substantiate the proposition given by Sir Michael Foster which is often quoted is: a man, before going to church, fired his gun, and left it empty. But during his absence, somebody else went out shooting with the gun and, while keeping it back, left it loaded. The owner, late in the same day, took up the gun again and, in doing so, touched the trigger. The gun went off, and killed his wife, who was in the room. The man had reasonable grounds to believe that the weapon was not loaded. He was acquitted.[24]Mistake must be of material facts, i.e., facts essential to constitute the offence allegedly committed by the accused. He must be absolutely ignorant of the real circumstances of the case which makes his act an offence.[25] Where a fact is unknown to the accused, his conduct must not be taken to be the intention with regard to it. For instance, *A* fires a bullet into a bush where, unknown to him, *B* is hiding and the bullet kills *B*. It is true that *A* fired intentionally into the bush, but he is not liable as he did not fire intentionally at *B*. Then again, it is raining and *X* takes the only umbrella in the stand at his college, thinking that it is his own umbrella but in fact it is *Y*'s. *X* is not guilty of theft, because there is actus reus but no mens rea. So also, *N*, a nurse in a hospital, gives *P*, a patient, a liquid thinking it to be a medicine, in fact; it is poison. *N* is not guilty of murder, for she did not intend to give poison.[26] However, where the act of the accused is in itself wrong, although not criminal, the ignorance on his part of the circumstances which makes the act crim-

inal is no defence.[27] For example, *A* strikes *B* and *B* falls unconscious. *A* thinking that *B* is dead, sets fire to the body and burns it; *A*'s act is not innocent, though he is act ing under a bona fide mistake of fact. It does not amount to mistake of fact for avoiding criminal liability as he, in burning the body of *B*, intended to cause disappearance of the evidence of his previous act of striking *B* and its consequential result.[28]

Under s 79, IPC, though an act is not justified by law, yet if it is done under the bona fide belief and in good faith that it is justified by law, then it will not be an offence.[29] So, when an accused, under a bona fide mistake of fact, mistook a human being in the jungle as a wild animal at night and killed the person, then the accused was held to be not liable.[30] Where an accused killed a person under the mistaken belief that the person who entered his house did so with the intention of killing him,[31] or where an accused acting under a momentary delusion killed his own son considering him to be a tiger,[32] or when an accused assaulted and killed a person and seriously injured two under the bona fide mistake that he was attacking ghosts and not human beings,[33] the conduct of the accused in all these cases was held to be justified in law and therefore they were absolved from liability.

Ignorantia facti doth excusat, however, is subject to two reservations. First, mistake of fact cannot be successfully pleaded when responsible inquiry would have elicited the true facts. For example, *A* abducts *B*, a girl under 18 years of age, out of guardianship of her father without his consent. He believes that she is above the age of 18, but does so without making any inquiry, basing his belief on mere appearance. *A* is guilty of kidnapping under s 361 of the IPC.[34]Secondly, it cannot be accepted as a plea, when an act us is made reus without reference to mens rea of the doer.[35]

BOUND BY LAW

Under s 76, acts done by a person bound by law or by mistake of fact believes himself to be bound by law is protected from criminal liability. The illustrations to the section explain the meaning of the term 'bound by law'. The first illustration is of a soldier who fires on a mob by order of a superior officer, in conformity with the commands of the law. The act ion of the soldier is protected under this section. The second illustration is that of an officer of a court of justice who being ordered by court to arrest *Y*, and after due enquiry, believing *Z* to be *Y*, arrests *Z*. The action of the officer is again protected under this section. In order to get benefit of s 76, thus, a person has to show the existence of facts which would justify his belief, in good faith, that he was bound by law to act .[36] For illegal acts, therefore, neither the orders of a parent nor a superior will protect the doer from liability.

Section 43 , IPC, explains the term 'legally bound to do' as act s which, if omitted, would amount to commission of an illegality by a person.

When a person made a defamatory statement while deposing as a witness, he cannot get the protection of this section, as he is not bound by law to make a defamatory statement as a witness.[37]

A person, who was charged with the kidnapping of a minor girl, pleaded that he did so at the request of the girl's mother, his defence was not accepted as he was not bound by law to obey the orders of the mother to take the girl away.[38]

ACTS DONE UNDER ORDER OF A SUPERIOR AUTHORITY

Every act done under orders of superior authorities is not protected under this section. Where the orders of the superior authority are illegal, it will not save the subordinate officer from liability.[39] Where a police constable shoots and kills another under the orders of his superior officer, he cannot escape criminal liability because the order was obviously illegal and he was aware of the illegality of the order.[40]

In *State of West Bengal v Shew Mangal Singh* ,[41] the case of the prosecution was that the deceased and his brother were shot dead by the police at point blank range and brutally murdered. According to the defence version, the accused police officers were on patrol when they were attacked by a mob. When an Assistant Commissioner of Police was injured in the mob violence, orders were given by the Deputy Commissioner of Police to open fire. The accused constables were bound by law to obey the orders of the superior officer.

Both the Calcutta High Court and the Supreme Court held that the situation warranted and justified the order to open fire and hence, the accused was entitled the protection of s 76.

However, the IPC does not recognise the mere duty of blind obedience by a soldier to his superior authority. He will not be absolved from liability unless he shows that either the order was legal and binding on him or the circumstances made him, in good faith, to believe reasonably that he was bound by law to obey it. A soldier, who fired upon a mob by order of his commanding officer, could not get immunity from criminal liability merely on the ground that he obeyed the order of his superior authority.[42]

In *Dakhi Singh v State* ,[43] the accused arrested the deceased who was suspected of being a thief, and the deceased resisted the arrest. The accused used force which resulted in his death. Though s 46, CrPC, lays down that a police officer can use all means necessary to effect arrest, it also states that it does not give the right to cause death of a person who is not accused of an offence punishable with death or imprisonment for life. So, it was held that since the deceased was only suspected of theft, ss 76 and 79, IPC, did not justify shooting the person dead.

Arrest under warrant issued by a court is an act protected by this section. So, when a person executed the warrant of arrest and by a bona fide mistake arrested the wrong person, he will get the benefit of this section.[44] However, he will be precluded from taking shelter behind provisions of s 76, if he maliciously procures an order from a magistrate to harass and humiliate a person.

Where convict warders and convict officials beat and tortured the convicts that resulted in the death of two convicts, it was held that s 76 does not afford any defence to them. It was obviously an illegal order and convict warders should have known that merciless beating of convicts is contrary to law. At best, the fact that the convict warders acted in obedience to orders given by the officials, could only be used to mitigate the sentence.[45]

Private persons who are bound by law to assist the police under s 37 of the CrPC are also protected under s 76 of the IPC.

JUSTIFIED BY LAW

Section 79 protects act s which are justified by law or are bona fide believed, by mistake of fact, to be justified by law. It exonerates the doer because of his bona fide belief, although mistaken, that eliminates his culpability. It comes into play only when there is real or supposed legal justification for a person in doing the act complained of and that the same was done with an intention of advancing the law to the best of his judgment exerted in good faith.[46]

An act wholly justified by law does not amount to an offence at all in view of the provisions of s 79. In *Kiran Bedi & Jinder Singh v Committee of Inquiry* ,[47] a lawyer was apprehended by the students of St Stephens College, University of Delhi, and handed over to the police on the allegation of committing an offence within the campus. The said lawyer was handcuffed and produced before the court. The other lawyers protested against the handcuffing, but the police officials ignored it. The lawyer was discharged by the court on the same day and the court also directed the Commissioner of Police to take action against the guilty police officials. The petitioner made a press statement justifying the police act ion and criticised the order of the magistrate discharging the lawyer. A group of lawyers, anguished at this press statement, went to meet the petitioner, who refused to meet them. It was alleged that instead the petitioner ordered a *lathi-charge* against the lawyers. The lawyers went on an indefinite strike demanding a judicial enquiry. Thereafter, a mob engineered by the petitioner was alleged to have attacked the courts, injuring some lawyers and destroying property. Thereafter, a Commission of Inquiry, consisting of two judges of the Delhi High Court, was constituted.

As per s 8B of the Commissions of Inquiry Act 1952, if, during the enquiry, it is considered necessary to inquire into the conduct of any person or if the reputation of any person is to be prejudicially affected, then such persons should be given an opportunity to defend themselves. Generally, such persons are asked to depose only at the end of enquiry, so as to enable the person to defend himself on all the points placed before the Commission.

However, in the instant case, the petitioner and another were asked to depose at the beginning of the inquiry itself. The petitioner refused on the ground that she should be called only at the end of the inquiry. On her refusal, the Commission directed prosecution against her under s 178 of the IPC, which makes refusal by a public servant to take oath or affirmation to state the truth when duly required, an offence. As against this prosecution, the petitioners took the plea of valid justification for refusing to bind themselves by oath or affirmation.

The petitioners claimed that the exception under s 79 of the Code applied to them.

However, doer of an act which is wholly unjustified or going beyond what is strictly justified in law does not get protection of s 79. In *State of Andhra Pradesh v N Venugopal* ,[48] the accused were all policemen. Of the three, one was a sub-inspector, another, head constable and the third, a constable. They arrested a person on the suspicion that he had received some stolen property and was involved in house-breaking. Three days later, the arrested person was found dead, with a number of injuries. The accused were charged with offences under ss 348, 331 and 201 of the IPC. The prosecution case was that the deceased was arrested, wrongfully confined and tortured for the purpose of extracting a statement from him. When the accused policemen realised that the injuries were serious, they removed the person from the police station and threw the body at another place, where it was ultimately found. The trial court convicted the accused. On appeal, the high court, believing that whatever a police officer does in investing a crime is justified, set aside the order of conviction passed by the trial court. As against the order of the high court, the state preferred an appeal to the Supreme Court. The Supreme Court, on hearing the appeal, observed:

> To be able to say that an act is done 'under' a provision of law, one must discover the existence of a reasonable apprehension between the provisions and the act . The High Court fell into the error of thinking that whatever a police officer does to a person suspected of a crime at a time when the officer is engaged in investigating that crime should be held to be done in the discharge of his official duties to investigate and as such under the provisions of the law that imposed this duty on him. This view is wholly unwarranted in law.

The Supreme Court held that the act of beating or confining or sending away an injured person had no relation to the process of investigation. It reversed the judgment of the high court and convicted all the accused.

In *Raj Kapoor v Laxman* ,[49] the petitioner was the producer of a film named *Satyam Shivam Sundaram*. He was prosecuted under s 292 of the IPC alleging that the film was obscene and indecent. The petitioner, who was the producer of the film, challenged the criminal proceedings on the ground that since the film was duly certified for public show by the Board of Censors under the Cinematograph Act 1952, no prosecution could be legally sustained. It was contended that the certification of the film by the Censor Board provides a justification in law in exhibiting the film, even if the film was assumed to be an obscene one. Quashing the prosecution, the Supreme Court held:

> ...[J]urisprudentially viewed, an act may be an offence, definitionally speaking; but a forbidden act may not spell inevitable guilt if the law itself declares that in certain special circumstances it is not to be regarded an offence. In the instant case, since the petitioner had obtained a certificate for public exhibition, they act ed on the *bona fide* belief that the certification justified their public exhibition. They were therefore entitled to protection under section 79 , IPC .

Private persons acting under ss 38, 43, 72 and 73 of the CrPC are also protected under s 79 of the IPC.

GOOD FAITH

One of the essential ingredients required for an accused to get the protection of ss 76 and 79 is that his act ion must be done in 'good faith'. Section 52 , IPC , defines the term 'good faith'. It reads: 'Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention'. The term 'good faith' as defined in this section is in the negative form. Section 3(22)of the General Clauses Act 1897 defines the very same term in a positive manner: 'A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not'. The element of honesty which is prescribed in the General Clauses Act 1897 is not incorporated in s 52 of the IPC.[50]Under the General Clauses Act, the stress is on

the moral element of honesty and right motive. If the intention is honest, then even if theact was negligent, it is deemed to be done in 'good faith'. However, under the Code, the emphasis is on whether the person has done an actwith due care and attention. So, if a person, howsoever honest in his intention, blunders, he cannot get the protection under the IPC because apart from an honest intention, he is also expected to act with due care and caution. The distinction between the positive and negative definitions of 'good faith' defined respectively in the General Clauses Act 1897 and the IPC, as articulated by the Madras High Court in Re*Ganpathia Pillai*,[51] is:

> Section 52makes no reference to moral elements of honesty and right motive, which are...predominant in the positive definition enacted in...the General Clauses Act, 1897. While an honest blunderer acts in*good faith*within the meaning of General Clauses Act, an honest blunderer can never act in*good faith* within the meaning of the Penal Code for being negligent. *Good faith* according to the Code does not require logical infallibility but due care and caution which must be in each case be considered with reference to general circumstances, the capacity and intelligence of the person whose conduct is in question.

Due care denotes the degree of reasonableness in the care sought to be exercised. The enquiry must be of such a depth, as a reasonable and prudent man would make with the genuine desire to know the truth.[52]However, what is due care and attention depends on the position in which a man finds himself. The law does not expect the same standard of care and attention from all persons regardless of the position they occupy. In the determination of good faith, a reference to the capacity, intelligence and position of the accused as well as the circumstances under which he act s, therefore, becomes a relevant consideration.[53]

In *Harbhajan Singh v State of Punjab* ,[54] the accused challenged the correctness of his conviction for defamation under s 500, IPC. In this case, the accused published a statement stating that S Surinder Singh Kairon, son of S Pratap Singh Kairon, Chief Minister of Punjab, was not only a leader of smugglers, but was responsible for a large number of crimes being committed in Punjab. But, because the culprit happens to be the chief minister's son, the cases are always shelved up. A complaint was filed by S Surinder Singh stating that the press statement was highly defamatory. The accused claimed the protection of the *ninth exception* (imputation made in good faith) to s 499 of the IPC, as he made the statement in good faith and for public good.

The court held 'good faith' was always a question of fact. In this case, the accused led extensive evidence to establish that he acted in 'good faith' by taking due care and attention before issuing the press statement. Prior to the statement issued by the accused several newspapers had already carried stories about the criminal act ivities of the complainant. Some members of the Punjab Legislative Assembly had also made similar statements on the floor of the house. Apart from this, the accused produced material to show that the complainant was closely associated with some smugglers and had also personally ensured that cases against them were withdrawn. There were also confidential reports of the Punjab University wherein there were records to show that the complainant threatened students with sticks and threw his weight around in the college campus. There were also several letters which the complainant had written to various government servants asking them to carry out his bidding. So, in view of this extensive documentation by the accused, the Supreme Court held that the accused acted in good faith. There was no dispute that the statement was also made for public good.

The Supreme Court observed that:

> Good faith requires not indeed logical infallibility, but due care and attention. But, how far erroneous act ions or statements are to be imputed to want of due care and caution must, in each case, be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question.

In *Chaman Lal v State of Punjab* ,[55] a complaint was made by a nurse attached with a civil dispensary against the accused, who was the President of the Municipal Committee at the relevant point in time. He wrote a letter to the civil surgeon on the basis of allegations made by 'leading men of all communities' that the complainant had a very bad reputation having illegal relations with a cycle repairer. The letter written by the accused indicated that he set his seal of approval to the matters contained in that letter. There was no proof that he made any inquiry about the facts or that he acted with reasonable care. On the contrary, the

court held that the accused act ed without sense of responsibility and propriety. Being the President of the Municipal Committee, he was required to act with utmost prudence and caution. His conviction was upheld.[56]

In *State of Orissa v Bhagaban Barik* ,[57] the accused and the deceased had strained relations over grazing of cattle. On the date of the incident, the deceased had gone to the pond to fetch his bell metal utensils. He was given a *lathi* blow on his head. The defence plea was that the utensils of the accused had been stolen and that he was keeping a watch for the thief. It was held that there was complete lack of good faith on part of the accused, as the circumstances proved that he had no occasion to believe that he was striking a thief.

In *Jain Exports Pvt Ltd v Union of India* ,[58] an experienced export house well-versed with the policies and procedures of export and import of goods, pleaded that they, in good faith, assumed that non-edible variety of coconut oil was not a canalised item and could therefore, be imported under Open General License. The court rejected the plea holding that it was not a bona fide act .

Where the offence depends upon the existence of certain circumstances (definitional or aggravating) and the knowledge thereof by the accused, a consideration as to whether the accused was bound to enquire into, and acquaint with, those circumstances becomes imperative. And if he was bound to do so, his failure to make due enquiries would make him guilty of want of good faith and thereby deprive him of the protection of ss 76 and 79 of the IPC.[59]

'Due care and attention' required under the IPC, it seems, depends on the three factors: first, the nature of the act committed by the accused; secondly, its magnitude and importance; and thirdly, the facility a person has for the exercise of the care and attention.

DIFFERENCE BETWEEN SECTION 79, INDIAN PENAL CODE 1860 AND SECTION 197, CODE OF CRIMINAL PROCEDURE 1973

Section 79 deals with circumstances which when proved, make act s complained of not an offence. It safe-guards persons who fall within the ambit of the section from conviction. Section 197, Cr PC, on the other hand, is a protection against prosecution itself. It provides that no court, without prior sanction of the government, shall take cognisance of an offence alleged to have been committed by judges or public servants while acting or purporting to act in the discharge of their official duty. However, it does not exclude the alleged conduct from being an offence.[60] The former provides substantive protection (i.e., protection against conviction) to public servants and others, whose actions are justified by law; the latter provides procedural safeguard (i.e., protection against trial).

PROPOSALS FOR REFORM

The Law Commission of India, expressing its agreement with the principles of immunity from liability embodied in ss 76 and 79 of the IPC, declined to propose any substantive modifications in the provisions. However, plausibly for the sake of better clarity, it recommended regrouping of the principles laid down in these two provisions.[61] It proposed that the first parts of both the sections be combined together and be numbered as s 76. The proposed s 76 reads:

> *76. Act done by a person bound or justified by law.*--Nothing is an offence which is done by a person who is bound by law to do it or is justified by law in doing it.

And the second parts of ss 76 and 79, which have common elements of mistake of fact and bona fide belief, be brought together to form the proposed s 79 to read it as:

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

Illustrations[62]

(a) *A*, an officer of a Court of Justice, being ordered by that Court to arrest *Y*, and, after due enquiry, believing *Z* to be *Y*, arrests *Z*. *A* has committed no offence.

(b) *A* sees *Z* commit what appears to *A* to be a murder. *A*, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes *Z*, in order to bring *Z* before the proper authorities. *A* has committed no offence, though it may turn out that *Z* was acting in self-defence.

1 *Jaswantrai Maniklal Akhaney v State of Bombay* AIR 1956 SC 575.

2 *Russell on Crime*, JW Cecil Turner (ed), vol 1, 12th edn, Stevens & Sons, London, 1964, p 75.

3 *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, 1962, p 53.

4 *R v Downes* [1875] 1 QBD 25 CCR.

5 Generally speaking, a fact is something perceptible by the sense, while law is an idea in the minds of men. For example, a mistake as to whether a marriage has been celebrated may be either a mistake of fact or a mistake of law. It is a mistake of fact if no ceremony has been performed. But the mistake is one of law if, though the ceremony has been performed, there is a misunderstanding of the rules of law governing the validity of ceremony. See, Glanville Williams, *Criminal Law: The General Part*, second edn, Stevens & Sons, London, 1961, p 287.

6 Though the terms 'ignorance of law' and 'mistake of law' have different connotations, writers and courts have treated them as synonymous. 'Ignorance of law' suggests knowing no law on a particular subject, whereas 'mistake of law' suggests knowing something of the law but not enough, or the wrong thing. Thus, 'ignorance', in this sense, means 'no opinion whatever' and 'mistake' 'an incorrect opinion'.

7 See Winfield, 'Mistake of Law', Law Quarterly Review, no 49, p 327. See also Glanville Williams, *Criminal Law: The General Part*, second edn, Stevens & Sons, London, 1961, ch 8: Ignorance of Law.

8 *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, 1962, p 54. See also Glanville Williams, *Criminal Law: The General Part*, Stevens & Sons, London, 1961, pp 290-91.

9 Austin, *Lectures on Jurisprudence*, vol 1, students' edn, 1920, p 498. See also John Selden, *History of the Criminal Law,* vol 2, 1882, p 114.

10 Shamsul Huda, *The Principles of the Law of Crimes* (Tagore Law Lectures, 1902), Eastern Book Co, Lucknow, Reprint 2011, pp 233-34.

11 *Martindale v Falkner* (1846) 135 ER 1124, pp 1129-1130.

12 Glanville Williams, *Criminal Law: The General Part*, second edn, Stevens & Sons, London, 1961, pp 289-90.

13 See, *Kiriri Cotton v Dewani* [1960] AC 192, p 204; *Andre v Blanc* [1979] 2 Lloyd's Rep 427, p 431.

14 For example, the American Model Penal Code1962; the Draft German Penal Code 1962; theDraft Japanese Penal Code1961; the Norwegian Penal Code 1961; theArgentinean Penal Code1960 and the Korean Penal Code 1960 allow, in the indicated circumstances, mistake of law as a good defence. For further details see, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, pp 400-402.

15 See *S v De Blom* (1977) 3 SA 513(South Africa) ; *Lim Chin Aik v R* [1963] AC 160(PC) .

16 *King Emperor v Tustipada Mandal* AIR 1951 Ori 284, p 289.

17 *Mohammad Ali v Sri Ram Swarup* AIR 1965 All 161; *Narantakath vParakkal Mammu*AIR 1923 Mad 171.

18 *State of Maharashtra v MH George* AIR 1965 SC 722, (1965) 1 Cr LJ 19(SC) .

19 *Emperor v Nanak Chand* AIR 1943 Lah 208, (1944) Cr LJ 666; AIR 1958 MB 241 (244), (1958) Cr LJ 1327(DB) .

20 *State of Maharashtra v MH George* AIR 1965 SC 722, (1965) 1 Cri LJ 19(SC) .

21 See his separate note 'Ignorantia Juris non Excusat', in Law Commission of India, 'Forty-Second Report: The Indian Penal Code', Government of India, 1971, p 397,*et seq*. For judicial deliberation on the applicability of the maxim to delegated legislation, see *State of Maharashtra v MH George* AIR 1965 SC 722, (1965) 1 Cr LJ 19(SC) . See also, *Padmapat Sugar Mills Co v*

State of Uttar Pradesh 118 ITR 326(SC), wherein the Supreme Court observed that the presumption that every person knows law is not a correct statement and there is no such maxim known to the law.

22 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, p 405.

23 *Halsbury's Laws of England*, vol 11, fourth edn, Butterworths, London, para 21, p 23.

24 Foster 265 TAC.

25 *King Emperor v Tustipada Mandal* AIR 1951 Ori 284, p 290.

26 RC Nigam, *Law of Crimes in India*, Asia, London, 1965, pp 305-306.

27 *King Emperor v Tustipada Mandal* AIR 1951 Ori 284.

28 *King Emperor v Sree Narayan* AIR 1949 Ori 48.

29 *Keso Sahu v Saligram* (1977) Cr LJ 1725(Ori) .

30 *State of Orissa v Khora Ghasi* (1978) Cr LJ 1305(Ori) .

31 AIR 1947 Lah 249.

32 *Chirangi v State of Madhya Pradesh* AIR 1952 Nag 282, (1952) Cr LJ 1212(MP) .

33 *State of Orissa v Ram Bahadur Thapa* AIR 1960 Ori 161, (1960) Cr LJ 1349(Ori) . See also, *Waryam Singh v Emperor* AIR 1926 Lah 554; *Bouda Kui v Emperor* AIR 1943 Pat 64.

34 *Krishna Maharana v Emperor* AIR 1929 Pat 651.

35 (1848) 153 ER 907.

36 Re *Latifkhan*(1895) ILR 20 Bom 394.

37 AIR 1920 All 232, (1921) Cr LJ 564(All) .

38 *Pramatha Nath v P C Lahiri* AIR 1920 Cal 725.

39 *Haji Mahamoodkhan Dulathan v Emperor* AIR 1942 Sind 106.

40 *Emperor v Piniladhoshah Ibrahimshah* AIR 1942 Sind 33.

41 AIR 1981 SC 1917, (1981) Cr LJ 1683(SC) .

42 Re *Charandas* AIR 1950 East Punjab 321. However, in certain circumstances, a soldier receives absolute protection under s 132 of the Code of Criminal Procedure 1973. It protects him from criminal prosecution, except with the sanction of the Central Government, if he, in good faith, has acted in obedience of an order. See*Nagraj v State of Mysore* AIR 1964 SC 269.

43 AIR 1955 All 379, (1955) Cr LJ 905(All) (DB) .

44 *Gopalia Kallaiya*(1923) 26 Bom LR 138.

45 *Chaman Lal v Emperor* AIR 1940 Lah 210; see also Re *Charandas* AIR 1950 East Punjab 321.

46 *Pitchai v State by Inspector of Police, Vadamadurai,* (2004) 13 SCC 579.

47 AIR 1989 SC 714, (1989) Cr LJ 903(SC) .

48 AIR 1964 SC 33.

49 AIR 1980 SC 605. See also *Jayantila K Katakia v P Govindan Nair* AIR 1981 SC 1196; *Ramesh Chotalal Dalal v Union of India* AIR 1988 SC 775.

50 *Harbhajan Singh v State of Punjab* AIR 1966 SC 97.

51 AIR 1953 Mad 936.

52 Re *SK Sundaran*(2001) Cr LJ 2932(SC) .

53 *Bhawoo Jiwaji v Mulji Dayal* (1888) ILR 12 Bom 377; *Po Mye v King* AIR 1940 Rang 129; *Waryam Singh v Emperor* AIR 1926 Lah 554; *State of Orissa v Ram Bahadur Thapa* AIR 1960 Ori 161, (1960) Cr LJ 1349(Ori) .

54 AIR 1966 SC 97, (1966) Cr LJ 82(SC) ; see also *Baburao v Sk Biban* (1984) Cr LJ 350(Ori) .

55 AIR 1970 SC 1372, (1970) 1 SCC 590.

56 See also *Sewakram Sobhani v RK Karanjiya* AIR 1981 SC 1514, (1981) 3 SCC 208; *Express Newspapers Pvt Ltd v Union of India* AIR 1986 SC 872, (1986) 1 SCC 133.

57 AIR 1987 SC 1265, (1987) 2 SCC 498.

58 AIR 1993 SC 2383, (1993) 4 SCC 51.

59 *King Emperor v Tustipada Mandal* AIR 1951 Ori 284; see also, *Bouda Kui v Emperor* AIR 1943 Pat 64.

60 *Nagraj v State of Mysore* AIR 1964 SC 269.

61 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, pp 82-83. For recommendations suggested by Justice RL Narasimham, a Member of the Law Commission, see 'Mistake of Law', above.

62 It recommended the deletion of Illustration (a) appended to original s 76 of the Code owing to its ambiguity regarding the nature of command of superior authority and controversial questions arising therefrom. Illustration (b) of s 76 is shifted, as illustration (a), to the proposed s 79.

CHAPTER 7

Judicial Act s

(Indian Penal Code 1860,Sections 77 and 78)

Section 77. Act of Judge when act ing judicially.--

Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Section 78. Act done pursuant to the judgment or order of court.--

Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

OBJECT OF THE SECTIONS

The object of protection given under these provisions to judges and their ministerial staff,[1] who are executing the orders of the judges, is to ensure the independence of the judges and to enable them to discharge their duties without any fear of the consequences. The protection is based on public policy. The rationale behind giving personal immunity to a judge under s 77 is explained aptly by Hari Singh Gaur. He observed:

> Judges and judicial officers have in all ages been the target of malice and spite. Their function often leads to exhibition of temper and feeling of retaliation. If, therefore, judges had been placed on the ordinary footing as regards the defence of their act or conducts, they would soon have forsaken their legitimate duties in order to find time to vindicate them-

> selves. Moreover, their exposure to the shafts of unsuccessful party or of condemned convict would have made their position one of considerable peril and precarious advantage. For no one would come forward to seek a situation in which his very fearlessness and independence would make him the butt of unscrupulous attack and organized opposition.[2]

Protection to judges or judicial officers is based on the premise that they should be able to act fearlessly, impartially and with full sense of security in their decision-making process. Its object is not to protect malicious or corrupt judges but to protect the public from the dangers to which the administration of justice would be exposed if concerned judicial officers were subject to inquiry as to malice, or to litigation with those whom their decisions might offend him. It is in the public interest that no action can lie against a Judge for his judicial act . Aggrieved party cannot demand any explanation from the Judicial Officer for the manner in which the judgment was rendered.[3] No person, therefore, has the right, even under the Right to Information Act 2005, to seek reasons from a Judge as to why he had taken a particular decision in the matter which was before him. The judge is not obliged to give reasons, other than those given in his judgment or order disposing the matter.[4]

Section 78, which supplements s 77, protects ministerial officers and others, who may be required to execute the 'Process of Court of Justice',[5] for making the protection given to judges more effective and ensuring that judicial orders and directions are carried out effectively. Apart from these two sections, there are two other analogous Acts, namely, the Judicial Officers Protection Act 1850,[6] and the Judges (Protection) Act 1985, that extend protection to such persons. The former Act provides immunity from civil liability to members of the judiciary, while the latter Act mandates a court not to entertain or continue with any civil or criminal proceeding against a sitting or a former judge for any act done or word spoken by him in the course of act ing or purporting to act in the discharge of his official or judicial duty or function.[7]

The following are the essential ingredients of these two provisions.

Judge

Section 77 protects act s done by a judge. Section 19 , IPC , defines the word 'Judge'. As per this section, the word 'Judge' denotes not only a person who is officially designated as a judge, but also a person who is empowered by law to give a definitive judgment in any civil or criminal proceeding. It also includes a person who is one of a body of persons, and the body of persons is empowered by law to give such a definitive judgment. The right to pronounce a definitive judgment is considered the *sine qua non* of a Court.[8] The illustration to s 19 states that a collector exercising jurisdiction in a suit under Act X of 1859 or a member of a *panchayat*, who is authorised to try and determine suits under Reg VII of 1816 of the Madras Code, are judges. A magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court, is not a judge. He will be a judge for the purpose of the Code, only when he is exercising jurisdiction in a suit or proceeding, wherein he does have the power to give a definitive judgment. The section makes no distinction between a written judgment delivered by a judge and oral remarks made in the course of a judgment delivered by him. It does not confer immunity on a judge when he makes some unwarranted and serious defamatory remarks about an accused that are not covered by any of the relevant exceptions to s 499 [9] of the IPC.[10] Obviously, persons designated as judges of the Supreme Court, the state high courts, district courts, and subordinate courts will be 'judge' under the IPC. A mere fact-finding body or authority, like a commissioner appointed under the Public Servants (Enquiries) Act 1850, would not be a judge or a court of justice.[11] Similarly, a Collector who exercises powers of enquiry and award under the Land Acquisition Act of 1894 does not qualify for protection under s 77 of the IPC as he does not carry judicial function.[12]

Acting Judicially

The next important element of s 77 is that it should not only be an act of a judge, but it should also be done by him in the course of discharging his judicial powers. A judge is protected *only* for acts done by him 'when act ing judicially'.[13] In *Anowar Hussein v Ajoy Kumar Mukherjee* ,[14] the accused officer was holding two offices--one, an executive office as a sub-divisional officer and the other, a judicial office as a sub-divisional magistrate. He ordered the arrest of a person who owned an extensive agricultural estate. The person was released on bail after three days. He filed a suit for compensation for false imprisonment. The trial court

granted the complainant a decree for Rs 5,000, which was confirmed by the high court. The accused put up the defence that he ordered the arrest of the complainant on a bona fide exercise of his executive power on the information that he was involved in some offences. The Supreme Court held that since the accused officer acted in his executive capacity and not in discharge of his duties as a magistrate, he was not entitled to any protection from legal liability. Proceedings initiated before Magistrate under chapter VIII of the Cr PC are of judicial character and the magistrate, therefore, is protected even if he, in good faith, act ed without jurisdiction or with malice.[15]

Judicial acts are not confined to act s done in the open court, but also include orders passed in chambers. A person obtained bail, but failed to furnish sureties and so he was detained in custody. He filed a suit for damages against the magistrate. It was held that the magistrate was protected under the Judicial Officer's Protection Act 1850, which is analogous to ss 77 and 78 of the IPC. In *Rachapudi Subba Rao v Advocate General, Andhra Pradesh* ,[16] the petitioner filed a suit for declaration of a title in respect of a building. The additional subordinate judge dismissed his suit. The petitioner issued a legal notice in which, inter alia, he alleged that the judgment of the judge in the suit was delivered with bad faith. He further stated that the judge, while act ing judicially, did not act in good faith and he exercised his powers maliciously. Contempt proceedings were initiated against the petitioner by the Andhra Pradesh High Court,[17]and he was convicted for committing gross contempt of court and was sentenced to undergo one month's imprisonment. The petitioner filed an appeal before the Supreme Court. Before the Supreme Court, he reiterated that the judge had rendered a dishonest judgment and was guilty of serious misbehavior in the performance of his duties, and the allegations of 'bad faith' and 'malice' made in the notice were true. He further contended that the notice issued by him to the judge was in compliance with s 80 of the Code of Civil Procedure 1908 (CPC), as he intended to file a suit for damages against the judge. In view of this, he maintained that the 'notice' sent by him was not scandalous, so as to constitute contempt of court.

Rejecting his contention, the Supreme Court held that s 1 of the Judicial Officers Protection Act 1850 offers an absolute immunity from civil liability for acts done by a judge in his judicial capacity and which are within his jurisdiction. The question of 'good faith' arises only in cases where theact s may not be within his jurisdiction, but it was done by the judicial officer where he, in good faith, believed that he had jurisdiction. In respect of acts done which are within his jurisdiction, no enquiry will be entertained as to whether the act done or ordered to be done was erroneous or even illegal or was done or ordered without believing in good faith. In the instant case, since there was no dispute that the judicial officer concerned had jurisdiction, he would be protected from civil liability. The appeal was dismissed and conviction and sentence maintained.

In *Ram Paratap Sharma v Dayanand* ,[18] a Judge of the Punjab and Haryana High Court visited a sessions court and also met members of the Bar. While addressing the members of the Bar, he criticised the government policy and openly attacked the government in its political and administrative decisions. The members of the Bar wrote a letter to the Prime Minister and the Chief Justice of India stating that the action of the judge was not like a judge, but like a politician, expressed their regret over it and urged the government to take appropriate act ion in this regard. A contempt notice was issued by the Punjab and Haryana High Court against the signatories to the letter. In reply to the contempt notice, the members of the Bar asserted that the letter was addressed bona fide, in good faith and without ill-will and no publicity was given to it. It was intended to be a mere privileged communication made solely with a view to upholding dignity of the court. If the letter was constituted to be contempt of the court, they tendered their apology. The full Bench of the high court accepted the apology, and discharged the petitioners.

On appeal, the Supreme Court held that if any judge addresses on political problems or controversies, the judge exposed himself to discussion by public. The judge in such a case cannot take shelter behind his office. It is no part of the duty of a judge nor is it a duty in the discharge of the office of a judge to go and address a meeting on political matters. Since, the views expressed in such meetings are his personal opinion, the protective umbrella of the court cannot be used by way of bringing charges of contempt. The Supreme Court directed that the contempt proceedings be dropped. In *Daya Shankar v High Court of Allahabad* ,[19] a judicial officer was found copying while writing his first semester LL M examination. The Supreme Court held that the conduct of the petitioner was unworthy of a judicial officer. According to the court, judicial officers cannot have two standards--one in the court and another outside the court. They must have only one standard of rectitude, honesty and integrity. It upheld the dismissal of the petitioner from judicial service.[20]

In *Yaqub Ali v State of Rajasthan* ,[21]the rights of parties in a suit for possession was being decided by the Rajasthan High Court, while the magistrate initiated parallel criminal proceedings under ss 145 and 147 of the CrPC. The high court held that the magistrate had no power or jurisdiction to do so. It was contended that the action of the magistrate amounted to contempt of court. However, the high court held that the magistrate committed only an error of judgment, and such an act ion was protected under the Judicial Officers Protection Act 1850.

EXERCISE OF POWER BELIEVED IN GOOD FAITH TO BE GIVEN BY LAW

The protection under s 77 extends not only to act s of a judge in exercise of judicial power given to him by law, but also to acts done by him in exercise of judicial power which he believes in good faith[22] was given to him by law.[23] So, even if a judge act s beyond his jurisdiction, provided it is under the bona fide belief that he has the jurisdiction, then even such acts are protected by this section.[24]However, if the act ion of a judicial officer is actuated by mala fides or improper motive, then it exhibits lack of good faith and hence, he cannot get the protection of s 77. Where a magistrate ordered wrongful imprisonment, he was held liable and was offered no protection.[25] Where a judicial officer was to sign warrants for arrest of convicted persons but warrants were signed and issued even against acquitted person due to negligence, it was held that the judicial officer could not get protection or immunity.[26]

A warrant for execution of a sentence was issued under s 425, CrPC. The fact that the sentences were to run concurrently was not mentioned. The accused, against whom the warrant was issued, was detained beyond the term. The officer who issued the warrant was protected.[27]

ACTS DONE PURSUANT TO JUDGMENT OR ORDER OF COURT

Section 78, as mentioned earlier, protects ministerial and other staff, who may be required to execute orders of the court. If such immunity was not extended, then executing or implementing court orders would become impossible. The protection extends even if the court order, pursuant to which the person may act, was actually without or in excess of jurisdiction, provided the person who was executing the order believed, in good faith, that the court concerned had such jurisdiction.[28]A magistrate had issued a warrant to attach some properties that included properties of other parties of a partnership firm. But the order was not challenged as being without jurisdiction by the parties concerned. The executive officer believed in good faith that he was bound to execute the order and attached the properties of the partnership firm by act ual seizure. The Calcutta High Court held that the act of the executing officer was protected.[29]

In *Sheo Narain v State of Rajasthan* ,[30] the petitioner had obtained a decree in a civil suit and became a *khatedar* tenant of a piece of land. Thereafter, a complaint was registered against him under ss 209, 210, and 420 of the IPC in the police station, stating that he had suppressed the fact that the land belonged to a person from a scheduled caste, and got the sale deed registered, on the basis of which the decree was obtained. The High Court of Rajasthan quashed the FIR, holding that the petitioner became a *khatedar* tenant pursuant to the decree of a court. Until such a decree is set aside, he would be protected under s 78 of the IPC and no criminal complaint could be maintainable against him.

However, protection of s 78 cannot be extended to the execution of oral orders of a judge. It also does not protect a person if he exceeds the power given to him by a court. Apart from the protection given by these sections, the Supreme Court in *Delhi Judicial Service Association*, *Tis Hazari Court v State of Gujarat* ,[31] has issued certain directions in respect of arrest of judicial officers in the event of their being involved in a criminal case.

In this case, the Chief Judicial Magistrate (CJM), Nadiad, in Gujarat had antagonised the local police. A false charge of having consumed liquor in breach of the prohibition law enforced in the State of Gujarat was foisted on him. A police inspector arrested, assaulted and handcuffed the CJM, tied him with a thick rope like an animal and made a public exhibition of him by sending him in the same condition to the hospital for medical examination. Photographs of the CJM in handcuffs with a rope tied around his body along with the consta-

bles were published in newspapers all over the country. The Supreme Court initiated contempt proceedings against all the concerned police officials and also punished them for the same. Apart from that, the court also issued directions that if a judicial officer is to be arrested for any offence, it should be done under intimation to the district judge or the high court. If circumstances necessitate immediate arrest, a formal or technical arrest may be effected and the same be informed to the district judge and the chief justice of the high court. On arrest, the judicial officer shall not be taken to the police station without prior order of the district judge. The Supreme Court also directed that in all instances when a judicial officer is arrested, handcuffs should not be used.[32]

PROPOSALS FOR REFORM

The Law Commission of India[33] recommended no changes in the provision dealing with protection accorded to a judge under s 77 of the IPC. However, recalling a large number of judicial pronouncements wherein public servants executing courts' orders have been badly injured, and the courts have acquitted their assailants on the sole ground that the courts' order was without jurisdiction, it opined that a public servant executing such an order should not be put in the risk of being injured as a result of the exercise of the right of private defence by the party against whom he attempts to execute the judgment or order of a court so long as he act s in good faith. Stressing that public policy warrants such a protection for the prompt execution of courts' orders, the Law Commission recommended the insertion of a new provision[34] in s 99 of the IPC to make the immunity from prosecution provided in s 78 co-extensive with the deprivation of the right of private defence provided in the first paragraph of s 99 of the IPC.

1 'Ministerial staff' refers to various officials attached to a court, whose duty is to execute mandates lawfully issued by judicial officers, ie, magistrates or judges. Such officials are, for example, court clerks, bailiffs, *ameenas* and so on.

2 Hari Singh Gour, *Penal Law of India*, vol I, 11th edn, Law Publishers, Allahabad, 1998, p 434.

3 *Anowar Hussain v Ajoy Kumar Mukherjee* AIR 1965 SC 1651, 1965 Cr LJ 686.

4 *Khanapuram Gandaiah v Administrative Officer* AIR 2010 SC 615, (2010) 2 SCC 1.

5 The words 'Court of Justice', as defined under s 20 of the IPC, denote a judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially.

6 The protection under the Act is also available to a person (other than a judge) who is obliged to adjudicate upon the rights of persons, or to punish for misconduct, irrespective of the form of proceedings resorted by such a person. For further comments and proposals for reform in the Judicial Officers Protection Act, see Law Commission of India, 'One Hundred and Fourth Report on The Judicial Officers Protection Act, 1850', Government of India, 1984.

7 Judges (Protection) Act, 1985, s 3(1).

8 *Brajnandan Sinha v Jyoti Narain* AIR 1956 SC 66, 1956 Cri LJ 156.

9 *Exceptions* 2, 3 and 7 to s 499 protect a judge from liability indicated under its s 500.

10 *Kamala Patel v Bhagwan Das* AIR 1934 Nag 123.

11 *Brajnandan Sinha v Jyoti Narain* AIR 1956 SC 66.

12 *Surendra Kumar Bhatia v Kanhaiya Lal* (2009) 12 SCC 184, AIR 2009 SC 1961.

13 Ss 219 and 220 of the Penal Code provide punishment for a judge if he acts corruptly or maliciously or contrary to law in a judicial proceeding.

14 AIR 1965 SC 1651.

15 *Suresh Kumar Sharma v Durgalal Vijay* (2011) ILR 1 MP 628.

16 AIR 1981 SC 755.

17 *Muddada Chayanna v G Veerabhadrarao* AIR 1979 AP 253(DB) .

18 AIR 1977 SC 809, (1977) Cr LJ 579(SC) .

19 AIR 1987 SC 1469.

20 See also *Ravichandran Iyer v AM Bhattacharjee J* (1995) 5 SCC 457; *K Veeraswami v Union of India* (1991) 3 SCC 655.

21 (1995) Cr LJ 1376 (Raj).

22 The expression 'in good faith', used in s 77, implies that care and attention which dictates of justice, prudence and common sense would demand in the particular case. See (1904) 1 Cr LJ 146. A judicial officer cannot be held to have acted 'in good faith' in the discharge of his duties, unless he act ed reasonably, circumspectly and carefully. See *Collector of Sea Customs v Chidambarm* (1875) ILR 1 Mad 89.

23 *Kamala Patel v Bhagwan Das* AIR 1934 Nag 123. The burden of proving that he acted 'in good faith' lies upon the judge. See (1904) 1 Cr LJ 146.

24 A mistake of law, though made in good faith, is not a good defence under ss 76 and 79 of the IPC. But such a mistake may be a good defence under ss 77 and 78 of the Code. See (1904) 1 Cr LJ 146.

25 *State of Uttar Pradesh v Tulsi Ram* AIR 1971 All 162.

26 (1970) All Cr LR 429.

27 (1985) Cr LJ 642.

28 *Kapur Chand v State of Himachal Pradesh* (1976) 3 Cr LT 376(HP) .

29 AIR 1973 Cal 372.

30 (1999) 2 Crimes 169(Raj) .

31 AIR 1991 SC 2176.

32 Ibid., pp 2212-13.

33 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, pp 86 and 101-104.

34 The recommended clause runs: *Restrictions on the right of private defence.*--(1) There is no right of private defence against an act which does not reasonably cause an apprehension of death or of grievous hurt, if the act is done or attempted to be done:(a) by a public servant acting in good faith in pursuance of the judgment or order of a court of justice, though the court may have had no jurisdiction to pass such judgment or order, provided the public servant believes in good faith that the court had such jurisdiction...; see Law Commission of India, 'Forty-Second Report: The Indian Penal Code', Government of India, 1971, p 104.

CHAPTER 8

Accident and Misfortune

(Indian Penal Code 1860,Sections 80 and 81)

Section 80. Accident in doing a lawful act.--Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Illustration

A is at work with a hatchet; the head flies of and kills a man who is standing by. Here, if there was no want of proper caution on the part of *A*, his act is excusable and no an offence.

ESSENTIAL INGREDIENTS

Section 80 exempts a person from liability if the act is done accidentally, by misfortune, without any criminal intention or knowledge and the accident occurs while doing a lawful act in a lawful manner and by lawful means, wherein due care and caution is exercised. It exempts the doer of an innocent or lawful act in an innocent and lawful manner from any unforeseen result that may ensue from accident or misfortune. An accident or misfortune will operate as an exonerating factor, if it is shown that: first, the act was a mere accident or misfortune; secondly, the act was not accompanied by any criminal intention or knowledge; thirdly, it was an outcome of lawful act done in a lawful manner by lawful means, and fourthly, it was done with proper care and caution.[1]If either of these elements are wanting the act will not be excused on the ground of accident.[2] The defence of 'accident' in the Penal Code is equivalent to 'inadvertence without culpability'.[3]

Accident or Misfortune

The word 'accident' is derived from the Latin word *accidere*, signifying 'fall upon, befall, happen, chance'. The idea of something fortuitous and unexpected is involved in the word 'accident'. To bring an act within the meaning of the term 'accident' used in s 80, an essential requirement is that the happening must be one to which human fault does not contribute.[4]It does not mean a mere chance. It rather means an unintentional, an unexpected act . It implies the idea of something not only unintended but something which was so little expected that it came as a surprise. An injury caused is neither willful nor negligent. It is something that happens out of the ordinary course of things. An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precaution against it.[5] It is the effect of an act which is accidental and not the act which caused that effect.

The term 'misfortune' means the same thing as an accident plus that it was as unwelcome as it was unexpected.[6] It is only an accident with attendant evil consequences. Both the words 'accident' and 'misfortune' are used in the sense of implying the injury to another. But the difference between the two lies in the fact that an accident involves only injury to another, while misfortune causes injury as much to the author as to another unconnected with the act.[7]Accident and misfortune, thus, means not just the happening of the unexpected or unintended event, but it also means that such unexpected or unintended act resulted in injury to another.

Absence of Criminal Intention or Knowledge

For the application of this section, it is essential to establish that the act was done without any 'criminal intention or knowledge'. In other words, it must be without mens rea or guilty mind. An act that was intended by or known to the doer cannot obviously be an accident.

Thus, injuries caused due to accidents in games and sports are covered by this section. The Allahabad High Court, in *Tunda v Rex* ,[8] dealt with a case where two friends, who were fond of wrestling participated in a wrestling match. One of them sustained injuries which resulted in his death. The other person was charged under s 304A, IPC. The high court held that when both agreed to wrestle with each other, there was an implied consent on the part of each to suffer accidental injuries. In the absence of any proof of foul play, it was held that the act was accidental and unintentional, and the case fell within ss 80 and 87,[9]IPC.

In *State Government of Madhya Pradesh v Rangaswamy* ,[10] the accused fired at an object from a distance of 152 feet. To his horror, he found that he had shot at a human being. The accused pleaded that he was under the bona fide impression that the object fired at was a hyena that he saw the previous day. At the time of shooting, it was raining and hence he did not expect a man to be present at the place in question. It was held that the act of causing death was purely an accident and the accused was protected under s 80.

In *State of Orissa v Khora Ghasi* ,[11] the accused was watching his maize field in the night. He heard some noise inside his field, and thinking that a bear had entered into the maize field, shot an arrow in the direction from where the said noise was heard. The arrow hit the deceased who had stealthily entered the maize field of the accused to commit theft of maize. The deceased died as a result of the injury caused by the arrow. The Orissa High Court quoted with approval, the decision of the Lahore High Court[12]:

> ... [I]f the accused believed in good faith at the time of assault that the object of his assault was not a living human being but a ghost or some object other than a living human being, then he cannot be convicted of an offence under section 302 or section 304 , The ground for such opinion is that *mens rea* or an intention to do wrong or to commit an offence does not exist in such a case and that the object of 'culpable homicide' can be 'a living human being' only.

The Orissa High Court upheld the acquittal of the accused.

In *Atmendra v State of Karnataka* ,[13] the accused had fired at the deceased. The accused pleaded that it was an accident, as the reaper swung by the deceased at the accused struck the gun. However, no reaper was found at the place of occurrence. Further, the evidence of the ballistic experts ruled that the firing took place from a short distance. There was also evidence that there was a dispute between the accused and the deceased. The Supreme Court held that the act of the accused was intentional and not accidental. He was convicted under s 302 and sentenced to life imprisonment.

In *Girish Saikia v State of Assam* ,[14] the accused was attacked by his brother in the night when he was asleep. The brother attempted to strangulate and punch the accused. The two brothers started scuffling and rolled out of the room. The accused got hold of a bamboo and tried to strike his brother. But suddenly their father intervened and the bamboo blow aimed at the brother accidentally fell on the head of the father. The father succumbed to the injuries and died. The Gauhati High Court held that the accused had committed no offence as the case was covered by (the exception in) s 80 and acquitted him.

In *Sukhdev Singh v Delhi State (Govt of NCT of Delhi)* ,[15]relying upon the facts on record disclosing that the accused, during the scuffle, had deliberately shot the deceased, the Supreme Court declined to give benefit of s 80 to the accused-appellant as his act was not accidental.

A Lawful Act in a Lawful Manner by Lawful Means

To avail of the protection under s 80, an act should be an accident, done without any criminal intention and such an act should also be a lawful act, done in a lawful manner, by lawful means.

If an act is not lawful or is not done in a lawful manner by lawful means, this section will have no application.[16]

If a blow is aimed at an individual unlawfully and it strikes another and kills him, the accused cannot be protected under s 80.[17]Where a mother was angry with her child and took a small iron bar used as a poker and threw it at him which accidentally hit another child who had entered the room and as a consequence the child died, the court held that the woman was guilty, although she had no intention of killing the child, as her act was an improper mode of correcting her child.

Proper Care and Caution

The accidental act should not only be without any criminal intention and a lawful act, but the said lawful act should also have been exercised with 'proper care and caution'. What is expected is not the utmost care, but sufficient care that a prudent and reasonable man would consider adequate, in the circumstances of the case.[18]One of the primordial requirements of s 80 is that the act must have been done 'with proper care and caution' and the amount of care and circumspection taken by an accused must be one taken by a prudent and reasonable man in the circumstances of a particular case. If an act is done without proper care and caution, an accused, therefore, is not entitled to the benefit of s 80.[19]

In *Bhupendrasinh A Chudasama v State of Gujarat* ,[20] the accused constable, along with the head constable, was on patrol duty at a dam site, which was in danger on account of heavy rainfall. The accused took the plea that he saw a fire and hence fired. The accused shot at close range without knowing the identity of his target. The Supreme Court held that the act was done without any care and caution. His conviction for murder was upheld and he was sentenced to life imprisonment.

In *Sita Ram v State of Rajasthan* ,[21] the accused was digging the earth with a spade. The deceased came to collect the mud. The spade hit the deceased on the head and he succumbed to the injuries. The accused pleaded that it was an accident. The Rajasthan High Court held that the accused was aware that other work-

ers would come and pick up the mud. The accused did not take proper care and caution and acted negligently. He was convicted under s 304A, IPC.

In *Shankar Narayan Bhadolkar v State of Maharashtra* ,[22] the Supreme Court refused to give benefit of s 80 to a person who picked up a gun, unlocked it, loaded it with cartridges and shot dead, from a close range, one of the invitees for dinner at his place. It held that act of the accused was without proper care and caution, and deliberate.

NECESSITY

Section 81. Act likely to cause harm, but done without criminal intent, and to prevent other harm.--

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

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

Illustrations

(a) *A*, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that before he can stop his vessel, he must inevitably run down a boat *B*, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat *C* with only two passengers on board, which he may possibly clear. Here, if *A* alters his course without any intention to run down the boat *C* and in good faith for the purpose of avoiding the danger to the passengers in the boat *B*, he is not guilty of an offence, though he may run down the boat *C* by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat *C*.

(b) *A*, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A*'s act, *A* is not guilty of the offence.

Section 81 , IPC, embodies the principle that where the accused chooses lesser evil, in order to avert the bigger, then he is immune. The genesis of this principle emanates from two maxims: *quod necessitas non habet leegem* (necessity knows no law) and *necessitas vincit legem* (necessity overcomes the law).

Doctrine of Necessity

Section 81 of the recognises and embodies the doctrine of necessity as a defence against criminal liability. Necessity in legal context involves the judgment that the evil of obeying the letter of the law is socially greater in the particular circumstances than the evil of breaking it. In other words, the law has to be broken to achieve a greater good.[23]The illustrations to the section amply explain the context in which the doctrine of necessity may be pressed. In illustration (a), it is seen that the captain of a ship when confronted with the option of running down a ship with 20 or 30 passengers or a smaller boat with two passengers, then his option to run down the smaller boat is protected under this section. Illustration (b) is of a situation where a person pulls down houses to prevent the fire from spreading. In both the illustrations, one may notice that the act of running down a small vessel or pulling down houses is per se an offence. But when it is done not with the intention of causing harm to the passengers of the smaller vessel or with the intention of destroying the neighboring houses but only to prevent greater harm, then, this section would apply. It is pertinent to note

that although s 81 does not specifically refer to 'greater evil' or 'lesser evil', it in effect deals with the case of 'lesser evil'.

Mens Rea

Sections 80 and 81 are analogous provisions, the former dealing with accidents and the latter with inevitable accidents. However, there is a difference as to the nature and extent of mens rea prescribed under both these sections. Section 80 stipulates the absence of criminal intention as well as criminal knowledge. But s 81 stipulates the absence of criminal intention alone. Thus, the terms 'without criminal intention' or 'knowledge' are present in s 80, whereas, the term used in s 81 is 'without criminal intention' alone. In fact, s 81 clearly contemplates a situation where the accused has knowledge that he is likely to cause harm, but it is specifically stipulated that such knowledge shall not be held against him. Thus, in certain situations, even though the presence of knowledge is sufficient mens rea, in this section, knowledge alone will not be sufficient if there is absence of criminal intention. Though the demarcating line between knowledge and intention is thin, it is, however, not difficult to perceive that they connote different things.[24]

Preventing or Avoiding Other Harm

The immunity from criminal liability under s 81 will be available where an offence is committed without any criminal intention, to cause harm and in good faith and if such offence is committed for the purpose of preventing or avoiding other harm to person or property. In order to attract s 81, it is necessary to show that the act complained of was done in good faith in order to prevent or avoid greater harm to the person or property of others.[25]However, the harm caused need not necessarily be lesser than the harm averted, though this question would become material when judging the good faith of an act . The explanation to the section provides that the justification for the harm caused and whether the risk caused should be excused, is a question of fact to be determined in each case.

In Re *Ramaswamy Ayyar*,[26] where a village magistrate put a restraint upon a drunkard who was threatening to commit breach of peace and was a danger to other villagers, it was held that the village magistrate, even as a private citizen was protected by this section. The *ratio* in *Ramaswamy Ayyar*'s case was confirmed by a Full Bench of the Madras High Court in *Gopal Naidu v Emperor* .[27] In this case, a drunken man carrying a revolver in his hand was disarmed and put under restraint by police officers, though the offence of public nuisance under s 290 was a non-cognisable offence without a warrant. Though the police officers were prima facie guilty of the offence of wrongful confinement, it was held that they could plead justification under this section. In this case, the Madras High Court held that the person or property to be protected may be the person or property of the accused himself or of others. The word 'harm' in this section means physical injury.[28] In *Bishambhar v Roomal* ,[29] wherein the complainant, who misbehaved with a *chamar* girl and who agreed in writing to abide by the decision of the *panchayat*, was taken round the village with blackened face and was given a shoe-beating, the Allahabad High Court ruled that members of the *panchayat* were not guilty for their acts alleged contrary to ss 323 and 506 of the IPC as they acted 'without any criminal intention', to save the complainant from serious consequences of his own misbehaviour.

Necessity as a Reason for Homicide

The question, whether the doctrine of necessity can be applied as a justification for killing another human being, is a very tricky question. The usual view is that necessity is no defence to a charge of murder.[30] But, the question becomes much more difficult in cases of emergency.

Killing a person in self defence may appear to be an example of necessity. While self defence may overlap necessity, the two are not the same. Private defence operates only against aggressors. Generally, the aggressors are wrongdoers, while the persons against whom act ion is taken by necessity, may not be aggressors or wrongdoers. Unlike necessity, private defence involves no balancing of values.[31]

In *United States v Holmes* ,[32] the accused was a member of the crew of a boat after a shipwreck. Fearing that the boat would sink, he, under the orders of the mate, threw 16 male passengers overboard. The accused, though not convicted for murder, was convicted for manslaughter and sentenced to six months' imprisonment with hard labour.

In an English case, *R v Dudley and Stephens* ,[33] the crew of a yacht, 'Mignonette', were cast away in a storm and were compelled to put into an open boat, which had no water or food. On the twentieth day, having had nothing to eat for eight days, and being 1,000 miles away from land, two of the crew (Dudley and Stephens) agreed that the cabin boy, who was likely to die first, should be killed to feed themselves upon his body; and one of them carried out the plan. The men ate his flesh and drank his blood for four days. They were then rescued by a passing vessel and were subsequently charged with murder. The jury[34] returned a special verdict in which they declared that:

> ...[I]f the men had not fed upon the body of the boy, they would *probably* have not survived to be so picked up and rescued, but would within the four days have died of famine; that the boy, being in a much weaker condition, was *likely* to have died before them; that at the time of the act there was no sail in sight, nor any reasonable prospect of relief; ...that assuming any necessity to kill anyone, there was no greater necessity for killing the boy than any of the other three men; but whether upon the whole matter, the prisoners were and are guilty of murder, the jury are ignorant, and refer to the court.

The question was considered by a divisional court of five judges, which held that the act was murder and awarded them the sentenced of death. However, their death sentence was commuted by the Crown to a six months' imprisonment.

The principles that can be deduced from the *Dudley* and *Stephens* are:

(1) self-preservation is not an absolute necessity;
(2) no person has a right to take another's life to preserve his own, and
(3) there is no necessity that justifies homicide.[35]

In the above-mentioned cases, it is difficult, just as the jury in the *Dudley's* case found difficult, to decide which is a matter of greater harm and whether the act was justified. In the *Holmes*, the crew threw out sixteen passengers. The choice of persons whether from among the crew or passenger was a matter of confusion and it was indeed impossible to decide whether to enable the other people on the boat to live, they were justified in unilaterally deciding to kill sixteen passengers. The same question would arise in the *Dudley'*scase as to the justification in picking upon the cabin boy and not anybody else. Where necessity may not justify totally the act ion of the accused in situations mentioned in the *Holmes* and the *Dudley*, the compulsion of circumstances may go strongly in alleviation of the guilt of the accused and in mitigating the sentence of the accused.

PROPOSALS FOR REFORM

Section 81, as explained in preceding paragraphs, excuses a doer of a deliberate act done, in good faith and without any criminal intention but with the requisite knowledge, to avoid other greater imminent harm. This legislative intent is well reflected in s 81 and in the *explanation* and illustrations appended thereto. However, the Law Commission of India is not impressed by the existing scheme of splitting this idea in s 81 and in its *explanation*. It feels that such a splitting is unnecessary. For easier understanding of the provision, it recommended that existing s 81 be re-worded as:

> Nothing is an offence which, though done with the knowledge that it is likely to cause harm, is done in good faith for the purpose of preventing or avoiding other harm to person or property, provided the latter harm is of such a nature and so imminent as to justify or excuse the risk of doing the act with such knowledge.[36]

It, however, recommended that the illustrations be kept intact for better understanding of the legislative intent of s 81.

1 *Atmendra v State of Karnataka* AIR 1998 SC 1985, (1998) Cr LJ 2838(SC) .

2 *Sukhdev Singh v Delhi State (Govt of NCT of Delhi)* (2003) 7 SCC 441, AIR 2003 SC 3716.

3 John Dawson Mayne, *The Criminal Law of India*, Higginbothams Ltd, second edn, 1901, p 394.

4 Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 588-89.

5 Sir James Fitzjames Stephen, *A Digest of Criminal Law*, ninth edn, Sweet & Maxwell, London, art 316.

6 *Tunda v Rex* AIR 1950 All 95.

7 RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 320.

8 AIR 1950 All 95.

9 Section 87 exempts an unintentional death and grievous hurt.

10 AIR 1952 Nag 268.

11 (1978) Cr LJ 1305 (Ori).

12 *Waryam Singh v Emperor* AIR 1926 Lah 554.

13 *Atmendra v State of Karnataka* AIR 1998 SC 1985, (1998) Cr LJ 2838(SC) .

14 (1993) Cr LJ 3808 (Gau).

15 (2003) 7 SCC 441.

16 *Karali Bauri v Subhas Das Musib* (1983) Cr LJ 1474(Cal) .

17 AIR 1924 Oudh 228.

18 *State Government of Madhya Pradesh v Rangaswamy* AIR 1952 Nag 268.

19 *Shankar Narayan Bhadolkar v State of Maharashtra* AIR 2004 SC 1966.

20 AIR 1997 SC 3790.

21 (1998) Cr LJ 287 (Raj).

22 *Shankar Narayan Bhadolkar v State of Maharashtra* AIR 2004 SC 1966.

23 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, London, 1983, Indian Reprint by Universal Publishing, New Delhi, 1999, p 597.

24 *Basdev v State of Pepsu* AIR 1956 SC 488.

25 *Dendati Sannibabu v Varadapureddi Sannibabu* AIR 1959 AP 102, (1959) Cr LJ 167(AP) .

26 AIR 1921 Mad 458, (1922) Cr LJ 412(Mad) .

27 AIR 1923 Mad 523, (1924) Cr LJ 599(Mad) .

28 *Veeda Menezes v Yusuf Khan* AIR 1966 SC 1773.

29 AIR 1951 All 500, (1952) Cr LJ 179(All) .

30 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, London, 1983, Indian Reprint by Universal Publishing, New Delhi, 1999, p 604.

31 Ibid, p 603.

32 26 Fed Cas 360 (1842) (Circuit Court, Eastern District, Pennsylvania).

33 [1884] 14 QBD 273.

34 In England, trials are conducted by the judge in the presence of a jury consisting of ordinary, respectable citizens. The judge briefs the jury on the position of law. It is for the jury to decide, on facts, the guilt or innocence of the accused. The jury system is not prevalent in India.

35 Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, see comments on s 81.

36 Law Commission of India, 'Forty-Second Report: Indian Penal Code ', Government of India, 1971, p 86.

CHAPTER 9

Infancy

(Indian Penal Code 1860,Sections 82 and 83)

Section 82. Act of a child under seven years of age.--

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

Section 83. Act of a child above seven and under twelve of immature understanding.--

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

INTRODUCTION

Sections 82 and 83, IPC, confer immunity from criminal liability on child offenders. This immunity is based on the principle of juvenile justice. The constitutional basis for juvenile justice can be derived from arts 15(3) and 39(e) and (f) of the Constitution of India .[1] Article 15(3) provides that 'Nothing in this article shall prevent the state from making any provision for women and children'. Article 39 forms part of the Directive Principles of the State Policy. Clause (e) of art 39 provides, inter alia, that the tender age of children is not abused. Clause (f) stipulates that children are to be given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that youth be protected against exploitation and against moral and material abandonment.

ESSENTIAL INGREDIENTS

The following are the essential ingredients of ss 82 and 83.

(1) Act of Child under Seven Years of Age

Section 82 presumes that a child below seven years is *doli incapax*, ie, he is incapable of committing a crime and cannot be guilty of any offence. It presumes that he cannot distinguish 'right' from 'wrong'. This presumption emanates from the recognition of the fact that he lacks the adequate mental ability to understand the nature and consequences of his act and thereby an ability to form the required mens rea. This presumption is conclusive. It cannot be rebutted by adducing evidence that the child had the capacity of understanding the consequences of his act. Even though there may be the clearest evidence that the child caused an act us reus with mens rea, he cannot be held guilty once it appears that he, at the time he committed the act, was below seven years. Section 82 totally absolves a child below seven years of age from criminal liability.

(2) Act of a Child above Seven but Below 12 Years of Age

Section 83 presumes that a child above 7 but below 12 years of age is *doli capax*, i.e., capable of committing a crime depending upon his maturity of understanding. But this presumption is rebuttable. It can be rebutted by proof of 'mischievous discretion' of the child. The prosecution is required to prove beyond reasonable doubt that the child caused an act us reus with mens rea and that he knew that his conduct was not merely mischievous but 'wrong'. Liability of such a child depends upon his maturity of understanding of the nature and consequences of his conduct and not on his age. The question relevant for determining his liability, therefore, is not one of his age but of the requisite degree of his maturity of understanding at the time of commission of a crime. It therefore becomes necessary for the defence to prove that the child was not only below 12 when he committed a crime in question but also had not attained the sufficient maturity required to understand the nature and consequences of his conduct. In the absence of such evidence, a court presumes that the child accused intended to do what he really did.[2] However, once a court comes to a conclusion that the concerned child has not attained sufficient maturity of understanding, then the immunity conferred by s 83 is as absolute as that conferred by s 82.[3]

The presumption of innocence of a child is based on the principle of immaturity of intellect. 'The younger the child in age, the lesser the possibility of being corrupt', seems to be its premise. This is to say, 'malice makes up for age,' i.e., *quia malitia supplet aetatem*. Hence, as age advances, the maxim loses force.

Beyond the age of 12, there is no immunity from criminal liability, even if the offender is a person of undeveloped understanding and incapable of understanding the nature and consequences of his act.[4] But, even if the accused is past the age of 12, the question of his age does not become totally irrelevant. The question of his youth and maturity of understanding will be relevant in the context of the sentence to be passed against him in the event of his conviction.[5]

However, the treatment of all juveniles, i.e., persons up to the age of 18 is now governed by the Juvenile Justice (Care and Protection of Children) Act 2000[6] (Juvenile Justice Act). It repealed the thitherto prevailing the Juvenile Justice Act 1986 (repealed Juvenile Justice Act).

(3) Maturity of Understanding

Section 83 stipulates that when a child accused of an offence is above seven and under 12 years, the court has to ascertain if the child has sufficient maturity of understanding, so as to understand the nature and consequence of his conduct. The words 'consequences of his conduct' do not mean penal consequences but the natural consequences which result from his act . Before convicting a child who is over 7 years but under 12 years of age, a judge is required to first conduct an enquiry and give a finding of fact as to whether the child had attained sufficient understanding to judge the nature of consequences of his act. Proof of attainment of sufficient maturity can be arrived at by a court on the consideration of all the circumstances of the case. It can be inferred from the nature of the act and his subsequent conduct and other allied factors such as his demeanor and appearance in the court. It need not be proved by the prosecution by positive evidence.[7]

However, a combined reading of ss 82 and 83, which respectively confer immunity from criminal liability to a child 'under seven' and 'above seven', reveals that criminal liability of an infant of 'seven' years is left out. However, Hari Singh Gour, with a view to overcoming the lacuna, suggests that such an infant 'should be dealt under s 82 rather than under s 83' of the Code.[8]

Juvenile Justice (Care and Protection of Children) Act, 2000

A study of the Juvenile Justice Act is essential for a complete understanding of the law relating to criminal liability of children. It is a comprehensive legislation dealing not only with juveniles in conflict with law, i.e., juveniles who are alleged to have committed an offence, but also provides for care, protection, treatment and rehabilitation of both 'juveniles in conflict with law' and 'children in need of care and protection'.[9] The definition of 'juvenile' or 'child' under this Act is much wider than what is provided under ss 82 and 83 of the Code. Section 2(k) of the Act defines 'juvenile' or 'child' as 'a person who has not completed eighteenth year of age'. Though the Act does not provide for absolute immunity from criminal liability for offences committed by juveniles as in ss 82 and 83, the provisions are almost akin to it. The Act provides that no child, who has com-

mitted an offence, be sentenced to death or imprisonment for life or committed to prison in default of payment of fine or in default of furnishing security.[10] It also, inter alia, stipulates that the child who has committed an offence should be sent home after advice or admonition; released on probation of good conduct and placed under the care of parents or guardian; or sent, for a period not exceeding three years, to a Special Home.[11] The Act further removes all disqualifications attached to conviction of a juvenile in conflict with law.[12]Thus, though absolute immunity from criminal liability is not provided to juveniles under this Act, upon a reading of all the sections, it would appear that something akin to immunity is provided to delinquent juveniles under this Act.

DETERMINATION OF AGE OF AN ACCUSED JUVENILE

One of the major questions which confront the courts in respect of juveniles is the determination of age of a juvenile accused of a crime.

Three issues have constantly come up before the courts in respect of juvenile delinquents. The first is the relevant date, i.e., the date of commission of the offence or the date on which the accused is brought before a competent authority under the Children Act or a court, for reckoning the age of the child. The second is the nature of the evidence that is required to prove the age of the juvenile delinquent. And, the third is the stage at which the plea that the accused child is a juvenile can be taken.

In *Umesh Chandra v State of Rajasthan* ,[13] a three-judge Bench of the Supreme Court, while dealing with the Rajasthan Children Act 1970, held that 'the relevant date for applicability of the Act so far as the age of the accused, who claims to be a child, is concerned, is the date of the occurrence and not the date of the trial'.[14] However, a two-judge Bench of the Supreme Court in *Arnit Das v State of Bihar* ,[15] without taking note of the *Umesh Chandra*dictum, ruled that the crucial date to determine whether an accused is juvenile or not (under the repealed Juvenile Justice Act--a *pari materia* statute with the Rajasthan Children Act 1970) is the date on which the accused is produced before the court. A five-judge Bench of the Supreme Court, relying upon the review memorandum not challenging the correctness of the finding that the petitioner was not a juvenile (under the repealed Juvenile Justice Act) on the date of offence but contesting only the effect of two-Judge Bench ruling in the *Arnit Das* in the light of the *Umesh Chandra*case, also dismissed a review petition on the ground that it does not entertain questions of academic interest. It, therefore, refused to answer the question of relevant date for determining the age of a juvenile delinquent (for applicability of the repealed Juvenile Justice Act).[16]

However, the judicial ambivalence was put to rest in 2005 in *Pratap Singh v State of Jharkhand* .[17] A Constitution Bench of five judges of the Supreme Court which, in the backdrop of the conflicting ratio of the *Arnit Das* and the *Umesh Chandra*, was called upon to lay down correct law regarding the relevant date for determining the age of an accused as a juvenile offender. One of the questions formulated for judicial deliberation by the Bench was: what would be reckoning date in determining the age of the alleged offender as juvenile offender, viz, the date when produced in a court or a competent authority (as has been held in *Arnit Das*) or the date when on which the offence was committed (as has been held in *Umesh Chandra*). Stressing the legislative intent of juvenile legislations and their legislative scheme striving for the protection and rehabilitation of juvenile delinquents, the Constitution Bench held that the reckoning date for the determination of the age of the juvenile is the date of an offence committed by him and not the date when he is produced before the Juvenile Board or the court. It accordingly ruled that 'the law laid down' in *Umesh Chandra* is the 'correct law' and not the ruling in *Arnit Das*.[18]

In *Bhoop Ram v State of Uttar Pradesh* ,[19] the Supreme Court was dealing with a case where there was a conflict in respect of the age between the school certificate produced by the accused and the medical certificate. According to the school certificate, the age of the accused on the date of the commission of the offence was below 16 years, but the medical certificate given by the Chief Medical Officer certified that the accused had completed 16 years on the date of occurrence. The Supreme Court held that a medical certificate is based on estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. Since there was no material to throw doubts on the entries in the school certificate, the court accepted the age as shown in the school certificate. The accused faced a charge of murder and was awarded life imprisonment by the trial court. The Supreme Court, in view of the fact that the accused had been wrongly sen-

tenced to imprisonment instead of being treated as a child, quashed the sentence awarded to him and directed his release.[20] If school admission certificate and academic records indicating age of the accused child are doubtful and offer speculations about his real age, medical evidence based on scientific investigation receives precedence over the school record.[21]

Generally, proof of age is a matter of factual finding. The material evidence to establish the age of the accused has to be produced before the trial court,[22] and it is ordinarily the duty of the trial court to determine the age of the accused before pronouncing the judgment. While determining age of the accused for finding out whether he is juvenile or not, a court is not expected to adopt a hyper-technical approach in appreciating the evidence adduced by the accused. And if two views are possible on the said evidence, it should lean in favor of holding the accused to be a juvenile in borderline cases.[23] However, very often this is not done.

In *Gopinath Ghosh v State of West Bengal* ,[24] the plea that the accused was a minor was raised for the first time before the Supreme Court. The Supreme Court, observed that in view of the underlying intendment and beneficial provisions of the West Bengal Children Act 1959, read with cl (f) of art 39 of the Constitution, the court considered it proper not to allow a technical contention that the plea of the accused being a minor was being raised for the first time in the Supreme Court for that would thwart the benefit of the provisions being extended to the accused, if he was otherwise entitled to such provisions. The Supreme Court directed the sessions judge to enquire into the matter and submit a finding as to the age of the accused. The sessions judge, after hearing both the sides, certified that the accused was aged between 16 and 17 years. Since the West Bengal Children Act 1959, defined 'child' as a person below 18 years, the Supreme Court held that the accused was entitled to protection under the Act and accordingly set aside the conviction of the accused.[25]

In *Bhola Bhagat v State of Bihar* ,[26] the Supreme Court observed that when a plea is raised on behalf of an accused that he was a child, at the time of the commission of the offence, it becomes obligatory for the court in case it entertains any doubt about the age as claimed by the accused, to hold an enquiry for determination of age. Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court when such a plea is raised, to examine that plea with care, and it cannot fold its hands without returning a positive finding in that regard. The apex court also directed the high courts to issue administrative directions to the subordinate courts that whenever such a plea is raised before them and if they entertain any reasonable doubt about the correctness of the plea, they must, as a rule, conduct an inquiry by giving opportunity to the parties to establish their respective claims and return a finding regarding the age of the concerned accused and then to deal with the case in the manner provided by law.

ARREST OF A JUVENILE OFFENDER

As s 82 exempts a child under seven years of age from any criminal liability, it is illegal for the police officer to arrest a boy under seven years of age.[27]Now, as per s 12 of the Juvenile Justice Act, any juvenile accused of a bailable or non-bailable offence, unless his release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger, is to be released on bail with or without surety. He cannot be put in a police station or jail. However, if in the interest of the juvenile, the Juvenile Justice Board is of the opinion that the juvenile should not be released on bail, he should be kept in an Observation Home or a place of safety. And his parent or guardian must be immediately informed.[28]

TRIAL OF DELINQUENT JUVENILES

As per s 10 of the Juvenile Justice Act every juvenile in conflict with law who is accused of committing an offence is required to be placed under the charge of the special juvenile police unit and the designated police officer is under obligation to immediately report it to the Juvenile Justice Board constituted under the Act . The Board shall hold an inquiry to satisfy itself whether the juvenile has committed the offence or not.[29] No juvenile shall be charged with or tried for any offence together with a person who is not a juvenile, notwithstanding the provisions of the CrPC. Separate trials should be held for the juveniles and other accused.[30] It may be noted that the language used in the Act is 'hold the inquiry' and not trial of the juvenile in conflict with law. This is to maintain the spirit of the Act, which has been enacted for the benefit of juveniles.

SENTENCING OF JUVENILES

Prior to the enactment of the Juvenile Justice Act, the courts have taken the view that the young age of the accused may be taken into consideration to award a lenient sentence. Now, s 16 of the Juvenile Justice Act provides that no delinquent juvenile shall be sentenced to death or imprisonment for life or committed to a prison in default of payment of fine or of furnishing security. Where a juvenile has attained the age of 16 and has committed a serious offence, the conduct and behavior of the child is such that it would not be in the interest of the accused or the other juveniles kept in the homes, the Juvenile Justice Board may order the delinquent juvenile to be kept in a place of safety and in a manner it deems fit.

A child below 16 years of age, it was held, cannot be termed as a *goonda* and cannot be subjected to preventive detention under the Tamil Nadu Goondas Act.[31] Where the offender was 15 years of age when he raped a girl of seven years and was convicted, the Andhra Pradesh High Court held that he could not be sentenced to rigorous imprisonment for a term of 10 years.[32]

PROPOSALS FOR REFORM

The Law Commission reiterating the need to 'treat' juvenile delinquents rather than to punish and recalling the role played by juvenile institutions and the condi-tions generally existing in the Indian families, suggested that an act in violation of criminal law of a child below 10 years of age should not be considered as an offence. Accordingly, it recommended that the words 'seven years' appearing in s 82 be replaced by the words 'ten years'. Further, in the light of this proposed modification, it proposed the deletion of s 83 from the Penal Code .[33]

1 *Gopinath Ghosh v State of West Bengal* AIR 1984 SC 237; *Gaurav Jain v Union of India* AIR 1997 SC 3021; *Satto v State of Uttar Pradesh* AIR 1979 SC 1519, (1979) Cr LJ 943(SC) .

2 *Hiralal Mallick v State of Bihar* AIR 1977 SC 2236, (1977) Cr LJ 1921(SC) ; see also *Ulla Mahapatra v The King* AIR 1950 Ori 261.

3 *Emperor v Dhondya Dudya* AIR 1919 Bom 173.

4 *Kalka Prasad v State of Uttar Pradesh* AIR 1959 All 698.

5 *Hiralal Mallick v State of Bihar* AIR 1977 SC 2236, (1977) Cr LJ 1921(SC) .

6 Act No. 56 of 2000. For further details see, Ved Kumari, *Juvenile Justice System in India: From Welfare to Rights*, second edn, Oxford, 2010.

7 *Abdul Sattar v Crown* AIR 1949 Lah 51.

8 See, Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, commentary on ss 82 and 83.

9 A 'juvenile in conflict with law' and 'child in need of care and protection' is defined in s 2(l) and 2(d) of the Juvenile Justice Act of 2000, respectively.

10 Juvenile Justice (Care and Protection of Children) Act 2000, s 16.

11 Ibid, s 15.

12 Ibid, s 19.

13 (1982) 2 SCC 202.

14 Ibid, p 210.

15 (2000) 5 SCC 488, AIR 2000 SC 2261.

16 *Arnit Das v State of Bihar* AIR 2001 SC 3575, (2001) 7 SCC 657.

17 (2005) 3 SCC 551.

18 S 2(i) of the Juvenile Justice Act 2000 is amended in 2006 to give effect to the *Pratap Singh*dictum. The age relevant of the delinquent for the purpose of the Act is the date of an offence committed by him. However, in case of a continuing offence, the age of the juvenile in delinquency is to be determined with reference to the date on which the offence is said to have been committed by him. See, *Vimal Chadha v Vikas Choudhary* (2008) 15 SCC 216; *Vikas Choudhary v State of NCT of Delhi* AIR 2010 SC 3380, (2010) 8 SCC 508.

19 AIR 1989 SC 1329, (1989) 3 SCC 1.

20 Also see *Jayendra v State of Uttar Pradesh* AIR 1982 SC 685, (1981) 4 SCC 149; *Pradeep Kumar v State of Uttar Pradesh* AIR 1994 SC 104.

21 *Om Prakash v State of Rajasthan* (2012) 4 SCALE 348, 2012 5 SCC 201.

22 *Rajinder Chandra v State of Chhattisgarh* AIR 2002 SC 748, (2002) 2 SCC 287.

23 Section 49,Juvenile Justice Act 2000.

24 AIR 1984 SC 237, (1984) Cr LJ 168(SC) .

25 Now by virtue of s 7-A of the Juvenile Justice Act 2000, inserted in the Act in 2006, the claim of juvenility can be raised before any court and at any stage, even after final disposal of the case. In *Hari Ram v State of Rajasthan* (2009) 13 SCC 211, (2009) 6 SCALE 695, and *Amit Singh v State of Maha- rashtra* (2011) 13 SCC 744, 2011 (8) SCALE 439, the Supreme Court gave benefit of s 7-A to the convict juveniles.

26 AIR 1998 SC 236, (1997) 8 SCC 720.

27 AIR 1916 Mad 642.

28 Juvenile Justice Act 2000, s 13.

29 Ibid, s 14.

30 Ibid, s 18.

31 *Ramachandran v Inspector of Police, Madaras* (1994) Cr LJ 3722(Mad) .

32 *Reepik Ravinder v State of Andhra Pradesh* (1991) Cr LJ 595(AP) .

33 Law Commission of India, 'Forty-Second Report: Indian Penal Code', Government of India, 1971 pp 87-89.

[redacted]: Criminal Law,12th Edition/[redacted] Criminal Law 2014/CHAPTER 10 Insanity or Mental Abnormality

CHAPTER 10

Insanity or Mental Abnormality

(Indian Penal Code 1860,Section 84)

Section 84. Act of a person of unsound mind.--

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

INTRODUCTION

Insanity or mental abnormality is one of the general exceptions to criminal liability recognised by the IPC. This is based on the principle of mens rea discussed earlier. By virtue of the maxim *actus non facit reum nisi means sit rea*, an act forbidden by penal law is not punishable if it is unaccompanied by a guilty mind. The justification for providing unsoundness of mind as a complete defence is that an insane person is incapable of forming criminal intent. Further, a mad man has no will (*furiosis nulla voluntas est*) and he is like one who is absent (*furiosus absentis low est*). In fact, a mad man is punished by his own madness (*furiosus furore sui puniter*).[1]

The foundation for the law of insanity was laid down by the House of Lords in 1843, in what is popularly known as the *M'Naghten* case.[2] The accused by the name of Daniel M'Naghten suffered from a delusion that Sir Robert Peel, the then Prime Minister of Britain had injured him. He mistook Edward Drummond, Secretary to the Prime Minister for Sir Robert Peel. He shot and killed him. The accused took the plea of insanity. The medical evidence showed that M'Naghten was laboring under a morbid delusion which carried him away beyond the power of his own control. He was held to be 'not guilty by reason of insanity' by the jury.[3] However, his acquittal caused public excitement and considerable furor. The verdict was made a subject of debate in the House of Lords. In consequence of the debate, to make the law on the topic clear, a set of five questions were formulated and put to the House of Lords for definite answers. Answers to these questions are known as the M'Naghten Rules.[4] The second and third of the five questions and the answers thereto constitute the core of law of insanity as an extenuating factor. The following main principles were enunciated by the House of Lords in reply to the questions:

(1) Every person is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is established.
(2) To establish the defence of insanity, it must be clearly proved that at the time of committing the crime, the person was so insane as not to know the nature and quality of the act he was doing, or if he did know it, he did not know that what he was doing was wrong.
(3) The test of wrongfulness of the act is in the power to distinguish between right and wrong, not in the abstract or in general, but in regard to the particular act committed.

Section 84 , IPC, more or less, embodies the principles laid down in the M'Naghten Rules.[5] However, the word 'insanity' is not used in s 84 of the Penal Code . It uses the expression 'unsoundness of mind', which is not defined in the Code. There, however, appears no difference in the etymological meaning of the two terms--'insanity' and 'unsoundness of mind'--as they mean a 'defect of reason arising from a disease of the mind'. The courts in India have treated the expression 'unsoundness of mind' as equivalent to 'insanity'.[6] The Gauhati High Court, obviously influenced by the M'Naghten Rules, has ruled that an accused, to get the protection of s 84, is required to establish that he, at the time of committing the offence, was 'labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong'.[7]

ESSENTIAL INGREDIENTS OF SECTION 84

In order to seek protection of s 84, IPC, it is necessary for an accused to prove that he, because of 'unsoundness of mind', was: incapable of knowing the 'nature' of the act ; or that the act was 'contrary to law'; or that the act was 'wrong'.[8] The crucial point of time of such incapability due to unsoundness of mind is the time when he committed the offence.[9] His insanity prior or subsequent to the commission of the offence is not in itself adequate to absolve him from the criminal liability.

Unsoundness of Mind

The term 'unsoundness of mind' has not been defined in the IPC. It means a state of mind in which an accused is incapable of knowing the nature of his act or that he is incapable of knowing that he is doing wrong or contrary to law. But, it has been equated by the courts to mean insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not *ipso facto* exempted from criminal liability. The mere fact that the accused was conceited, odd, irascible and his brain is not quite alright, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual

act s, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behavior or that behavior is queer are not sufficient to attract the provisions of s 84.[10] A mere warped or twisted mind, which many a criminal has, cannot qualify to be termed 'unsound mind'.[11] It is not every type of insanity which is recognised medically that is given the protection of this section. Medical insanity is different from legal insanity. The insanity, for the purpose of s 84, should be of such a nature that it completely impairs the cognitive faculty of the mind, to such an extent that he is incapable of knowing the nature of his act or what he is doing is wrong or contrary to law.[12] It is only the legal and not the medical insanity that absolves an accused from criminal responsibility.[13]

A person can be said incapable of knowing 'nature' of the act if he, at the time of doing it, was ignorant of the physical characters of the act. A good illustration is to be found in the case, mentioned by Sir James Stephen, of the idiot who cut off the head of a man whom he found sleeping because, as he explained, it would be such fun to watch him looking about for his head when he awoke. It is quite certain that he had no idea that his fun would be lost, because the man would never awake. If at the time of committing the offence the accused knew the nature of the act, he is obviously punishable.[14]

It is quite clear that if a person does an act and at the time doing it, by reason of insanity, does not know that the act is either wrong or contrary to law, he would be protected under s 84 even though he knew the nature of the act. The word 'wrong' is interpreted to mean a moral wrong and not a legal wrong since s 84 uses the alternative phrase 'contrary to law'. The very fact that the authors of the IPC used both the words 'wrong or contrary to law' indicates that the word 'wrong' does not mean 'contrary to law' for if it is taken as 'contrary to law' the already existing phrase ('contrary to law') becomes redundant and the legislature would never use a word which is redundant.[15]

Section 84 will apply even in cases of fits of insanity and lucid intervals. But it must be proved in such cases that at the time of commission of the offence, the accused was suffering from a fit of insanity, which rendered him incapable of knowing the nature of his act[16] and the act was not committed during lucid intervals.[17]

Kinds of Insanity

There are no hard and fast rules in respect of what are the kinds of insanity which are recognised by courts as 'legal insanity'. A survey of the case law reveals that the courts are influenced more by the facts of the case and the nature of the crime, rather than any formal evidence as to the kind of insanity that the accused is suffering from.

Law groups insanity into two broad heads, namely: (a) *Dementia naturalis*, i.e. individuals who are insane from birth, and (b) *Dementia adventitia or accidentialis*, i.e., an individual who becomes insane after his birth.

Hallucination or Delusion

Hallucination or delusion is a state of mind where a person may be perfectly sane in respect of everything, but may be under a delusion in respect of one particular idea. The Madras and the Bombay High Courts have held that a person who is not insane but is merely suffering from some kind of obsession or hallucination, cannot invoke s 84 in his favor.[18]

Somnambulism

Somnambulism is the unconscious state known as walking in sleep and if proved, will constitute unsoundness of mind and the accused will get the benefit under s 84, IPC.[19]

Irresistible Impulse, Mental Agitation, Annoyance and Fury

Irresistible impulse, mental agitation, annoyance and fury all merely indicate loss of control and not indicative of unsoundness of mind.[20] Every minor mental aberration is not insanity[21] and the circumstances indicating a mere probability of legal insanity cannot, however, be sufficient to discharge the onus of the accused to establish the plea of insanity.

Irresistible impulse[22] or impulsive insanity[23] has never been accepted as defence under s 84 unless it is attributable to unsoundness of mind. Similarly, it is held that a crime attended with a mere agitation of mind[24] or

an uncommon ferocity[25] or a moderate depression[26] or an over-sensitiveness of mind or character[27] does not necessarily lead to an inference that it had affected mental capacity of a person. A mere strange behavior exhibited by an accused after commission of an offence does not necessarily indicate the lack of requisite mens rea.[28]An act committed because of extreme anger (and not as a consequence of unsoundness of mind) does not bring its doer within the ambit of s 84.[29]

However, it is pertinent to note here that the mental abnormality falling short of complete insanity premised on the M'Naghten Rules warrants diminished responsibility under the Homicide Act 1957 of the United Kingdom, the birthplace of the M'Naghten Rules. It obviously covers cases of killings under irresistible impulse.[30]

Insanity as a Result of Smoking Ganja or Heavy Intoxication

Where insanity is caused by excessive drinking even involuntary or by smoking *ganja* or other drugs, such insanity will also amount to unsoundness of mind, if it makes a person incapable of understanding what he is doing or that he is doing is something wrong or illegal. The accused can take shelter under this section, if he can prove that the insanity existed at the time of commission of the act.[31] However, a mere loss of self-control due to excessive drinking or smoking *ganja*[32] or abuse of cannabis & alcohol[33] does not entitle him the cloak of immunity provided under s 84.

Lack of Motive or a Trifling Matter

The absence of a strong and adequate motive to commit a serious offence like murder is not by itself a proof of insanity.[34] But the absence of motive may be taken into consideration along with other circumstances of the case to determine the question of sanity or otherwise of the accused.[35]

The fact that the accused caused the death of a person over a trifling matter will not by itself warrant a conclusion that he was insane, when no plea of insanity was taken before the trial court, nor was any material produced to establish the ground of insanity.[36] A crime committed for a paltry reason is no defence.[37]

Excessive or Unusual Violence

The brutality and ferociousness of the act by itself cannot lead to the conclusion of insanity.[38] A brutal and callous way of committing a crime cannot by itself be an indicator of unsoundness of mind.[39] A crime cannot be excused by its own atrocity.[40] In order to determine whether the conduct of the accused was an insane act, one must look beyond the act itself for evidence as to how much the accused acted with knowledge.[41]

Unsoundness of Mind at the Time of Committing the Offence

One of the main points to be highlighted under this section is that the law is concerned only with insanity that existed at the time of committing the offence.[42] The existence of unsoundness of mind prior to the commission of the offence or after the commission of the offence is neither relevant nor per se sufficient to bring his case within the exception provided by s 84, though it may be taken into consideration for the purpose of deciding whether the accused was insane.[43] What is crucial for him is to establish that he was insane at the time of committing the offence.[44]

The Supreme Court of India in *State of Madhya Pradesh v Ahmadulla* ,[45] has held that the burden of proof is upon the accused to prove that he was suffering from unsoundness of mind at the time when he did the act . In this case, the accused had murdered his mother-in-law to whom he bore ill-will in connection with his divorce. It was proved that he did the act at night having got into the house by scaling over a wall with the aid of a torch light and entered the room where the deceased was sleeping. All this showed that the crime was committed not in a sudden mood of insanity, but one that was preceded by careful planning and exhibiting cool calculation in execution and directed against a person who he considered to be his enemy. In these circumstances, the Supreme Court, rejecting his plea of insanity and setting aside the acquittals of both the sessions court and the high court, convicted the accused of the offence of murder, and sentenced him to rigorous imprisonment for life.

In *Bhikari v State of Uttar Pradesh* ,[46] the accused was working in the field. A few months before the occurrence, he had threatened to kill all the family members of the deceased. Further, on the date of the event,

though there were other people around, he carefully chose only the children of the deceased's family. All this indicated that his act ions were deliberate, premeditated and not acts of an insane man.

In *Ratan Lal v State of Madhya Pradesh* ,[47] the accused was in the habit of setting fire to his own clothes and house. It was held that this could hardly be called rational and was more likely verging on insanity. The Supreme Court accepted the plea of insanity raised by the accused and absolved him of criminal liability.

In *Sheralli Wali Mohammed v State of Maharashtra* ,[48] the accused, having killed his wife and daughter with a chopper, locked himself inside the house and shouted, 'save my wife, save my child, call the police'. When the door was opened with an axe from outside, he was found standing near the door with a chopper in hand, while his wife and daughter were lying on the ground with bleeding injuries. A plea of insanity was rejected on the ground that neither the absence of motive for killing his wife and child or nor attempt on his part to run away when the door was opened indicates that he was either insane or lacked the requisite mens rea.

In the case of *Oyami Ayatu v State of Madhya Pradesh* ,[49] the accused was a life convict. The deceased was also a co-prisoner. The deceased went to the urinal in the night. While proceeding, his foot touched the bamboo sticks which had been spread by the accused in a shed. The accused attacked the deceased with a knife and killed him. The mere fact that the accused made a clean breast of his crime would not go to show that he was of unsound mind. Further, the fact that the accused caused the death over a trifling matter would also not warrant a conclusion that the accused was not a sane person. The death sentence was confirmed.

In *SK Nair v State of Punjab* ,[50] the accused tried to assault a person with a dagger. The deceased caught hold of him and said that the matter will be reported to the superiors. The accused retorted to the deceased with the words 'only if you were still alive' and inflicted a blow with a *khukri* on the deceased and killed him. The defence of the accused was that he suffered from paranoia. A paranoid is not only a person of unsound mind, but also suffers from special and peculiar ideas and visions, which are different from other persons of unsound mind. A paranoid within moments may behave wildly and then be normal again. The threat meted out by the accused to the deceased showed that at the time of the commission of the crime, the accused did not lose his sense of understanding. He was, therefore, convicted under s 302 and sentenced to life imprisonment.

In *Shrikant Anandrao Bhosale v State of Maharashtra* ,[51] the accused killed his wife by hitting on her head with a grinding stone when she was washing clothes. He took the plea of insanity as a defence. The trial court and the Bombay High Court rejected it. He contended before the Supreme Court that he was entitled to the benefit of s 84, as he, at the time killing his wife, was insane. In support of his contention, he relied on his past psychiatric treatment and the testimony of two medical specialists who prepared his medical record and stated that he suffered from suspicious ideas, persecutory delusions, loss of sleep and was a paranoid schizophrenic. There was also a history of psychiatric illness in the family of the accused. In the light of these circumstances, the apex court gave him the benefit of s 84 by holding that a paranoid schizophrenia is a mental disease that can recur and the sufferer may not be fully aware of his act s and the consequences thereof.[52] However, the mere fact that the accused was under medical treatment prior to committing an offence is not enough to get him the benefit of s 84 if he remained mentally fit thereafter, at the time of commission of the offence, and during the trial.[53]

PRESUMPTION OF SANITY

It is important to remember that the plea of insanity is a defence against criminal responsibility. It must, therefore, be established by the defence. The courts will presume that every person is sane and in full control of all his faculties, until the contrary is proved.[54]As per s 105 of the Indian Evidence Act 1872, 'when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the IPC or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances'. The first illustration to s 105 is as follows: '*A*, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on *A*'. This illustration clearly shows that if any accused puts forth a plea of insanity, then it is for him to establish the same in court. Until such proof, the court shall presume that the accused is sane.[55]

The Crucial Point of Time When the Accused Should be Insane

Section 84 requires that if the plea of insanity put up by the accused is to be sustained, the accused has to establish by positive evidence that not only was he insane generally, but the fact that insanity existed at the crucial point of time when the offence was committed.[56] Proof of existence of insanity at a time prior to the commission of crime will not help the accused. In *Jai lal v Delhi Administration* ,[57] the accused was a schizophrenic who was treated and cured. He stabbed a one-and-a-half-year-old child who died and injured two others. A plea of insanity was raised as a defence. But, the court took into consideration his subsequent behavior, as he hid the knife, locked himself in the house to prevent arrest and attempted to run away from the back door. He also tried to dispense the crowd by throwing brickbats from the roof. The Supreme Court held that his conduct displayed consciousness of guilt. He knew the physical nature of stabbing and that it would kill. His conviction under s 302, IPC, was confirmed and was sentenced to life imprisonment. However, previous history of mental condition was considered as a relevant piece of evidence in determining the question whether insanity of the type mentioned in this section existed, at the time when he committed the alleged offence.[58]

The nature of evidence required to establish the existence of insanity at the time of commission of the offence depends on the facts and circumstances of each case. Scientific or medical evidence of insanity is not necessary to sustain a defence under this section. Insanity may be proved from inference of facts and circumstances of each case.[59] The entire conduct of an accused from the time immediately before the commission of the offence up to the time the sessions proceedings commence becomes relevant in ascertaining as to whether the plea of insanity raised by the accused is genuine, bona fide or an afterthought.[60] Factors that are generally relevant for the purpose of ascertaining insanity are: behavior of the accused before and after commission of an offence; the motive for the crime; the previous history of the mental condition of the accused; the state of mind at the time of the offence; the events that happened immediately prior to and after the offence, and conduct of the accused immediately after the offence.[61] A court is duty bound to take into account all the material available to it to find out whether the accused is entitled for the benefit under s 84 of the Code.[62]

BURDEN OF PROOF

When the plea of insanity is raised by the accused,[63]it is not the duty of the prosecution to establish affirmatively that the accused was capable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. Every person is presumed to know the law and the natural consequences of his act. The prosecution, in discharging its burden in the face of a plea of insanity, has merely to prove the basic fact and to rely upon the normal presumptions aforesaid. It is then the accused who is called upon to rebut these presumptions and the inference in such manner as would go to establish his plea.[64] The burden of proving the existence of circumstances bringing the case within the purview of s 84, therefore, lies upon the accused.[65] However, as in cases of proof of all General Exceptions, the accused need not prove the existence of insanity beyond reasonable doubt. All that he has to establish is the probability of the existence of insanity at the time of commission of the offence. It is enough for him to show, as in the civil case, that the preponderance of probabilities is in his favor.[66] The Supreme Court has outlined the burden of proof in the context of the plea of insanity in the following propositions.

(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and the burden of proving that always rests on the prosecution from beginning to the end of the trial.

(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by s 84 of the Penal Code : the accused may rebut it by placing before the court all the relevant evidence--oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.

(3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards, one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be

entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.[67] An accused succeeds not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.[68]

(4) The standard to be applied, for ascertaining whether the accused was of unsound mind or not, is whether he, according to the ordinary standard adopted by a reasonable man, was able to judge whether his act was right or wrong.[69]

However, it becomes obligatory on the part of an investigation officer to get the accused medically examined immediately when previous history of insanity or abnormality of mind of the accused is revealed to him or it comes or is brought to his notice and to place that evidence before the court. His failure to carry out the medical examination creates a serious infirmity in the prosecution case and the accused entitles the benefit of doubt and the consequential acquittal.[70]

However, it may be pertinent to point out that the courts in India have, by and large, been very cautious to accept the plea of insanity.[71]

PROCEDURE FOR TRIAL OF PERSONS OF UNSOUND MIND

Special procedure is prescribed for the conduct of trial of accused who is of unsound mind or insane. Chapter 25 of the CrPC prescribes elaborate procedure for trial of a person of unsound mind. During a trial, if it appears to the judge that the accused is of unsound mind and consequently incapable of making his defence, then at the first instance, the trial court is required to conduct an enquiry and try the fact of such unsoundness and incapacity.[72] This is to ascertain whether the accused is capable of making his defence or not. Failure on the part of the court to do so vitiates the whole trial.[73] If the court comes to a conclusion that the accused is of unsound mind, then the trial will be postponed, until such time the accused is treated and is in a position to understand the court proceedings and to defend himself.[74]

If the accused is acquitted on the ground that he, by reason of unsoundness of mind, was incapable of knowing the nature of the act, the magistrate or court is required to order that he be either detained in safe custody in a lunatic asylum or be delivered to a relative or a friend, who gives security to the court that he will take care of him and prevent him from causing injury to himself or to any other person.[75]

PROPOSALS FOR REFORM

During the last about 150 years, the law relating to insanity as incorporated in s 84 as an extenuating factor has remained static. Legislature as well as courts[76] in India, in spite of a number of indicia provided by modern medical science and psychiatry for ascertaining the state of mind of the accused pleading insanity and of some progressive statutory and judicial inroads made in the overseas jurisdictions, including in the country of its origin, have not been able to bring any reforms in the law of insanity. As a result, the existence of mental derangement not falling within the ambit of s 84 has merely been pleaded as an extenuating circumstance.

The Law Commission of India even admitting the fact that the expression 'unsoundness of mind', compared to the expressions 'disease of the mind' and 'mental deficiency' used in the M'Naghten Rules, is 'somewhat vague and imprecise', failed to see any worth in proposing changes in s 84 of the IPC.[77]Apprehending the complicated medico-legal issues associated with the defence of 'diminished responsibility' and recalling the judicial discretion in sentencing under the IPC, allowing courts to take into account any extenuating circumstances including mental abnormality, it also declined the idea of incorporating the doctrine of 'diminished responsibility' in the Penal Code.[78]

1 Sir William Blackstone, *Commentaries on the Laws of England*, vol 4, 17th edn,1830, p 304.

2 (1843) 8 Eng Rep 718.

3 M'Naghten was, however, detained in a mental hospital.

4 For text of these questions and answers see, RC Nigam, *Law of Crimes in India*, Asia, London, 1965, pp 360-362.

5 A comparative reading of the M'Naghten Rules; s 84 of the IPC and its corresponding draft provisions (ss 66 and 67 of the Draft Indian Penal Code prepared by Lord Macaulay in 1837, which respectively read: 'Nothing is an offence which is done by a person in a state of idiocy,' and 'Nothing is an offence which a person does in consequence of being mad or delirious at the time of doing it.') reveals that the M'Naghten Rules influenced the law governing insanity in India. It is also evident that s 84 is based on the above-mentioned propositions (1) and (2), which have been derived from answers to question numbers (2) and (3) in the*M'Naghten* case. Further, courts in India have invariably followed the M'Naghten Rules in the interpretation of s 84. For example, see *Hazara Singh v State* AIR 1958 Punj 104; *Ramdulare v State of Madhya Pradesh* AIR 1959 MP 259; *Ashiruddin Ahmad v R* AIR 1949 Cal 182.

6 (1972) 2 Mad LJ 497, (1973) 1 Mad LJ 179.

7 *Someswar Bora v State of Assam* (1981) Cr LJ (NOC) 51(Gau) .

8 *Bharat Kumar v State of Rajasthan* (2004) Cr LJ 1958(Raj) .

9 *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) ; *Hari Singh Gond v State of Madhya Pradesh* AIR 2009 SC 31, (2008) 16 SCC 109.

10 *Surendra Mishra v State of Jharkhand* AIR 2011 SC 627, (2011) 11 SCC 495.

11 *Francis v State of Kerala* (1975) 3 SCC 825, 1974 Cri LJ 1310.

12 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) ; *Amrit Bhushan Gupta v Union of India* AIR 1977 SC 608, (1977) Cr LJ 376(SC), (1977) 1 SCC 180; *Tubu Chetia v State of Assam* (1976) Cr LJ 1416(Gau) ; *Keshaorao v State of Maharashtra* (1979) Cr LJ 403(Bom) ; *Shankaran v State* (1994) Cr LJ 1173(Ker) ; *Shaikh Ahmed v State of Andhra Pradesh* (1996) Cr LJ 2582(AP) ; *Gopal Bhowmik v State of Assam* (2001) Cr LJ 2656(Gau) ; *Gulab Manik Surwase v State of Maharashtra* (2001) Cr LJ 4302(Bom) ; *Bharat Kumar v State of Rajasthan* (2004) Cr LJ 1958(Raj) ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) ; *Rajendra v State of Raja- sthan* (2004) Cr LJ 2458(Raj) .

13 *S Sunil Sandeep v State of Karnataka* (1993) Cr LJ 2554(Kant) ; *Bharat Kumar v State of Rajasthan* (2004) Cr LJ 1958(Raj) ; *Pulu Mura v State of Assam* (2004) Cr LJ 458(Gau) ; *Hari Singh Gond v State of Madhya Pradesh* AIR 2009 SC 31, (2008) 16 SCC 109; *Sudhakaran v State of Kerala* AIR 2011 SC 265, (2010) 10 SCC 522; *State of Rajasthan v Shera Ram @ Vishnu Dutta* AIR 2012 SC 1, (2012) 1 SCC 602.

14 *Amrit Bhushan v Union of India* AIR 1977 SC 608, (1977) 1 SCC 180, (1977) Cr LJ 376(SC) ; *Surya Prasad v State of Orissa* (1982) Cr LJ 931(Ori) .

15 *Rambharose v State of Madhya Pradesh* (1974) MPLJ 406; *Shivraj Singh v State of Madhya Pradesh* (1975) Cr LJ 1458(MP), 1975 MPLJ 98; but see *Geron Ali v Emperor* AIR 1941 Cal 129.

16 *State of Orissa v Bagh Syama* (1977) Cr LJ (NOC) 21(Ori) ; *Ram Lal v State of Rajasthan* (1977) Cr LJ (NOC) 168(Raj) ; *Tukappa Tamanna Lingardi v State of Maharashtra* (1991) Cr LJ 2375(Bom) .

17 *Ramchandran v State of Kerala* (1986) Cr LJ 1222(Ker) .

18 Re *Manickam*AIR 1950 Mad 576, (1963) Mah LJ (Notes) 24(DB) .

19 Re *Pappathi Ammal*AIR 1959 Mad 239, (1959) Cr LJ 724(Mad) .

20 Re *Raja Gopala*AIR 1952 Mad 289.

21 *Bharat Kumar v State of Rajasthan* (2004) Cr LJ 1958(Raj) ; *Pulu Mura v State of Assam Pulu Mura v State of Assam* (2004) Cr LJ 458(Gau) .

22 *Parapuzha Thamban v State of Kerala* (1989) Cr LJ 1372(Ker) . However, it may be a relevant factor for inflicting a lesser punishment; see *Ram Adhin v Emperor* AIR 1932 Oudh 18; *State of Assam v Inush Ali* (1982) Cr LJ 1044(Gau) .

23 *Sidheswari Bora v State of Assam* (1981) Cr LJ 1005(Gau) . However, a view is expressed that compulsive state of mind be taken into account while quantifying punishment.

24 *Gourishankar v State* (1965) 68 Bom LR 236.

25 *Gour Chandra v State of Orissa* (1989) Cr LJ 1667(Ori) .

26 *TN Lakshmaiah v State of Karnataka* (2002) 1 SCC 219.

27 *Budha v State of Maharashtra* (1985) Cr LJ 844(Bom) .

28 *Parapuzha Thamban v State of Kerala* (1989) Cr LJ 1372(Ker) .

29 *Srikant Anandrao Bhosale v State of Maharashtra* (2003) 7 SCC 748.

30 See *R v Byrne* [1960] 2 QB 396.

31 *Basdev v State of Pepsu* AIR 1956 SC 488, (1956) Cr LJ 919(SC) .

32 *Ajmer Singh v State* AIR 1955 Punj 13(DB), (1955) Cr LJ 305(H&P) .

33 *Jojo @ Jojomon v State of Kerala* (2011) ILR 2 Kerala 789, 2011 (3) KLJ 25.

34 *Sheralli Wali Mohammed v State of Maharashtra* AIR 1972 SC 2443 (1972) Cr LJ 1523(SC) ; *Netrananda Behara v State of Orissa* AIR 1968 Ori 233; *Nakula Chandra Aich v State of Orissa* (1982) Cr LJ 2158(Ori) ; *Mitu Khalida v State of Orissa* (1983) Cr LJ 1385(Ori) ; *Kujhiyaramadiyil Madhavan v State* (1994) Cr LJ 450(Ker) ; *Bapu @ Gajraj v State of Rajasthan* (2007) 8 SCC 66, 2007 (8) SCALE 455.

35 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) ; *Raghu Pradhan v State of Orissa* (1993) Cr LJ 1159(Ori) ; *Ajaya Mahakud v State of Orissa* (1993) Cr LJ 1201(Ori) .

36 *Oyami Ayatu v State of Madhya Pradesh* AIR 1974 SC 216, (1974) Cr LJ 305(SC) .

37 *Lata Seikh v State of West Bengal* (1983) Cr LJ 1675(Cal) .

38 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) ; *Bhikari v State of Uttar Pradesh* AIR 1966 SC 1, (1966) Cr LJ 63(SC) .

39 *Kuttappan v State of Kerala* (1986) Cr LJ 271(Ker) .

40 *Chhagan v State* (1976) Cr LJ 671(Raj) ; see also *Emperor v Gedka Goala* AIR 1937 Pat 363.

41 *Kalicharan v Emperor* AIR 1948 Nag 20, (1948) Cr LJ 377(DB) .

42 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) .

43 *Ratan Lal v State of Madhya Pradesh* AIR 1971 SC 778, (1971) Cr LJ 654(SC) .

44 *Kuttappan v State of Kerala* (1986) Cr LJ 271(Ker) ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) ; *Pulu Mura v State of Assam* (2004) Cr LJ 458(Gau) .

45 AIR 1961 SC 998, (1961) 2 Cr LJ 43(SC) .

46 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) ; *Bhikari v State of Uttar Pradesh* AIR 1966 SC 1, (1966) Cr LJ 63(SC) .

47 *Ratan Lal v State of Madhya Pradesh* AIR 1971 SC 778, (1971) Cr LJ 654(SC) .

48 *Sheralli Wali Mohammed v State of Maharashtra* AIR 1972 SC 2443 (1972) Cr LJ 1523(SC) ; *Netrananda Behara v State of Orissa* AIR 1968 Ori 233; *Nakula Chandra Aich v State of Orissa* (1982) Cr LJ 2158(Ori) ; *Mitu Khalida v State of Orissa* (1983) Cr LJ 1385(Ori) ; *Ramlal v State of Rajasthan* (1977) Cr LJ (NOC) 168(Raj) ; *Kujhiyaramadiyil Madhavan v State* (1994) Cr LJ 450(Ker) .

49 *Oyami Ayatu v State of Madhya Pradesh* AIR 1974 SC 216, (1974) Cr LJ 305(SC) .

50 *SK Nair v State of Punjab* AIR 1997 SC 1537, (1997) Cr LJ 772(SC) .

51 *Srikant Anandrao Bhosale v State of Maharashtra* (2003) 7 SCC 748. See also *Prakash v State of Maha- rashtra* (1985) Cr LJ 196(Bom) (in which the Bombay High Court also ruled that prior or subsequent treatment for schizophrenia coupled with the medical evidence supporting such a schizophrenia warrant the s 84 exemption) and *Kuttappan v State of Kerala* (1986) Cr LJ 271(Ker), in which the Kerala High Court set aside the conviction imposed under s 302, IPC, by treating a paranoid schizophrenia as a disease of mind.

52 See also *State v Mohinder Singh* (1983) 2 SCC 274; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) .

53 *Bapu @ Gajraj v State of Rajasthan* (2007) 8 SCC 66, 2007 (8) SCALE 455.

54 *Dulal Naik v State* (1987) Cr LJ 1561(Cal) ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) .

55 *Sheralli Wali Mohammed v State of Maharashtra* AIR 1972 SC 2443 (1972) Cr LJ 1523(SC) .

56 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) . See also *Ratan Lal v State of Madhya Pradesh* AIR 1971 SC 778, (1971) Cr LJ 654(SC) ; *Sudhakaran v State of Kerala* AIR 2011 SC 265, (2011) Cr LJ 292(SC) .

57 *Jai Lal v Delhi Administration* AIR 1969 SC 15.

58 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) .

59 *State of Madhya Pradesh v Ahmadulla* AIR 1961 SC 998, (1961) 2 Cr LJ 43(SC) . See also *S Sunil Sandeep v State of Karnataka* (1993) Cr LJ 2554(Kant) ; *Pundalik Laxman Chavan v State of Maharashtra* (1994) 3 Crimes 298(Bom) .

60 *TN Lakshmaiah v State of Karnataka* (2002) 1 SCC 219.

61 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) .

62 *Sannatamma v State of Karnataka* (2004) Cr LJ 2257.

63 No plea of insanity can be raised for the first time before the Supreme Court if no foundation therefor is established before. See, *Sastry v Advocate General of Andhra Pradesh* (2007) 15 SCC 271; *Jagdish v State of Madhya Pradesh* (2009) 12 SCALE 580, (2009) 14 SCR 727. The accused who was not insane at the time of commission of an offence cannot take the plea of insanity if he turns insane after conviction. No High Court (invoking art 226 of the Constitution) or the Supreme Court (exercising its jurisdiction under art 136 of the Constitution) is allowed to interfere with his death sentence. See,*Armit Bhushan Gupta v Union of India* AIR 1977 SC 608, (1977) Cr LJ 376(SC), (1977) 1 SCC 180.

64 *Jai Lal v Delhi Administration* AIR 1969 SC 15.

65 *State of Madhya Pradesh v Ahmadulla* AIR 1961 SC 998, (1961) 2 Cr LJ 43(SC) ; *Srikant Anandrao Bhosale v State of Maharashtra* (2003) 7 SCC 748; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) ; *State of Rajasthan v Shera Ram @ Vishnu Dutta* AIR 2012 SC 1, (2012) 1 SCC 602.

66 *Bhikari v State of Uttar Pradesh* AIR 1966 SC 1, (1966) Cr LJ 63(SC) .

67 *Dahyabhai Chhaganbhai Thakkar v State of Gujarat* AIR 1964 SC 1563, (1964) Cr LJ 472(SC) ; see also *Ratan Lal v State of Madhya Pradesh* AIR 1971 SC 778, (1971) Cr LJ 654(SC) ; *Vidhya Devi v State of Rajasthan* (2004) Cr LJ 2332(Raj) ; *Sheralli Wali Mohammed v State of Maharashtra* AIR 1972 SC 2443, (1972) Cr LJ 1523(SC) .

68 *TN Lakshmaiah v State of Karnataka* (2002) 1 SCC 219. The dictum was followed by the Madras High Court in *Albert Collins v State* decided on 12 July 2004.

69 *Siddhapal Kamala Yadav v State of Maharashtra* AIR 2009 SC 97, (2009) 1 SCC 124.

70 *Bapu @ Gajraj v State of Rajasthan* (2007) 8 SCC 66, 2007 (8) SCALE 455; *Hari Singh Gond v State of Madhya Pradesh* AIR 2009 SC 31, (2008) 16 SCC 109; *Siddhapal Kamala Yadav v State of Maha- rashtra* AIR 2009 SC 97, (2009) 1 SCC 124; *State of Maharashtra v Govind Mhatarba Shinde* (2010) Cr LJ 3586(Bom), 2010 (112) Bom LR 2241.

71 For example, see *Kuzhiyaramadiyil Madhavan v State* (1994) Cr LJ 450(Ker) ; *State of Maharashtra v Umesh Krishna Pawar* (1994) Cr LJ 774(Bom) ; *Shankaran v State* (1994) Cr LJ 1173(Ker) ; *Meh Ram v State* (1994) Cr LJ 1897(Raj) ; *Sheralli Wali Mohammed v State of Maharashtra* AIR 1972 SC 2443, (1972) Cr LJ 1523(SC) .

72 Code of Criminal Procedure 1973, ss 329 & 330. Also see*Jai Shankar v State of Himachal Pradesh* (1973) 3 SCC 83.

73 *Dhora v State of Kerala* (1992) 1 Crimes 90(Ker) ; *Dhani ram v State of Himachal Pradesh* (1982) Cr LJ 1546(HP) ; *Bhagmal v State of Himachal Pradesh* (1990) ILR 2 HP 947.

74 *Shivaswamy v State of Mysore* AIR 1971 SC 1638, (1971) Cr LJ 1193(SC) ; *State of Madhya Pradesh v Dilip Bankar* (2009) Cr LJ 655(MP), 2008 (5) MPHT 53.

75 Code of Criminal Procedure 1973, s 335. See also*Kuttappan v State of Kerala* (1986) Cr LJ 271(Ker) ; *Krishan Dutt v State of Himachal Pradesh* (1992) Cr LJ 1065(HP) ; *Sannatamma v State of Karnataka* (2004) Cr LJ 2257(Kant) ; *Leena Balkrishna Nair v State of Maharashtra* (2010) Cr LJ 3392, 2010 (112) Bom LR 1614.

76 In 1959, a Division Bench of the Madhya Pradesh High Court observed 'In 1843 law and medicine were in agreement as to what insanity is. The basis of this agreement was the notion that the mind is divided up into compartments some of which can be diseased while the others remain intact. Since 1843 medical views as to insanity have changed. Psychiatrists now agree that the mind is a whole, a unity, and that a person cannot be mentally and emotionally diseased without his total personality being

affected. The courts, however, have continued to use the standards of over a hundred years ago.' See, *State of Madhya Pradesh v Chhotelal* AIR 1959 MP 203, (1959) Cr LJ 844(MP) . See also *Ramdulare v State of Madhya Pradesh* AIR 1959 MP 259.

77 Law Commission of India, 'Forty-Second Report: the Indian Penal Code ', Government of India, 1971, p 93.

78 Ibid, pp 95-96.

CHAPTER 11

Intoxication

(Indian Penal Code 1860,Sections 85 and 86)

Section 85. Act of a person incapable of judgment by reason of intoxication caused against his will.--

Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Section 86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.--

In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

INTRODUCTION

Alcohol is quite strongly associated with crimes of violence. The effect of alcohol on the brain is depressant from the beginning. Its apparently stimulating effect is due solely to the fact that it deadens the higher control centres and progressively the other centres as well, thus weakening or removing the inhibitions that normally keep us within the bounds of civilised behaviour. It also impairs perception, reasoning and the ability to foresee consequences.[1]

Intoxication presents problems in theory of responsibility. A man who commits a crime under the influence of alcohol may have otherwise led a normal and responsible life. His acts committed under the influence of alcohol may not reflect his real character. It could have been a mere aberration in his life. Convicting a person who commits a crime under the influence of alcohol like all other offenders may appear to be harsh. On the other hand, it is not uncommon for offenders to consume alcohol before committing an offence. Hence, it may not be in the interests of the general society to treat intoxication as a general defence. This is because, a man by consuming alcohol and becoming intoxicated voluntarily, impairs his own self control and good judgment.[2]

Sections 85 and 86 of the deal with intoxication as an extenuating factor. A combined reading of ss 85 and 86 reveals that the former lays down the law relating to involuntary intoxication or drunkenness as a defence to a criminal charge, while the latter deals with criminal liability of a voluntarily intoxicated person when he commits an offence under the influence of self-administered intoxicant.

Section 85, which is couched in the phraseology similar to that of s 84, accords immunity from criminal liability to a person intoxicated involuntary as s 84 gives to a person of unsound mind. Section 86 provides for a limited exemption from criminal liability to a self-intoxicated person. It, in ultimate analysis, deals with the effect of voluntary drunkenness on criminal liability in certain types of cases. In the absence of evidence of intoxication, both the sections become inapplicable.[3]

INVOLUNTARY INTOXICATION

Section 85 protects a man from criminal liability, if, at the time of committing the offence, he was incapable of knowing the nature of the act or that he was doing something wrong or contrary to law by reason of intoxication, provided that the intoxicant was administered to him 'without his knowledge' or 'against his will'. A person seeking protection of s 85 is required to establish that he was: (i) incapable of knowing the nature of the act committed, or (ii) that he was doing what was either wrong or contrary to law, and (iii) that the thing which intoxicated him was administered to him without his knowledge or against his will.[4]

Incapable of Knowing the Nature of the Act

For the defence of intoxication to be available under s 85, it must not only be established that the intoxicant was administered without his knowledge or against his will, but also by reason of such intoxication, the person concerned was incapable of understanding the nature of the act or that he is doing what is either wrong or contrary to law. Influence of the intoxicant administered, short of making a person incapable of understanding the nature of the act committed by him, does not entitle him the protection of s 85. Similarly, a mere fact that an intoxicant was administered to him by another person without his knowledge or against his will does not qualify him for the exemption.[5] Simply because his mind was so affected by the intoxicant that he readily gave way to some violent passion also does not bring him under the protective umbrella of the general exemption.[6] What is required to establish is that he, by reason of the intoxicant administered to him without his knowledge or against his will by someone else, lost his ability to understand the nature of the act committed by him.[7]

'Without His Knowledge' or 'Against His Will'

The terms 'without his knowledge' or 'against his will' denote that it should be involuntary intoxication. The expression 'without his knowledge' means that the person concerned is ignorant of the fact that what is consumed by him is an intoxicant or is mixed with an intoxicant.[8] In other words, he must be totally unaware that whatever was administered or given to him will have any intoxicating effect. The words 'against his will' mean that the person was forced or coerced into consuming an intoxicant. Normal persuasion acting as an incentive is not covered by the expression 'against his will', unless there is an element of compulsion to consume the intoxicant against his will.[9]

In *Bablu @ Mabarik Hussain v State of Rajasthan* ,[10] wherein the appellant, under the influence of liquor, killed his wife and five children, the Supreme Court ruled that the mere proof of intoxication is not enough to invoke s 85. The accused needs to take the plea and prove that the intoxicant was administered to him without his knowledge or against his will.

VOLUNTARY INTOXICATION

A careful reading of ss 85 and 86 reveals that an act done under the influence of self-induced intoxication amounts to an offence even if the doer, by reason of intoxication, is incapable of knowing the nature of the act or that what he is doing is either wrong or contrary to law. He, therefore, is not entitled for immunity from the corresponding criminal liability because he, due to the self-administered intoxicant, loses his mental ability to know the nature of the act or that what he is doing was wrong or contrary to law.[11] If voluntary drunkenness was allowed to be a protective shield against criminal liability, it would obviously lead to a sort of license to commit crimes with impunity. Voluntary drunkenness, therefore, is no defence for any offence.[12]

However, s 86 deals with immunity of a self-intoxicated person when he commits an offence requiring 'particular knowledge or intention', as a definitional ingredient, on the part of an accused. It provides that if an offence requiring such a knowledge or intention is committed by a self-induced intoxicated person, only knowledge (and not the intention) of the offence on his part will be presumed. If such an offence is committed by an involuntarily intoxicated person, neither knowledge nor intention in committing it is to be presumed on the part of the doer. S 85 covers all the offences, while s 86 covers the offences requiring particular intent or knowledge. Section 86, in this sense, is an exception to s 85. Nevertheless, the degree of intoxication demanded by both the sections is same. A voluntarily intoxicated person seeking protection of s 86 is, like an involuntary intoxicated person seeking protection of s 85, required to show that the degree of his intoxication made him incapable of knowing the nature of the act or that what he is doing is either wrong or contrary to law. Intoxication short of this degree does not attract the s 86 exemption.[13] The state of intoxication, envisaged under s 86, must render the accused incapable of forming the specific intent essential to constitute the crime.[14]

Voluntary Intoxication: Presumption of Knowledge

A person who gets into a state of intoxication voluntarily is presumed to have the same knowledge as he would have had if he had not been intoxicated.[15] For instance, in a case of culpable homicide not amounting to murder, if the accused was in a state of intoxication at the time of the alleged offence and the intoxication was voluntary, he will be presumed under s 86, IPC, to have known at the time of the act that it is likely to cause death and he will be liable to punishment under Part II of s 304. So, when a man, who had voluntarily consumed liquor, killed another, while he fired in the air to scare another away, was found guilty and was convicted for having committed culpable homicide.[16] Similarly, a man, when, in a highly intoxicated state of mind, stabbed the abdomen of his friend, which wound proved fatal, was convicted under s 304 Part II by imputing him the requisite knowledge.[17]If an accused does an act while in a state of voluntary intoxication, he will be presumed to have known that it was so imminently dangerous that it must in all probability cause death and will be held guilty of murder.[18]

This presumption of knowledge in cases of voluntary intoxication is, like all other presumptions, rebuttable. Thus, in cases of voluntary intoxication, where the offence requires particular knowledge or intent, then the court will presume that such knowledge as he would have, had if he had not been intoxicated is present. The onus or the burden shifts on the accused to prove that he, by reason of intoxication, had become incapable of having the particular knowledge which he is presumed to have.[19]

Voluntary Intoxication and Intention

Section 86 makes the distinction between intention and knowledge. It may be noted that the first part of the section speaks of 'intent or knowledge' and the latter part deals only with the 'knowledge'. So far as knowledge is concerned, law attributes to the intoxicated man the same knowledge as he would have if he had not been intoxicated. It is obvious that if really the drafters of the Penal Code wanted that 'intention' also to be presumed even in the case of an act done in a drunken state of mind, the word (intention) could have been mentioned in the second part of s 86 also, but it is omitted.[20] Thus, the presumption of knowledge alone is provided for and not presumption of intention.[21]So far as intent or intention is concerned, it must be gathered from the attending general circumstances of the case, paying due regard to the degree of intoxication. If a man was out of his mind altogether at the time of commission of crime, it would not be possible to fix him with the requisite intention. But, if he had not gone so deep in drinking and from the facts, it could be found that he had full knowledge of the events, one can apply the rule that a man is presumed to intend the natural consequences of his act. The fact that he was so affected by alcohol that he readily gave in to some violent passion, does not rebut this presumption. Intention is something which is prompted by motive and knowledge is an awareness of the consequences of the act . In many cases, intention and knowledge merge into each other and mean more or less the same thing. If a person, in spite of his drunkenness, knew the consequences of his act, it can safely be presumed that he intended the resultant consequences.[22] Intention can be presumed from knowledge, unless there are some other factors that repel such an inference.[23] The demarcating line between knowledge and intention is no doubt thin, but it is not difficult to perceive that they connote different things.[24]

In *Basdev v State of Pepsu* ,[25] a retired military officer was charged with the murder of a young boy aged about 15 years. Both of them and others of the same village attended a marriage party. All of them went to the house of the bride to take the mid-day meal. Some had settled down in their seats and some had not. The retired officer, who was very drunk and intoxicated, asked the young boy to step aside a little so that he could occupy a convenient seat. But, when he did not move, the officer whipped out a pistol and shot the boy in the abdomen. The injury proved fatal. The evidence showed that the accused sometimes staggered and was incoherent in his talk. But it also showed that he was capable of walking independently and talking coherently as well. The evidence proved that he came on his own to the house of the bride and that he made the choice of his own seat and after injuring the deceased, he attempted to get away from the scene and was secured at a short distance from the scene of the crime. When he was secured, he realised what he had done and asked for forgiveness. All these facts, according to the Supreme Court, went to prove that there was no proved incapacity in the accused to form the intention to cause bodily injury sufficient in the ordinary course of nature to cause death. In view of his failure to prove such incapacity, the court presumed that he intended the natural and probable consequences of his act . In other words, he intended to inflict bodily injuries on the deceased and the bodily injuries so intended to be inflicted, was sufficient in the ordinary course of nature to cause death. The accused was found guilty of murder. The Supreme Court, after referring to relevant British judicial dicta, observed:

> So far as knowledge is concerned the court must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, the court must gather it from the attending general circumstances of the case paying due regard to the degree of intoxication. Was the man beside his mind altogether for the time being? If so, it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking, and from the facts it could be found that he knew what he was about, the court can apply the rule that a man is presumed to intend the natural consequences of his act or act s.[26]

The apex court, thus, laid down a principle that, where an offence is committed by a person under deep influence of intoxication, it can be presumed that he has knowledge of the act which he is committing, but it cannot be presumed that he has got intention and the same has to be inferred from the facts and circumstances of the case.

In *Mavari Surya Sathya Narayan v State of Andhra Pradesh* ,[27] the accused and the deceased were married for 11 years. He was an alcoholic and quarreled often with her. One day, after taking his meals, he went outside and returned home with a brandy bottle and after consuming it, he started scolding the deceased by stating that he sustained loss as he married the daughter of his maternal uncle. He asked her to sign on blank papers saying that he would write whatever he liked on the papers. When she refused, he became wild and began beating her. When she tried to go out of the house, he caught hold of her hair and dragged her into the room. He closed the door and attempted to set her on fire. She put out the flames and tried to run away. The accused again pulled her, poured kerosene and set her on fire, and she ultimately died of the burns. The Andhra Pradesh High Court, relying on the *Basdev* dictum, held that having regard to the facts, it cannot be said that the accused was in total loss of mental power and hence the provisions of s 86 would not apply.

In *Shankar Jaiswara v State of West Bengal* ,[28]the Supreme Court refused to invoke s 86 in favor of the accused, who, in a state of drunkenness, abused the deceased in a filthy language, and when told to leave him alone, stabbed him seven times to his death with a sharp weapon, as he was not out of his senses on account of intoxication. He was conscious and capable of understanding the consequences of his conduct. His conduct was 'not devoid of intention'. It accordingly upheld his conviction under s 302 of the Penal Code. It also ruled that the onus of proof that he, because of drunkenness, was incapable of forming the requisite particular intention lies on the accused. Mere proof of intoxication is not enough.[29]

INTOXICATION AND INSANITY

In *Basdev v State of Pepsu* ,[30] the apex court ruled that insanity, whether produced by drunkenness or otherwise is a defence to the crime charged. In other words, voluntary intoxication operates as an extenuating factor if it leads to 'unsoundness of mind'.[31] The IPC makes no difference between insanity caused by habitu-

al excessive drinking and insanity resulting from other causes. It does not deprive him of the immunity from liability only on the ground that the insanity resulted from his self-induced excessive drunkenness. Voluntary drunkenness falling short of insanity, however, becomes one of the relevant factors in ascertaining as to whether the accused had mental ability to form the requisite specific intent, if the crime in question warrants it. The Supreme Court, dilating on voluntary intoxication *vis--vis* criminal liability under s 86, observed:

> There is distinction, however, between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If act ual insanity in fact supervenes as the result of alcoholic excess it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent, but evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his act.[32]

Further, intoxication may resemble insanity, but the two are not the same. Both in cases of insanity and involuntary intoxication, the defence put up is incapacity of understanding or knowing the nature of the act .[33] In a Madras case,[34] the accused was highly drunk and that induced in him a spirit of bravado and made him violent. He drew a line on the ground and warned that he would kill anybody who crossed it. The deceased who tried crossing the line was attacked by the accused and was killed. The plea of insanity due to intoxication put up by the accused was not accepted by the court, which felt that the warnings given by him, though foolish, clearly show that he was very well aware of what he was doing. If the incapacity to understand the nature of the act or to have the particular knowledge or to form the particular intent necessary to constitute the offence is the result of an inherent defect or infirmity of the mind, then the case will come only under s 84 and s 86 will have no application.

Although, both intoxication and insanity lead to incapacity to understand the nature of the offence, they cannot be treated in the same manner. The poisoning of the brain with alcohol or other drugs is a knowingly self-induced condition. Volition enters into it in a way that it does not into insanity. The threat of punishment may cause a person to moderate his intake of intoxicants and it may cause even the intoxicated person to control himself. Drunkenness is not itself insanity, but drinking may result itself what is thought of insanity, it may be symptomatic of insanity or bring out latent insanity. In respect of sentence, a person who commits a serious crime and sets up a plea of intoxication is sent to prison, whereas a person who sets up the defence of insanity may not be sent to prison but sent to a psychiatric hospital or lunatic asylum for as long as he is thought to be dangerous.[35]

BURDEN OF PROOF

Section 85 deals with the act of a person incapable of judgment due to intoxication caused against his will or without his knowledge. Section 86 deals with the offence requiring a particular intent or knowledge committed by one who is voluntarily intoxicated. Both the provisions, being part of 'General Exceptions' to criminal liability, put burden of proof on the persons seeking protection thereof.[36]

To avail the protection of s 85, it is required for an accused to prove that the intoxication was not voluntary and that he, by reason of intoxication, lost the mental equilibrium to distinguish a right from wrong or nature of the act committed by him.[37] Both the questions of involuntary nature of intoxication, as well as its effect on his mental faculties, are questions of fact that need to be established by an accused. Evidence of drunkenness short of requisite mental deprivation disentitles him the protective umbrella of s 85.

Similarly, the onus of proof that the state of self-induced intoxication has made the accused incapable of forming the requisite specific intent essential to constitute the crime lies on the voluntary intoxicated person. A mere proof of that he was labouring under the influence of self-administered intoxicant is not enough to attract the protection. To substantiate the plea, he is required to lead evidence that he was in such a state of drunkenness that made him incapable of forming an intent essential to constitute the crime.[38] Evidence of drunkenness which falls short of proving such incapacity and merely establishes that the mind of the ac-

cused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that the man intends the natural consequences of his act .[39]

PROPOSALS FOR REFORM

Liability for a crime committed by a person under the influence of an intoxicant administered to him by someone else without his knowledge or against his will is equated with that of an insane person. Involuntary drunkenness absolves an individual from liability. A voluntary or self-induced intoxication does not operate as an extenuating factor even though it makes a person mentally incapable to understand the consequences of his act. Section 86 lays down that voluntary intoxication cannot be pleaded as a defence on the ground that the intoxicated person did not have the particular kind of know-ledge or intent mentioned in the definition of the offence with which he is charged.

However, phraseology of s 86, as pointed by the apex court in the *Basdev* case, is confusing. Referring to the expression 'intent or knowledge' appearing in the first part of s 86 and the omission of 'intent' in the second part of the section, the Supreme Court queried: 'If in voluntary drunkenness knowledge is to be presumed in the same manner as if there was no drunkenness, what about those cases where mens rea is required? Are we at liberty to place intent on the same footing and, if so, why has the section omitted intent in its latter part?'

The Law Commission of India, with a view to doing away the judicially hinted 'confusion', felt it desirable to omit altogether the reference to 'intention' in s 86. It also recommended the merger of ss 85 and 86 in a single provision as both of them deal with the same subject. The proposed provision reads:

85. Act of a person who is intoxicated.--

(1) Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law: Provided that such intoxication was not self-induced.
(2) Where an act done by a person in a state of intoxi-cation which is self-induced will be an offence if done with a particular knowledge, he shall be liable to be dealt with as if he did the act with the knowledge he would have had if he had not been intoxicated.
(3) Intoxication is self-induced in a person when he voluntarily causes the state of intoxication in himself.[40]

The proposal seems to be convincing. However, in the present submission, it would be more appropriate to replace '(3)' by 'Explanation'.

1 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, London, 1983, p 464.

2 Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, London, 1983, p 465.

3 *Sohon Manihi v State of Bihar* AIR 1970 Pat 303, (1970) Cr LJ 1245(Pat) .

4 *Bablu @ Mubarik Hussain v State of Rajasthan* (2006) 13 SCC 116, AIR 2007 SC 697.

5 *Chet Ram v State of Himachal Pradesh* (1971) Cr LJ 1246(HP) ; *Venkappa Kannappa Chowdari v State* (1996) Cr LJ 15(Kant) .

6 *Amer Singh v State* AIR 1955 Punj 13, (1955) Cr LJ 305(P&H) ; *Bablu @ Mubarik Hussain v State of Rajasthan* (2006) 13 SCC 116, AIR 2007 SC 697.

7 *Venkappa Kannappa Chowdari v State* (1996) Cr LJ 15(Kant) .

8 *Jethuram v State of Madyha Pradesh* AIR 1960 MP 242, (1960) Cr LJ 1093(MP) .

9 Ibid.

10 (2006) 13 SCC 116, AIR 2007 SC 697.

11 *Jojo @ Jojomon v State of Kerala* (2011) ILR 2 Kerala 789, 2011 (3) KLJ 25.

12 *State of Orissa v Kabasi Suba* (1978) Cr LJ (NOC) 259(Ori) .

13 *State of Maharashtra v Ashok Yashwant Atigre* (1987) Cr LJ 1416(Bom) .

14 *Dasa Kandha v State of Orissa* (1976) Cr LJ 2010(Ori) .

15 *Basdev v State of Pepsu* AIR 1956 SC 488.

16 *Amer Singh v State* AIR 1955 Punj 13, (1955) Cr LJ 305(P&H) .

17 *Enrique F Rio v State* (1975) Cr LJ 1337(Goa) ; see also *Krushna Singh v State of Orissa* (1971) Cr LJ 1497(Ori) .

18 See Re *Suruttayyan alias Vayyapuri Goundan*AIR 1954 Mad 523; *Dasa Kandha v State* (1976) Cr LJ 2010(Ori) .

19 *State of Orissa v Kabasi Suba* (1978) Cr LJ (NOC) 259(Ori) ; *State of Orissa v Matuka Barik* (1978) Cr LJ NOC 260(Ori) .

20 *Mavari Surya Satyanarayana v State of Andhra Pradesh* (1995) Cr LJ 689(AP) .

21 *Manindralal v Emperor* AIR 1937 Cal 432; *Zora Singh v Emperor* AIR 1929 Lah 436.

22 *Prabhunath v State of Uttar Pradesh* AIR 1957 All 667; Re *Macherla Balaswamy*AIR 1953 Mad 827, (1952) 1 Mad LJ 772; *Sadhu Kumar v King* AIR 1951 Ori 354.

23 Re *Mandru Godaba*AIR 1916 Mad 489.

24 *Basdev v State of Pepsu* AIR 1956 SC 488.

25 Ibid.

26 Ibid., para 28.

27 (1995) Cr LJ 689 (AP).

28 (2007) 9 SCC 360, (2007) Cr LJ 3271(SC) .

29 *Bablu @ Mubarik Hussain v State of Rajasthan* (2006) 13 SCC 116, AIR 2007 SC 697.

30 AIR 1956 SC 488.

31 Reiterated in, *Bablu @ Maubarik Hussain v State of Rajasthan,* (2006) 13 SCC 116, AIR 2007 SC 697.

32 *Basdev v State of Pepsu* AIR 1956 SC 488, para 11.

33 *Samman Singh Tahkar Singh v Emperor* AIR 1941 Lah 454.

34 AIR 1939 Mad 407, (1940) Cr LJ 642(Mad) .

35 See *Sannatamma v State of Karnataka* (2004) Cr LJ 2257(Kant) . See also, Glanville Williams, *Textbook of Criminal Law*, second edn, Stevens & Sons, London, 1983, p 464.

36 *State of Orissa v Kasabi Suba* (1978) Cr LJ (NOC) 259(Ori) ; *State of Orissa v Matuka Barik* (1978) Cr LJ NOC 260(Ori) .

37 *Sohon Manihi v State of Bihar* AIR 1970 Pat 303, (1970) Cr LJ 1245(Pat) .

38 *Dasa Kandha v State of Orissa* (1976) Cr LJ 2010(Ori) .

39 *Enrique F Rio v State* (1975) Cr LJ 1337(Goa) .

40 Law Commission of India, '*Forty-Second Report: The Indian Penal Code*', Government of India, 1971, p 97.

CHAPTER 12

Consent and Compulsion

(Indian Penal Code 1860,Sections 87 to 94)

INTRODUCTION

Volunti non fit injuria, an old Roman law maxim, signifying that harm caused with consent cannot be considered an injury, plays some role in criminal law. Consent of a victim, subject to some limitations that are imposed in social interest, operates as an extenuating factor. However, modern criminal law, generally, does not absolve a person from criminal liability for act s posing threat or causing risk to human life. Nevertheless, a doer is protected from criminal liability if he, in good faith, causes or takes risk of causing injury, with or without consent, for the 'benefit' of the sufferer.

Sections 87 to 93 of the Code deal with consent as a general exception. Sections 87 and 91 lay down the law of consent as a defence, while ss 88, 89, 92 and 93 lay down the law relating to immunity for the harm caused, in good faith, with or without consent, for the benefit of the sufferer. And s 90 explains what is not consent for the purposes of the Code.

Section 94 exempts a person from criminal liability for acts committed, with specified exceptions, under compulsion or duress.

WHAT IS CONSENT?

Generally speaking, consent means something that is done deliberately and by free will. It is a concurrence of wills.[1] It involves a deliberate exercise of intelligence based on the knowledge of the significance and moral effect of the act .[2]It is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. It supposes three things--a physical power, a mental power and a free and serious use of them.[3] Consent obtained by intimidation, force, mediated imposition, circumvention, surprise or undue influence, therefore, is mere a delusion and not a deliberate and free act of the mind.[4]A mere act of submission,[5] or knowledge of the risk involved, therefore, does not amount to consent.[6]

The word 'consent' has not been defined in the IPC. However, s 90 of the IPC describes as to what does not amount to consent as intended by any section in the Code. It describes consent in a negative manner. It states:

90. Consent known to be given under fear or misconception.--

A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.--if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.--unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

A plain reading of s 90 reveals that consent given by a person 'under fear of injury' or 'under a misconception of fact' is not 'consent' at all. Similarly, consent given by a person of unsound mind or a person who intoxicated, who is incapable of understanding the nature and consequences of the consented act, and a person below 12 years of age, unless contrary appears from the context, is not a valid consent. Section 90, ulti-

mately, provides that consent to be a ground for avoiding criminal responsibility is required to be a real consent and not vitiated by fear, fraud or immaturity.[7]

Consent obtained by threats or violence, obviously, is not a real consent as it is given 'under fear of injury'. It is not necessary that the consenter was put 'under fear of injury' for obtaining his consent. Consent obtained by putting any other person in whom he is interested in 'under fear of injury' is also not a true consent. The word 'injury', by virtue of s 44 of the IPC, encompasses any harm illegally caused to a person in body, mind, reputation or property.

The phrase 'misconception of fact' used in s 90 refers to 'misconception' regarding the true nature of the act, that is, in reference to the effect and consequence of the act. Thus, in a case, wherein death was caused by a venomous snake under a misconception induced by the representation of a snake charmer that the bite would do no harm, it was held that the consent was not a true consent since it was given under a misconception of a fact based on the assurances given by the snake charmer.[8]

A misconception of fact may arise out of fraud[9] or misrepresentation of facts.[10] Consent given on misrepresentation of facts, therefore, does not afford a defence to the person act ed upon such consent. However, misrepresentation of facts, to bring it within the ambit of s 90 needs to associate with deception or deceit. Consent obtained on a promise to be fulfilled at a future uncertain date, therefore, does not ipso facto, vitiate the consent. Consent for sexual intercourse obtained on a promise to marry in future and its failure by the accused, it was held, cannot be said that it was induced by misconception of fact unless from the very inception the accused never really wanted to marry the girl, who on the promise of marriage, consented to, and indulged in, sexual intercourse until she became pregnant.[11]

Consent given 'under fear of injury' or 'under a misconception of fact', in ultimate analysis, amounts to the consent given by the victim under 'coercion' or 'mistake of fact' respectively.[12] However, this is not adequate to vitiate the consent unless the person who obtained the consent knew or had reason to believe that the consent was given by the victim in consequence of such 'fear of injury' or 'misconception of fact'. In other words, two conditions need to be satisfied for application of the first part of s 90, namely, *first*, the consent was given under 'fear of injury' or 'a misconception of fact, and *secondly*, the accused was conscious of the fact or had reason to think that the consent was given under fear or misconception. The first factor, namely 'consent given under fear of injury or misconception of fact, is set out from the point of view of the victim, while the latter, i.e. knowledge on the part of the accused that the consent emanated from any of the first factor, is set out from the point view of the accused. Both the factors need to be cumulatively satisfied.[13]

Consent given by an insane or an intoxicated person and by an infant (below under 12 years of age) is not a valid consent under the IPC. It, therefore, does not absolve the doer of the consented act.[14]The rule, obviously, is based on the premise that a lunatic, an intoxicated person and a child are immature to understand the consequences of the consented act .

However, s 90 cannot be construed as an exhaustive definition of consent for the purpose of the IPC. The normal connotation and concept of 'consent' is not intended to be excluded. The Supreme Court and High Courts have not merely gone by the phraseology of s 90, but travelled a wider field, guided by the etymology of the word 'consent'.[15]

WHY IS 'CONSENT' A GENERAL EXCEPTION?: UNDERLYING PRINCIPLE

The drafters of the Code, explaining the object and underlying principle of consent as an extenuating factor and its limitations, observed:

> We conceive the general rule to be that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age, who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned. ... The reason on which the general rule which we have mentioned rests, is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary and innocent actions. It is by no means true that men always judge rightly of their own interests. But it is true that, in the vast majority of cases, they judge better of their own interests than any law-

> giver, or any tribunal, which must necessarily proceed on general principles and which cannot have within its contemplation the circumstances of particular cases and tempers of particular individuals, can judge for them. ... It is difficult to conceive any law which should prevent a man from capriciously destroying his property... It is difficult to conceive of any law which should prevent a man from capriciously injuring his own health... It is chiefly, we conceive, for this reason that almost all governments have thought it sufficient to restrain men from harming others and have left them at liberty to harm themselves. But, though in general we would not punish an act on account of any harm which it might cause to a person who had consented to suffer that harm, we think that there are exceptions to this rule, and that the case in which death is intentionally inflicted is an exception.... It is always, and under all circumstances, a thing which a wise lawgiver would desire to prevent if it were only for the purpose of making human life more sacred to the multitude... It seems to us clear, therefore, that no consent ought to be justification of intentional causing of death.[16]

ACTS DONE BY CONSENT

Sections 87, 88 and 89 of the Code deal with various aspects of acts done with consent, which, but for the consent given, would amount to offences.

Though each of these sections deal with different contexts and situations, there is a common thread running through all the sections. While each section will be dealt with separately, it is also important to understand the similarities, the differences and the distinctions between these sections for a complete understanding of the provisions.

INTENTIONAL DEATH OR GRIEVOUS HURT MAY NOT BE CAUSED WITH CONSENT

Section 87. Act not intended and not known to be likely to cause death or grievous hurt, done by consent.--

Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration

A and *Z* agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if *A* while playing fairly, hurts *Z*, *A* commits no offence.

Absence of Intention

Section 87 opens with the words 'Nothing which is not intended to cause death or grievous hurt'. These words signify that mens rea or intention to cause death or grievous hurt on part of the doer should be completely absent, in order to obtain the benefit of the section. It does not permit a man to give his consent to anything intended, or known to be likely to cause his own death or grievous hurt. Consent does not justify either causing intentional death or grievous hurt. It puts an absolute or unconditional restriction on intentional death by consent.[17] However, there can be intention to cause hurt, which is short of grievous hurt.

So, consent as a defence to criminality is available in cases where: (1) harm, short of grievous hurt, is caused by consent; (2) harm resulting even in death, if, it was not so intended or it was without knowledge that it is likely to cause death.

Section 87 is premised on two very simple propositions: (1) that every person is the best judge of his own interests, and (2) that no man will consent to what he thinks hurtful to himself.[18]

In one case,[19] the complainant molested a girl. About 200 people armed with *lathis* were determined to punish him. At that time, three persons of the locality intervened and tried to bring about a settlement. They,

along with others, who were relatives of the girl, assembled before the *panchayat*. The complainant consented to submit to the decision of the *panchayat*. In order to avoid other harm to the complainant, the *panchayat* decided to take him around the village with a blackened face and beat him with a shoe. The decision of the *panchayat*having been carried out in this manner, the three persons who intervened and the other relatives of the girl were prosecuted for offences punishable under ss 323 and 503 of the Code. The Allahabad High Court held that the accused were entitled to the benefit under ss 81 and 87 of the Code. It observed that in a case like this when the accused persons act ed bona fide, without any criminal intent in order to save the complainant from the serious consequences resulting from his own indecent behaviour, with his consent, obtained in writing and for his benefit, then it may not amount to an offence. In another case,[20] the deceased, a middle-aged man, believed himself to have been rendered *dao*-proof or proof against any harm resulting from any attack by a sharp instrument by means of a charm, asked the accused to try a *dao* on his right arm. The accused believed in the assurance of the deceased and inflicted a moderate blow with his *dao* as requested, with the result that his arteries were cut and the deceased bled to death. He was convicted under s 304, but on appeal, his conviction was set aside on the strength of s 87 and s 90. The court held that the accused neither intended to cause or knew that he was likely to cause any hurt, much less the death, of the deceased.

The Allahabad High Court was confronted with yet another case,[21] where the accused and the deceased were friends and engaged themselves in a friendly wrestling match during which the accused's friend (the deceased) received an injury, by accident, on his skull. The court found that no foul play could be attributed to the accused and hence, he was not liable for any offence.

Absence of Knowledge

Section 87 stipulates not only absence of intention to cause death or grievous hurt, but also absence of knowledge by the doer that the act is likely to cause death or grievous hurt. It may be noted that in the case of the *dao* injury and in the case relating to the wrestling match, the accuseds concerned did not have intention to cause death or grievous hurt, nor did they even remotely had knowledge that the act done by them was likely to cause death or grievous hurt. The illustration to the section states of an agreement between two persons to fence with each other for amusement. If in the course of such fencing, any harm is caused without foul play, then the doer of the act commits no offence. But, on the other hand, instead of a fencing match, if it was a duel to be contested with loaded pistols, the nature of the weapon used clearly demonstrates that the parties intended death and if any hurt is caused thereby, then the party causing it was liable irrespective of the consent given to the duel.[22] Thus, the applicability of the section can be judged not by the factum of consent given or the harm caused, but by the intention and knowledge of the person causing it. For example, if a person requests another to kill him, the person to whom the request had been made has no right to kill with impunity,[23] merely because there was a request for the same. If he were to do so, he would be guilty because at the time of killing the person, he had both the intention and the knowledge to kill, even though it was done with the consent of the person.

The consent under s 87 must not only be to the act, but also to the harm or risk of harm that is likely to be caused by the act . Thus, a mere consent to undergo an operation without having any idea about the harm or risk of harm involved is not sufficient.[24] Mere submission to an act is not consent. Similarly, consent obtained by fraud stands on the same footing as the consent given under the misconception of facts and will be of no avail for the purpose of defence under the IPC.[25]

Consent by Whom?

The next question that comes for consideration on the issue of consent is as to who should consent. As per s 87, the consent must be given by the person suffering the harm and such person should be above 18 years of age. Consent obtained from a person below 18 years of age and act ed thereupon does not exempt the accused from criminal liability.

Express or Implied Consent

Consent under the section may be express or implied. As long as there is consent, and the said consent is free, it is not necessary that the consent should be expressed in so many words or specifically articulated.

The term 'implied consent' in so far as the criminal law is concerned, is used to signify either: (1) consent by acts and conduct; or (2) consent presumed, though never given or in any way signified. When a customer enters a shop and picks up goods exhibited for sale, there is implied consent to enter the shop, to handle the goods and to purchase them, if required. This denotes consent by act s and conduct.

Illustration (m) to s 378 (theft) of the IPC illustrates consent presumed, though never given or in any way signified:

> *A*, being on friendly terms with *Z*, goes into *Z*'s library in *Z*'s absence, and takes away a book without *Z*'s express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that *A* may have conceived that he had *Z*'s implied consent to use *Z*'s book. If this was *A*'s impression, A has not committed theft.

The illustration indicates that *A* is not guilty of theft because he had *Z*'s implied consent to enter his library and take a book, though; he has never given or in any way signified the same. It is a legal fiction created taking into consideration human conduct on probabilities.[26]

Consent Valid to Offences Relating to Injury to Body Alone

The exemption from criminal liability under s 87 by reason of giving consent to the harm caused, is applicable only to offences of a personal nature. Consent has no relevance in respect of offences that are grave and are public in character. Where offences are of a public character, consent does not make it any less an offence nor does it grant immunity from punishment to the person doing the act. Such offences of public character are: offences against State (ss 121-130); offences relating to the army, navy and air force (ss 131-140); offences affecting public tranquility (ss 141-160); offences by or relating to public servants (ss 166-171); offences against public justice (ss 191-229), and offences relating to government stamps, coins, weights and measures (ss 230-267). Consent to these offences accords no immunity from liability. In fact, the consenting party becomes an accomplice or an abettor.

Another area in which consent to take the risk will not exonerate the person concerned from civil and criminal liability, is in the case of industrial accidents. For instance, the fact that the workers have agreed to work in hazardous industry does not take away the liability of the employer under the Workmen's Compensation Act 1923. Similarly, where such risk involves perils to life or suffering of grievous nature to workers, their consent may not be a good excuse for the employer to avoid its criminal responsibility.

Evidence of Consent

The question as to whether consent has been given or not, is always a question of fact which has to be determined by leading evidence before the trial court. Thus, questions as to whether consent was obtained without knowledge or by misconception or by fraud or whether there was an implied consent existing, are questions of fact which have to be proved by the accused person who wants to take benefit of the exceptions stipulated under ss 87, 88 and 89 of the IPC. The *factum* of consent may be proved by circumstantial evidence as well.

BENEVOLENT ACTS WITH OR WITHOUT CONSENT

Sections 88, 89 and 92 deal with situations where the act causing the harm to a person is done for the benefit of the person in good faith.

Section 88. Act not intended to cause death, done by consent in good faith for person's benefit.--

Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Illustration

A, a surgeon, knowing that a particular operation is likely to cause the death of *Z*, who suffers under a painful complaint, but not intending to cause *Z*'s death, and intending, in good faith, *Z*'s benefit, performs that operation on *Z*, with *Z*'s consent. *A* has committed no offence.

Section 89. Act done in good faith for benefit of child or insane person, by or by consent of guardian.--

Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provisos--Provided--

First.--That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly.--That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.--That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.--That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. *A* is within the exception, inasmuch as his object was the cure of the child.

Section 92. Act done in good faith for benefit of a person without consent.--

Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

Provisos--Provided--

First.--That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly.--That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.--That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly.--That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations

(a) *Z* is thrown from his horse, and is insensible. *A*, a surgeon, finds that *Z* requires to be trepanned. *A*, not intending *Z*'s death, but in good faith, for *Z*'s benefit performs the trepan before *Z* recovers his power of judging for himself. *A* has committed no offence

(b) *Z* is carried off by a tiger. *A* fires at the tiger knowing it to be likely that the shot may kill *Z*, but not intending to kill *Z*, and in good faith intending *Z*'s benefit. *A*'s ball gives *Z* a mortal wound. *A* has committed no offence.

(c) *A*, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. *A* performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. *A* has committed no offence.

(d) *A* is in a house which is on fire, with *Z*, a child. People below hold out a blanket. *A* drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, *A* has committed no offence.

Explanation.--Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

No Criminal Intention to Cause Death

All the three sections stipulate that the doer of the act causing the harm should not have the intention to cause death. Section 88 provides that 'Nothing, which is not intended to cause death, is an offence...' As far as ss 89 and 92 are concerned, they deal with situations where the persons to whom the harm is caused are not in a position to give consent. Section 89 deals with acts done for the benefit of children under 12 years of age and of persons of unsound mind, where the guardian or person having charge of the person can act or give the consent. In these two sections, the first proviso to the sections provides that 'this exception shall not extend to the intentional causing of death, or to the attempting to cause death'. These words really mean that there should be no intention or mens rea to cause death, in order to avail of the defence against criminal liability under these sections.

In all these cases, there should be no intention to cause death, though the doer might have the knowledge that the act is likely to cause death. So, a distinction between 'intention' and 'knowledge' is made. The word 'intention' is capable of different shades of meaning in the IPC itself. It is clear from the illustrations to ss 88, 89 and 92 that the Code uses the word 'intention', in the sense that something is intentionally done, if, it is done deliberately or purposely, in other words, is a willed though not necessarily a desired result, or a result which is the purpose of the deed.[27] The surgeon of the illustrations certainly does not desire the harm that may be caused, nor is that his purpose. Nevertheless, the provisions of the sections show that he could have intended the harm, and is saved from being a criminal only by these provisions. However, an unqualified medical practitioner cannot claim protection of s 88 as it can hardly be deemed to act in 'good faith'.[28]

For the Benefit of the Person

Under all these three sections, if, an accused wants to avail of the exemption from criminal liability, he has to establish that the act was done not only with no intention to cause death, but for the 'benefit' of the person concerned.

The explanation to s 92 stipulates that 'mere pecuniary benefit is not benefit within the meaning of ss 88, 89 and 92.' The words 'mere pecuniary benefit' denote that while the act cannot be only for pecuniary benefit, it may be for pecuniary benefit along with some other benefit. However, if the harm caused resulted only in a pecuniary benefit, then it will not amount to 'benefit' as contemplated under ss 88, 89 and 92. For instance, if a beggar desired that his hand be amputated, to enable him to beg successfully, the harm caused would have conferred only a 'mere pecuniary benefit' on the sufferer.[29]

Consent[30]

Under s 88, consent is required from the person harmed.[31] Under s 89, since it deals with harm caused for the benefit of a child below 12 years or a person of unsound mind, consent must be obtained from the guardian or other person having lawful charge of that person. As far as s 92 is concerned, it deals with

emergency situations where it may not be practical or possible to obtain the consent of either the person harmed or the guardian, if the person harmed is a minor or a person of unsound mind. The illustrations to s 92 clearly denote the situations contemplated under this provision.

Good Faith

All the three sections provide that the doer of the act causing the harm must not have any intention to cause death or grievous injury, but must also act in good faith. A thing, by virtue of s 52 of the IPC, is said not to be done in good faith if it is done or believed without due care and attention. In order to get the benefit of s 88 or s 89, it is necessary for the accused to prove that the act charged as an offence was done by him with 'due care and attention'.[32]

However, as far as ss 88, 89 and 92 are concerned, 'good faith' may sometimes mean more than just 'due care and attention'. This is especially so, when dealing with act s done by physicians and doctors. In respect of physicians and doctors who undertake to administer medicine or to perform surgical operations, apart from diligence and care, reasonably sufficient knowledge and experience of their business is also called for.[33] If this is absent, then the consent given by the patient may not come to the aid of the harm doer. Consent on the part of the patient and of good faith on the part of the medical practitioner are interdependent.[34]

Corporal Punishment by School Teachers

When a child below 12 years is sent by its parent or guardian to a school, it is presumed that the parent or the guardian gives his implied consent to put the child or ward under the discipline and control of the school authorities and to inflict, if necessary, reasonable punishment on the child for maintaining school discipline or correcting it.[35] And when a child of over 12 years of age goes to school, it may be assumed that the child gives an implied consent to subject itself to the discipline and control of the school authorities and to receive reasonable and moderate corporal punishment as may be necessary for its correction and for maintaining school discipline.[36] A moderate corporal punishment inflicted by a teacher, in good faith, for maintaining discipline in the school or inculcating good habits in the child, therefore, does not amount to an offence. A teacher will be protected under s 89 of the Code even when he exceeds the limits, if any, laid down by a state government.[37]

In *M Natesan v State of Madras* ,[38] wherein a school teacher gave corporal punishment to his pupil for mischievous behavior, the Madras High Court ruled:

> It cannot be denied that having regard to the peculiar position of a school teacher he must in the nature of things have authority to enforce discipline and correct a pupil put in his charge. To deny that authority would amount to a denial of all that is desirable and necessary for the welfare, discipline and education of the pupil concerned. It can therefore be assumed that when a parent entrusted a child to a teacher, he on his behalf impliedly consents for the teacher to exercise over the pupil such authority. Of course, the person of the pupil is certainly protected by the penal provisions of the Indian Penal Code . But the same Code has recognised exceptions in the form ofSections 88 and 89. Where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he would naturally lose the benefit of the exceptions. Whether he is entitled to the benefit of the exceptions or not in a given case will depend upon the particular nature, extent and severity of the punishment inflicted.[39]

In *KA Abdul Vahid v State of Kerala* ,[40] the Kerala High Court, relying upon the *M Natessan* dictum, also held that corporal punishment given to a student by a school teacher, with a view to maintaining discipline and making him to be aware of, and to adhere to, good qualities, gets protection of ss 88 and 89 of the Code. However, an immoderate and unwieldy corporal punishment does not attract ss 88 and 89.

Provisos to Sections 89 and 92

Sections 89 and 92 deal with situations where consent for the harm done is not given by the person harmed. Section 89 deals with children below 12 years and persons of unsound mind and hence, they do not have the legal capacity to give consent. Hence, consent is given on their behalf by guardians or persons legally in charge of them. Section 92 deals with situations where the person harmed is not physically in a position to give consent or it is not practical or possible to get the consent of the guardians, as it is an emergency situation. In both these provisions, the end result is that the concerned act is done without the consent of the per-

son harmed. In view of this, the legislature thought it fit that some additional safeguards should be provided and the provision that the doer should act in 'good faith' is not sufficient.

So, the following four provisos have been added to these sections:

First, the benefit of these two sections shall not extend to the intentional causing of death or attempting to cause death.

Secondly, the provisions will not extend to situations where the doer is aware or has knowledge that the act is likely to cause death, unless the act is done for the purpose of preventing death or grievous hurt or curing of any grievous disease or infirmity.

Thirdly,[41] the provisions will not apply to situations where it results in voluntary causing of grievous hurt or attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity.

Fourthly, the provisions will not apply to the abetment of offences, where the committing of the offence abetted is not covered by these provisions.

WHERE CONSENT DOES NOT ABSOLVE A DOER

Section 91. Exclusion of acts which are offences independently of harm caused.--

The exceptions in sections 87, 88 and 89 do not extend to act s which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence 'by reason of such harm'; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

Section 91 carves out an exception to the exceptions in ss 87, 88 and 89. In no unclear terms, it says that consent will condone the act causing harm to the person giving the consent which will otherwise be an offence, and not the acts which are offences independently of the consented harm. As per ss 87, 88, and 89, harm caused to persons with their consent, or for their benefit with their consent, does not constitute an offence, as long as such harm is not likely to cause death or grievous hurt to the person who has given consent.

Under ss 87, 88 and 89, the act s complained should cause harm or be intended to cause harm. Such acts would be offences but for the consent given by the person to whom the harm is caused. So under ss 87, 88 and 89, the act s of the doer, but for the consent given, would constitute an offence by reason of any harm, which it may cause or be intended to cause. However, s 91 contemplates a situation wherein, despite the consent given, an act constitutes an offence not by reason of the harm caused or intended to be caused, but by reason that the act consented to is per se illegal.

The illustration[42] to the section is self-explanatory. Section 312,IPC, provides that causing miscarriage of a woman is an offence unless it is done for the purpose of saving the life of the woman. Thus, since causing miscarriage is an offence per se, even if it is done with the consent of the woman, it will not be covered under ss 87, 88 and 89 but would fall under s 91. The act amounts to an offence not by reason of the harm caused or intended to be caused to the woman, but it amounts to an offence independent of the harm caused or intended to be caused to the woman. Thus, in cases where the act s committed, albeit with consent are per se illegal, irrespective of the harm caused, then such acts will not be protected under ss 87, 88 and 89. For instance, illustration to s 88 deals with two adults who agree to fence each other. Both the consenting adults are aware that in the course of fencing injury or harm might be caused to either of them. However, having consented to fencing, if one of them is hurt or harmed, the doer of the harm cannot be made criminally liable, because that person will be protected by the general exception under s 88. However, if there is a law which

makes fencing itself an offence, then irrespective of the consent of the parties to suffer the harm caused, it will still be an offence. This is so not because of the harm caused or intended to be caused, but because the act is an offence independent of the harm caused.

Similarly, illustration to s 88 deals with the context of surgeon performing a surgery for a person's benefit with the consent of the patient. The consent of the patient would grant immunity to the surgeon, even if in the course of the surgery, harm is caused to the victim. However, if the surgery performed is itself an illegal and amounts to an offence, as for example causing miscarriage, then the case would fall under s 91 and not under s 88. Thus, it would constitute an offence, even if the patient had consented. This is because causing miscarriage is by itself an independent offence merely by the harm caused to the patient. In such cases, consent of the patient does not protect the doer.

COMMUNICATION MADE IN GOOD FAITH FOR 'BENEFIT'

Section 93. Communication made in good faith.--

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

Illustration

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. *A* has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

Section 93, read with its illustration,[43] intends to protect persons, particularly medical practitioners, for communication, made to the patient in good faith and for his benefit, causing harm[44] to its recipient. The essential ingredients of this provision are: *first*, the communication must be made in good faith, and *secondly*, it must be made for the benefit[45] of the person to whom it is made.

COMPULSION BY THREATS OR DURESS PER MINAS

Section 94. Act to which a person is compelled by threats.--

Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:

Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1--A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2--A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of the exception.

Introduction

This section recognises the principle that offences committed out of compulsion is a defence to criminal liability. Compulsion is a restraint upon the will of a person, whereby a man is urged to do that which his judgment disapproves and if the decision rests on the person, he will reject it. The principle is founded on the well-known maxim, *actus me invito factus non est meus acts*, i.e., an act which is done by me, against my will is not my act, and hence I am not responsible for it. Therefore, it is highly just and equitable that a man should be excused for his act s which are done through unavoidable force and compulsion.[46]

Offences to which Section 94 is Applicable

The benefit of this section will extend to all offences under the Code, except the two which have been specifically excluded in the provision, namely, murder and offences against the State punishable with death. By virtue of s 40, para 2 of the Code, this section will apply to any special law or local law.

Exclusion of Murder and Offences against the State Punishable with Death

As stated earlier, the benefit of this section stands excluded in respect of offences of murder and offences against the State punishable with death. That is, a person who commits a murder under threat of instant death cannot take shelter under this section. This is presumably under the principle that a man cannot kill another to save his own life.[47] However, a person who, under threat of instant death at the hands of murderers, abets murder and the offence of causing disappearance of the evidence of murder; is entitled to get protection of s 94.[48] But a person, who even under the threat of instant death participates in the commission of a murder, cannot seek protection of the section.[49]

As regards the second exception, i.e., offence against the state punishable with death, where compulsion is not an excuse from criminal liability, there is only one offence against the state in the IPC, which is punishable with death. The offence of waging or attempting to wage war or abetting such war against the Government of India under s 121, IPC, is alone punishable with death. The exception has presumably been introduced on the assumption that an individual should place the sovereignty of his country, even above his own life. So, even at gunpoint, a person should refuse to wage war against the state. The fact that a gun was pointed at him and had he not waged a war, he would have been killed; is not an excuse.

Threat of Instant Death

In order to avail of the exception under this section, the threat under which the act was done must be a threat of instant death if the act is not done. The threat cannot be anything less than threat of instant death. If the threat is anything other than 'instant death', then this section will not apply.

Where the threat of death though initially present but thereafter ceases to exist, or where it is to be effected at a future or distant point in time, then it cannot be pleaded as an excuse because the threat is not 'instant'.

Where the accused helped in the removal of the dead body of a person after the murder of such person by the accused's master, under the threat of the master to kill him if he refused to help him in the disposal of the dead body, the accused who would have otherwise been guilty under s 201 was exempted from punishment under this section.[50]

The mere order of a superior police officer is not sufficient to justify a subordinate police officer in torturing a person to extract a confession from him, unless the subordinate police officer can show that he was compelled to act under fear of instant death.[51]

Where a public officer was bribed in order to avoid pecuniary injury and personal loss, the person who bribed was held to be guilty of abetment of the offence of taking illegal gratification by the public officer, and the pecuniary injury or loss under fear of which the accused committed the offence, was not held to be an excuse for the commission of the offence, as there was no threat of instant death.[52]

The offence of falsification of accounts committed under orders of a superior officer cannot be excused under this section, as there was no question of the offence having been committed under threat of instant death.[53]

It is sufficient, if, there is a reasonable apprehension that instant death will be caused to him if the person does not do the act . Whether the threat of instant death was real or not, if the circumstances show that at the time of doing the offence, the accused was under a reasonable apprehension that instant death will be caused to him if he does not do the act, then such reasonable apprehension of instant death is sufficient for the accused to be excused from criminal liability under this section.

Threat should be Present at the Time of Doing the Act

Another crucial ingredient of this provision is that the threat of instant death must be present at the time of doing the act or committing the offence. If the threat of instant death ceases or does not continue to exist, at the time of actual commission of the offence, then this section will not apply.[54]

Proviso and Explanations

There are two explanations to s 94. The first explanation is an extension of the proviso to the section. In the proviso to the section, it is provided that the person doing the act should not, of his own accord, place himself in such a situation by which he became subject to such compulsion or threat. Similarly, the person should not have placed himself in such a situation of being placed under compulsion, out of a reasonable apprehension of harm to himself, short of instant death. Explanation 1 is really an explanation of the proviso. It states that where a person joins a gang of dacoits of his own accord or by reason of threat of being beaten, he will not get the benefit of this section. This is because the threat meted out to him was only of being beaten and not of instant death. So, in the explanation, the man has placed himself in a position so as to expose him to such constraints or threats.

Explanation 2 shows the contra scenario where a person is seized by a gang of dacoits. He did not either of his own accord or under threats short of instant death, gets into the company of the gang of dacoits. Since, the situation is not of his own making, the man concerned will get the benefit of this section. Whether a person was forced by threat of instant death by a gang of dacoits to commit an offence within the meaning of this explanation is a question of fact and the absence of proof of such force makes the explanation inapplicable.

PROPOSALS FOR REFORM

The Fifth Law Commission of India expressed its agreement with the existing law relating to consent embodied in ss 87-93 of the IPC. It, therefore, has not suggested any changes in these sections.

However, the Law Commission, expressing its reservations about the law relating to compulsion or duress *per minas*, as articulated in s 94 of the IPC, proposed two major changes. First, a person threatened with grievous bodily harm should be allowed to plead duress as an excuse in the same way as a person threatened with death. Second, threat of death or serious bodily injury to someone very near and dear to a person be also treated as duress *per minas* and thereby an extenuating factor. However, the latter one, it suggested, be limited to near relatives, such the children, the parents and the spouse of the person threatened.

With a view to making the existing as well as proposed reforms more clear, the Law Commission, suggested that the existing two explanations of s 94 be put as illustrations thereof as they, in its opinion, merely deal with special situations rather than clarifications.[55]

1 Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 746.

2 *Tulshidas Kanolkar v State of Goa* (2003) 8 SCC 590; *Rao Harnam Singh v State* AIR 1958 Punj 123.

3 *Uday v State of Karnataka* (2003) 4 SCC 46, AIR 2003 SC 1639.

4 *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203, (2005) 1 SCC 88.

5 *Tulshidas Kanolkar v State of Goa* (2003) 8 SCC 590; *State of Himachal Pradesh v Mango Ram* (2000) 7 SCC 224; *Rao Harnarain Singh v State* AIR 1958 Punj 123.

6 *Pradeep Kumar @ Praddep Kumar Verma v State of Bihar* AIR 2007 SC 3059, (2007) 7 SCC 413; *State of Uttar Pradesh v Chhoteylal* (2011) 2 SCC 550, AIR 2011 SC 697.

7 *Khalilur Rahman v Emperor* AIR 1933 Rang 98.

8 *Poonai Fattemah*(1869) 12 WR 7(Cri) .

9 Re *N Jaladu*AIR 1914 Mad 49.

10 *Purshottam Mahadev v State of Bombay* AIR 1963 Bom 74.

11 *Jayanti Rani v State of West Bengal* (1984) Cr LJ 1535(Cal) ; *Hari Majhi v State of West Bengal* (1990) Cr LJ 650(Cal) ; *Sekar v State by Inspector of Police, Thiruvannamala,* (1995) 1 Crimes 472(Mad) ; *Abhoy Pradhan v State of West Bengal* (1999) Cr LJ 3534(Cal) ; *Sudhamay Naik alias Bachhu v State of West Bengal* (1999) Cr LJ 4482(Cal) ; *Araj Sk v State of West Bengal* (2001) Cr LJ 416(Cal) ; *Baldhari Ohdar v State of Bihar* (2001) Cr LJ 883(Pat) ; *Uday v State of Karnataka* AIR 2003 SC 1639, (2003) 4 SCC 46; *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203, (2005) 1 SCC 88; *Md Mahasin Sk v Sayeda Khatun Bibi & Anr* (2005) Cr LJ 3162(Cal) ;*Yedla Srinivasa Rav v State of Andhra Pradesh* (2006) 11 SCC 615, 2006 (9) SCALE 692; *Pradeep Kumar @ Pradeep Kumar Verma v State of Bihar* AIR 2007 SC 3059, (2007) 7 SCC 413; *Swapan Chatterjee v State of West Bengal* (2009) Cr LJ 16(Cal), (2008) 3 CALLT 177(HC) .

12 *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203, (2005) 1 SCC 88.

13 *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203, (2005) 1 SCC 88.

14 *Tulshidas Kanolkar v State of Goa* (2003) 8 SCC 590.

15 *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203, (2005) 1 SCC 88; *Pradeep Kumar @ Pradeep Kumar Verma v State of Bihar* AIR 2007 SC 3059, (2007) 7 SCC 413.

16 Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India*, Pelham Richardson, 1838, Note B, pp 79-80.

17 However, consent of the deceased may operate as a mitigating factor. See s 300, Exception V, and ss 312 & 314, IPC.

18 *State of Maharashtra v Miss Joyee* (1975) 77 Bom LR 218.

19 *Bishambar v Roomal* AIR 1951 All 500, (1952) Cr LJ 179(All) .

20 *Nga Shwe Kin v Emperor* (1916) Cr LJ 581(Bom) .

21 *Tunda v Rex* AIR 1950 All 95.

22 Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 751.

23 However, by virtue of s 300 Exception V, death by consent amounts to culpable homicide not amounting to murder and, by virtue of s 304, warrants lesser culpability. See *Dashrath Paswan v State of Bihar* AIR 1958 Pat 190, (1958) Cr LJ 548(Pat) ; *Kanaya Kosvan v Emperor* AIR 1931 Mad 436, and *Vijay@Gian Chand Jain v State of Madhya Pradesh* (1994) 6 SCC 308.

24 *Nga Shwe Kin v Emperor* (1916) Cr LJ 581(Bom) .

25 Re *N Jaladu*AIR 1914 Mad 49.

26 See also Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 747.

27 *Sunku Sreedharan Kottu Kallil v State of Kerala* AIR 1970 Ker 98, (1970) Cr LJ 688(Ker) .

28 *Juggankhan Jamshankhan v State* AIR 1963 MP 102, (1963) Cr LJ 296(MP) .

29 Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 754.

30 For further details see above, 'What is consent?'.

31 *Pan Singh v Emperor* AIR 1935 All 282.

32 *Simbhu v Narain* AIR 1923 All 546.

33 *Suresh Gupta (Dr) v Government of NCT of Delhi* (2004) 6 SCC 422; *Jacob Mathew v State of Kerala* (2005) 6 SCC 1.

34 *Gopinath Pillai v State of Kerala* (2000) Cr LJ 3682(Ker) .

35 *M Natesan v State of Madras* AIR 1962 Mad 216.

36 *GB Ghatge v Emperor* AIR 1949 Bom 226.

37 *Ganesh Chandra Saha v Jivraj Somani* AIR 1965 Cal 32, (1965) Cr LJ 24(Cal) .

38 *M Natesan v State of Madras* AIR 1962 Mad 216.

39 Ibid, para 5.

40 (2005) Cr LJ 2054 (Ker).

41 It may be noted that the provisos 'first, secondly and fourthly' of s 89 and s 92 are almost similar. However, proviso 'thirdly' of s 89 differs from 'thirdly' of s 92. The former prohibits the causing of 'grievous hurt', while the latter prohibits the causing of merely 'hurt' for any purpose other than the prevention of 'death or hurt'. The reason is obvious. In s 89, there is the consent of the guardian, while under s 92 there is no consent at all.

42 The *illustration*, in the light of the Medical Termination of Pregnancy Act 1971, allowing termination of pregnancy on a number of grounds and not only on the ground of saving life of the woman, seems to be somewhat inappropriate.

43 It, however, does not reveal the 'benefit' aspect of the communication.

44 'Harm' means an injurious mental reaction. See *Veeda Menezes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489(SC) .

45 The term 'benefit' in this section, probably, includes personal, pecuniary as well as spiritual benefit.

46 Sir William Blackstone, *Commentaries on the Laws of England*, vol 3, 17th edn, 1830, p 27.

47 *R v Dudley and Stephens* [1884] 14 QBD 273.

48 *Sanlaydo v Emperor* AIR 1933 Rang 204, (1933) Cr LJ 262(Rang) ; *Bachanlal v State of Uttar Pradesh* AIR 1957 All 184, (1957) Cr LJ 344(All) .

49 *Paramhansa Jadab v State* AIR 1964 Ori 144.

50 *Emperor v Antar* AIR 1925 All 315.

51 *Queen Empress v Latif Khan* (1895) ILR 20 Bom 394(DB) .

52 *Queen Empress v Maganlal & Motilal* (1890) ILR 14 Bom 115, pp 131-32.

53 Re *Doraiswami Reddiar*AIR 1951 Mad 894, (1952) Cr LJ 1093(Mad) .

54 *Zahid Beg v Emperor* AIR 1938 All 91.

55 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, pp 98-100.

CHAPTER 13

Trivial Act s

(Indian Penal Code 1860,Section 95)

Section 95. Act causing slight harm.--

Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

OBJECT AND APPLICABILITY OF THE SECTION

One of the principles of law is *de minimis non curat lex*--the law does not concern itself with trifles. This has found expression in s 95 of the IPC.[1] Justifying incorporation of s 95, the authors of the Code observed:

> ...[S]ection is intended to provide for those cases which though, from the imperfections of language, they fall within the letter of penal law, are yet not within its spirit and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen into another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. There are innumerable act s without performing which men cannot live in society, acts which all men constantly do and suffer in turn, and which it is desirable they should do and suffer in turn yet which differ only in degree from crimes. That these act s ought not be treated as crimes is evident, and we think it far better expressly except them from the penal clauses of the Code than to leave it to the judges to except them in practice; for if the Code is silent on the subject, the judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law or by wresting the language of the law from its plain meaning.[2]

A man living in a society, undeniably, cannot either avoid inconveniences to himself or others. It would be, therefore, an idle travesty of law to with such delinquencies as crimes.[3]Section 95, hence, intends 'to exclude from the operation of the Code those cases which, from the imperfection of the language, fall within the letter of the penal law but are yet not within its spirit' and 'to prevent penalisation of negligible wrongs or offences of trivial character'.[4] Shamshul Huda, justifying, in a tone similar to the Law Commissioners, practical utility the provision, observed:

> No reasonable man complains of trifles. No man can pass through a crowded thoroughfare without treading on somebody's toes or without clashing against somebody and no reasonable man would complain of such small annoyances. *De minimis non curat lex* is an old doctrine of Roman law. The provision is unnecessary for ordinary men, but there are eccentric people all over the world, and it is to guard against eccentricities that a formal provision of law of this kind is needed.[5]

Section 95 will come into play only when the act complained of amounts to an offence,[6] and 'no person of ordinary sense and temper' would complain of it.[7] Where the act is of such a nature that it will not be an offence, even independent of this section, then there is no question of applying this section.[8]Whether an act which amounts to an offence is trivial, however, would depend upon the nature of the injury,[9] the position of the parties, the relation between them,[10] the situation in which they are placed, the knowledge or intention with which the offending act is done[11] and other related circumstances. It cannot be judged solely by the measure of physical or other injuries the act causes.[12]

MEANING OF HARM

Harm is not defined in the IPC. Its dictionary meaning connotes hurt, injury, damage, impairment, moral wrong or evil. The word 'harm' is used in many sections in the IPC. Its meaning would vary depending on the context in which it is used. For instance, reference in ss 81, 87-89, 91, 92, 100, 104 and 106, IPC, can only mean physical injury. In s 93, it means an injurious mental reaction. In s 415, it means injury to a person in body, mind, reputation or property. In ss 469 and 499 'harm' means harm to reputation of the aggrieved party.[13] The expression 'harm' used in s 95 is of wide amplitude.[14] It connotes hurt, injury, insult,[15] damage, impairment, moral wrong or evil, including intentional physical injury, financial loss[16] or loss of reputation.[17]

In *Veeda Menezes v Yusuf Khan* ,[18] Yusuf Khan was a tenant of Mrs Veeda Menezes. Robert, the servant of Mrs Menezes called Yusuf's wife a thief. Next day, Yusuf slapped Robert due to which heated exchange of abusive words followed between Yusuf and Mr Menezes. Yusuf threw a file at Mr Menezes, though it did not hit him, but scratched Mrs Menezes's elbows. A complaint was launched at the Bandra Police Station by Mrs Menezes stating that Yusuf committed house trespass in order to commit an offence punishable with imprisonment, threw a shoe at her, slapped the face of her servant Robert and also caused her a 'bleeding incised wound on the forearm'. Yusuf was charged under s 323, IPC. A special public prosecutor was appointed to prosecute him. The trial court convicted Yusuf and sentenced him to a fine of Rs 10 on each count of assault against Robert and Mrs Menezes. The high court acquitted Yusuf on the ground that the offence committed was trivial and was covered by s 95, IPC. Mrs Menezes took up the case on appeal to the Supreme Court. The Supreme Court observed that the offence was petty, but was given undue importance. The version of Mrs Menezes as to the incident was a gross exaggeration. The Supreme Court upheld the verdict of the high court that the injuries caused to Mrs Menezes and Robert were trivial, and the case was one in which the

injury intended to be caused was so slight that a person of ordinary sense and temper would not complain of the harm caused thereby.

In *Keki Hormusji Gharda v Mohervan Rustom Irani* ,[19] the Supreme Court observed that the Bombay High Court ought to have exercised its jurisdiction under s 482 of the CrPC as the inconvenience caused due to the construction of an access road was trivial in nature.

In *Bindeshwari Prasad Sinha v Kali Singh* ,[20] the allegation against the accused was that he took away a certified copy of a judgment meant for the complainant by signing his name. The complainant obtained another copy thereafter. The court held that this was a case which was covered by s 95.

Where the offence complained of is in respect of outraging the modesty of a woman, the harm caused can never be said to be trivial, in view of the ignominy and trauma caused to the woman. In *Rupan Deol Bajaj v KPS Gill* ,[21] the petitioner was an officer of the Indian Administrative Service (IAS) belonging to the Punjab cadre. She was posted as Special Secretary (Finance) at the relevant point in time. She filed a complaint alleging commission of offences under ss 341, 342, 352, 354 and 509 of the Penal Code by KPS Gill, the then Director General of Police, Punjab. According to the petitioner, she was invited to a dinner party in the house of her colleague. KPS Gill was also present at the party. He called out to her and asked her to come and sit next to him. When she went, he pulled the chair on which she was going to sit close to his chair. The petitioner, surprised at this act, pulled the chair back to its original place and when she was about to sit down, he once again pulled the chair close to his chair. Realising that something was wrong, she immediately left him. Ten minutes later, KPS Gill got up from his seat and came and stood close to her. He made an action with a crook of his finger and asked her to come along with him. The petitioner objected to his obnoxious behaviour and asked him to leave. He once again repeated that she should accompany him and this time in a commanding voice. The petitioner was apprehensive and frightened as the accused had blocked her way and she could not get up from the chair without touching him. She immediately drew her chair back about a foot and a half, and quickly got up and turned to get out. At this point, the accused, KPS Gill, slapped Mrs Bajaj on her posterior. This was done in the full presence of the other ladies and guests. The petitioner made a complaint against KPS Gill and registered a First Information Report (FIR) against him. The accused moved the high court for quashing the FIR. The high court allowed the application and quashed the FIR on the ground that the allegations made therein did not disclose any cognisable offence and the nature of harm allegedly caused to Mrs Bajaj, did not entitle her to complain about the same in view of s 95, IPC. On appeal, the Supreme Court disagreed with the high court. The apex court held that s 95 has no application to the allegations made in the FIR. Mr Gill, the top most official of the state police, indecently behaved with Mrs Bajaj, a senior lady IAS officer, in the presence of other officers, in spite of her raising objections continued with such behaviour. The apex court held that when an offence relates to the modesty of a woman, under no circumstances can it be termed trivial.

OFFENCES UNDER PUBLIC WELFARE ENACTMENTS

In the chapter on mens rea, we have noticed that there are certain offences under various social welfare legislations, wherein strict liability is imposed on persons. Now, the question arises as to whether in respect of such offences, the plea of triviality can be accepted. For instance, violation of traffic rules such as parking a vehicle in a no parking area or exceeding the speed limit marginally etc, may by themselves result in no harm or negligent harm. However, the plea that the harm caused is trivial, may not be accepted in such cases and the persons concerned are liable to pay the fine imposed.

In *Jagdish Prasad v State of Uttar Pradesh* ,[22]it was contended that the Prevention of Food Adulteration Act 1955 imposed a heavier punishment for a second offence under theAct, and where the first offence was of a serious nature and the second a trivial one, it would render the provisions strange, as it would punish a smaller offence with a harsher punishment. The Supreme Court rejected the contention and labeled the entire argument as fallacious. It held that there was no foundation in the Act for distinguishing trivial and serious offences, for the Act provided the same punishments for both. If the punishment is the same, it would follow that the statute considered them to be of the same seriousness.[23]

In *State of Maharashtra v Taher Bhai* ,[24]the magistrate relying on s 95, IPC, acquitted the accused, who was prosecuted for an offence punishable under Prevention of Food Adulteration Act 1955. The two accused

were found selling hard boiled sugar confectionary and the magistrate had acquitted them on the ground that they were only sellers of confectionary purchased from others. The Bombay High Court held that s 95 shall have no application to any offence under the Prevention of Food Adulteration Act 1955. A slight deviation from the standard fixed under the Act is not going to cause slight harm as contemplated under s 95, IPC. The high court set aside the order of acquittal and remanded the matter to the magistrate for trial.

Similarly, the Andhra Pradesh High Court also held that where the accused was found guilty of misbranding under the Prevention of Food Adulteration Act 1955, benefit of s 95 should not be given to the accused, because misbranding is a serious offence.[25]

In *State of Karnataka v Lobo Medicals* ,[26] a firm running under the name and style of M/s Lobo Medicals was trading in drugs. One day, one of the drug inspectors found that the accused sold '6 3' ml ampules of Neurobion Merc for Rs 15 plus taxes, and '3 20' tablets of Solerobion for a sum of Rs 22.05 plus taxes. On verification from the price list, it was found that the accused had collected Rs 1.69 in excess for the Neurobion Merc ampules and a sum of Rs 0.60 in excess in respect of the Solerobion tablets. It was contended that the amount involved in this case was so low that it should attract 95, IPC. The Karnataka High Court rejected this contention. It held that if this was an offence of the classical type, say for example, theft of a few paise, then s 95 would certainly have been applicable. But this was a case dealing with a socio-economic offence. The high court quoted the Forty-seventh Report of the Law Commission of India:

> ...[I]n the case of social and economic offences, ...what has been detected and brought before the Court is, more often than not, a surface manifestation of a poisonous spring of habitual misconduct running underground. Detection is particularly difficult in the case of social and economic offences. Gathering of information leading to prosecution is equally difficult and conviction much more so. Whatever may be the position as regards conventional crimes, the odds here are that it was by sheer luck that the offender has escaped detection for other crimes.[27]

The high court held that the offence under the Act was a strict liability offence, and hence cannot be considered as a trifling offence. However, in view of the minor nature of the offence, it took a lenient view in imposing the punishment and sentenced him to a fine of Rs 100 in default to undergo simple imprisonment for a week.

In *Bichitrananda Naik v State of Orissa* ,[28] the accused was prosecuted for selling adulterated mustard oil. A sample of the mustard oil revealed that the saponification value and the Bellier Test value were in excess of the permissible limit. It was contended that the excess was very slight and hence s 95, IPC, would afford protection to the petitioner. The Orissa High Court rejected this contention and held that the sample of the mustard oil is not of the standard purity required by the statute and hence, the conviction of the accused was upheld.

Nevertheless, one finds a couple of judicial pronouncements taking the position that s 95, IPC, is applicable to offences under special Acts. Doctrine of *de minimis non curat lex*, for example, was applied by the Bombay High Court[29]for acquitting persons accused of omitting act s contrary to the Prevention of Corruption Act 1988.[30] The Madhya Pradesh High Court also relied upon s 95 to quash a conviction for illegally possessing insignificant railway property.[31]

COMPOUNDING OF TRIVIAL OFFENCES

Compounding of offences means settling or condoning matters between the parties. Section 320 , CrPC , provides a schedule of offences that may be compounded by the parties. In one case,[32] a person by the name of Hazarika was the holder of a firewood *mahal* licence. Under the licence, he was entitled to cut and collect firewood from dead and fallen trees. By mistake, he had illegally felled some green trees and converted them into firewood. Admitting his mistake, he paid Rs. 50 as compensation and compounded the offence. The question arose as to whether such a compounding was permissible under the law. It was contended that the wrong done was of such a trivial nature that the rendering of compensation was in the eyes of law sufficient to redress it and to put an end to the matter without any reflection on the character of the person charged with having done the wrong. The court rejected this contention and held that when a person

charged with an offence, however trivial it may be, unless there is some provision in law to compound it, the law must take its course and the charge enquired into resulting in either conviction or acquittal.

PROPOSALS FOR REFORM

The Fifth Law Commission of India, expressing its satisfaction with the legislative intent of s 95, recommended no changes in the law relating to triviality.[33]

1 *Bindeshwari Prasad Sinha v Kali Singh* AIR 1977 SC 2432, (1978) Cr LJ 187(SC) ; *Sadananda Garh v Shibakali Hazara* AIR 1954 Cal 288.

2 Macaulay, Macleod, Anderson and Millett, A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India, Pelham Richardson, 1838, Note B, pp 109-10.

3 (1970) Cr LJ 1188 (Mad).

4 *Veeda Menzes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489(SC) ; followed in *State of Karna- taka v Babu Manikyam* (2002) Cr LJ 3604(Kant) .

5 Shamsul Huda, *The Principles of Law of the Crimes* (Tagore Law Lectures 1902), Eastern Book Co, Lucknow, Reprint 2011, comments on s 95.

6 *State of Madhya Pradesh v Amritlal* AIR 1953 Nag 141, (1953) Cr LJ 801(Nag) .

7 *Veeda Menezes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489(SC) ; see also, *Devendrappa v State of Mysore* (1970) Cr LJ 1188(Kant) ; *Ranjit Singh v State of Bihar* (1991) 1 Crimes 867(Pat) .

8 *Veeda Menezes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489(SC) .

9 *Anoop Krishna Sharma v State of Maharashtra* (1992) Cr LJ 1861(Bom) ; *Ranganayakkam v Subbamma* AIR 1967 AP 208.

10 *Md Ibrahim v Ismail* AIR 1949 Mad 760.

11 *Rupan Deol Bajaj v KPS Gill* AIR 1996 SC 309, (1995) 6 SCC 194.

12 *Veeda Menezes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489(SC) ; *Ranganayakkam v Subbamma* AIR 1967 AP 208.

13 *Veeda Menezes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489(SC) .

14 *Veeda Menezes v Yusuf Khan* AIR 1966 SC 1773, (1966) Cr LJ 1489(SC) ; *Devendrappa v State of Mysore* (1970) Cr LJ 1188(Kant) .

15 *Philip Rangel v Emperor* AIR 1932 Bom 193.

16 Re *Ethirajan*AIR 1955 Mad 264, (1955) Cr LJ 816(Mad) ; *Ganesh Dutt Bharwal v Keshar Dass* (1991) 3 Crimes 773(HP) ; *Ranjit Singh v State of Bihar* (1991) 1 Crimes 867(Pat) .

17 *Bheema v Venkata Rao* AIR 1964 Mys 285; *Jasraj Jagga v Emperor* AIR 1929 Lah 234; *MS Sharif Ahmed v B Quabul Singh* AIR 1921 All 30.

18 AIR 1966 SC 1773, (1966) Cr LJ 1489(SC) .

19 (2009) 6 SCC 475, AIR 2009 SC 2594.

20 AIR 1977 SC 2432, (1978) Cr LJ 187(SC) .

21 AIR 1996 SC 309, (1995) 6 SCC 194.

22 AIR 1966 SC 290, (1966) Cr LJ 194(SC) .

23 See also *State of Maharashtra v Champalal Punjaji Shah* AIR 1981 SC 1675, (1981) 3 SCC 610, (1981) Cr LJ 1273(SC) .

24 (1978) Cr LJ 820 (Bom).

25 *Public Prosecutor v Kalavala Satyanarayana* (1975) Cr LJ 1127(AP) .

26 (1978) Cr LJ 1837 (Kant).

27 Law Commission of India, 'Forty-Seventh Report: The Trial and Punishment of Social and Economic Offences', Government of India, 1972, para 7.49.

28 (1978) Cr LJ 1050 (Ori).

29 *Hanmantappa Murtyappa Vijapure* (*since deceased by L Reps*) *v State of Maharashtra*(2004) Cr LJ 3001(Bom) ; *Arun Prahlad Kale v State of Maharashtra* (1992) Cr LJ 1142(Bom) ; *Bhagwan Jathya Bhoir v State of Maharashtra* (1992) Cr LJ 1144(Bom) ; *Shivchalappa Gurumortyappa Loni v State of Maharashtra* (1993) Mad LJ 573.

30 The Punjab High Court also took a similar view. See *Municipal Committee, Amritsar v Arjan Singh* (1972) 74 Punj LR 793.

31 *State of Madhya Pradesh v Mahadeo* (1972) Cr LJ 1297(MP) ; but see, *Mahendra Singh v State of Bihar* (1987) 2 Crimes 173(Pat) .

32 *Biswabahan v Gopen Chandra* AIR 1967 SC 895.

33 Law Commission of India, *'Forty-Second Report: The Indian Penal Code '*, Government of India, 1971, p 100.

CHAPTER 14

Private Defence

(Indian Penal Code 1860,Sections 96 to 106)

PART A

INTRODUCTION

A state is under obligation to protect life, limb and property of its subjects. But no state, howsoever resourceful and organised it may be, will be in a position either to depute a policeman to every individual for protecting his body and property or to dog the steps of every person who unlawfully poses threat to body and property of others. A state can never extend its help to all at all times and in all cases. In such a situation, an individual, in pursuit of his basic instinct of self-preservation, will be forced to resort to all the possible means at his command to protect himself and his property. He is neither expected to surrender nor to flee, but to hold his ground and to quell the imminent threat and to repel it.[1] He is entitled to stay and overcome the threat.[2] Obviously, he is expected to use force that is just required to counter the danger or until the state comes to his rescue. An unrestricted right to defend will inevitably result into 'might is right' rule and thereby will create serious law and order problems. It, thus, intends to discourage cowardice and meek submission to aggression but at the same time does not encourage private warfare. Hari Singh Gour observed thus:

> ...[B]ased on the cardinal principle that it is the first duty of man to help himself. It is next based on the principle that the police of the state is not ubiquitous and a person may then strike out for himself or for another. But such a rule, if unqualified, might encourage vendetta which would lead to social disorder. It, therefore, lays down the limits within which the rule applies, and the conditions to which it is subject.[3]

Most of modern civilised societies, including India, plausibly influenced by this ideology, do sanction, within certain reasonable limits and with some riders, the right of every person to resist violence or repel violence by violence, in times when state help cannot be obtained.[4]

Justifying the right of private defence recognized under the Indian Penal Code and limitations thereon, authors of the Code observed:

> We propose ... to except from the operation of the penal clauses of the Code large classes of act s done in good faith for the purpose of repelling unlawful aggression ...[W]e have attempted to define, with as much as exactness as the subject appears to us to admit, the limits of right of private defence .... Where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious.[5]

BASIS OF THE RIGHT OF PRIVATE DEFENCE

The right of private defence is based on the cardinal principle that it is the primary duty of a man to help himself. Self-preservation is the prime instinct of every human being.[6] Bentham, in his *Principles of the Penal Code*[7] says:

> The right of defence is absolutely necessary. The vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of the sum total of individual resistance. Take away this right and you become in so.

The right of private defence serves a social purpose. It not only restrains bad characters, but also encourages the right spirit in a free citizen. A citizen, as a general rule, is neither expected to run away for safety when he is faced with grave and imminent danger to his person or property as a result of unlawful aggression, nor is he expected, by use of force, to right the wrongs done to him or to punish the wrongdoer for commission of the offences. 'A man', observed Russell, 'is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended'.[8] There is nothing more degrading to the human spirit than to run away in face of peril.[9] It is a highly prized and valuable right granted to a person to offer effective resistance against his assailant.[10]

In a well-ordered civilised society, it is generally assumed that state can take care of the persons and properties of individual citizens. This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself.[11] Mayne, delving into rationale of the right, observed:

> The whole of self-defence rests on these propositions: (1) that society undertakes, and in the great majority of cases, is able to protect private persons against unlawful attacks upon their person and property; (2) that, where its aid can be obtained, it must be resorted to; (3) that, where its aid cannot be obtained, the individual may do everything that is necessary to protect himself; (4) but that the violence used must be in proportion to the injury to be averted, and must not be employed for the gratification of vindictive or malicious feelings.[12]

The right of private defence, thus, originates from the idea that a person has an inherent right to protect himself by effective self-resistance against unlawful aggressor and no individual expected to run away but to retaliate when his life, limb or property is in jeopardy. It rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence.[13]

PART B

THE RIGHT OF PRIVATE DEFENCE IN INDIA: LEGISLATIVE FRAMEWORK

The law of private defence of body and property in India is codified in ss 96 to 106 of the Indian Penal Code (IPC), which are ostensibly based on the idea that the right of self-preservation is a basic human instinct. These sections, which are clustered under the sub-heading '*Of the Right of Private Defence*' of the ch IV captioned 'General Exceptions', constitute a comprehensive legislative framework of the right of private defence as they deal with the subject-matter, nature and extent of the right of self defence in India as well as the limitations within which the right is required to be exercised. These provisions are complete in themselves and no reliance on the principles of governing the right of self-defence in Common Law can be placed for their interpretation.[14] All these provisions have to read together to have proper grasp of the scope and limitations of the right of private defence.[15]

Section 96, which declares that 'nothing is an offence which is done in the exercise of the right of private defence', lays down the general rule on the right of private defence, while s 97, which deals with the subject-matter of the right of private defence of body and of property and lays down the extent of the right of private defence, proclaims that every person, subject to restrictions contained in s 99, has a right to defend his own body and the body of another person, against any offence affecting human body, and right to defend property of his and of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. And s 99 lists the situations wherein the right of private defence of body as well as of property is not available to an individual. It lays down the limits of the right. Sections 102 and 105 deal with commencement and continuation of right of private defence of body and of property respectively; while ss 100 and 101 and 103 and 104 deal with the extent of the 'harm' (including voluntary death) that may be inflicted on the assailant in exercise of the right of body and of property respectively. Section 98 makes the right of private defence available even against persons who, by reason of infancy, insanity, intoxication or misconception, are legally incompetent to commit an offence. In other words, it gives the right of private defence against certain act s of persons whose rights exempted from criminal liability. And s 106 allows a person to take the risk of harming innocent person in order to, in exercise of the right of private defence of body, save himself from mortal injury.

Section 96, thus, declares, in general terms, that nothing is an offence which is done in the exercise of private defence. The subsequent ss 97-98 and 100-106 explain the contours of the right and define the broad boundaries within which it can be exercised. All the rights enumerated in these sections are subject to restrictions or limitations that are stated in s 99.

GENERAL PRINCIPLES

Section 96. Things done in private defence.--

Nothing is an offence which is done in the exercise of the right of private defence.

Section 97. Right of private defence of the body and of property.--

Every person has a right, subject to the restrictions contained in section 99, to defend-

First--His own body, and the body of any other person, against any offence affecting the human body;

Secondly--The property, whether movable or immovable, of himself or any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief for criminal trespass.

RIGHT OF PRIVATE DEFENCE ESSENTIALLY A DEFENSIVE AND NOT A PUNITIVE RIGHT

As the very words 'nothing is an offence which is done in the exercise of the right of private defence', appearing in s 96 denote, the right of private defence is essentially a defensive right circumscribed by the IPC and it is available only when the circumstances clearly justify it. It is exercised only to repel unlawful aggression[16] and not to punish the aggressor for the offence committed by him.[17] It is basically preventive in nature and not punitive.[18] It is neither a right of aggression nor a reprisal.[19] Its exercise cannot be vindictive or malicious.[20]

However, a right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survives.[21] A person is not entitled to use the violence that is disproportionate to the injury which is to be averted or which is reasonably apprehended. The moment a defender exceeds it, he commits an offence and is thereby disentitled for the right of private defence.

The exercise of the right is subject to the restrictions mentioned in s 99 which are as important as the right itself.[22]

In *Ram Ratan v State of Bihar* ,[23] the complainant's cattle trespassed into a field and started grazing. The accused party seized the cattle and was taking them to the pound. The complainant party, on coming to know of the seizure of the cattle by the accused party, came with good numbers, variously armed to rescue the cattle. The Supreme Court held that since the complainant's party had come armed with sharp edged weapons and *lathis* to rescue the cattle from the accused party, the accused party could have apprehended that they were not peacefully inclined and would use force against them in order to rescue the cattle and that the force likely to be used could cause grievous harm. In view of this, the court held that the accused party committed no offence in causing injuries to persons in the complainant's party and even causing death to one of them. The accused were all acquitted.

In *Jai Dev v State of Punjab* ,[24] a piece of land was bought by the accused party in a neighbouring village of Ahrod. Since they were outsiders to the village, the Ahrod villagers treated them as strangers. When the accused, who were armed, were ploughing the field in the disputed land, the villagers of Ahrod, who could not tolerate that strangers should take possession of the land, came armed in large numbers to take possession of the field. The accused party in self-defence of their property caused harm and shot dead one Amin Lal. Immediately thereafter, the villagers of Ahrod who had come to the field ran away and there was no longer any justification for using any force against the running villagers. The moment the property had been cleared of trespassers, the right of private defence ceased to exist. However, the accused shot dead two of the fleeing villagers. While the right of private defence was available in the killing of Amin Lal, the Supreme Court held that it was not available to kill the fleeing villagers who were already some distance away from the field. The accused were convicted for murder and sentenced to life imprisonment.

In *Nabia Bai v State of Madhya Pradesh* ,[25] the accused along with her mother and sister were weeding their crop when the deceased passed through the neighbouring field. The deceased then came into the field and attacked all three of them with a knife. There was some grappling and the accused managed to get hold of the knife held by the deceased and inflicted injuries resulting in death of the deceased. The Supreme Court observed that the accused had neither motive nor any intention to kill the deceased. She only wanted to save herself from an armed intruder who had inflicted knife injuries on her. The accused was acquitted.

In *Munna v State of Uttar Pradesh* ,[26] the accused attacked the deceased on 6 April 1975 at 2.15 pm. He put up a plea of self-defence and placed reliance on five injuries sustained by him. According to the doctor's evidence, he treated the accused on 8 April at 1.30 am and according to him the injuries were six hours old. The fact that he went to the doctor one and a half days after the incident was held to show that they were not injuries sustained in the course of the incident. The Supreme Court rejected the accused's plea of self-defence and it sentenced him to life imprisonment.

In *State of Punjab v Karnail Singh* ,[27] the Supreme Court held that the evidence revealed that out of the three deceased, two were fired from a very close range and the third was shot in the back, showing that he was fleeing. The accused's plea of self-defence was rejected and he was convicted and sentenced to life imprisonment.

In *Rajesh Kumar v Dharamvir* ,[28] the accused party and the deceased party had a dispute over a shop which had a common inner boundary wall. The accused party started demolishing the wall. Hearing the sound, the party of the deceased came out on to the lane and shouted at them to stop. In the rift between the two, one was killed. The accused took the plea of private defence, stating that the deceased had tried to break open their outer door and in defence of their property they had to kill the deceased. The incidents took place outside on the lane and not inside the house. The Supreme Court held that even assuming that the version put up by the defence was correct, only as long as the deceased party continued in the commission of offence of breaking, the accused had the right of private defence, but it ended the moment the commission of the mischief was done. They attacked the deceased in the lane after the damage was over. The Supreme Court held that the right of private defence can be exercised only to repel unlawful aggression, and not to retaliate.

The right under s 96 was one of defence and not of retribution or reprisal. The plea of private defence was rejected and the accused were convicted and sentenced to imprisonment.

In *State of Madhya Pradesh v Ramesh* ,[29] wherein the defendant, on the instruction of his father, fetched a gun and shot at the two boys, against whom his father, along with his two brothers and mother, started pelting stone. The shot killed one of the boys and injured another. The Supreme Court, reiterating the thitherto established principles governing the right of private defence, asserted that the right of private defence is essentially a defensive right and it does not include in it the right to launch an offensive attack. The right of private defence arises only when there is unexpected apprehension and one is taken unawares.[30]

RIGHT OF PRIVATE DEFENCE NOT AVAILABLE TO AGGRESSORS

As seen so far, the right of private defence is to repel any attack on the body or property of a person. The right presupposes attack or aggression by the person against whom the right is claimed. Where the person who is attacked by the accused is not an aggressor, no right of private defence can be claimed by the accused.[31]It is available against an offence and therefore, where an act is done in exercise of the right of private defence, such act cannot give rise to any right of private defence in favour of the aggressor in return. No aggressor can claim right of private defence.[32] This would be so even if the person exercising the right of private defence has the better of the aggressor, provided, he does not exceed his right because the moment he exceeds it, he commits an offence. The courts have therefore to be careful in seeing that no one on the mere pretext of the exercise of the right of private defence takes sides in a quarrel between two or more persons and inflicts injury on one or the other.[33]

In *Mannu v State of Uttar Pradesh* ,[34] when the deceased were going to the market, they were waylaid and attacked by the accused with dangerous weapon. Although, there were injuries caused on the side of the accused party as well and there was also loss of a life, the Supreme Court rejected the plea of self-defence, holding that the accused being the aggressors were not entitled to the right of self-defence.

In *State of Uttar Pradesh v Ram Swarup* ,[35] the accused's father held the contract of *tehbazari* in a vegetable market for 10 years. In one particular tender, he was outbid by the deceased. On the day of the incident, the accused's father went to the market to purchase a basket of melons. The deceased declined to sell it saying that it was already marked for another customer. Hot words followed during which the deceased, asserting his authority, said he was the *thakedar* of the market and his word was final. The accused's father was offended by this show of authority and left in a huff. The accused's father returned with his three sons, one of them being the accused, an hour later. The accused's father had a knife, the accused had a gun and the other two brothers had *lathis*. They threw a challenge as to whose authority prevailed in the market. The deceased was taken by surprise and he was shot dead by the accused at point blank range. The defence pleaded that at the time the accused went with his father and brothers to the market, there was an unexpected quarrel between the deceased and the accused's father, which assumed the form of grappling. The deceased's servants beat the father of the accused with *lathis*, and it was the beating that impelled the accused to use the gun in defence of his father. The Supreme Court rejected the plea stating that the accused, his father and brothers went to the market with a preconceived design to pick up a quarrel. The accused themselves were the lawless authors of the situation. The court held that:

> ...[T]he right of private defence is a right of defence, not of retribution. It is available in face of imminent peril to those who act in good faith and in no case can the right be conceded to a person who stage-manages a situation wherein the right can be used as a shield to justify an act of aggression. While providing for the right of private defence, the Penal Code has surely not devised a mechanism whereby an attack may be provoked as a pretence for killing.

In *Jaipal v State of Haryana* ,[36] the Supreme Court pointed out that it was the accused party alone who carried dangerous weapons, which clearly showed their intention to attack. The complainant party did not carry any weapons, but instead suffered injuries. The accused alone was held to be the aggressor.

FREE FIGHT

A free fight is when two individuals or parties fight with one another using unlawful force against each other. Both the sides mean to fight from the start. They come armed with determination to measure their strength

and to settle a dispute by force. There is a pitched battle. A pre-plan fight between two parties may lead to an inference that the object of neither party is to protect itself, but it is not necessary that a pre-planned fight is always necessary to turn a 'fight' into a 'free fight.[37] In such a case of free fight, both the parties are aggressors and none of them is entitled to claim the right of private defence.[38] An appropriate test for determining as to whether a fight is a free fight or not is to see whether the parties voluntarily entered into fight with mutual intent to harm each other. The question of who attacks and who defends in such a fight is wholly immaterial.[39]In a free fight, no right of private defence is available to either party and each individual is responsible for his own act s.[40] Since there is either common intention or common object in a free fight, an accused cannot be punished for having recourse to s 149 of the IPC. Each individual is responsible for his own acts.[41] However, if, judging by the number of injuries on the parties to a free fight, it is difficult to decide who were the aggressors and who inflicted what blow on whom, all the accused deserve acquittal.[42]

RIGHT OF PRIVATE DEFENCE NOT AVAILABLE AGAINST LAWFUL ACTS

As we have seen, the right of private defence arises only in situations where there is an unlawful aggression against the accused. In order to repel such unlawful aggression, the right of private defence can be exercised. It is only when *A* commits or threatens to commit an offence against *B* or his property, that *B* gets a right of private defence. On the other hand, if *A*, for instance, were to enter into *B*'s property for the purpose of executing an order of the court and *B* prevents *A* from entering the property, resulting in harm or injury to *A*, the plea of private defence is not available to *B*. In other words, the right of private defence cannot be exercised when a person is carrying out a lawful act. In fact, preventing a person from doing a lawful act would itself amount to an offence.

In *Kanwar Singh v Delhi Administration* ,[43]a raiding party possessing authority under a section of the Delhi Municipal Corporation Act, seized the stray cattle belonging to the accused. The accused resisted the seizure of the cattle and inflicted injuries on the raiding party. Since, the raiding party was carrying out a lawful act, it was justified in law to seize the cattle, no right of private defence was available to the accused. Accordingly, he was convicted.

Similarly, in *Ram Ratan v State of Bihar* ,[44]when a person seized cattle on the ground that they were trespassing on his land and causing damage to the crop and took them to the pound, it was held by the Supreme Court that he was not committing theft and hence when he was attacked by the owners of the cattle who obstructed him, the person had the right of self-defence against the obstructers. The obstructing party could not have had any right of private defence and cannot rescue the cattle by force in as much as the act of taking the cattle to the pound is not an offence.

UNLAWFUL ASSEMBLY AND PRIVATE DEFENCE

When five or more persons come together to form an assembly, in order to assert their right of private defence either in respect of their person, body or property, such an assembly cannot be termed to be an unlawful assembly. But when these persons use unlawful force (i.e. when they do not act in self-defence), they constitute an unlawful assembly.[45] In *State of Bihar v Nathu Pandey* ,[46] the Supreme Court held that an assembly can not be designated as an unlawful assembly, if its object is to defend property by the use of force within the limit prescribed by law.

Where both parties concerned assemble at a place with arms apprehending opposition and confrontation and have come prepared to meet it, then both parties are unlawful assemblies and the right of self-defence is not available to either of them.[47]

RIGHT OF PRIVATE DEFENCE AGAINST ACTS OF LUNATICS, INTOXICATED PERSONS

Section 98. Right of private defence against the act of a person of unsound mind, etc.---

When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act,

or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations

(a) *Z*, under the influence of madness, attempts to kill *A*; *Z* is guilty of no offence. But *A* has the same right of private defence which he would have if *Z* were sane.

(b) *A* enters by night a house which he is legally entitled to enter. *Z*, in good faith, taking *A* for a house-breaker, attacks *A*. Here *Z*, by attacking *A* under this misconception, commits no offence. But *A* has the same right of private defence against *Z*, which he would have if *Z* were not acting under that misconception.

It has been seen earlier that the act s of lunatics, intoxicated persons or acts done under mistake are not offences. The right of private defence is available only against commission of offences. So, s 98, IPC, specifically provides that the right of private defence extends to act s which would be offences, but for the fact that they are acts of youth, persons of unsound mind, act s of intoxicated persons and acts done under misconception. It ensures that a person does not lose his right of private defence merely because the opposite party is legally incompetent to commit an offence[48] and is protected because of legal abnormality. If a drunken man breaks law and attacks either the person or property of other people, any member of the public is entitled to exercise the right of private defence against such attack, even the drunken man himself is entitled to the protection of law.[49]Section 98 is based on the fact that the right of private defence arises from the human instinct of self-preservation and not from any supposed criminality of the person who poses danger to body and property. The illustrations to the section are self-explanatory.

PART C

PLEA OF SELF-DEFENCE

It is not necessary for the accused to raise the plea that he act ed in exercise of his right of private defence.[50] Where a plea of private defence is raised, it is the duty of the court to examine the same in the light of the evidence and material before it. Only when the plea is not established, the accused can be convicted of the offence.[51]

The fact that the plea of self-defence was not raised by the accused and that he had on the contrary pleaded alibi, did not preclude the court from giving the benefit of the right of private defence, if, it can be established from other material on record. The analogy of estoppel or of the technical rules of civil pleadings is, in such cases inappropriate and the courts are expected to administer the law of private defence in a practical way with reasonable liberality, so as to effectuate its underlying object, bearing in mind that the essential basic character of this right is preventive and not retributive.[52]

In *Munshi Ram v Delhi Administration* ,[53] the Supreme Court has held that although the accused had not taken the plea of private defence in their statements, necessary basis for that plea has been made in the cross-examination of the prosecution witnesses, as well as by adducing defence evidence. It has been observed that even if an accused does not plead self-defence, it is open to the court to consider such plea if the same arises from the material on record.

In *Moti Singh v State of Maharashtra* ,[54] the Supreme Court ruled that a person cannot be denied of the benefit of the right of private defence merely because he failed to plead it or took a different line of defence during the trial, if the evidence adduced by the prosecution indicates that he was put under a situation where he could reasonably have apprehended danger to his body. The crucial factor is not what the accused pleaded, but whether he had the cause to reasonably apprehend danger to body.

BURDEN OF PROOF

Section 105of the Indian Evidence Act 1872 (the Evidence Act) requires that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the 'General Exceptions' or special exception or proviso contained in or proviso contained in any part of the IPC is on

him and the court shall presume the absence of such circumstances. This presumption is rebuttable. It, thus, puts the burden of proving the existence of circumstances which would bring the act of the accused alleged to be an offence within the exercise of right of private defence is on him and the court shall presume the absence of such circumstances. The burden of establishing the plea of self-defence, thus, is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.[55] A court is bound to examine with care and in its proper setting the entire incident and evidence for deciding the availability or otherwise of the right of private defence.[56] The burden on the accused, however, is not so heavy as it is on the prosecution. He need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show, as in a civil case, that the preponderance of probabilities is in favour of his plea. The oft quoted observation of the Supreme Court in *Salim Zia v State of Uttar Pradesh* ,[57] runs:

> It is true that the burden on an accused person to establish the plea of self defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence.[58]

He is not required to call evidence to substantiate his plea. He can establish it by reference to circumstances transpiring from the prosecution evidence itself.[59] He is entitled to be acquitted if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception), a reasonable doubt is created in the mind of the court about the guilt of the accused.[60]However, if there is conflicting evidence of witnesses, the evidence of some witnesses being compatible with the inference that the accused may have act ed in the exercise of the right of private defence and that of some pointing and supporting version of the prosecution, the evidence favouring the accused has to be accepted.[61]

While dealing with ss 96 and 99 of the IPC and s 105 of the Evidence Act, the Supreme Court, through its judicial pronouncements,[62] has evolved a set of principles. A few prominent among them are:

(1) Under s 105 of the Evidence Act, the burden of proof is on the accused, who sets up the plea of self-defence. In the absence of the said proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution.

(2) The burden of establishing the plea of self defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

(3) It is not necessary for the accused to plead in so many words that he acted in self-defence. A different plea adopted by the accused does not foreclose the judicial consideration on the exercise of the right of private defence. The crucial factor is not whether the accused pleaded right of private defence but whether the accused had the cause to reasonably apprehend such a danger. If the circumstances show that the right of private defence was legitimately exercised, then it is open to the court to consider such a plea.

(4) A plea of right of private defence cannot be based on surmises and speculation.

(5) Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused.

(6) Whether in a particular set of circumstances, a person legitimately act ed in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. In determining this question of fact, the court must consider all the surrounding circumstances.

(7) In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed on its proper setting. Before accepting the plea of right of private defence, it is necessary to consider whether there was reasonable apprehen-

sion in the mind of the accused that an offence is likely to commit and there was no sufficient time to have recourse to the protection of public authority.

(8) While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor.

(9) To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death.

(10) The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. The court has only to examine probabilities in appreciating the plea.

EXPLANATION FOR INJURIES ON THE ACCUSED

The question as to the effect of the failure of prosecution to explain the injuries, if any, on the accused has drawn considerable attention of the courts. This is because sometimes the presence or absence of injuries on the bodies of the accused may help determine whether the plea of self-defence was valid and as to who were the actual aggressors and further whether the right of self-defence has been exceeded or not. But, when the prosecution fails to explain and remains silent about the injuries caused to the accused, considerable doubt may be thrown on the version of the prosecution.

One of the earliest cases in which this question came up for discussion is in *Mohar Rai v State of Bihar* .[63] In this case, the Supreme Court held that the non-explanation of the injuries sustained by the accused at the time of the occurrence or in the case of the altercation are very important circumstances from which the court can draw the following inferences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable; and

(3) That in case there is a defence version which explains the injuries on the person of the accused, it is rendered probable so as to throw doubt on the prosecution case.

The ratio in the above-mentioned case was followed by the Supreme Court in *Lakshmi Singh v State of Bihar* ,[64] wherein it held that the failure of the prosecution to explain the injuries on the accused would infer the following two results: (1) that the evidence of the prosecution witness is untrue, and (2) that the injuries probabilise the plea taken by the accused.[65]

However, in *Jagdish v State of Rajasthan* ,[66] a two-judge Bench of the Supreme Court laid down the proposition that where serious injuries are found on the person of the accused, as a principle of appreciation of evidence, it becomes obligatory on the prosecution so as to satisfy the court as to the circumstances under which the occurrence originated. However, before the obligation is placed on the prosecution two conditions must be satisfied, namely: (1) that the injury on the person of the accused must be very serious; and (2) that it must be shown that the injury must have been caused at the time of the occurrence in question. In *Hare Krishna Singh v State of Bihar* ,[67] another two-judge Bench of the apex court held that it is not the law or invariable rule that whenever the accused sustains an injury in the same occurrence the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved.[68]

In view of these conflicting and divergent decisions by the Supreme Court on the question as to whether the prosecution is obliged to explain the injuries sustained by the accused in the same occurrence and whether failure of the prosecution to do so explain would mean that the prosecution has suppressed the truth and also the origin and genesis of the occurrence a two-judge bench of the apex court[69] referred the matter to a larger Bench for a finality on the point.

A three-judge Bench of the Supreme Court in *Ram Sunder Yadav v State of Bihar* ,[70] responding to the above mentioned referred to matter, noted, with approval, the rulings of a three-judge Bench of the Supreme Court in *Bhaba Nanda Sarma v State of Assam* [71] and in *Vijayee Singh v State of Uttar Pradesh* .[72] In the former, the Bench ruled that the prosecution is not obliged to explain the injuries on the accused in all cases and in all circumstances. While another three-judge Bench of the court, before whom the same question again came up for consideration in the latter case, held:

> In *Mohar Rai* case it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise, in *Lakshmi Singh* case also it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume great importance where the evidence consists of interested or inimical witnesses or where the defence gives probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case.[73]

The three-judge Bench in *Ram Sundar Yadav*, thus, ruled that its response to the question referred to it was not required as it was already answered by a larger Bench of the Supreme Court in *Bhaba Nanda Sarma* and *Vijayee Singh*. Subsequently, the Supreme Court, following the *Ram Sundar Yadav* dictum, categorically stated that the court before allowing non-explanation of the injuries on the person of the accused to affect the prosecution case, needs to satisfy the existence of two conditions: (i) that the injury on the person accused of was of serious nature; and (ii) that such injuries must have been caused at the time of occurrence of the instance in question.[74]

A reading of latest judicial pronouncements of the apex court[75] reveals that the Supreme Court has laid down a few guidelines regarding injuries on the accused vis--vis prosecution's obligation to explain them and the legal effects of non-explanations thereof. They are:

(1) Injuries of serious nature found on the person of accused may assume importance in respect of the genesis and manner of occurrence alleged by the prosecution. They may hint that the accused had the right of private defence. Injures of superficial nature by themselves are inconsequential and may not affect the prosecution case.

(2) Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance.

(3) Non-explanation of injuries by the prosecution does not affect the prosecution's story where injuries sustained by the accused are simple or superficial in nature or where the prosecution has proved its case beyond reasonable doubt against the accused or the court otherwise is convinced that the accused is guilty.

(4) A mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. The fact as regard failure to explain injuries on accused vary from case to case. Whereas non-explanation of injuries suffered by the accused probabilises the defence version that the prosecution side attacked first, in a given situation it may also be possible to hold that the explanation given by the accused about his injury is not satisfactory and the statements of the prosecution witnesses fully explain the same and, thus, it is possible to hold that the accused had committed a crime for which he was charged. Where injuries were sustained by both sides and when both the parties suppressed the genesis in the incident, or where coming out with the partial truth, the prosecution may fail.

(5) It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved.

(6) Merely on the ground that the prosecution witnesses have not explained the injuries on the accused, the evidence of prosecution witnesses ought not to be rejected outrightly.
Non-explanation of an injury per se cannot be a ground to totally discard the prosecution version. Rejection of the prosecution case in its entirety for merely non-explanation of the injuries sustained by the accused persons is erroneous.

(7) No law in general terms can be laid down to the effect that each and every case where prosecution fails to explain injuries on the person of the accused, the same should be rejected without any further probe.

(8) A court has to make an effort for searching out the truth from the material available on record. It has to find out how much of the prosecution case was proved beyond reasonable doubt.

(9) Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question.

(10) Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Nevertheless, the non-explained injuries need to be weighed along with other materials to see whether the prosecution version is reliable, cogent and trustworthy.

(11) When the prosecution evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case.

PART D

LIMITS OF THE RIGHT OF PRIVATE DEFENCE

Section 96 , IPC, declares in general terms that 'nothing is an offence which is done in the exercise of private defence'. The subsequent ss 97-98, 100-106, IPC, explain the contours of this right and define the broad boundaries within which this right can be exercised. All the rights enumerated in these sections are subject to restrictions stated in s 99.

Section 99. Acts against which there is no right of private defence.--

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

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

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

Extent to which the right may be exercised.--The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

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

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

Section 99 stipulates the acts against which the right of private defence does not arise. It sets the limits within which the right of private defence is to be exercised.

The first two paragraphs (read with the explanations 1 and 2) lay down that there is no right of private defence against an act done or attempted to be done by a public servant[76]or an act done or attempted to be

done by direction of a public servant, unless it causes reasonable apprehension of death or of grievous hurt, so long as the public servant act s legally.

The right of private defence, by virtue of paragraph three of s 99, is not available when there is time available for having recourse to state authorities or for seeking help from the state.

The last paragraph stipulates that harm caused in exercise of the right of private defence in no case should exceed the quantum of harm that may be necessary for the purpose of defence.

The right of private defence of person or of property, thus, is to be exercised subject to the following conditions: (i) if a public servant does not cause reasonable apprehension of death or of grievous hurt to the person or damage to the property; (ii) if there is no sufficient time for recourse to public authorities, and (iii) no harm more than necessary to repel the attack is caused.[77]

Acts of Public Servants

The section provides that no right of private defence is available against actions of a public servant or act ions done under the direction of a public servant,[78] if it is done in good faith under colour of his office though that action or direction may not be strictly justifiable by law. However, this protection given to lawful act s of public servants or person acting under their directions will not apply in cases where the act ions of the public servant cause a reasonable apprehension of death or of grievous hurt to the parties concerned.[79] In other words, even if a government servant is doing an act in good faith under colour of his office, if his act is such that it causes a reasonable apprehension that it will result in death or grievous hurt of parties, then the parties are entitled to exercise their right of private defence against public servants.[80]

However, explns 1 and 2 to s 99 provide that the section will apply only if the person, doing the act, has knowledge or has reason to believe that the doer of the act is a public servant or is acting under the direction of a public servant.[81] If the person is act ing under directions of a public servant then such person should state the authority under which he acts or if the authority is in writing, he should produce the same if demanded in order to get the protection under this section.

The restriction on the right of private defence rests on the probability that the act s of a public servant are lawful in which case resistance necessarily amounts to unlawful, partly on the theory that resistance is unnecessary since the law will set right what has been wrongly done in its name, and on the ground that it is good for the society that a public servant should be protected in the execution of his duty even where he is in error.[82]

Time to have Recourse to Authorities

Section 99 further stipulates that there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities.[83]

The restriction is based on the fact that the right of private defence is given to a person to repel an imminent danger to his body and property when the state help is not available to him. Obviously, the necessity of self help disappears when he has ample opportunity to have recourse to state authorities.[84] In such a situation, a delinquent has to approach public authorities rather than taking law into his hands.[85]

However, the time element in s 99 does not depend upon the gravity of the offence threatened but on the accused's reasonable apprehension that the act would be completed by the time the public authorities act .[86] The mere fact that the police station is not very far away from the place of incidence cannot deprive a person of his right of private defence.[87]

The right of self-defence of either body or property can only be at the time when there is imminent danger or harm. If the parties had advance intimation of the impending harm, then their remedy is to approach the appropriate authorities. Similarly, if the alleged harm is already done, then again their remedy is to take recourse to law and not to take law unto their hands.[88]

Right does not Extend to Causing more Harm than Necessary

Section 99 places a further limitation to exercise the right of private defence. It stipulates that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.[89]

Where the accused continued to assault the deceased after he had fallen down and rendered harmless, it was held that there was no right of private defence.[90]

In *Mohinder Pal Jolly v State of Punjab* ,[91] there was a dispute between the workers and the management over demand for wages. The workers threw brickbats at the factory. The owner of the factory came out and fired with a revolver killing one worker. The Supreme Court held that the owner exceeded his right of self-defence in killing the worker. Similarly, when an accused was attacked with a stick by the deceased and the accused stabbed him with the knife in the heart, it was held that the accused exceeded his right of self-defence.[92]

In *Baljit Singh v State of Uttar Pradesh* ,[93] the accused party was in possession of some disputed land. The complainant's party trespassed into the land armed with *lathis*. The accused party tried to protect the land from trespass, as a result of which the accused assaulted the deceased and caused as many as 72 injuries which resulted in the death of the deceased. It was held that the accused exceeded his right of self-defence.

In *Onkarnath Singh v State of Uttar Pradesh* ,[94] there was an incident of grappling between the accused party and the complainant party. After some time, the complainant party started fleeing. However, the accused party chased them and made a murderous assault. The Supreme Court held that the two incidents, i.e., the incident of the actual grappling between the parties and the murderous assault thereafter, were two separate incidents both in point of time and distance. There was no continuity of act ion to justify the murderous assault. The court observed that the assault was exceedingly vindictive and maliciously excessive. The force used was out of proportion to the supposed danger, which no longer existed from the complainant party.

The question whether the right of private defence exercised by an accused is in excess of his right and whether the accused has caused more harm than necessary, is entirely a question of fact to be decided upon the circumstances of each case.[1]

It is true that the violence a person is entitled to use in defending himself or his property should not be unduly disproportionate to the injury which is to be averted, or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious.[2] A vindictive or malicious act by a person implies that the act was not done for protecting himself or his property but with the motive of taking revenge.[3] The right does not allow an individual to chase and kill his assailant who is running away from the scene.[4] However, there can be no doubt that in judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself or his property, and so he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. But in dealing with the question as to whether more force is used than was necessary or justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a court room, for instance, long after the incident has taken place. That is why in some judicial decisions it has been observed that the means, which a threatened person adopts, or the force which he uses should not be weighed in golden scales.[5] When a person is faced with imminent peril of life and limb of himself or of other, he is not expected to weigh in golden scales the precise force needed to repel the danger. The law therefore allows a defender, in the heat of moment, to carry his right of private defence a little further than what would be necessary when calculated with precision and exactitude by a calm and unruffled mind.[6] The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required to the thinking of a man in ordinary times or under normal circumstances. In moments of excitement and disturbed equilibrium, it is often difficult to expect a person to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force.[7] In such situations, a court needs to pragmatically view the facts and circumstances of a case and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping by a person while exercising his right of private de-

fence. Keeping in view normal human reaction and conduct, the court has to give due weightage to the pragmatic facts that occurred on the spur of the moment on the spot and to avoid a hyper technical approach in considering them.[8]

To begin with, the person exercising his right of private defence must consider whether the threat to his person or property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right, he must use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared. So long as the threat lasts, the right of private defence can be legitimately exercised. It would not be fair to require, as Mayne has observed, that he should modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to secure his victory over his assailant by using the necessary force. This necessarily postulates that as soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is continuing, the right is there; if the danger or the apprehension about it has ceased to exist, there is no longer the right of private defence.[9]

PART E

RIGHT OF PRIVATE DEFENCE OF BODY

Section 96 declares in general terms that nothing is an offence which is done in the exercise of private defence. Section 97 specifically recognises the right to private defence of body and property. It broadly specifies the offences against which the right of private defence can be exercised. These rights are, however, subject to the limitations imposed under s 99 dealt with above.

RIGHT OF PRIVATE DEFENCE OF BODY EXTENDS TO PROTECTION OF OTHERS ALSO

Section 97*first* provides that the right of private defence extends not only to the protection and defence of one's own body, but also the body of any other person 'against any offence affecting the human body'.[10]To put it conversely, there is no right of private defence if the apprehended act does not fall under the chapter dealing with 'offence affecting the human body'.[11]

WHEN THE RIGHT OF PRIVATE DEFENCE OF BODY EXTENDS TO CAUSING DEATH

Section 100. When the right of private defence of the body extends to causing death.--

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

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

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

Thirdly.--An assault with the intention of committing rape;

Fourthly.--An assault with the intention of gratifying unnatural lust;

Fifthly.--An assault with the intention of kidnapping or abducting;

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

Seventhly.--An act of throwing or administrating acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.

The right to private defence of the body extends in certain situations to the extent of even causing death of the aggressor. This is recognised by s 100, IPC. This right, it must always be borne in mind, is subject to the restrictions imposed under s 99, such as the fact that first, this right will not be available against a public servant act ing in good faith under colour of office, unless the act causes reasonable apprehension of death or grievous hurt, secondly, the right of private defence is not available if there is time to take recourse to authorities, and thirdly, this right does not extend to causing more harm than necessary. So, subject to these conditions, the right of private defence extends to the causing of death of the aggressor, subject to further conditions enumerated in s 100.

As per s 100, the right of private defence extends to causing death of the assailant when any one of the six situations stipulated therein arise in the committing of the offence by the doer. In other words, it provides that the right of private defence of body extend to the causing of voluntary death of the act ual or potential assailant if he through either of the specified assaults causes reasonable and immediate apprehension of death or grievous hurt in the mind of the accused.[12] The categories of assault specified in the section are: (1) assault to kill or cause grievous hurt; (2) assault to commit rape to gratify unnatural lust; (3) assault to kidnap or abduct, and (4) assault to commit wrongful confinement. If death is caused in the exercise of the right of private defence of body, the defender, for absolving himself from criminal liability, must prove that: (a) the offence defended against was one of the six categories mentioned in s 100, and (b) he acted within the limitations stipulated under s 99.

Section 100 authorises and justifies the taking away of life of a person in the exercise of the right of self-defence, if four cardinal conditions exist. They are: (1) the accused must be free from fault in bringing about the encounter; (2) there must be present an impending peril to life or great bodily harm, either real or so apparent as to create honest belief of an existing necessity; (3) there must be no safe or reasonable mode of escape by retreat; and (4) there must have been a necessity for taking life.[13]

The following are some of the situations in which the Supreme Court decided whether the right of private defence extended to the extent of causing death or not.

(1) Numerous, extensive and serious injuries received by the accused would support the defence plea that there was reasonable apprehension that the assault would result in death.[14] Where the injuries on the accused were serious and unexplained by the prosecution, then the benefit of doubt would go to the accused.[15]
(2) If the injuries received by the accused were minor injuries, then the plea of private defence to the extent of causing death may not be available to the accused.[16]
(3) Two constables who were part of an anti-dacoity squad had an argument and raised their rifles. The other member of the squad rushed to intervene. The deceased constable lowered his rifle, but the accused fired three shots. The plea of self-defence was rejected to the accused.[17]
(4) Where the *lathi* blows were aimed at a vulnerable part of the body like the head, it was held by the Supreme Court that the victim was justified in using his spear to defend himself and as a result cause the death of the deceased.[18]
(5) Where both the deceased were unarmed and serious injuries were caused by knives on their vital parts by the accused, it was held that the accused had no right of self-defence.[19]

Reasonable Apprehension of Death or Grievous Hurt Sufficient

The 'first' clause of s 100 stipulates that the right of private defence of body extends to causing death, when such an assault reasonably causes the apprehension that death will otherwise be the consequence of such assault. The 'second' clause stipulates that when an assault causes the reasonable apprehension that grievous hurt will otherwise be the consequence of such assault, then the right of private defence extends to causing of death.

In order to avail of the exception to criminal liability under this clause, what is required to be established is that there were reasonable circumstances giving rise to reasonable apprehension of either death or grievous hurt.[20] Such an apprehension of death or grievous hurt must be real or reasonable and not an illusory or im-

aginary. It must be present and imminent and not remote or distant one.[21] The reasonable apprehension of the accused that death or grievous hurt will be caused to him, however, is required to be judged from the subjective point of view of the accused and it cannot be subjected to microscopic and pedantic scrutiny.[22] A plea of right of private defence cannot be based on surmises and speculation.[23] The accused must be under a bona fide fear that death or grievous hurt would otherwise be the consequence of the assault if he does not defend.[24] Killing in the exercise of right of private defence would be justified only if there was an honest and well-founded belief in the imminence of the danger.[25]It is not essential that act ual injury should be caused by the aggressor or the victim before the right of self-defence can be availed of.[26] Person apprehending danger is not required to wait for sustaining injury. Mere reasonable apprehension is sufficient for exercising his right of private defence.[27]

This right of private defence rests on the general principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. To say that a person could only claim the right to use force after he had sustained a serious injury by an aggressive wrongful act is a complete misunderstanding of the law embodied in s 100. The right of private defence is available for protection against apprehended unlawful aggression and not for punishing the aggressor for the offence committed by him. If after sustaining a serious injury, there is no apprehension of further danger to the body, then obviously the right to put defence would not be available. Therefore, as soon as reasonable apprehension of danger arises, the right of private defence can be exercised.[28] Whether there was reasonable apprehension of death or grievous hurt, is always a question of fact, to be determined on the basis of the facts and circumstances of each case.[29]

In *Amjad Khan v State* ,[30]a communal riot broke out between the Sindhi refugees and the local Muslims. Several Muslim shops had been broken and looted and many killed. The mob had broken into another part of the house where the accused lived and looted it; the women and children of his family fled to the accused for protection. The mob was act ually beating at his door with *lathis*. Under these circumstances, the Supreme Court held that it was not necessary for the accused to wait and see if the mob actually would or not destroy and loot his shop and kill his family. The threat was implicit in the conduct of the mob and the accused had a right of private defence and was justified in firing two shots which resulted in the death of one person.[31]

When there was a verbal altercation between the deceased and the accused and the deceased took off the shoe of his left leg, the accused felt insulted, dragged him to the middle of the road and stabbed him. The Supreme Court held that holding of a shoe could not cause reasonable apprehension of danger in the mind of the accused and the plea of private defence was not available to the accused.[32]

In *Parshottam Lal Ji Waghela v State of Gujarat* ,[33] the accused belonged to the *vankar* caste. The deceased belonged to the *chamars*, a scheduled caste. The area in which the *vankars* lived was called *vankarwas.* The *chamars* were not permitted to pass through the street in the *vankarwas* area. When a woman called Shantaben passed through the street in the vankarwas area, it was objected to by the *vankars.* The accused kicked her in the abdomen. Shantaben went to the temple where the *chamars* had gathered for *bhajans* and narrated the incident. On hearing this, about seven to eight chamars who were still at the temple proceeded towards the house of the accused, agitated about the assault on Shantaben. The accused, in anticipation that the *chamars* would come, came to the eastern end of the street of *vankarwas* along with other *vankars.* He was also armed with a gun. There was some pelting of stones between the parties. The accused shot dead two chamars. He pleaded that he did so in self-defence because the *chamars* were hurling stones. The Supreme Court rejected the plea stating that the *chamars* having come directly from the temple were unarmed. None of the accused *(vankars)* party was injured in the stone pelting. So, there could not have been any reasonable apprehension of death or grievous hurt to the accused from the *chamars.*

Assault with Intention of Committing Rape or Gratifying Unnatural Lust

Clauses 'thirdly' and 'fourthly' of s 100 provide that the right of private defence of body extends to causing death in cases of assault with intention of committing rape or gratifying unnatural lust.[34]

In *Yeshwant Rao v State of Madhya Pradesh* ,[35] the minor daughter of the accused had gone to the toilet on the rear side of the house. The deceased was indulged in sexual intercourse with her. The accused seeing his minor daughter being sexually molested by the deceased, hit the deceased with a spade. The deceased on trying to flee also fell and hit himself. He died due to injury of the liver. The prosecution case was that the

minor girl had consented to the sexual intercourse. The Supreme Court held that since the girl was a minor, the question of 'consent' does not arise and the act of the deceased would amount to committing rape under s 376, IPC, and hence, the father in defence of the body of his daughter, was justified in exercising his right of private defence. The accused was acquitted.

In *Badan Nath v State of Rajasthan* ,[36] the Rajasthan High Court gave benefit of *thirdly* of s 100 to a father who killed a person, who, taking opportunity of the absence of mother of prosecutrix and after alluring accused to consume liquor, was attempting to commit rape on his pregnant daughter. The High Court, in another case,[37] also acquitted a person who rescued a woman from sexual assault and gave a fatal blow to the deceased who was outraging modesty of the woman. Similarly, a woman, who stabbed the person indulged in forced and non-consensual sexual intercourse with her, was also given the benefit of s 100.[38]

Assault with Intention of Kidnapping or Abducting

Clause 'fifthly' of s 100 provides that the right of private defence of the body extends to causing death in cases of assault with intention of kidnapping or abducting.

In *Vishwanath v State of Uttar Pradesh* ,[39] the accused's sister was staying with her father and brother (the accused) because she did not want to live with her husband. The deceased husband came to the house of the accused and tried to drag his wife away. The girl caught hold of the door as she was being taken out and a tug-of-war followed between her and her husband. At this stage, the accused (the brother of the wife) took out a knife and stabbed the deceased (the husband) once. The knife penetrated the heart and he fell down senseless and thereafter died. The accused put up the plea that his case would come under 'fifth' clause of s 100.

The prosecution contended that ss 364-369 of the IPC do not make 'abduction' a pure and simple crime. As per these clauses, abduction coupled with certain intents such as murder, wrongful confinement is alone an offence. So, the right of private defence under clause 'fifthly' of s 100 will be available only when the abduction is with some other intent. If it is just abduction, the benefit of s 100 is not available. The Supreme Court rejected this argument and held that abduction, in cl (5) of s 100, means only *abduction simpliciter* as defined under s 362 of the IPC, i.e. where a person is compelled by force to go from any place. It ruled that the moment there is an assault with intention to abduct, the right to private defence is available. It would not be right to expect from a person who is being abducted by force to pause and consider whether the abductor has further intention as provided in s 364-369, IPC. Moreover, the fifth clause itself does not qualify the term 'abduction' and hence, the clause must be given full effect according to its plain meaning. The clause merely requires that there should be an assault, which is an offence against human body, and that assault should be with the intention of abducting. The apex court acquitted the accused.

Assault with Intention of Wrongful Confinement

The 'sixthly' of s 100 provides that the right of private defence of body extends to causing death when there is an assault with intention of wrongfully confining[40] a person. This is further qualified that such wrongful confinement must be under circumstances, which cause reasonable apprehension that the person will not be able to have recourse to public authorities for his release.

A person wrongfully arrested and being taken to the police station for being handed over to the police cannot be said to have a reasonable apprehension that he will be unable to have recourse to the authorities for his release.[41]However, if an assault with intent to cause wrongful confinement is made by a private individual and if he is unable to have recourse to a public authority for his release, he can avail the right of private defence of body mentioned in 'sixthly' of s 100. In order to apply 'sixthly' of s 100, there must be proof of the following facts, namely: (i) there must be an assault; (ii) that assaults must be with the intention of wrongful confinement; (iii) such an assault must be made under the circumstance which may reasonably cause a person to apprehend that he will be unable to have recourses to the public authorities for his release; (iv) all the three must co-exist, and (v) even if all these four exist, the act must fall under the restriction mentioned in s 99.[42]

Act of Throwing or Administrating Acid

The 'seventhly' of s 100, inserted by the Criminal Law (Amendment) Act 2013, provides that the right of private defence of body extends to causing death when an act of throwing or administering acid causes rea-

sonable apprehension that grievous hurt will, if not defended, be the consequence of the act of throwing or administering acid.

WHEN THE RIGHT OF PRIVATE DEFENCE OF BODY DOES NOT EXTEND TO CAUSING DEATH

Section 101. When such right extends to causing any harm other than death.--

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

As per s 101, IPC, the right of private defence of body will extend to causing harm and not death in all other situation except as provided in s 100. In other words, the right of private defence of body will extend to causing death of the assailant, only in the situations stated in s 100. In all other situations, the right of private defence of body will only extend to causing any 'harm,' short of death. However, it is pertinent to note that in all these cases, the defender's right of private defence is subject to the limitations mentioned in s 99.

In *Yogendra Morarji v State of Gujarat* ,[43] there was a dispute over payment of dues claimed by the deceased from the accused in respect of digging of a well in the accused's land. The accused's jeep was stopped in the middle of the road by the deceased and others. The deceased party pelted stones on the accused. The accused fired three rounds, one of which hit the deceased. The question before the court was whether the accused had a right of private defence and if so, did it extend to causing of death or did it fall short of causing death?

The Supreme Court held that the moment the jeep of the accused was stopped by the deceased and others, in the background of the dispute over the dues claimed, there was all possibility that the accused had reasonable apprehension of physical harm at the hands of the deceased and others.

But, on the question whether the right extended to causing death, the Supreme Court held that the accused was traveling in a closed station wagon and so even if the deceased were pelting stones, he could not have reasonably apprehended death or grievous hurt as a result of the stone throwing. Furthermore, the accused had fired three rounds in quick succession. He should have fired one round and waited to see its effect on the group attempting to surround him before firing the next round. In view of the above, the court held that the right of private defence of the accused extended to only causing harm and not death. By killing the deceased, the accused had exceeded his right and hence was convicted under s 304, IPC.

For claiming right of private defence extending to voluntarily causing death, the accused must establish that there were circumstances giving rise to reasonable grounds for apprehension that either death or grievous hurt would be caused to him.[44] Such a reasonable apprehension is required to judge subjectively.[45] The apprehension is in the mind of the person exercising the right of self-defense and the apprehension is to be ascertained objectively with reference to events and deeds at that crucial time and in the total situation of surrounding circumstances.[46]

COMMENCEMENT AND CONTINUATION OF THE RIGHT OF PRIVATE DEFENCE OF BODY

Section 102. Commencement and continuance of the right of private defence of the body.--

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

Section 102 provides that the right of private defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though, the offence may not have been committed. It does not commence until there is a reasonable apprehension.[47] However, a mere threat to body is sufficient to commence the right. It lasts so long as the reasonable apprehension of the danger to

the body continues.[48] Therefore, a person cannot get benefit of s 102, if he continues his attack even when the apprehension of danger becomes past.[49]

The danger or the apprehension of danger must be present, real or apparent. The right of private defence is available when one is suddenly confronted with immediate necessity of averting an impending danger that is not his creation.[50]

Further, the right of private defence continues as long as such apprehension of danger to the body continues. Thus, the right of private defence is co-terminus with the commencement and existence of a reasonable apprehension of danger to commit the offence. So, when the accused after a grappling incident, murderously assaulted a fleeing party, it was held that the supposed danger came to an end when he attacked the deceased and when the danger was over, the accused's right to private defence got over as well. The accused had no right to chase and kill the deceased.[51]

RIGHT OF PRIVATE DEFENCE EXTENDS TO THE CAUSING OF UNAVOIDABLE HARM TO INNOCENT PERSONS

Section 106. Right of private defence against deadly assault when there is risk of harm to innocent person.--

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

Illustration

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. *A* commits no offence if by so firing he harms any of the children.

Section 106 , IPC, provides that when there is a deadly assault on a person which causes a reasonable apprehension of death and his right of private defence cannot be effectively exercised without causing harm to an innocent person, then in such situations, any harm caused to innocent persons is also protected by law. In other words, in the exercise of the right of private defence, if, some innocent person is killed or injured, law protects the man exercising the right of private defence by exempting him from criminal liability. The illustration to the section is self-explanatory.

In *Wassan Singh v State of Punjab* ,[52] there was a fight between two groups. The accused himself received nine injuries. He shot at the assailants with his gun, which however, hit an innocent woman bystander, killing her. The Supreme Court held that the accused had the right of private defence and hence he was acquitted.

However, s 106 needs to be read in the light of s 100 and certain restrictions with which it operates. The limitations imposed by s 99, though, unlike in s 100, not specifically mentioned therein, are applicable to it by virtue of s 97 of the IPC.

PART F

RIGHT OF PRIVATE DEFENCE OF PROPERTY

Section 97, cl (2) declares that everybody has a right to private defence of property subject to the restrictions contained in s 99, which stipulates as to what are the acts against which no right of private defence is available. The right to defend property is further restricted to against any attack which is an offence falling under the definition of theft, robbery, mischief or criminal trespass and it is not available to an aggressor.

The right to private defence of property extends to defending both movable and immovable property. As in the case of private defence of body, it can be for the defence of one's own property or that of any other person. The right is available against act s of theft, robbery, mischief or criminal trespass or attempts of committing the same.

Possession of Property

One of the important factors that need to be present in order to exercise the right of private defence of property, is that the person exercising such a right, should be in actual physical possession of the property.

The possession contemplated in law is 'settled possession' which means such clear and effective possession of a person, even if he is a trespasser, who gets the right under the criminal law to defend his property against attack even by the true owner.[53]

In *Lakshmi Tiwari v State of Bihar* ,[54] the complainant had the title and lawful possession of the disputed land which was transferred to him by a registered document. The accused had cultivated the land as the manager or agent of the accused. So, he could not claim possession of the said land in his own independent right as against the complainant. Consequently, the Supreme Court held that the accused had no right of private defence of property in respect of the disputed land.

Right of Private Defence of Trespasser

A trespasser who is in 'settled possession' of the land gets the right to defend his property against attack even by the true owner.

The Supreme Court, in *Puran Singh v State of Punjab* ,[55] laid down four criteria as to the nature of possession, which may entitle a trespasser to exercise the right of private defence of property and person. They are:

(1) The trespasser must be in act ual physical possession of the property over a sufficiently long period.
(2) The possession must be in the knowledge, either express or implied, of the owner or without any concealment and which contains an element of *animus possidendi*.
(3) The process of dispossession of the true owner by the trespasser must be complete and final.
(4) One of the usual tests to determine settled possession of the true owner by the trespasser in the case of cultivable land, would be whether any crop has been grown on the land. If crop has been grown, even the true owner has no right to destroy the crop grown by the trespasser.

Thus, the true owner has every right to dispossess or throw out a trespasser, while the trespasser is in the act or process of trespassing and has not accomplished his possession. However, this right is not available to the true owner, if, the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law. Once the trespasser has occupied possession, the true owner has no right of private defence of property. In such a situation, he is supposed to resort to help of the public authorities to dislodge the trespasser and not to take law into his hands.[56] The right of private defence is available to the occupier and not to the true owner. However, an occupier ceases to have the right of private defence against the real owner if he had been in lawful possession of the land.[57] Nevertheless, a person while exercising his right of private defence, by virtue of s 99, is not allowed to inflict more harm than necessary.[58]

In *Khuddu v State of Uttar Pradesh* ,[59] the accused were all harijans, who were allotted land by the gram panchayat and were given possession of the same. The deceased and others were members of a co-operative society, who owned a farm. There was no demarcation between the two lands and relationships were strained between them. From evidence, it appeared that the accused had taken forcible possession of the land some days ago, and when the deceased and others had gone to the land, the plea of the accused that they act ed in self-defence could not be ignored either, as it seemed plausible. The Supreme Court however held that they exceeded the right of private defence of property and convicted them under s 304(II), IPC.[60]

Right of Private Defence of Property against Criminal Trespass

Section 97 provides for the right of private defence of property against an act that falls under the definition of criminal trespass. Section 441 , IPC , defines criminal trespass as:

441. Criminal trespass.--Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass'.

Thus, while the mere entry upon another's property without permission is trespass, when such entry is with 'intent' to the act s mentioned in the section, then it amounts to criminal trespass. The right of private defence of property is available only as against 'criminal trespass' and not otherwise.[61]

In *Cherubin Gregory v State of Bihar* ,[62] the deceased was an inmate of a house near that of the accused. The wall of the toilet of the house of the deceased had collapsed a week prior to the day of occurrence, with the result that his toilet had become exposed to public view. Consequently, the deceased, among others, started using the toilet of the accused. The accused resented this and made it clear to them that they did not have his permission to use it and protested against their coming there. The oral warnings, however, proved ineffective. So, the accused fixed a naked and uninsulated live wire of high voltage in the passage to the latrine, so as to make entry into his latrine dangerous to intruders. There was no warning regarding the live wire. On the fateful day, the deceased managed to get inside the toilet, but as she came out, she touched the wire and died as a result of shock.

It was contended on behalf of the accused that he had a right of private defence of property and death was caused in the course of the exercise of that right, as the deceased was a trespasser. The Supreme Court rejected the contention stating that the mere fact that the person entering a land is a trespasser, does not entitle the owner or occupier to inflict injuries by direct violence on that person. The Supreme Court upheld the conviction.

In *Munshi Ram v Delhi Administration* ,[63] the accused was in possession of an evacuee land. The land was sold in public auction to the complainant and a certificate of sale was issued. The delivery of the land itself could be taken only as per certain procedures laid down in law, but, the complainant had attempted to take possession illegally. The Supreme Court held that the act of the complainant amounted to trespass and held that the accused had the right of private defence of property.

In *Hukam Singh v State of Uttar Pradesh* ,[64] the Supreme Court held that a person committing criminal trespass upon the land of another has to abide by the direction of the owner and to go back, If he, instead of retreating, resorts to violence, he has to face the consequences thereof and the owner has the right to use reasonable force against him. The right of private defence of property against criminal trespass continues till the accused leaves the property. It comes to an end when the act of trespass is complete.

Private Defence of Property against Theft, Robbery and Mischief

Section 97 provides the right of private defence of property against an act that amounts to an offence falling under the definition of theft, robbery and mischief.[65]

When a person seized cattle which trespassed into his field and took them to the pound, he committed no theft. So, it was held that the owner of the cattle had no right of private defence.[66]

WHEN THE RIGHT OF PRIVATE DEFENCE OF PROPERTY EXTENDS TO CAUSING DEATH

Section 103. When the right of private defence of property extends to causing death.--

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

First.--Robbery;

Secondly.--House-breaking by night;

Thirdly.--Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly.--Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

Section 104. When such right extends to causing any harm other than death.--

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

Section 103 , IPC, provides where the private defence of property extends to causing death, subject to the restrictions imposed under s 99,[67] in cases where the following offences are committed or attempted to be committed:

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

As per s 104, if theft, mischief or house-trespass does not create any reasonable apprehension of death or grievous hurt, then the right of private defence of property extends to voluntary causing to the wrong-doer of any harm other than death.

Section 103, thus, envisages that in the exercise of the right of private defence a person can cause death only in the specific cases mentioned therein while s 104 applies to cases where harm other than death of the assailant can be caused provided conditions stipulated thereunder are satisfied.[68] And if a group of armed persons comes to evict him from his land, he, having reasonable apprehension of death or of grievous hurt, can even cause death of the aggressors to repel the imminent danger to his body and property.[69]

In *Nathan v State of Madras* ,[70] the accused party was in possession of the land and the complainant party tried to forcibly harvest and take away the crop. Since the complainant party was not armed with any deadly weapon and there could not have been any fear of death or grievous hurt, it was held that as per s 104, the right of private defence of property of the accused extended only to the extent of causing harm other than death.[71]

The right of private defence of property does not extend to causing death of the person who committed merely criminal trespass. Only a house-trespass committed under such circumstances as may reasonably cause apprehension that death or grievous hurt would be the consequence, justifies death of an assailant as it is enumerated as one of the offences under s 103.[72] However, if an accused is able to prove that the deceased-assailant after trespassing in the open land caused reasonable apprehension of grievous hurt or death that necessitated killing of the assailant, will absolve him from the liability under s 100 of the IPC.[73]

COMMENCEMENT AND CONTINUATION OF THE RIGHT OF PRIVATE DEFENCE OF PROPERTY

Section 105. Commencement and continuance of the right of private defence of property.--

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

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

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

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

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

As per s 105, the right of private defence of property commences when a reasonable apprehension of danger to the property commences.

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

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

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

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

PART G

PROPOSALS FOR REFORM

The Fifth Law Commission of India, in its Report on the Indian Penal Code,[74] proposed some structural and substantive reforms in the law relating to the right of private defence.

It suggested re-arrangement of ss 96-106 on the basis of their theme and subject-matter. It recommended that ss 100-102 & 106, dealing with the right of private defence of body, and ss 103, 104 and 105, dealing with the right of private defence of property, with the changes proposed therein, should be re-clustered and re-arranged. These re-clustered provisions should be placed after ss 96-99, which deal with extent of, and restrictions on, the right to private defence of body and of property. It believed that the suggested structural change would make understanding of these provisions easier and would facilitate their application.[75]

It also recommended a couple of changes in the substantive law relating to the right of private defence. A few prominent amongst them are mentioned here below:

(1) It proposed two reforms of significant consequences in Paragraph 1 of s 99, which sets restrictions on the right of private defence of individual against act s of a public servant. *First*, it suggested that Paragraph 1 of s 99, restricting the right of private defence against irregular (not illegal) act of a public servant, should be made co-extensive to the provisions of s 78 of the Code, which extends protection to a public servant act ing, in good faith, in pursuance of the judgment or order of a court passed by it without jurisdiction. In the former case, unlike in the latter, a public servant takes the risk of being injured in the right of private defence if the act done by him was illegal. *Second*, a public servant acting, in good faith, in pursuance of a court order or judgment passed without jurisdiction, should be made immune, like in s 78, from prosecution.[76]For giving effect to this proposal it recommended the insertion of a new clause (a) in its revised s 99, which reads: '(a) by a public servant act ing in good faith in pursuance of the judgment or order of a court of justice, though the court may have had no jurisdiction to pass such judgment or order, provided the public servant believes in good faith that the court had such jurisdiction.'[77]

(2) It suggested the deletion of Paragraph 3 of s 99, which deprivers a person of his right of private defence if he had time to have recourse to public authorities to seek protection before he exercised his right of private defence. The Commission offered four justifications for its proposal: (i) many a times the question as to whether the accused had sufficient time for seeking the protection of public authorities is not free from difficulties, (ii) the right of private defence, in principle, rests on a justification 'detached reflection cannot be expected in face of the uplifted knife', and, it, therefore, allows a defender to commit an offensive act against the assailant, (iii) the law, in such a situation, should not expect a person to consider carefully whether there is or is not sufficient time to seek the protection of public authorities, and (iv) such a stringent restriction on the right of private defence is not found in penal laws of other countries.[78]

(3) It recommended the deletion of an assault with the intention of ab-ducting mentioned from *fifthly* of s 100 on the ground that abduction is an auxiliary act not punishable by itself. It is punishable only when it is committed with any of the intents specified in ss 364-369 of the Code. It felt that it is improper to make an assault with the intent of committing an act which is not an offence to justify killing. In such a simple assault it is improper to allow a defender to kill the assailant as well as to allow the assailant to take the risk of being killed. It, therefore, proposed that *fifthly* of s 100 should be limited to the cases where the abduction is punishable under the Penal Code .[79]

(4) It suggested the expansion of the scope of *thirdly* of s 103, which enumerates the situations that justify causing of voluntary death in the exercise of the right of private defence of property. The Commission recommended that another three aggravated forms of offences against property should be added to '*thirdly'* of s 103. They are: (i) 'mischief by explosive substance'; (ii) 'mischief by fire or explosive substance committed on any vehicle', and (iii) 'places of worship'. It also proposed that 'house-trespass' be substituted by 'criminal trespass' in '*fourthly'* of s 103.[80]

The Indian Penal Code (Amendment) Bill of 1978 sought to give effect to these proposals for reform,[81] but the Bill, though passed by the *Rajya Sabha*, lapsed due to the dissolution of *Lok Sabha*.

The Fourteenth Law Commission[82] which, on a reference from the Government of India, carefully reviewed the 1978 Amendment Bill and re-looked at the proposals for reform of the Fifth Law Commission on which relevant clauses of the Bill were drafted, endorsed, with minor modifications, most of the recommendations of the Fifth Law Commission and approved respective clauses of the 1978 Bill that gave effect to those proposals. However, it declined to endorse the proposal of deleting Paragraph 3 of s 99 and the corresponding clause 32 of the Bill. It doubted propriety of the clause 32 of the Bill that sought to substitute the existing s 99 of the Penal Code on the lines (including deletion of the third paragraph) suggested by the Fifth Law Commission. The Fourteenth Law Commission apprehended that the deletion of Paragraph 3 may allow people to resort, with impunity, to their right of private defence even though they had ample time to approach public authorities to avert the danger and seek their protection.[83]

1 *Jai Dev v State of Punjab* AIR 1963 SC 612; but see *Yogendra Morarji v State of Gujarat* AIR 1980 SC 660, (1980) Cr LJ 459(SC) .

2 *George Dominic Varkey v State of Kerala* AIR 1971 SC 1208, (1971) 3 SCC 275, (1971) Cr LJ 1057(SC) .

3 Hari Singh Gour, *Penal Law of India*, seventh edn, Law Publishers, Allahabad, p 421.

4 *Gotipulla Venkatasiva Subbrayanam v State of Andhra Pradesh* (1970) 1 SCC 235; *State of Orissa v Rabindranath Dalai & Anr* (1973) Cr LJ 1686(Orissa) .

5 Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note B, p 82.

6 *James Martin v State of Kerala* (2004) 2 SCC 203.

7 Bentham, *Principles of the Penal Code*, p 269. Cited in RC Nigam, *Law of Crimes in India,* Asia, London, 1965, p 422.

8 *Russell on Crime*, JW Cecil Turner (ed), vol 1, 11th edn, Stevens & Sons, London, p 49.

9 *Munshi Ram v Delhi Administration* AIR 1968 SC 702, (1968) Cr LJ 806(SC) ; see also *Vidhya Singh v State* (1971) 3 SCC 244, (1971) Cr LJ 1296(SC) ; *Nityananda Pasayat v State of Orissa* (1989) Cr LJ 1547(Ori) .

10 *Dnyanu Hariba Mali v State of Maharashtra* AIR 1970 SC 979.

11 *Jai Dev v State of Punjab* AIR 1963 SC 612.

12 John Dawson Mayne, *The Criminal Law of India,* fourth edn, Higginbotham, Madras,1896,p 202.

13 *Deo Narain v State of Uttar Pradesh* AIR 1973 SC 473, (1973) Cr LJ 677(SC) .

14 *Barisa Mundi v State* AIR 1959 Pat 22; see also *Rajinder v State of Haryana* (1995) 5 SCC 187.

15 *Munney Khan v State of Madhya Pradesh* AIR 1971 SC 1491, (1970) 2 SCC 480; *Kashi Ram v State of Rajasthan* AIR 2008 SC 1172, (2008) 3 SCC 55; *Narain Singh v State of Haryana* (2008) 11 SCC 540, AIR 2008 SC 2006.

16 *Rajesh Kumar v Dharamvir* AIR 1997 SC 3769, (1997) Cr LJ 2242(SC) .

17 *Deo Narain v State of Uttar Pradesh* AIR 1973 SC 473, (1973) Cr LJ 677(SC) .

18 *Jassa Singh v State of Haryana* (2002) 2 SCC 481, (2002) Cr LJ 563(SC), AIR 2002 SC 520; *James Martin v State of Kerala* (2004) 2 SCC 203; *Kulwant Sing v State of Punjab* (2004) 9 SCC 257.

19 *Onkarnath Singh v State of Uttar Pradesh* AIR 1974 SC 1550, (1974) Cr LJ 1015(SC) ; *State ofj&K v Hazara Singh* AIR 1981 SC 451, (1980) Cr LJ 1501(SC) ; *Devilal v State of Madhya Pradesh* (1991) 3 Crimes 536(MP) ; *Ramraj Shukla v State of Madhya Pradesh* (1992) Cr LJ 1223(MP) ; *Bhanwar Singh v State of Madhya Pradesh* AIR 2009 SC 768, 2008 (7) SCALE 633.

20 *Jai Dev v State of Punjab* AIR 1963 SC 612; *Munshi Ram v Delhi Administration* AIR 1968 SC 702, (1968) Cr LJ 806(SC) ; *Munney Khan v State of Madhya Pradesh* AIR 1971 SC 1491, (1970) 2 SCC 480.

21 *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727(SC), (2005) 10 SCC 358.

22 *Onkarnath Singh v State of Uttar Pradesh* AIR 1974 SC 1550, (1974) Cr LJ 1015(SC) .

23 AIR 1965 SC 926.

24 AIR 1963 SC 612.

25 AIR 1992 SC 602.

26 AIR 1993 SC 278.

27 AIR 1995 SC 1970.

28 AIR 1997 SC 3769, (1997) Cr LJ 2242(SC) .

29 (2005) 9 SCC 705, (2005) Cr LJ 652(SC) .

30 *Kashi Ram v State Rajasthan* (2008) 3 SCC 55, AIR 2008 SC 1172.

31 *Kishan v State of Madhya Pradesh* AIR 1974 SC 244, (1974) Cr LJ 324(SC) ; *Sonelal v State of Uttar Pradesh* AIR 1981 SC 1379, (1981) Cr LJ 1027(SC) ; *State ofj&K v Hazara Singh* AIR 1981 SC 451, (1980) Cr LJ 1501(SC) ; *Kanhaiyalal v State of Rajasthan* AIR 1989 SC 1515, (1989) Cr LJ 1482(SC), *Ram Kumar v State* (1994) Cr LJ 1458(SC) ; *Dharam Pal v State of Uttar Pradesh* (1994) Cr LJ 615(SC) ; *Rajesh Kumar v Dharamveer* AIR 1997 SC 3769, (1997) Cr LJ 2242(SC) ; *AC Gangadhar v State of Karnataka* AIR 1998 SC 2381; *Vijayan v State* AIR 1999 SC 1311; *Bishna @ Bhiswasdeb Mahato v State of West Bengal* AIR 2006 SC 302, (2005) 12 SCC 657; *Preetam Singh v State of Rajasthan* (2003) 12 SCC 594, JT 2008 (8) SC 427; *Kashi Ram v State of Rajasthan* AIR 2008 SC 1172, (2008) 3 SCC 55.

32 *Chacko v State of Kerala* (2001) 10 SCC 640; *Kashi Ram v State of Rajasthan* AIR 2008 SC 1172, (2008) 3 SCC 55; *Bhanwar Singh v State of Madhya Pradesh* AIR 2009 SC 768.

33 *Munney Khan v State of Madhya Pradesh* AIR 1971 SC 1491; *Sekar v State* (2002) 8 SCC 354.

34 AIR 1979 SC 1230.

35 AIR 1974 SC 1570, (1976) 4 SCC 296, (1974) Cr LJ 1035(SC) .

36 AIR 2000 SC 1271, (2000) Cr LJ 1778(SC), (2000) 3 SCC 436.

37 *Kalu Ram v State of Rajasthan* AIR 1965 Raj 74.

38 *Onkarnath Singh v State of Uttar Pradesh* AIR 1974 SC 1550, (1974) Cr LJ 1015(SC) ; *Vishvas Aba Kurane v State of Maharashtra* AIR 1978 SC 414, (1978) Cr LJ 484(SC) ; *Munir Ahmad v State of Rajasthan* AIR 1989 SC 705; *Sikhar Behera v State of Orissa* (1993) Cr LJ 3664(SC) ; *Dwarka Prasad v State of Uttar Pradesh* (1993) Supp 3 SCC 441, (1993) 2 JT 168.

39 *Gajanand v State of Uttar Pradesh* AIR 1954 SC 695; see also *Jeshingbhai Nathabhai v State of Gujarat* (1970) Cr LJ 97(Guj) ; *Ahmed Sher v Emperor* AIR 1931 Lah 513.

40 *Thakur Ranjit Bhandari v State of Gujarat* (1984) Cr LJ 529(Guj) ; *Sikhar Behera v State of Orissa* (1993) Cr LJ 3664(SC) ; *Dwarka Prasad v State of Uttar Pradesh* (1993) Supp 3 SCC 441, (1993) 2 JT 168.

41 *Gajanand v State of Uttar Pradesh* AIR 1954 SC 695; *Bhagel Singh v Swaran Singh* (1992) Cr LJ 695(SC) ; *Amrik Singh v State of Punjab* (1993) Cr LJ 2857(SC) ; *Rohtas v State of Haryana* (1993) Cr LJ 3303(P&H) ; *Vajrapu Sambhayya Naidu v State of Andhra Pradesh* AIR 2003 SC 3706, (2003) Cr LJ 4433(SC) .

42 *Kanbi Nanji Virji v State of Gujarat* AIR 1970 SC 219, (1970) Cr LJ 363(SC) .

43 AIR 1965 SC 871.

44 AIR 1965 SC 926.

45 *Kartar Singh v State of Punjab* AIR 1961 SC 1987, (1961) Cr LJ 853(SC) ; *State of Bihar v Banwari Singh* AIR 1951 Pat 473.

46 AIR 1970 SC 27, (1970) Cr LJ 5(SC) .

47 *Sikhar Behera v State* (1982) Cr LJ 1167(Ori) (DB) .

48 *Ram Prasad Ahir v State of Uttar Pradesh* AIR 1959 All 790.

49 *Manikirki v Emperor* AIR 1925 Rang 121.

50 *Kasam Abdulla Hafiz v State of Maharashtra* AIR 1998 SC 1451, (1998) Cr LJ 1422(SC) ; *Rizan v State of Chhattisgarh* AIR 2003 SC 976, (2003) Cr LJ 1226(SC) ; *James Martin v State of Kerala* (2004) 2 SCC 203.

51 *George v State of Kerala* AIR 1960 Ker 142, (1960) Cr LJ 589(Ker) (DB) .

52 *Gottipulla Venketa Siva Subbrayanan v State of Andhra Pradesh* AIR 1970 SC 1079.

53 AIR 1968 SC 702, (1968) Cr LJ 806(SC) .

54 (2002) 9 SCC 494; see also *State of Uttar Pradesh v Lakhmi* AIR 1998 SC 1007, (1998) 4 SCC 336; *Periasami v State of Tamil Nadu* (1997) Cr LJ 219(SC).

55 *Munshi Ram v Delhi Administration* AIR 1968 SC 702, (1968) Cr LJ 806(SC) ; *State of Uttar Pradesh v Ram Swarup* AIR 1974 SC 1570, (1976) 4 SCC 296, (1974) Cr LJ 1035(SC) ; *State of Gujarat v Bai Fatima* AIR 1975 SC 1478, (1975) Cr LJ 1079(SC) ; *State of Uttar Pradesh v Mohd Musheer Khan* AIR 1977 SC 226, (1977) Cr LJ 1897(SC) ; *Jagdish v State of Rajasthan* AIR 1979 SC 1010; *Mohinder Pal Jolly v State of Punjab* AIR 1979 SC 577, (1979) Cr LJ 584(SC) ; *Vijayee Singh v State of Uttar Pradesh* AIR 1990 SC 1459, (1990) 3 SCC 190; *Kulwant Sing v State of Punjab* (2004) 9 SCC 257; *V Subramani v State of Tamil Nadu* (2005) Cr LJ 1727(SC), (2005) 10 SCC 358; *Kishan Chand v State of Uttar Pradesh* (2007) 14 SCC 737, AIR 2008 SC 133.

56 *Sekar v State of Rajasthan* (2003) Cr LJ 53(SC) .

57 AIR 1979 SC 391, (1979) Cr LJ 323(SC) .

58 Ibid, para 9.

59 *Rizan v State of Chhattisgarh* AIR 2003 SC 976; *Sekar v State of Rajasthan* (2003) Cr LJ 53(SC) ; *Babulal Bhagwan Khandare v State of Maharashtra* (2005) 10 SCC 404; *Shajahan v State of Kerala* (2007) 12 SCC 96, (2007) Cr LJ 2291(SC) .

60 *Partap v State of Uttar Pradesh* AIR 1976 SC 966; *Rizan v State of Chhattisgarh* AIR 2003 SC 976.

61 *Machindra Babu Salve v State of Maharashtra* (1997) Cr LJ 486(DB) Bom).

62 *Jagdish v State of Rajasthan* AIR 1979 SC 1010; *Vijayee Singh v State of Uttar Pradesh* AIR 1990 SC 1459, (1990) 3 SCC 190; *Moti Singh v State of Maharashtra* (2002) 9 SCC 494; *Mohd Khalid v State of West Bengal* (2002) 7 SCC 334; *Rizan v State of Chhattisgarh* AIR 2003 SC 976, (2003) Cr LJ 1226(SC) ; *Sekar v State of Rajasthan* (2003) Cr LJ 53(SC) ; *V Subramani & Anr v State of Tamil Nadu* (2005) Cr LJ 1727(SC), (2005) 10 SCC 358; *Babulal Bhagwan Khandare & Anr v State of Ma-*

harashtra (2005) 10 SCC 404; *Raj Pal v State of Haryana* (2006) 9 SCC 678, 2006 (4) SCALE 456; *Dharam v State of Haryana* (2007) 15 SCC 241, AIR 2007 SC 397; *Radhe v State of Chhattisgarh* (2008) 11 SCC 785, AIR 2008 SC 2878; *Ravishwar Manjhi v State of Jharkhand* AIR 2009 SC 1262, 2008 (16) SCALE 45; *Abid v State of Uttar Pradesh* (2009) 14 SCC 701, 2009 (9) SCALE 185; *Raghbir v State of Haryana* AIR 2009 SC 1223, 2008 (14) SCALE 664.

63 AIR 1968 SC 1281.

64 AIR 1976 SC 2263, (1976) 4 SCC 394.

65 Ibid, para 12.

66 IR 1979 SC 1010.

67 AIR 1988 SC 863.

68 See also *Ram Lagan Singh v State of Bihar* AIR 1972 SC 2593; *Onkarnath Singh v State of Uttar Pradesh* AIR 1974 SC 1550, (1974) Cr LJ 1015(SC) ; *Bhagwan Tana Patil v State of Maharashtra* AIR 1974 SC 21.

69 *Ram Sunder Yadav v State of Bihar* AIR 1999 SC 2873, (1999) 2 SCC 52, (1999) Cr LJ 3671(SC) (decided on 30 July 1998).

70 AIR 1998 SC 3117, (1998) 7 SCC 365, (1998) Cr LJ 4558(SC) (decided on 24 August 1998).

71 AIR 1977 SC 2252, (1977) 4 SCC 396.

72 *Vijayee Singh v State of Uttar Pradesh* AIR 1990 SC 1459, (1990) 3 SCC 190.

73 Ibid, para 10.

74 *Takhaji Hiraji v Thakore Kubersing Chamansing* (2001) 6 SCC 145, AIR 2001 SC 2328; *Sikandar Singh v State of Bihar* AIR 2010 SC 3580, (2010) 7 SCC 47.

75 *Kesha v State of Rajasthan* AIR 1993 SC 2651; *State of Karnataka v Jinnappa Kudachi* (1993) Cr LJ 3915(SC) ; *Dwarka Prasad v State of Uttar Pradesh* (1993) Supp 3 SCC 441, (1993) 2 JT 168;*Venu v State of Tamil Nadu* (1993) Cr LJ 3671(SC) ; *Rajendra Rajmutyam v State of Maharashtra* (1994) Supp 3 SCC 339; *Gurnam Singh v State of Punjab* (1995) Supp 3 SCC 743; *Chacko v State of Kerala* (2001) 10 SCC 640; *Thakhail Hiraji v Thakore Kubersing Chamansingh & Ors* AIR 2001 SC 2328, (2001) 6 SCC 145, (2001) Cr L J 2602(SC) ; *Kashiram v State of Madhya Pradesh* AIR 2001 SC 2902, (2002) 1 SCC 71; *Moti Singh v State of Maharashtra* (2002) 9 SCC 494; *Ram Avtar v State of Uttar Pradesh* (2002) 10 SCC 52, (2003) Cr LJ 480(SC) ; *Laxman Singh v Poonam Singh & Ors* AIR 2003 SC 3204, (2004) 10 SCC 94, (2003) Cr LJ 4478(SC) ; *James Martin v State of Kerala* (2004) 2 SCC 203; *Chacko @ Aniyan Kunju & Ors v State of Kerala* AIR 2004 SC 2688, (2004) 12 SCC 269; *V Subramani & Anr v State of Tamil Nadu* (2005) 10 SCC 358, (2005) Cr LJ 1727(SC) ; *Bishna @ Bhiswadeb Mahato v State of West Bengal* AIR 2006 SC 302, (2005) 12 SCC 657; *Shajahan v State of Kerala* (2007) 12 SCC 96, (2007) Cr LJ 2291(SC) ; *Babu Ram v State of Punjab* AIR 2008 SC 1260, (2008) 3 SCC 709; *State of Punjab v Gurlabh Singh* (2009) 13 SCC 556, AIR 2009 SC 2469.

76 'Public Servant' is defined under s 21 of the IPC.

77 *Puran Singh v State of Punjab* AIR 1975 SC 1674; see also *Ramjilal v State of Rajasthan* (1990) Cr LJ 392(Raj) .

78 *Kesho Ram v Delhi Administration* AIR 1974 SC 1158, (1974) Cr LJ 814(SC) .

79 *State of Uttar Pradesh v Niyamat* AIR 1987 SC 1652, (1987) Cr LJ 1991(SC) .

80 *Kanwar Singh v Delhi Administration* AIR 1965 SC 871; *State of Uttar Pradesh v Ram Sanehi* (1969) Cr LJ 952(All) .

81 *Emperor v Kishenla* AIR 1924 All 645; *Emperor v Abdul Hamin* AIR 1942 All 74; *Dara Singh v Crown* AIR 1947 Lah 249; *Ranveer Singh v State of Uttar Pradesh* (1997) Cr LJ 2266(All) .

82 *State of Uttar Pradesh v Niyamat* AIR 1987 SC 1652, (1987) Cr LJ 1991(SC) .

83 *Mazidar Rahman v State of Assam* (1977) Cr LJ 1293(Gau) .

84 *Sampath v State of Tamil Nadu* (1993) Cr LJ 2468(Mad) .

85 *Amjad Khan v State* AIR 1952 SC 165, (1952) Cr LJ 848(SC) ; *Gurdatta Mal v State of Uttar Pradesh* AIR 1965 SC 257, (1965) Cr LJ 242(SC) ; *Munshi Ram v Delhi Administration* AIR 1968 SC 702, (1968) Cr LJ 806(SC) ; *Ram Rattan v State of Uttar Pradesh* AIR 1977 SC 619, (1977) Cr LJ 433(SC) ; *Lala Ram v Hari Ram* AIR 1970 SC 1093; *SC Karsan v State of Gujarat* (1969) 3 SCC 203.

86 *Abdul Hadi v Emperor* AIR 1934 All 829; *State of Haryana v Karan Singh* (1996) Cr LJ 3698(H&P) ; *Harish Kumar v State of Madhya Pradesh* (1996) Cr LJ 3511(SC) .

87 *State of Uttar Pradesh v Haripal Singh* (2000) All LJ 1224.

88 *Ram Rattan v State of Uttar Pradesh* AIR 1977 SC 619, (1977) Cr LJ 433(SC) ; *Lalaram v Hariram* AIR 1970 SC 1093.

89 *State of Uttar Pradesh v Ram Swarup* AIR 1974 SC 1570, (1976) 4 SCC 296, (1974) Cr LJ 1035(SC) .

90 *Patil Hari Meghji v State of Gujarat* AIR 1983 SC 488.

91 AIR 1979 SC 577, (1979) Cr LJ 584(SC) .

92 *Rafiq v State of Maharashtra* AIR 1979 SC 1179, (1979) Cr LJ 706(SC) .

93 AIR 1976 SC 2273.

94 AIR 1974 SC 1550, (1974) Cr LJ 1015(SC) .

1 *George Dominic Varkey v State of Kerala* AIR 1971 SC 1208, (1971) 3 SCC 275, (1971) Cr LJ 1057(SC) .

2 *Jai Dev v State of Punjab* AIR 1963 SC 612.

3 *State of Assam v Abinash Dutta* (1982) Cr LJ 400(Gau) .

4 *Ram Narain v State of Uttar Pradesh* AIR 1972 SC 2544, (1973) 3 SCC 246, (1973) Cr LJ 29(SC) ; *Shankar Balu Patil v State of Maharashtra* (2007) 12 SCC 450.

5 *Mohd Ramazani v State (Delhi Administration)* AIR 1980 SC 1341, (1980) Cr LJ 1010(SC) ; *Sunil Gangrade v State of Madhya Pradesh* (1997) Cr LJ 4238(MP) .

6 *V Subramani v State of Tamil Nadu* (2005) 10 SCC 358, (2005) Cr LJ 1727(SC) ; *Satya Narain Yadav v Gajanand* AIR 2008 SC 3284, 2008 (10) SCALE 728; *Ravishwar Manjhi v State Jharkhand* AIR 2009 SC 1262, 2008 (16) SCALE 45.

7 *Bishna @ Bhiswadeb Mahato v State of West Bengal* AIR 2006 SC 302, (2005) 12 SCC/657.

8 *James Martin v State of Kerala* (2004) 2 SCC 203.

9 *Jai Dev v State of Punjab* AIR 1963 SC 612.

10 Chapter XVI of the IPC deals with 'Of Offences Affecting the Human Body' (ss 299-377).

11 *Rajinder v State of Rajasthan* (1995) 5 SCC 187. In *Yeshwant Rao v State of Madhya Pradesh* (AIR 1992 SC 1683), 1992 Cri LJ 2779 the Supreme Court ruled that the accused, who saw his minor daughter being sexually molested by the deceased, had the right of private defence against him. But the right of private defence is not available to the husband against adulterer of his wife as 'adultery' is not an offence against 'human body'. On the contrary, if the husband threatens the adulterer with bodily harm, the latter will have the right of private defence body against the husband.

12 *Yogendra Morarji v State of Gujarat* AIR 1980 SC 660, (1980) Cr LJ 459(SC) ; *State of Uttar Pradesh v Gajey Singh* (2009) 11 SCC 414, (2009) Cr LJ 2274(SC) .

13 *Balbir Singh v State of Punjab* AIR 1959 Punj 332.

14 *Gopal v State of Rajasthan* AIR 1972 SC 1838, (1972) Cr LJ 1191(SC) ; see also *Patori Devi v Amar Nath* AIR 1988 SC 560, (1988) Cr LJ 836(SC) ; *Vijayee Singh v State of Uttar Pradesh* AIR 1990 SC 1459, (1990) 3 SCC 190; *Wassan Singh v State of Punjab* (1996) Cr LJ 878(SC), (1996) 1 SCC 458.

15 *Makwana Takhat Singh Ratan Singh v State of Gujarat* AIR 1992 SC 1989, (1992) Cr LJ 3596(SC) .

16 *Nanhu Kahar v State of Bihar* AIR 1971 SC 2143, (1971) Cr LJ 1467(SC) ; see also *Dhananjai v State of Uttar Pradesh* AIR 1994 SC 551, (1994) Cr LJ 614(SC) ; *Hardev Bhanji Joshi v State of Gujarat* AIR 1993 SC 297, (1993) Cr LJ 64(SC) ; *Kanhiyalal v State of Rajasthan* AIR 1989 SC 1515, (1989) Cr LJ 1482(SC) .

17 *Mohd Yusuf v State of Uttar Pradesh* AIR 1994 SC 1542.

18 *Deo Narain v State of Uttar Pradesh* AIR 1973 SC 473, (1973) Cr LJ 677(SC) ; *V Subramani v State of Tamil Nadu* (2005) 10 SCC 358, (2005) Cr LJ 1727(SC) .

19 *Kuria Kose v State of Kerala* (1995) Cr LJ 2687.

20 *Vishvas Aba Kurane v State of Maharashtra* AIR 1978 SC 414, (1978) Cr LJ 484(SC) ; *George Dominic Varkey v State of Kerala* AIR 1971 SC 1208, (1971) 3 SCC 275, (1971) Cr LJ 1057(SC) ; *Kulwant Singh v State of Punjab* AIR 1994 SC 1271; *State of Uttar Pradesh v Gajey Singh* (2009) 11 SCC 414, 2009 Cr LJ 2274; *Darshan Singh v State of Punjab* AIR 2010 SC 1212, (2010) Cr LJ 1393(SC), (2010) 2 SCC 333, *Arjun v State of Maharashtra* (2012) 5 SCALE 52, AIR 2012 SC 2181.

21 *Rameshar v State (Delhi Administration)* (1981) Cr LJ 1125(Del) .

22 *Wassan Singh v State of Punjab* (1996) Cr LJ 878(SC), (1996) 1 SCC 458.

23 *Sekar v State of Rajasthan* (2003) Cr LJ 53(SC) ; *State of Madhya Pradesh v Ramesh* (2005) 9 SCC 705, (2005) Cr LJ 652(SC) .

24 Apprehension of accused that death or grievous hurt may be caused by witchcraft does not confer any right of private defence as law does not recognise death by witchcraft unless he apprehends physical violence, see *State of Gujarat v Dhiria Bhabji* AIR 1963 Guj 78.

25 *Vishvas Aba Kurane v State of Maharashtra* AIR 1978 SC 414, (1978) Cr LJ 484(SC) .

26 *Puran Singh v State of Punjab* AIR 1975 SC 1674.

27 (1997) Cr LJ 4238 (MP).

28 *Deo Narain v State of Uttar Pradesh* AIR 1973 SC 473, (1973) Cr LJ 677(SC) .

29 *Puran Singh v State of Punjab* AIR 1975 SC 1674.

30 AIR 1952 SC 165, (1952) Cr LJ 848(SC) .

31 See also *Mohd Ramzani v State of Delhi* AIR 1980 SC 1341, (1980) Cr LJ 1010(SC) .

32 *State of Uttar Pradesh v Zalim* AIR 1996 SC 3278, (1996) Cr LJ 2537(SC) .

33 (1992) Cr LJ 2521 (SC).

34 S 375 and s 377 define 'rape' and 'unnatural offences', respectively.

35 AIR 1992 SC 1683.

36 (1999) Cr LJ 2268 (Raj).

37 *Bhadar Ram v State of Rajasthan* (2000) Cr LJ 1174(Raj) .

38 *State of Orissa v Nirupamma Panda* (1989) Cr LJ 621(Ori) .

39 AIR 1960 SC 67, (1960) Cr LJ 154(SC) .

40 For definition of 'wrongful confinement', see s 340, IPC.

41 *Razu v Emperor* AIR 1946 Sind 17.

42 *Abdul Habib v State* (1974) Cr LJ 248(All) .

43 AIR 1980 SC 660, (1980) Cr LJ 459(SC) .

44 *Vishvas Aba Kurane v State of Maharashtra* AIR 1978 SC 414, (1978) Cr LJ 484(SC) .

45 *Wassan Singh v State of Punjab* (1996) Cr LJ 878(SC), (1996) 1 SCC 458.

46 *George Dominic Varkey v State of Kerala* AIR 1971 SC 1208, (1971) 3 SCC 275, (1971) Cr LJ 1057(SC) ; *Sunil Gangrade v State of Madhya Pradesh* (1997) Cr LJ 4238(MP) .

47 *George Dominic Varkey v State of Kerala* AIR 1971 SC 1208, (1971) 3 SCC 275, (1971) Cr LJ 1057(SC) ; *State of Uttar Pradesh v Zalim* AIR 1996 SC 3278, (1996) Cr LJ 2537(SC) .

48 *James Martin v State of Kerala* (2004) 2 SCC 203; *Moti Singh v State of Maharashtra* (2002) 9 SCC 494; see also *Yogendra Morarji v State of Gujarat* AIR 1980 SC 660, (1980) Cr LJ 459(SC) ; *Raj Pal v State of Haryana* (2006) 9 SCC 678, 2004 (4) SCALE 456.

49 *State of Uttar Pradesh v Ram Swarup* AIR 1974 SC 1570, (1976) 4 SCC 296, (1974) Cr LJ 1035(SC) .

50 *Laxman Sahu v State of Orissa* AIR 1988 SC 83; *Kulwant Singh v State of Punjab* (2004) 9 SCC 257.

51 *Onkarnath Singh v State of Uttar Pradesh* AIR 1974 SC 1550, (1974) Cr LJ 1015(SC) ; see also *State of Uttar Pradesh v Ram Swarup* AIR 1974 SC 1570, (1976) 4 SCC 296, (1974) Cr LJ 1035(SC) .

52 (1996) Cr LJ 878 (SC).

53 *Munshi Ram v Delhi Administration* AIR 1968 SC 702, (1968) Cr LJ 806(SC) .

54 AIR 1972 SC 1058.

55 AIR 1975 SC 1674.

56 *Ram Rattan v State of Uttar Pradesh* AIR 1977 SC 619, (1977) Cr LJ 433(SC) .

57 *State of Gujarat v Pandya Premshankar* (1999) Cr LJ 1841(SC) .

58 *State of Haryana v Sher Singh* (2002) 9 SCC 356; *Jalaram v State of Rajasthan* (2005) 9 SCALE 505.

59 AIR 1993 SC 1538.

60 See also *Buta Singh v State of Punjab* (1991) Cr LJ 1464(SC) .

61 *Rajinder v State of Haryana* (1995) 5 SCC 187.

62 AIR 1964 SC 205, p 206, (1964) 1 Cr LJ 138(SC) .

63 AIR 1968 SC 702, (1968) Cr LJ 806(SC) .

64 AIR 1961 SC 1541.

65 Ss 425-40 of the IPC deal with mischief. S 390 defines robbery and theft is dealt under s 378.

66 *Ram Ratan v State of Bihar* AIR 1965 SC 926.

67 *V Subramani v State of Tamil Nadu* (2005) 10 SCC 358, (2005) Cr LJ 1727(SC) . See also *Gurdatta Mal v State of Uttar Pradesh* AIR 1965 SC 257, (1965) Cr LJ 242(SC)

68 *Jai Bhagwan v State of Haryana* AIR 1999 SC 1083.

69 *Kesra Ram v State of Rajasthan* (1999) Cr LJ 1451(SC) .

70 AIR 1973 SC 665.

71 See also *Ghansham Dass v State* AIR 1979 SC 44.

72 *State of Rajasthan v Ram Bharosi* AIR 1998 SC 3016, (1998) Cr LJ 4053(SC) .

73 *Jassa Singh v State of Haryana* AIR 2002 SC 520, (2002) 2 SCC 481, (2002) Cr LJ 563(SC) .

74 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971.

75 Ibid, para 4.47.

76 Ibid, paras 4.51-4.53.

77 Ibid, para 4.56.

78 Ibid, para 4.55.

79 Ibid, para 4.55.

80 Ibid, paras 4.63 & 4.64.

81 See, clauses 32-37 of the Indian Penal Code (Amendment) Bill, 1978.

82 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997.

83 Ibid, para 12.24.

[redacted]: Criminal Law,12th Edition/[redacted] Criminal Law 2014/CHAPTER 15 Attempt

CHAPTER 15

Attempt

(Indian Penal Code 1860,Section 511)

INTRODUCTION

A crime is committed either after premeditation or at the spur of moment. The commission of crime by a person in the latter case, generally, travels through four distinct and successive stages. They are: (i) the formation of the intention to commit it; (ii) the preparations for commission of the contemplated crime; (iii) the attempt to commit it, and (iv) if the third stage is successful, the commission of the intended crime.[1]

Generally, criminal law does not penalise the first two stages, viz, the stage of contemplation or intention and the stage of preparation. Mere intention or contemplation to commit a crime is beyond the purview of criminal law. It is impossible for anyone to be able to 'look into the breasts of criminals' to ascertain and prove the evil intentions. It is even impossible for a devil to know the thought of a man. Further, it is always possible for the person to give up his evil intentions or designs. It is based on these considerations that a principle of law has come to be evolved, which makes only those intentions punishable that are accompanied by some express words[2]or an overt act aimed towards achieving the intention.

On similar grounds, the stage of preparation, which essentially involves devising or arranging means or measures necessary for the commission of the contemplated crime, as a general rule, is also not punishable.[3] For, apart from the difficulty of establishing the intention, it would be impossible in most cases, to establish that the preparation was actuated by an evil intention, or that it was directed towards achieving a particular wrongful or illegal act . This is because, it is quite possible that the person who originally had the intention to commit an offence, may, before actually attempting to commit it, give up or desist from committing it, either due to fear of the consequences or punishment, or even due to change of heart at the last moment.[4] There are also some practical reasons for not ordinarily punishing preparations for committing an offence. As stated earlier, it is difficult to state with certainty that the preparation was with the intention of committing the crime. For example, a person may have bought some poison like arsenic, or a gun or gunpowder. When questioned, he could say that he had bought them for killing wild animals or rats which destroyed his crops. Then again, preparation does not by itself disturb the peace of the locality, threaten the sense of security, or alarm the local residents by causing fear that the objects are bought for an unlawful purpose. If preparations were to be made punishable, then there is every likelihood that innocent people may be harassed and face unnecessary prosecution for the mere fact of having bought weapons or poison.

The third and the fourth stages, namely, attempt to commit an offence, and the act ual commission of the contemplated offence, which are respectively a direct movement towards commission of the contemplated crime and the actual commission of the crime, are always punishable. An attempt to commit a crime and the commission of a crime are, thus, perceived as substantive offences.

WHAT IS AN ATTEMPT TO COMMIT A CRIME?

An attempt to commit a crime is essentially a direct movement towards the commission of the contemplated offence after preparations are made. Neither a mere intention, howsoever blameworthy it may be, to commit a crime nor do the means arranged, howsoever effective they may be, to commit it, therefore, amount to an

offence unless some steps, believed to be necessary as far as the doer is concerned, are taken to accomplish the intended crime. In other words, an act (or a series of acts) more than merely preparatory to the commission of the intended offence is an offence. For instance, *A*, who purchases and loads a gun with the evident intention of shooting his enemy *B*, but makes no movement to use it against *B*, is beyond the purview of criminal culpability as he still remains at the stage of preparation. But if he, after having procured a loaded gun, pursues *B*, but fails to overtook him or is arrested before he is able to complete the offence or fires without effect, will be liable for attempting to murder *B*.[5]

An attempt to commit a crime, as mentioned earlier, broadly speaking, is a step forward in the direction of the commission of the intended offence. However, not every act in a series of acts committed in the direction of the contemplated offence amounts to an attempt. If such an act still rests in the stage of intention or within the stage of preparation, its doer does not generally attract criminal liability. It becomes indictable the moment it transgresses the stage of preparation and brings its doer relatively closer to his contemplated objective or evil intention but fails short of the intended crime. 'An attempt to commit a crime', observed Sir James Stephen, 'is an act done with intent to commit that crime, and forming part of a series of act s, which would constitute its actual commission if it were not interrupted'.[6]It is an act which a person does towards the commission of the offence, the commission of the offence being hindered by circumstances beyond his control.[7]"Attempt to commit an offence', according to the Supreme Court of India, 'is an act or a series of act s, which leads to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this'.[8] An attempt to commit an offence, in essence, is 'an intended but unfinished crime'.

WHY IS AN ATTEMPT TO COMMIT A CRIME PUNISHABLE?

Subjecting criminal liability for attempts, though the intended crimes thereof remained incomplete, is justified and rationalised on a few theoretical as well as utilitarian considerations.

A criminal attempt not only poses a threat to bodily and proprietary security but also infringes the right to security. Such an infringement constitutes, in itself, a *harm* that penal law seeks to punish. Hyman Gross, pressing the point, observed:

> ...[A]ttempt...may usefully be regarded as a second order harm: in itself it is the sort of conduct that normally presents a threat of harm; and that, by itself, is a violation of an interest that concerns law. The interest is one in security from harm and merely presenting a threat of harm violates that security interest.[9]

Criminal liability for attempts may be justified even in the absence of any *harm*. An attempt to commit a crime poses no less a danger to the legally protected interests than does the completed crime.[10] It therefore becomes necessary for criminal law, in the social interests, to identify and prevent a criminal attempt at the earliest feasible moment and to, through punitive sanctions, deter the perpetrator. Otherwise, he, with better skill and caution, might keep on trying to commit the intended crime till he accomplishes his evil intention and design and becomes successful in his criminal endeavour.[11]

AN ATTEMPT TO COMMIT A CRIME--AN INCHOATE CRIME?

An attempt to commit a crime, thus, is an offence in itself even though the intended crime is not committed. A person is punished for doing something, in furtherance of his evil intention and design, for carrying out the contemplated crime. He becomes culpable simply for the manifestation, through some act s, of his intention (mens rea) to commit the intended (but unaccomplished) prohibited harm (actus reus). It may be worth to recall here, as discussed in preceding chapters,[12] that *actus non facit reum nisi mens sit rea* insists that no criminal liability can generally be fastened to an individual for merely either having guilty mind or an evil design (mens rea) or committing a blameworthy prohibited act (actus reus) unaccompanied with the required culpable state of mind or requisite foresight of its evil consequences.

Penal law, nevertheless, justifies such a criminal policy on the need to nip in the bud and to punish the wrongdoer for the steps he had taken towards the commission of the intended offence. It accordingly criminalises some of the steps taken by him by labeling them as 'inchoate offences'.[13] Forms of inchoate crimes known to criminal law are: attempt, criminal conspiracy,[14] and incitement.[15]

An inchoate crime is 'a crime committed by doing an act with the purpose of effecting some other offence'[16] or 'an offence' that is 'relative to the offence-in-chief'.[17] It consists of actions falling short of the consummated crime. The word 'inchoate' means something which is 'just begun, incipient, in an initial or early stage, imperfect or undeveloped'.[18] It connotes something which is not yet completed. Premising their arguments on the literal meaning of the word 'inchoate', a few well-known authorities on criminal law[19] argued that the term 'inchoate' cannot be employed to indicate something which is itself complete or which has been done as a step towards an end which has not yet been achieved. They, therefore, feel that the nomenclature given to attempt, criminal conspiracy, and incitement, as 'inchoate offences' is misleading and inapt. These offences, they argue, are complete in themselves, even though they constitute a link in the chain of events leading to some object which is not yet attained. In such a situation, it is the unattained objective which is 'inchoate', and not the completed steps that have been taken towards that objective. Plausibly for these reasons, the 'inchoate crimes' are also labeled 'Preliminary Crimes' or 'Anticipatory Crimes'.

THE INDIAN PENAL CODE 1860 AND THE LAW OF ATTEMPT

Stages in the Commission of an Offence

The Indian Penal Code, like other penal laws, recognises that a pre-planned crime invariably goes through the four successive stages, namely:

(i) intention to commit an offence;
(ii) preparation to commit it;
(iii) attempt to commit it, and;
(iv) the commission of the offence. A culprit first intends to commit an offence, then makes preparation for committing it and thereafter attempts to commit it. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence.[20]

The IPC exempts the first stage from criminal liability. It does not attach any culpability to a mere mental determination or desire to commit a crime, howsoever evil it may be. A mere intention to commit an offence, not followed by any act, does not constitute an offence under the Penal Code . It does not take a mere 'will to commit an offence' for the 'deed', unless there is some external act that exhibits some progress in the direction of, or towards maturing and effecting, the contemplated crime.[21]

Similarly, mere arranging or devising means or measures, even in furtherance of the design or desire to commit an offence, as a general rule, does not come within the purview of penal law. However, the IPC punishes preparations to commit a few serious offences. They are:

(1) Preparations made for waging war against the Government of India (s 122);
(2) Preparations made for committing depredations on territories of any power in alliance or at peace with the Government of India (s 126);
(3) Making or selling or being in possession of instruments for counterfeiting coins or government stamps (ss 233-235 and 257);
(4) Possessing counterfeit coins, government stamps, false weight, or measures (ss 242, 243, 259 and 266), and
(5) Preparations made for committing dacoity (s 399).

Criminalisation of these preparations is plausibly justified on the need to nip grave offences in the bud and thereby to arrest criminality at incipient stages only. These preparations also preclude the possibility of innocent intentions of the persons involved therein.

The reason for not punishing the first two stages is that they are considered too remote to the completion of the intended crime. They are also perceived as harmless acts. The last two stages, namely, the stage of attempt to commit an offence and the act ual commission of the offence are made punishable under the IPC. An attempt to commit an offence is made punishable as it takes the perpetrator very close to the contemplated crime.[22] There is a greater degree of determination in attempt as compared with preparation.[23]

'An Attempt to Commit an Offence'--Approach of the Indian Penal Code 1860

The IPC has dealt with 'attempt' in a specific and general way. It 'treats' a criminal 'attempt' in four different ways. They are:[24]

(1) The commission of an offence and the attempt to commit it are dealt with in the same section and the extent of punishment prescribed is the same for both. The attempts that fall in this category are:
   (i) offences against the state (ss 121, 124, 124-A, 125, 130);
   (ii) abetting mutiny (s 131);
   (iii) offences against the public tranquility (ss 152 and 153-A);
   (iv) offences against public justice (ss 196, 198, 200 and 213);
   (v) offences relating to coins and government stamps (ss 239-241 and 251);
   (vi) offences relating to extortion, robbery and dacoity (ss 385, 387, 389, 391, 397 and 398); and
   (vii) criminal trespass (s 460).

(2) Attempt to commit specific offences are dealt side by side with the offences themselves, but separately, and separate punishments are provided for the attempts and the offences. The offences which fall in this category are:
   (i) attempt to commit murder (s 307);
   (ii) attempt to commit culpable homicide not amounting to murder (s 308); and
   (iii) attempt to commit robbery (s 393).

(3) Attempt to commit suicide (s 309).
(4) Attempt to commit offences, for which no specific punishment is provided in the IPC (s 511).

Section 511, which is the solitary provision included in the last chapter 'Of Attempts to Commit Offences' of the Penal Code, makes an attempt to commit an offence punishable. It lays down general principles relating to attempts in India.[25] It reads:

Section 511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.--Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations

(a) *A* makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore, is guilty under this section.
(b) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z's* pocket. *A* fails in the attempt in consequence of *Z's* having nothing in his pocket. *A* is guilty under this section.

A plain reading of s 511 reveals that it is applicable where no specific provisions in the IPC are made for punishing attempts to commit an offence. It comes into operation when a person, accused of attempting an offence, after having intended to commit an offence and having made preparations, has done an act (or a

series of act s) towards the commission of the intended offence.[26] But he, due to interruptions, could not commit it. It is not applicable to an attempt to commit a non-IPC offence.[27]

'Attempt'--Meaning and Essential Elements

It is interesting to note that the IPC has not defined the term 'attempt'. Section 511 provides punishment for a person who 'does any act towards the commission of the offence'. An attempt to commit an offence, under the IPC, seems to be a direct movement towards commission of the offence, which, due to some interruptions beyond control of the doer, remained unaccomplished.[28] It seems that the authors of the IPC have used the term 'attempt' in a border and non-technical sense. It may be defined as an act which if not prevented would result in the full consummation of the attempted offence. It is, thus, an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. An attempt to commit an offence consists in the intent to commit a crime, combined with the doing of some act for its actual commission.[29] The Supreme Court, in *Koppula Venkat Rao v State of Andhra Pradesh* ,[30] observed:

> The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. ...An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but failing short of act ual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, failing short of, its actual commission or consummation or completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted.[31]

A careful reading of the above quoted observation and of s 511 reveals that there are three essentials of the offence of attempt to commit an offence that are required to be proved by prosecution to secure conviction of a perpetrator. They are: *First*, he had an intention or mens rea to commit the contemplated or intended offence. *Secondly*, he has done some act or taken a step forward (ie, an act or a step which was more than merely preparatory to the commission of the intended offence) towards the commission of the contemplated offence. *Thirdly*, he, for reasons beyond his comprehension or control, failed to commit the intended offence.[32] An attempt to commit an offence, thus, can be said to begin when the preparations are complete and the doer commences to do something with the intention of committing the desired offence and which is a step towards the commission of the offence. The moment he, after making necessary preparations, commences to do an act with the necessary intention, he commences his attempt to commit the offence. Such an act need not be the penultimate act towards the commission of the offence. A step or direct movement towards the commission of the contemplated offence is sufficient.[33] Such a step, however, must itself be sufficient to show, prima facie, the doer's intention to commit an offence.[34] An attempt to commit an offence, thus, begins when the state of preparation ends.[35]

WHEN DOES PREPARATION END AND ATTEMPT BEGIN?

On occasions more than one, courts in India have stressed that there is a thin line between the preparation for, and an attempt to commit, an offence.[36] It is also difficult to distinguish between the two. But such a task is crucial as, ordinarily, preparations to commit an offence, as mentioned earlier, do not attract criminal liability. A doer becomes liable once he, through his act or a series of act s, enters into the arena of attempt.

It is, however, debatable as to when preparation has ended and the actual attempt has begun. This question is particularly crucial in situations when the attempt has been interrupted at some stage. The question as to whether only those act s committed would fall under the coverage of s 511, which should be a penultimate or final act to enable completion of the offence, came to be considered in detail by the Supreme Court in *Abhayanand Mishra v State of Bihar* .[37]

In this case, the accused applied to the Patna University for permission to appear as a private candidate in the MA degree examination. In support of his eligibility, he forwarded certificates showing that he had obtained his BA degree and that he had been teaching in a certain school. In support of his application, he also

attached certain certificates purporting to be from the headmaster of the school and the Inspector of Schools. The university authorities accepted his application and issued him an admission card. The University, however, received information that the certificates were fake and that the accused was not a teacher. This was found to be true. It was also found that the accused was debarred from taking any university examination for a certain number of years on account of his having indulged in corrupt practice at a university examination. The university prosecuted him for forgery and attempting cheat. The trial court convicted him only for attempting to cheat the university. The matter ultimately reached the Supreme Court.

Rejecting the contention of the appellant that he had not crossed the stage of preparation for 'cheating' the university, the Supreme Court held the accused guilty of having committed an offence contrary to s 420, read with s 511 of the IPC. It ruled that the preparation was complete when the accused prepared the application for submission to the university, and that the moment he had dispatched it, he had entered the realm of attempt to commit the offence of 'cheating'. The apex court summarised the scope of the law of attempt embodied in s 511 as:

> A person commits the offence of 'attempt to commit a particular offence' when: (i) he intends to commit that particular offence, and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission, such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.[38]

The above principle enunciated by the Supreme Court, that the act interrupted need not be the last act to complete the contemplated offence, but could be at any stage crossing the stage of preparation, was reaffirmed by the apex court in *Sudhir Kumar Mukherjee v State of West Bengal* .[39]In this case also, the defence of the accused was that at best the act committed by the accused could be construed as preparation and that the attempt to commit the offence had not taken place. In the instant case, the accused, an employee of a firm, in collusion with a limestone dealer, attempted to show false delivery of limestone to his company by forging the signatures of his superiors on the invoice, after which it would be presented for payment. At the time when he was caught, he had himself not signed the *challan* evidencing receipt of the goods. However, relying upon the *Abhayanand Mishra* case, the Supreme Court held that the very fact that a *challan* had been prepared and that the initials of the concerned clerk had been obtained by the accused on the *challan* showed that the definite step had been taken by the accused to commit the offence of cheating. It held that while it was true that the accused had not himself affixed his signature and stamp on the *challan*, which was necessary for the supplier to claim payment for supply of limestone from the company, the acts of the accused had crossed the stage of preparation and entered into the realm of attempt. The accused were, therefore, convicted for committing the offence of cheating under s 420 read with s 511 of the IPC.

TESTS FOR DETERMINING WHETHER AN ACT AMOUNTS TO A MERE PREPARATION OR AN ATTEMPT TO COMMIT AN OFFENCE

Courts have repeatedly held that the test to determine whether a particular act amounts only to preparation or whether it act ually amounts to an attempt to commit an offence is based on the facts and circumstances of each case. However, a few principles can be culled from the judicial pronouncements to help us determine whether a particular act or a series of act s has crossed the stage of preparation to enter into the area of attempt to commit an offence. Various tests have been developed and employed by courts in India for distinguishing an attempt to commit an offence from preparations made therefor. A few prominent among them discussed here below are: (1) the Proximity Rule, (2) Doctrine of *Locus Poenitentiae*, and (3) the Equivocality Test.

The Proximity Rule: Proximity in Relation to Time and Action or to Intention?

The act or a series of act s, in order to be designated as an attempt to commit an offence, must be sufficiently proximate to the accomplishment of the intended substantive offence. In other words, an act or a series of act s must be sufficiently proximate, and not remotely connected, to the crime intended. An act of the accused is considered proximate, if, though it is not the last act[40] that he intended to do, is the last act that

was legally necessary for him to do, if the contemplated result is afterwards brought about without further conduct on his part.[41]

The usual illustration of a proximate act is found in *R v Taylor* ,[42] wherein *A*, who was found in the act of striking a match behind a haystack, which he extinguished on perceiving that he was being watched, was held guilty of attempt to commit arson of haystack. But, if he had merely purchased a box of matches, he would not have been found guilty of attempted arson, however evident it might be that he intended to set fire to haystack when he purchased the matchbox. But even the first situation may create difficulties, if *A* had said that his intention in striking the match was to light his cigarette. The underlying principle is said to be embodied in the Latin maxim *cogitationis poenam nemo patitur*, which means that no man can safely be punished for his guilty purposes, save so for as they have manifested themselves in overt act s which themselves proclaim his guilt.

It is clear that though the line dividing preparation from attempt is very thin, the difference is nevertheless substantial in determining whether an act would amount to an attempt to commit an offence. The difference is starkly illustrated in *R v Raisat Ali,* [43] in which the Calcutta High Court considered the case where the prisoner had given an order to print 100 forms similar to those formerly used by the Bengal Coal Company. The first proof of the forms was also corrected by the accused. At about the stage when the accused was to have made the final corrections and alterations to the printed form to make them appear exactly like the originals, he was arrested and charged with attempting to make a false document under s 464, IPC. However, the court held him not to be guilty as the attempt could be said to have been completed only after the seal or the signature of the company had been affixed. Consequently, the act done was not an act towards making one of the forms of false documents, but if the prisoner had been caught in the act of writing the name of the company on the printed form and had completed a single letter of the name, then, in the words of Lord Blackburn, 'the actual transaction would have commenced which would have ended in the crime of forgery and he would have been held guilty of the attempt to commit forgery'.

The proximity rule was the basis for the Supreme Court rulings in *Abhayanand Mishra* and *Sudhir Kumar Mukherjee*. An authoritative pronouncement was given by the Supreme Court in *State of Maharashtra v Mohammad Yakub* .[44]In this case, the accused were arrested by officials of the Central Excise for attempting to smuggle silver out of India. Based on secret information, customs officials kept a watch over the accused and apprehended them when they had brought silver ingots in a truck. The accused were found to have kept some small and heavy parcels on the ground. At the same time, the sound of a mechanised sea-craft was also heard. The trial court convicted the accused for attempting to smuggle silver out of India in contravention of the Imports and Exports (Control) Act 1947, the Customs Act 1962, and the Foreign Exchange Regulation Act 1947[45](FERA). The Additional Sessions Court, on appeal, acquitted the accused on the ground that the facts proved by the prosecution showed that the accused had not proceeded beyond the stage of preparation and that they 'had not yet committed any act amounting to a direct movement towards the commission of the offence'. The appeal against acquittal was also dismissed by the Bombay High Court.

The Supreme Court, on appeal by the State of Maharashtra, however, set aside the acquittal by holding that the accused had committed the offence of attempting to export silver out of India by sea in contravention of law. Two separate, but concurring, judgments were delivered by Sarkaria and Chinnappa Reddy JJ. However, these two judicial pronouncements advance different criteria for identifying a 'proximate act' for distinguishing 'preparation' from 'attempt'.

Justice Chinnappa Reddy, delving into the proximity rule, observed:

> In order to constitute 'an attempt' first there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence and, third, such act must be proximate to the intended result. *The measure of proximity is not in relation to time and action but in relation to intention.*...[T]he act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention, but that it must be indicative or suggestive of the intention.[46]

However, Sarkaria J considered proximity in terms of the act ual physical proximity, rather than the intention-oriented proximity, to the objective of the intended crime. He observed:

> Broadly speaking...overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such an act or act s...manifest a clear intention to commit the offence aimed, being *reasonably proximate to the consummation of the offence*.[47]

Applying the proximity rule in the instant case, Sarkaria J ruled:

> They had reached close to the seashore and had started unloading the silver there, near a creek from which the sound of the engine of a sea-craft was also heard. Beyond the stage of preparation, most of the steps necessary in the course of export by sea had been taken. The only step that remained to be taken towards the export of the silver was to load it on a sea-craft for moving out of the territorial waters of India. But for the intervention of the officers of law, the unlawful export of silver would have been consummated.[48]

Thus, determination of the proximity rule, as perceived by Chinnappa Reddy J, relates with the proximity of 'state of mind' or 'intention' of the doer with the intended crime. While Sarkaria J perceived its determination in terms of the 'physical proximity' of the doer with the commission of the intended crime. The line of reasoning, in the backdrop of the requisite of committing an act 'towards the commission of the offence', given by Sarkaria J seems to be preferable to, and more logical than, the one advanced by Chinnappa Reddy J as proximity, generally, refers to the sequence of act s leading to, and closely connected with, the commission of the contemplated offence.[49]

Doctrine of Locus Poenitentiae

The doctrine *locus poenitentiae* refers to the possibility of a person who, having made preparations to commit an offence, actually backs out of committing it, owing to a change of heart or out of any other type of compulsion or fear. Thus, an act will amount to a mere preparation and not an attempt, if the person, on his own accord, gives up the idea of committing a crime before the criminal act is carried out. In other words, so long as the steps taken by the accused leave room for a reasonable expectation that he might, either of his own accord, because of the fear of consequences that might befall him or for whatever reason, desist from going ahead with the contemplated act, then he will be treated in law, as only being in the stage of preparation, and no criminal liability will be fastened to him.[50] However, if he desists from proceeding further owing to his acts being discovered or because a police officer was at his elbow, he ceases to be a beneficiary of the doctrine of *locus poenitentiae,* as thereafter he has no time for repentance.

This doctrine was the basis for the Supreme Court for ordering acquittal of the driver and helper of a truck convicted by a lower court of attempting to smuggle paddy out of Punjab in *Malkiat Singh v State of Punjab* .[51]In this case, the accused, driver and cleaner, were intercepted at Samalkha barrier post in Punjab, which is about 14 miles from the Punjab-Delhi border, driving a truck containing 75 bags of paddy. A letter written by the consigner in Punjab to the consignee in Delhi was also recovered from the possession of the driver. They were charged with the offence of attempting to export paddy in violation of the Punjab Paddy (Export Control) Order 1959. The Supreme Court set aside the conviction of the accused by holding that their act s were still at the stage of preparation. It observed:

> The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt act s already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present case, it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their minds at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey.[52]

However, in *State of Maharashtra v Mohammad Yakub* ,[53] the Supreme Court ruled that the test of *locus poenitentiae* propounded in the *Malkiat Singh* case is not a general rule and it is to be confined only to the particular facts of that case. It observed:

> We think...that the test propounded...should be understood with reference to the facts of the case...[T]he test is propounded with reference to the particular facts of the case and not as a general rule. Otherwise, in every case where an

> accused is interrupted at the last minute from completing the offence, he may always say that when he was interrupted he was about to change his mind.[54]

The Equivocality Test

The equivocallity test, a continuation of the proximate rule and the doctrine of *locus paenitentiae*, suggests that an act done towards the commission of the offence would amount to an attempt to commit the offence if, only if, it unequivocally indicates the intention of the doer to accomplish the criminal object. If what is done indicates beyond reasonable doubt that the end is towards which it is directed, it is an attempt, otherwise it is a mere a preparation. In other words, the steps taken or acts done by the accused must speak for themselves.[55] In *State v Parasmal* ,[56] the Rajasthan High Court, plausibly referring to the unequivocallity test, observed:

> When a person intends to commit a particular offence, and then he conducts himself in such a manner which clearly indicates his desire to translate that intention into act ion, and in pursuance of such an intention if he does something which may help him to accomplish that desire, then it can safely be held that he committed an offence of attempt to commit a particular offence. It is not necessary that the act which falls under the definition of an attempt should in all circumstances be a penultimate act towards the commission of that offence. That act may fall at any stage during the series of acts which go to constitute an offence under section 511 of the Indian Penal Code .

ATTEMPTING AN IMPOSSIBLE ACT

An attempt to commit an offence is doing an act or a series of act s or taking a step forward in the direction of an offence. The essentiality of a criminal attempt, as discussed earlier, lies in intention of a person to commit an offence and that must be evident from what he has actually done for accomplishing his ultimate criminal objective. However, in this backdrop, a pertinent but interesting question deserves attention, namely, does a step forward in the direction of committing an impossible act amount to an offence to commit the offence?[57]In other words, can there be an attempt to commit an act which is impossible? Such an impossibility may arise due to legal impossibility (because an act done by the accused, for reasons unknown to him, is not a crime),[58] physical impossibility (owing to physical impossibility of the accused to commit the intended crime, whatever means he adopts),[59] or impossibility through ineptitude (owing to inept means chosen by the doer or inefficiency to commit the intended crime).[60]

At one time, it was supposed that it would be a no crime if a person attempted to do something, which in fact was impossible to perform, for it was treated at par with a mere preparation. However, it is now perceived that impossibility of performance of an act does not per se render the attempt to do it an innocent or an act free from guilt.

However, the legal framework relating to law of attempts sketched under the IPC does not specifically deal with an attempt to do an act that is impossible to do. Nevertheless, a careful reading of illusts (a) and (b) appended to s 511 shows that a person can be held guilty of attempting to steal some jewels from an empty jewel box or something from an empty pocket. The crucial aspect is the belief of the person, and the intention preceding his act ion to do a particular act. It does not matter that it is after breaking open a box with the intention of stealing jewels which he believes to be inside it, or the person who picks another's pocket with the intention of picking (or lifting) whatever valuable he finds inside both persons find their intentions incapable of fulfillment.

These two illustrations, by necessary implication, lay down a rule that a person becomes liable for attempting to commit an impossible act (stealing jewels from the empty jewel box or something from the empty pocket) if he, with intent to commit the intended offence, has done everything within his reach to commit the intended offence but his criminal objective was frustrated because of reasons unknown to him or circumstances beyond his control or comprehension.[61] And an attempt to commit an offence is possible even when the intended offence is impossible to commit.[62] The crucial test for determining as to whether he has crossed the stage of preparation, it seems, is overt act that manifests his intention to commit the intended offence.

There is, however, not a single reported judicial pronouncement in India that delves deep into, and deliberates on, the law relating to impossible attempts reflected to in the two illustrations of s 511, IPC. However, *Munah Binti Ali v Public Prosecutor* ,[63] wherein the Federation of Malaya Court of Appeal delved into s 511 (along with illustrations) of the FMS Penal Code(of Malaysia), which is word to word same to that of s 511 (and its illustrations) of the IPC, offers some insight into these illustrations. When the Court of Appeal was called upon to adjudge the propriety of the lower court's order convicting a woman, under s 312 read with s 511 of the FMS Penal Code, for attempting to abort another woman, who was not act ually pregnant. The accused came to know that the woman was not pregnant only after she attempted to cause miscarriage. The Court of Appeal, dismissing the appeal against conviction, ruled:

> In the present case...the evidence clearly showed that it was the intention of the appellant to bring about a miscarriage and she could not have made the attempt unless she believed the complainant to be pregnant. If the complainant was not pregnant, then the failure of the attempt was due to a factor independent of the appellant herself. Her attempt was prevented or frustrated by the non-existence of a circumstance which she believed to exist. As I see it, she is in exactly the same position as the would-be pick-pocket who, believing that there is or may be something capable of being stolen in the pocket which he decides to pick, attempts to steal it and finds his attempt foiled by a circumstance independent of himself, namely, the non-existence of anything capable of being stolen. The circumstances of the case seem to me to be exactly covered by the illustrations to s 511 of the Penal Code, even though these illustrations speak of attempts to commit a different type of offence.[64]

However, it is pertinent to note here that the Criminal Attempts Act 1981 of the UK, which substituted the Common Law offence of attempt, has codified, inter alia, the law relating to impossible act s. With a view to overcome the thitherto difficulties associated with, and uncertainties relating to, attempts to commit acts that are impossible to commit, s 1 codifies 'attempt', including impossible attempt. It reads:

(1) If, with intent to commit an offence, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.
(2) A person may be guilty of attempting to commit an offence, even though the facts are such that the commission of the offence is impossible.
(3) In any case where: (a) apart from this sub-section a person's intention would not be regarded as having amounted to an intent to commit the offence, but (b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then for the purpose of sub-s (1) above, he shall be regarded as having had an intent to commit the offence.

In *R v Shivpuri* ,[65] the scope of s 1 came under judicial scrutiny. In this case, the appellant was arrested by customs officers while in possession of a suitcase which he believed to contain prohibited drugs. After his arrest, he told the officers that he was dealing in prohibited drugs. However, on analysis, the substance in the suitcase was found to not be drugs, but snuff or similarly harmless vegetable matter. Nevertheless, he was charged under s 1 of the Criminal Attempts Act 1981 and s 170(b) of the Customs and Excise Management Act 1979. He was convicted for attempting to commit an offence of being knowingly concerned in dealing with and harbouring prohibited drugs contrary to s 170(b) of the Customs and Excise Management Act 1979. One of the main grounds of his appeal was that because the substance found in his possession was not a prohibited drug, he could not be guilty of attempting to deal in or harbour prohibited drugs, and thus he could not be covered by s 1 of the Criminal Attempts Act 1981, as the commission of the actual offence was impossible. The Court of Appeal certified that the point of law involved therein was: 'does a person commit an offence under section 1 of the Criminal Attempts Act, 1981 where if the facts were as that person believed them to be, the full offence would have been committed by him, but where on the true facts the offence which that person set out to commit was in law impossible, eg because the substance imported and believed to be heroine was not heroin but harmless substance?'

The House of Lords dismissed the appeal by holding that where an accused is charged with being knowingly concerned with harbouring or dealing with goods whose import was prohibited, it would be sufficient if it is proved that the person knew that the goods concerned were prohibited goods.[66] Further, since no proof was required that the person knew which category of prohibited drugs the goods he had handled belonged to, it was immaterial that the appellant was unsure of the exact nature of the substance in his possession, other than the fact that he believed that he was dealing in either heroin or cannabis, the import of which was prohibited. The principle laid down in *Shivpuri*is that the accused is punished for his guilty mind, although the act

act ually committed is innocent.[67]An act otherwise innocent turns to be a crime, if the intention of the accused was to commit an offence through the said act s or activities.

Thus, impossibility to do the offence cannot be a defence in India and in England and a person's subjective belief to commit a particular crime is sufficient to convict him. However, law in India, compared to that of UK, is imprecise and needs to be read in the illustrations rather than in a substantive provision.

A Person 'On the Job' May Be Held Guilty

An important question while considering an attempt to commit an impossible act is as to whether the accused was actually 'on the job', i.e., whether he had gone beyond the stage of preparation and was in the next stage of trying to act ively implement the planned or desired action by way of trying to act on the intent, or trying to achieve his intention. As has been said, the impossibility of a thing does not prevent an attempt being made. Thus, a man trying to break open the best of steel safes with totally inappropriate or inadequate instruments, would still be guilty of attempting to steal, even though it is probably impossible to actually achieve it. If the person had been apprehended while he was 'on the job', then he was criminally liable. However, apart from the fact of the impossibility of achievement, if the person had never been on the job itself, then of course he could not be held liable.

The scope of the applicability of the 'impossibility test' is clearly brought out in the following illustrations:

(1) *D* shoots at *P*, whose back is turned to him. The attempt is rendered abortive by the fact that *P* is beyond the range of *D*'s weapon. *D* is guilty of attempt.
(2) *D* did not intend to kill *B*, knew the limited range of his weapon and was merely practicing it in fact. No mens rea, and hence no attempt.

Thus, it is clear that the question whether there is attempt or not, depends exclusively on mens rea. If there is mens rea, it is capable of establishing as an act us reus, an act that would otherwise be not only legally, but morally and socially, innocent.

APPLICATION OF THE LAW OF ATTEMPT--RELEVANT CONSIDERATIONS FROM INDIAN CASE LAW

Having till now considered the legal basis of the law of attempt in its various manifestations, it will be fruitful to consider the way it has been interpreted by the Supreme Court in different circumstances.

Test for Ascertaining Preparation vis--vis Attempt

Although, the provision has existed in the law books for a considerable period of time, one of the more important judgments which elaborated on the test for finding out whether the accused was at the stage of preparation or had indeed entered the 'attempt' phase was in *Malkiat Singh*,[68] discussed earlier. In that case, the Supreme Court held that:

> ...[A]s a matter of law, a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence, and secondly, to have done an act which constitutes the *actus reus* of a criminal attempt. The sufficiency of the *actus reus* is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it.

Proceeding further, the court held that:

> The test for determining whether the act s of the accused constituted an attempt or preparation, is whether the 'overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the act s already done would be completely harmless'.[69]

The test propounded in *Malkiat* was reconsidered in *Mohamad Yakub*.[70] In separate but concurring decisions, both Sarakaria and Chinnappa Reddy JJ clearly lay the specific nature of the test to determine when the stage of preparation has crossed over to one of attempt. As Sarkaria J writes, any crime has three stages. After the initial stage of entertaining idea or intention to commit an offence, the accused makes preparations in the second stage. Thereafter, he embarks on the third stage when he indulges in deliberate overt acts to commit the offence. At this stage, the judge held, 'It is sufficient if such act or act s were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence'. As mentioned earlier, such acts 'need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence'.[71]

Attempt to Cause Physical Injury--Some Basic Principles

A few important principles regarding the test for attempt have been evolved in offences for which specific provision has been made in the IPC such as attempt to commit murder (s 307). While detailed consideration of these provisions will be made in the relevant chapters, it will be helpful to consider a few of the main cases where some germane principles have been evolved.

Sufficient, if there is Intent Coupled with Some Overt Act in Execution Thereof

The Supreme Court in *State of Maharashtra v Balram Bama Patil* ,[72] had to consider a case involving assault of a group belonging to one political party by a group belonging to another party at the time of elections. The Bombay High Court had acquitted a few of the accused of an offence under s 307, IPC, on the ground that the accused had only caused simple injuries. The Supreme Court differed on this aspect and held:

> It is not necessary that the injury act ually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act . *It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof*.[73]

It is sufficient for a court to justify a conviction under s 307 if there is present an intent coupled with some overt act in execution thereof. A court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in s 307. An accused charged under s 307, therefore, cannot deserve acquittal merely because the injuries inflicted by him on his victim were in the nature of a simple hurt.[74]

Factors to Determine Intention

In *Harikishan v Sukhbir Singh* ,[75] the Supreme Court considered the case of two parties who had inflicted both serious and minor injuries on each other. What was challenged was the acquittal of a few accused of offence under s 307, IPC, by the Punjab and Haryana High Court, and the release of some others on probation of good conduct. As regards the test for finding out whether a specific act was done with necessary or requisite intention, the Supreme Court observed:

> The intention has to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted, are some of the factors that may be taken into consideration to determine the intention.[76]

The Supreme Court held that though the accused had sharp weapons, they used only the blunt side, did not get provoked enough to use the cutting edge despite being attacked and getting injured. They also did not have any motive. These considerations led the court to conclude that there did not seem to be any basis for holding that the accused had intention to commit murder. Therefore, it declined to interfere with the acquittal for offence under s 307, IPC.

Whether there was intention to kill or knowledge that death will be caused is a question of fact. It would depend on the facts and circumstances of a given case. Although the nature of injury actually caused may often given considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to act ual wounds.[77]

Law of Attempt in Relation to Gender Crimes or Sexual Offences

The distinction between the stage of preparation and attempt has always been a crucial factor determining convictions and sentences in cases involving gender crimes or sexual offences. Given the nature of gender crimes in our country, particularly that of rape, the manner in which these distinctions have influenced decisions have led to furious debates and discussions over the manner in which the legal principles to determine attempt are exercised at various levels of the judicial hierarchy, from trial to appellate and revisional courts to the Supreme Court.

In *State of Maharashtra v Rajendra Jawanmal Gandhi* ,[78]an eight-year old girl was sexually assaulted by the accused in his Maruti van, when she was returning home from tuition classes in the morning. The trial court had convicted the accused for offence under s 376, IPC and s 57 of the Bombay Children Act 1948 and sentenced him to undergo rigorous imprisonment for a period of seven years and ordered him to pay a fine of Rs 5,000. The Bombay High Court, on appeal, held that the evidence revealed that there was only an attempt to commit rape, as it could not be said that there was penetration, and therefore, there was no sexual intercourse though, the ingredients of the offence to commit rape existed. The high court accordingly convicted him for outraging the modesty of the girl, an offence contrary to s 354, IPC, and not for rape. It sentenced him to imprisonment only for the period already undergone (which was 33 days) and to pay a fine of Rs 40,000.

The Supreme Court, on consideration of the evidence, reiterated that though penetration did not take place (as the accused had ejaculated before penetration could take place) an attempt to commit rape was proved. It, therefore, convicted the accused for attempting to commit rape under s 376 read with s 511, IPC, and sentenced him to five years' rigorous imprisonment.

A year after the *Rajendra Jawanmal Gandhi* case, the apex court, in *Madan Lal v State of Jammu and Kashmir* ,[79] was more explicit in its judicial response to a similar unaccomplished rape due to prior ejaculation. It observed:

> The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with 511 IPC .[80]

The High Court of Uttaranchal failed to see any convincing logic in the contention advanced by the accused that putting saliva by him on the private part of the girl after forceful removal of her underwear was not a step forward towards the commission of act ual penetration but a mere criminal assault to outrage her modesty. The high court held that the accused by his act had not only shown his indication that he was about to commit rape but also taken a positive step for committing it and thereby disqualified himself for conviction under s 354 of the IPC for outraging the modesty of the girl.[81]

The distinction between an attempt to commit rape and to commit indecent assault sometimes is very meager. The point of distinction between an offence of attempt to commit rape and to commit indecent assault seems to be some act ion on the part of the accused that shows that the accused was just going to have sexual connection with a woman.[82]

PROPOSALS FOR REFORM

The Fifth Law Commission of India has expressed its dissatisfaction about the manner in which the law of attempt, in general, and s 511, in particular, is sketched and made operative in India. Phraseology of s 511, it observed, is not only 'most confusing' but is also of 'little assistance' in defining 'attempt', ascertaining constituent elements of attempt, and distinguishing 'preparation' from 'attempt'. With a view to making the law of attempt more precise the Law Commission proposed some significant substantive and structural changes. It suggested: (i) a definition of 'attempt' (and thereby its constituent physical and mental elements), (ii) deletion of last Chapter XXIII (dealing with attempts and comprising only s 511) from the Code, and (iii) insertion in the Penal Code of a new chapter, [Chapter V-B: 'Attempt'] comprising two new sections, namely ss 120-C and 120-D. The proposed s 120-C and s 120-D deal with 'definition of attempt' and 'punishment for attempt' respectively. The proposed s 120-C reads: 'A person attempts to commit an offence punishable by this Code, when: (a) he, with the intention or knowledge requisite for committing it, does any act towards its commission; (b) the act so done is closely connected with, and proxi-mate to, the commission of the offence; and (c) the act fails in its object because of facts not known to him or because of circumstances beyond his control.'[83]The recommended s 120-D merely re-casts the punishment provided under the existing s 511. The suggested definition of attempt offers a better clarification of both the requisite elements, act us reus and mens rea, of 'attempt'. A 'closely connected' and 'proximate' act 'towards commission of an offence' amounts to act us reus of 'attempt', while 'intention or knowledge' requisite for committing it constitutes mens rea of attempt. It also makes the defence of 'impossibility', including legal impossibility, irrelevant unless the cause of impossibility arises from a fact known to the perpetrator or is within his control.

Subsequently, the proposed s 120-C and s 120-D, with minor modifications, were incorporated in the Indian Penal Code (Amendment) Bill, 1978. But they could not take the form law as the Bill lapsed due the dissolution of the*Lok Sabha* in 1980. No legislative initiatives for reviving these proposals are taken thereafter.

Interestingly, the Fourteenth Law Commission declined to endorse these reforms in the Penal Code. It recommended that there is no need to either delete s 511 from, or to insert proposed ss 120-C and 120-D in, the Penal Code. Its main premise for disapproval was dual: (i) it is difficult to formulate a satisfactory and exhaustive definition that lays down a criterion for deciding as to where preparation to commit an offence ends and where attempt to commit that offence begins, (ii) mere proximity in time or place does not draw a definite line between 'preparation' and 'attempt'.[84]

1 *Asgarali Pradhan v Emperor* AIR 1933 Cal 893; *Venkat Rao v State of Andhra Pradesh* (2004) 3 SCC 602, AIR 2004 SC 1874. See RC Nigam, *Law of Crimes in India*, Asia, London, 1965, pp 111-112.

2 For example, s 503 of the IPC punishes a person for criminal intimidation, which is merely an expression of his intention to harm other.

3 *Kailash Chandra Pareek v State of Assam* (2003) Cr LJ 3514(Gau) .

4 This principle, which is called the doctrine of *Locus Poenitentiae*, is vividly illustrated in *Queen Empress v Ramakka* (1885) ILR 8 Mad 5, cited in Hari Singh Gour, *Penal Law of India*, vol 4, 11th edn, Law Publishers, Allahabad, 1998, p 4912.

5 RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 112.

6 Sir James Stephen, *A Digest of the Criminal Law*, ninth edn, Sweet & Maxwell, London,, art 29.

7 *Kenny's Outlines of Criminal Law*, JW Cecil Turner (ed), 18th edn, Cambridge, 1962, 'Attempt', p 95, *et seq*.

8 *Aman Kumar v State of Haryana* AIR 2004 SC 1498, (2004) 4 SCC 379, para 10.

9 Hyman Gross, *A Theory ofjustice*, Oxford, 1979, p 125.

10 *Koppula Venkat Rao v State of Andhra Pradesh* AIR 2004 SC 1874, (2004) 3 SCC 602.

11 See RA Duff, *Criminal Attempts*, first edn, Clarendon Press, London, 1996; Glazebrook, 'Should we have a Law of Attempted Crime?', Law Quarterly Review, 1969, vol 85, p 28; Glanville Williams, 'Why do Criminal Attempts Fail? A New Defence', Yale Law Journal, 1960, vol 70, p 160; James Brady, 'Punishing Attempts', The Monist, 1980, vol 63, p 246.

12 Chapters 3 and 4, above.

13 Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol II, Burt Franklin, New York, 1883, p 229.

14 For details, see ch 17, below.

15 For details, see ch 16, below.

16 Glanville Williams, *Textbook of Criminal Law: The General Part,* second edn, Stevens & Sons, London, 1983, Indian Reprint by Universal Publishers, New Delhi, 1999, p 402.

17 George P Fletcher, *Rethinking Criminal Law*, Little Brown, Boston, 1978, p 132.

18 *Oxford English Dictionary*.

19 See *Russell on Crime*, JW Cecil Turner (ed), vol 1, 12th edn, Stevens & Sons, London, 1964, ch 6--Preliminary Crimes; *Kenny's Outlines of Criminal Law*, JW Cecil Turner, (ed), 18th edn, Cambridge, 1962, ch IV--Preliminary Crimes; RC Nigam, *Law of Crimes in India*, Asia, London, 1965, pp 114-116.

20 *Sagayam v State of Karnataka* AIR 2000 SC 2161, (2000) 4 SCC 454; *Koppula Venkat Rao v State of Andhra Pradesh* AIR 2004 SC 1874, (2004) 3 SCC 602.; *Aman Kumar v State of Haryana* AIR 2004 SC 1498, (2004) 4 SCC 379; *Kailash Chandra Pareek v State of Assam* (2003) Cr LJ 3514(Gau) ; see also *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698; *Munirathram Reddy v State of Andhra Pradesh* AIR 1955 Andh Pra 118; *Asgarali Pradhan v Emperor* AIR 1933 Cal 893.

21 *Koppula Venkat Rao v State of Andhra Pradesh* AIR 2004 SC 1874, (2004) 3 SCC 602; *Aman Kumar v State of Haryana* AIR 2004 SC 1498, (2004) 4 SCC 379; *Kailash Chandra Pareek v State of Assam* (2003) Cr LJ 3514(Gau) .

22 *Kailash Chandra Pareek v State of Assam* (2003) Cr LJ 3514(Gau) .

23 *State of Madhya Pradesh v Babulal* (1960) Cr LJ 612(MP), *Madan Lal v State ofj&K* AIR 1998 SC 386, (1998) Cr LJ 667(SC) ; *Aman Kumar v State of Haryana* AIR 2004 SC 1498, (2004) 4 SCC 379.

24 See Shamsul Huda, *The Principles of Law of Crimes* (Tagore Law Lectures1902), Eastern Book Co, Lucknow, Reprint, 2011, ch 'Attempt'; RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 116; RB Tewari, 'Criminal Attempt', in Indian Law Institute, *Essays on the Indian Penal Code*, Indian Law Institute, New Delhi, 2005, p 106; Law Commission of India, 'One Hundred Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, paras 6.03 and 6.04.

25 *Koppula Venkat Rao v State of Andhra Pradesh* AIR 2004 SC 1874, (2004) 3 SCC 602.

26 *Satvir Singh v State of Punjab* AIR 2001 SC 2828, (2001) 8 SCC 633.

27 See *Sitaram v State of West Bengal* AIR 1962 Cal 370; *Sabir Kumar Kundu v State of West Bengal* (1991) 2 Cal LJ 71; *Satvir Singh v State of Punjab* AIR 2001 SC 2828, (2001) 8 SCC 633.

28 *Kailash Chandra Pareek v State of Assam* (2003) Cr LJ 3514(Gau) ; see also, *Damodar Behera v State of Orissa* (1996) Cr LJ 346(Ori) ; Re *Duraiswamy Mudali*AIR 1942 Mad 521.

29 *Damodar Behera v State of Orissa* (1996) Cr LJ 346(Ori) .

30 *Koppula Venkat Rao v State of Andhra Pradesh* AIR 2004 SC 1874, (2004) 3 SCC 602.

31 Ibid, para 10. It is reiterated in *Aman Kumar v State of Haryana* AIR 2004 SC 1498, (2004) 4 SCC 379, and relied upon in, *Dilawarsab Alisab Jakati v State of Karnataka* (2005) Cr LJ 2687(Kant), 2005 (2) KCCRSN 125.

32 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698; *Sudhir Kumar Mukherjee v State of West Bengal* AIR 1973 SC 2655; *Kailash Chandra Pareek v State of Assam* (2003) Cr LJ 3514(Gau) .

33 *Basirbhai Mohhomedbhai v State of Bombay* AIR 1960 SC 979; *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698; *State of Rajasthan v Parasmal* AIR 1969 Raj 65; *Madanlal v State of Rajasthan* (1987) Cr LJ 257(Raj) ; *State of Kerala v CK Bharathan* (1989) Cr LJ 2025(Ker) ; *Kamla Nand v State of Himachal Pradesh* (2003) Cr LJ 547(HP) .

34 *State of Maharashtra v Mohammad Yakub* (1980) 3 SCC 57.

35 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698; *State of Maharashtra v Mohammad Yakub* (1980) 3 SCC 57; *Aman Kumar v State of Haryana* (2004) 4 SCC 379, AIR 2004 SC 1498.

36 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698; *Sudhir Kumar Mukherjee v State of West Bengal* AIR 1973 SC 2655; *Aman Kumar v State of Haryana* (2004) 4 SCC 379, AIR 2004 SC 1498.

37 AIR 1961 SC 1698.

38 Ibid, para 36. It is also reiterated in, *State of Maharashtra v Mohammad Yakub* (1980) 3 SCC 57.

39 AIR 1973 SC 2655.

40 The 'last possible act' test, as a general principle, is entirely unacceptable in India. See, *State of Maha- rashtra v Mohammad Yakub* (1980) 3 SCC 57, AIR 1980 SC 1111; *Lachman Singh v State of Haryana* (2006) 10 SCC 524, AIR 2006 SC 2763; *Sachin Jana v State of West Bengal* (2008) 3 SCC 390, 2008 Cr LJ 1596.

41 Glanville Williams, *Textbook of Criminal Law: The General Part*, second edn, Stevens & Sons, London, 1983, Indian Reprint by Universal Publishers, New Delhi, 1999, p 481; see also *Narayandas Bhagwandas v State of West Bengal* AIR 1958 Cal 1118; *Basirbhai Mohomedbhai v State of Bombay* AIR 1960 SC 979; *Sagayam v State of Karnataka* AIR 2000 SC 2161, (2000) 4 SCC 454.

42 1895 I F & F 511, cited in RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 119. A similar illustration appears in *Malkiat Singh v State of Punjab* AIR 1970 SC 713, (1970) Cr LJ 750(SC) .

43 (1881) ILR 7 Cal 352.

44 (1980) 3 SCC 57, AIR 1980 SC 1111.

45 Now Foreign Exchange Management Act, 1999 (42 of 1999).

46 Ibid, para 31 (emphasis supplied).

47 Ibid, para 13 (italics supplied).

48 Ibid, para 14.

49 BB Pande, An Attempt on 'Attempt', (1984) 2 SCC 42(J) .

50 See, Re *Bavaji*AIR 1950 Mad 44; Re *Narayanaswamy Pillai*AIR 1932 Mad 507.

51 AIR 1970 SC 713, (1970) Cr LJ 750(SC) . Before *Malkiat Singh*, the Allahabad and Patna High Courts applied the equivocality test in *Queen v Dhundi* (1886) ILR 8 All 304 and *Lakshnn Prashad v Emperor* AIR 1923 Pat 307, respectively.

52 AIR 1970 SC 713, (1970) Cr LJ 750(SC), at para 4. The *Malkiat* dictum was relied upon, and employed by, the Bombay High Court in *Harish Chandra Kharpade v State of Maharashtra* (1983) 2 Crimes 98.

53 (1980) 3 SCC 57.

54 Ibid, para 30.

55 See, Turner, 'Attempts to Commit Crimes', in *Modern Approach to Criminal Law*, Davis (ed), p 279, and Glanville Williams, *Textbook of Criminal Law: The General Part*, second edn, Stevens & Sons, London, 1983, Indian Reprint by Universal Publishers, New Delhi, 1999, p 481.

56 AIR 1969 Raj 65.

57 For further details and conflicting judicial reflections on the question, see *Russell on Crime*, JW Cecil Turner (ed), vol 1, 12th edn, Stevens & Sons, London, 1964, p 186 *et seq*; David Ormerod, *Smith & Hogan Criminal Law - Cases and Materials*, tenth edn, Oxford, 2009, p 603 *et seq*. For further details on classification of impossibility, see AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine*, third edn, Oxford and Portland, Oregon, 2007, pp 322-326.

58 *Haughton v Smith* [1975] AC 476(HL) . Legal impossibility arises when the accused has done everything within his means but in fact, for reasons unknown to him, what he has done does not amount to a crime. He, for instance, intending to steal an umbrella from a basket kept at the entry of a supermarket for its customers to keep their wet umbrellas before entering the supermarket, picks up an umbrella, but unknown to him, turns out to be his own.

59 *Partington v Williams* [1975] 62 Cr App R 220. Physical impossibility arises due to impossible circumstances. A person, for example, intends to steal from safe, breaks it but finds it empty. There is nothing to steal.

60 *Haughton v Smith* [1975] AC 476(HL) . Impossibility through ineptitude arises when a person resorts to insufficient means for committing the intended crime. For example, a person tries to open a safe-vault with a small nail or administers insufficient poison or some harmless substance to kill his enemy or fails to penetrate a girl because of his inability to have erection.

61 Re *T Munirathnam Reddy*AIR 1955 AP 118.

62 *Queen-Empress v Mangesh Jivaji* (1887) ILR 11 Bom 376.

63 (1958) 24 Malayan Law Journal 159(CA) .

64 Ibid, at p 166.

65 [1986] 2 All ER 334 (HL).

66 It overruled its earlier decision in *Anderton v Ryan* [1985] 2 All ER 355(HL) .

67 *Shivpuri* is applied in *Jones (Ian Anthony)*, [2007]4 All ER 112 (CA).

68 *Malkiat Singh v State of Punjab* AIR 1970 SC 713, (1970) Cr LJ 750(SC) .

69 Ibid, para 4.

70 *State of Maharashtra v Mohammad Yakub* (1980) 3 SCC 57.

71 Ibid, para 13.

72 AIR 1983 SC 305, (1983) Cr LJ 331(SC) .

73 Ibid, para 9. Also reiterated in *Girija Shankar v State of Uttar Pradesh* AIR 2004 SC 1808, (2004) 3 SCC 793.

74 *State of Madhya Pradesh v Saleem @ Chamaru* (2005) 5 SCC 554.

75 AIR 1988 SC 2127.

76 Ibid, para 7.

77 *Bappa alias Bapu v State of Maharashtra* AIR 2004 SC 4119, (2004) 6 SCC 485.

78 AIR 1997 SC 3986, (1997) 8 SCC 386.

79 AIR 1998 SC 386, (1998) Cr LJ 667(SC) .

80 Ibid, para 12. See also *Bhursa Alias Bhursa Kira Alias Prahallad Mallik v State of Orissa* (2000) Cr LJ 2722(Ori) ; *Kamla Nand v State of Himachal Pradesh* (2003) Cr LJ 547(HP), wherein the High Courts of Orissa and of Himachal Pradesh respectively convicted a person under s 376 read with s 511 of the IPC even though there was no penetration as the accused ejaculated before penetration.

81 *Anokhe Lal v State of Uttaranchal* (2003) Cr LJ 2602(Uttarakhand) .

82 *Aman Kumar v State of Haryana* (2004) 4 SCC 379, AIR 2004 SC 1498; *State of Madhya Pradesh v Babulal* (1960) Cr LJ 612(MP) .

83 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, para 5.54.*Illustrations* are omitted. In view of the proposed definition of 'attempt', which would be applicable to an attempt to commit murder and attempt to commit culpable homicide, the Law Commission also recommended redrafting of ss 307 & 308 of the Code. For text of the reformulated ss 307& 308, see para 5.55

84 Law Commission of India, 'One Hundred Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, para 6.16.

CHAPTER 16

Abetment

(Indian Penal Code 1860,Sections 107 to 120)

INTRODUCTION

A person who does not himself commit a crime, may however command, urge, encourage, induce, request, or help a third person to bring it about and thereby be guilty of the offence of abetment. The term 'abet' in

general usage means to assist, advance, aid, conduce, help and promote. In *Corpus Juris Secundum*, the meaning of the word 'abet' has been given as under:

> To abet has been defined as meaning to aid; to assist or to give aid; to command, to procure, or to counsel; to countenance; to encourage, counsel, induce, or assist, to encourage or to set another on to commit.[1]

Thus, any act of an individual, which aids, helps or assists another to commit a crime, falls within the offence of abetment. The term 'abetment', in criminal law, thus indicates that there is a distinction between the person abetting the commission of an offence (or abettor) and the perpetrator of the offence or the principal offender.

PARTIES TO A CRIME

Chapter V (Of Abetment) of the IPC provides for the law governing the liability of all those considered in law to have abetted the commission of offences.

At the very outset, it will be useful to compare and contrast briefly the position in English law as compared to the Indian position. In English law, persons who themselves are not the main offenders, but who assist or aid them, are known as accessories.[2] English law recognises three types of accessories:

(1) Accessories before the fact;
(2) Accessories at the fact; and
(3) Accessories after the fact.

Further, when there are two or more parties to a crime, then they are classed into:

(1) Principals in the First Degree, i.e., those who actually commit the crime or offence with their own hands or through innocent agent;
(2) Principals in the Second Degree, i.e., those who are present at the commission of the crime and extend aid and assistance for its commission;
(3) Accessories before the fact, i.e., those who though not present in the scene of occurrence or where the crime is committed, counsel, procure or command another to commit the crime; and
(4) Accessories after the fact, i.e. those who knowing that a person has committed an offence knowingly receive, relieve, comfort, harbour or assist him from escaping from the clutches of law.

Principals in the first degree are persons who perpetrate a crime directly, i.e., through their own hands or through an innocent agent, i.e., a person, like a child below the age of discretion or a person of unsound mind, who, by reason of either immaturity of understanding or of impairment of mind, is legally incompetent to commit a crime. Thus, the presence of the principals in the first degree at the occurrence of an offence is not essential.

Accessories at the fact are generally classified as principals of the second degree, that is as aiders and abettors of the principal offender in the commission of the offence, and who may be act ually or constructively present in the scene of occurrence. They do not actually participate in commission of the crime. But they remain present, act ually or constructively, at the occurrence of the crime and thereby aid, assist, encourage or abet commission of the crime.

The distinction between principals in the first degree and of the second degree is not so crucial, as both are subjected to same punishment.

However, the IPC does not expressly recognise such a classification of parties to a crime. Nevertheless, it seems that the classification of parties and the consequential complicity of parties were there in the mind of the authors of the IPC.

Principals in the second degree and accessories at the fact are thus two classifications denoting essentially the same type of offenders, and they have been classed as abettors in this chapter. A distinction is however

made as regards the punishment that is liable to be inflicted on them depending on the nature of participation, as for example in s 114, IPC.

The IPC makes separate provisions to cover the liability of persons who, knowing well that a person has committed a crime, nevertheless associate with or extend help, assistance or aid to him to flee from justice,[3] as for example in ss 136, 157, 201, 212, 216, 216A, 310, 411 and 412.

LAW RELATING TO ABETMENT

The chapter on abetment will be examined in two parts. In the first portion, we shall examine the scope of s 107 providing for abetment and definition of abettor in s 108. In the second part, we shall study the provisions proposing liability for abetment in its various manifestations and results, and the punishments imposed for the various offences.

PART A

ABETMENT AND ABETTOR

Section 107. Abetment of a thing.--A person abets the doing of a thing, who--

First.--Instigates any person to do that thing; or

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

Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that thing.

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

Illustration

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend *Z*. *B*, knowing that fact and also that *C* is not *Z*, willfully represents to *A* that *C* is *Z*, and thereby intentionally causes *A* to apprehend *C*. Here B abets by instigating the apprehension of *C*.

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

PRINCIPLE AND SCOPE OF THE PROVISION

A majority of crimes are committed by two or more persons. In most of such crimes, there sometimes exist persons who by themselves may not participate in the crime, but through other means, as through instigation, or aid or extending help or cooperation, enable the others to commit the crime. These persons can be said to facilitate the commission of the offence. As it is said, just as a man owning properties and riches needs a sentinel to guard his properties, so does a thief or a criminal need others to assist him in the commission of an offence. This chapter covers the different ways in which such assistance or abetment may be provided such as to make them liable in criminal law for punishment.

Section 107 defines abetment of a thing. A person abets the doing of a thing when: (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime.[4] The abetment, thus, may be by instigation, conspiracy or intentional aid.

The definition of abetment in the chapter is general in nature. It does not make the abetment of an 'offence' but of a 'thing', which may or may not be an offence. This makes the abettor solely liable in some cases,

even though the person abetted may be wholly innocent. Abetment of an offence is provided in s 108, IPC. Abetment implies a certain degree of involvement of the abettor.

Thus, according to s 107, a person abets the doing of a thing when he:

(1) Instigates a person to commit an offence; or
(2) Engages with one or more persons in a conspiracy to commit an offence; or
(3) Intentionally aids a person by any act or illegal omission to commit an offence or illegally omits the doing of an act which would prevent the commission of the offence.

IMPORTANT ELEMENT: MENS REA

The essence of abetment is active and intentional assistance of a person to the perpetrator of an offence. It is therefore essential to keep in mind when considering the law relating to abetment is the requirement of mens rea as a precondition for liability. As can be gauged from a plain reading of s 107, instigation, engaging with another in a conspiracy to do a thing or intentionally aiding another are all act s in which the person abetting knowingly encourages or assists another person in the commission of the offence. Thus, knowledge about the act and its effect is implicit in the construction of the provision itself. It has been held in a case[5] that in order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other, it is absolutely necessary to connect him with those steps of the transaction which are criminal. Similarly, if a person who lends his support does not know or has no reason to believe that the act which he is aiding or supporting was in itself a criminal act, it cannot be said that he intentionally aids or facilitates the commission of an offence and that he is an abettor.[6] The Privy Council in *Barendra Kumar Ghosh v King Emperor* [7] held that the presence of a person at the scene of occurrence does amount to abetment if it is intended to encourage the commission of the offence. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough.[8]

The position is, however, different in the case of offences where the statute itself provides that no mens rea is required to make a person liable. Thus, for an act where the doing of an act itself amounts to an offence, as for example, in the sale of obscene books or other objects under s 292, IPC, or where strict liability exists in public welfare or social legislations,[9] mens rea is not required for proving abetment. The Supreme Court, while considering the validity of the Terrorist and Disruptive Act ivities (Prevention Act) 1987, concurred with the Bombay High Court judgment[10] stating that 'when no mens rea is essential in the substantive offence, the same is also not necessary in the abetment thereof'.[11]

We shall now consider the individual elements of the provision.

ABETMENT BY INSTIGATION

The first form of abetment is by instigation. The word 'instigate' literally means to provoke, incite, urge on or bring about by persuasion to do anything. It denotes incitement or urging to do some drastic or unadvisable act ion or to stimulate or incite. A person is said to instigate another when he urges forward or provokes, incites, urges or encourages such person to do an act prohibited by law.[12]

Instigation may be in any form. Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct.[13] There needs to be a close causal connection between instigation and the act committed.[14]A person is said to instigate another to do a thing when he actively suggests, stimulates, supports, hints or insinuates the commission of the act .[15] A mere association of the accused with the perpetrator of an offence does not make him an abettor unless it is proved that he instigated or had intention either in aiding or in commission of the offence.[16] A person who is a silent spectator and takes no active part in the commission of offence is not abettor.[17] Whether there was instigation, is a question of fact.[18] However, it is not necessary in law for the prosecution to prove that the act ual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation.[19]

A mere word, without necessary intent to incite a person, uttered in quarrel or in a spur of the moment or in anger does not constitute 'instigation'.[20]

Another form of instigation is that of approval of an act . While generally passive or unresponsive approval[21] may not necessarily be considered to be instigation, there are specific instances when approval has been held to be instigation, as for example, in instances of committing *sati*, when a widow immolates herself in the funeral pyre of her husband. When members of the funeral procession of her husband applauded her resolve by shouting *Sati Mata ki Jai*, they were held to have instigated her to commit *sati*, as their approval of the woman's act by participation in the procession gave her encouragement to commit suicide.[22]

Another form of instigation is as provided in expln 1 to s 107, by which a wilful misrepresentation or a wilful concealment of a material fact which one is bound to disclose thereby causing or procuring a thing to be done has been held to be instigation. The illustration appended to the explanation reveals instigation by 'wilful misrepresentation'. Instigation by 'wilful concealment' refers to a case where a person who is obliged to disclose a fact keeps quiet and thereby renders abets the commission of the act .

Advice per se does not necessarily amount to instigation. Instigation by advice is however difficult to prove. What has to be shown is that the advice was such that it was meant actively to suggest or stimulate the commission of an offence. Or else, general advice is far too vague an expression to prove allegation.

Instigation in Dowry Death Cases

Instigation as a form of abetment has generally been one of the essential considerations in cases involving death of young brides or women within seven years after marriage, as a consequence of dowry harassment. In *Protima Dutta v State of West Bengal* ,[23] a charge under s 306 read with s 34, IPC, was laid against the mother-in-law of the deceased and her husband of having abetted the commission of suicide by instigating and inciting her to commit suicide. The evidence revealed many circumstances which showed that the mother-in-law suggested to the deceased by conduct, language and direct or indirect expressions to commit suicide. Although, it did not amount to express solicitation, her cruel conduct towards the deceased over the months made the deceased suffer mentally. Therefore, the series of conduct amounting to act ively suggesting and stimulating the deceased to commit suicide, it was held, clearly amounted to instigation.

In the context of bride-burning and dowry related deaths, s 306 which provides for abetment of suicide, is often pressed into service. Here too, abetment is in terms of promoting, encouraging and thereby instigating suicides. A plethora of cases exists on this aspect. It will suffice to cite but a few[24] in which it has been held that the conduct of the husband and his relatives in creating such a miserable situation to evolve in which the deceased has no other recourse than to commit suicide, in fact, amounts to abetment by instigation.

State of Punjab v Iqbal Singh ,[25] was referred to by the Madhya Pradesh High Court in *Ram Kumar v State of Madhya Pradesh* ,[26] which considered the case of suicide committed by a woman who was married for 20 years during which her husband continuously treated her cruelly and demanded that she divorce him. The husband had been convicted by the trial court for abetting the suicide under s 306, IPC, and awarded him sentence of four years' rigorous imprisonment and imposed a fine of Rs 1,000. The high court held that while asking for divorce by itself cannot be called provocation to commit suicide, it is the cruelty and the overall atmosphere created by cruelties precedent and antecedent of such demands of divorce, which are material and which had the effect of leading the deceased person to take poison to end her life. The word 'instigate', it was held, should not be given restricted meaning to actual words spoken, but ought to be given a wider meaning to commensurate with the 'ordinary experiences of life'. While every case has to be examined against the specific circumstances and facts of that case, in the present case, it was the cruel conduct of the accused-husband which provoked his wife to commit suicide. Hence, he was rightly convicted of abetment to commit suicide under s 306, IPC, and the sentence was not interfered with.

In *K Prema S Rao & Anr v Yadla Srinivasa Rao* ,[27] the Supreme Court held that a continued and persistent demand, associated with physical torture and harassment, by a husband of a deceased wife for transfer of a piece of land given to the latter by her father as *stridhan* amounts to abetment by willful conduct to commit suicide under s 306 of the IPC. It also further ruled that failure to frame a charge under s 306 does not preclude a court from convicting a person thereunder if facts narrated in the statement of charges reveal all the necessary and constituting ingredients of s 306. A persistent demand for her consent for re-marriage leading to suicide of a wife and children is, ruled the Karnataka High Court, enough to convict a person for abetting a

matrimonial death.[28] However, a person cannot be convicted for abetting a suicide without sufficient proof of his direct involvement in the commission of the crime.[29]

ABETMENT BY CONSPIRACY

The second leg of the definition of abetment is the abetment by engaging with one or more persons in a conspiracy to commit an offence. Conspiracy and abetment by conspiracy are distinct offences. The distinction between an offence of abetment by conspiracy and the offence of criminal conspiracy, so far as an agreement to commit an offence is concerned, is that for abetment by conspiracy, mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of conspiracy, the very agreement or plot is an act in itself and is the gist of the offence.[30]As the Supreme Court explained, the distinction between conspiracy referred to in the second clause of s 107, and the provision of conspiracy in s 120-A is that in the former offence, a mere combination of persons or existence of agreement between them is not enough. An act or illegal omission should have taken place in pursuance of the conspiracy and in order for the commission of the conspiracy, conspired for; in the latter offence, the mere agreement, if it is one to commit an offence, is sufficient.[31] The persons who are initially guilty of conspiracy to commit an offence become guilty of abetting the offence as soon as an act or illegal omission takes place in pursuance of the conspiracy. To prove the charge of abetment by conspiracy, the prosecution is required to prove that the abettor had instigated the doing of a particular thing or engaged with one or more other person or persons in any conspiracy for the doing of that thing or intentionally aided by an act or illegal omission, doing of that thing.[32] Criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy.[33]

ABETMENT BY INTENTIONAL AIDING

By virtue of *thirdly* of s 107, a person abets the doing of a 'thing' who 'intentionally aids' the doing of that thing. Intentional aid consists of any of the following three components:

(1) Doing of an act directly assisting the commission of the crime; or
(2) Illegally omitting to do a thing which one is bound to do; or
(3) Doing an act which may facilitate the commission of the crime by another.

A careful reading of the third clause of s 107 along with expln 2 reveals that an act, which merely amounts to aiding the commission of an offence, does not amount to abetting an offence unless that act was done with intent to aid the commission of the 'thing'. A person, for example, invites another casually or for a friendly purpose and that facilitates the murder of the invitee does not make him an abettor unless the invitation was extended with intent to facilitate the commission of the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Mere knowledge on part of a person that his act would facilitate the commission of the offence also does not make him an abettor.[34] Similarly, mere presence of a person at the commission of a crime does not amount to 'intentional aid' unless it is shown that he, through his presence, intended to have the effect. The words 'intentional aid' used in s 107 *thirdly* warrant active complicity of a person in effecting a crime. A mere giving aid does not amount to abetment by aid if he does not know that the offence was being committed or contemplated. Intention to aid the commission of the offence is the gist of the offence of abetment by aid.[35] A person aiding the commission of an offence under coercion or fear, therefore, does not come within purview of the provision.[36]

It is clear from explanation 2 that in order to attract *thirdly* of s 107, the act must have been done for one cannot be held to have aided the doing of a thing when the thing has not been done at all! For example, if a servant has kept open the gate of his master's house with a view to facilitate the entry of thieves, he cannot be held guilty of the offence of probable theft by others. But if the servant, after having opened the door had invited the thieves to enter the house, he is guilty of abetment in so far as he had encouraged them by his conduct to commit theft. So also accomplices standing at a distance to help thieves in conveying the property stolen are abettors, even if they took no part in theft and were standing at a distance.

Abetment by Illegal Omission

When a person is bound legally to do a thing but deliberately refrains from doing that, then the person will be liable for abetment by illegal omission. Where the accused, a husband who did not dissuade his wife from committing suicide when she threatened to do so and actually committed suicide by setting fire to her cloths, he could not be held guilty of 'illegal omission'.[37] To held person guilty of abetment by 'illegal omission', it is required to prove that the accused was not intentionally aided the commission of the offence by his non-interference but also that his omission led to a breach of legal obligation. Thus, where a Head Constable of Police, perceiving that his subordinates were about to torture a prisoner for extorting confession, purposely left the place so as not to be a witness of what occurred, it was held that he was guilty of the abetment of the offence that was committed in his absence. He certainly omitted to do that which he was bound to do. It was illegal for him to go away in order that the crime should be committed.[38] But a mere presence of a village police officer when the offence of extortion was committed, it was ruled, would not make him an abettor.[39]

What is crucial to note is that the illegal omission should be of an act that the person is in law expected to do. Thus, when the law imposes on a person a duty to discharge, his illegal omission to act renders him criminally liable. A lorry driver, who allowed a child to drive, knowing the child did not know driving, resulting in accident, it was held the driver abetted the offence by illegal omission.[40]However, a sheer negligent act though in contravention of legal rules does not amount to an abetment by 'illegal omission'.[41]

Facilitating the Commission of a Crime

A person is held to abet a crime if he, by way of assistance or supply of a thing or otherwise, helps facilitate the crime committed by another. In the case of *Eshan Meah,*[42] one Bedoo, who was supervising some labourers and who had got into a quarrel, shouted in the heat of the moment that he wished he had a fatal weapon to teach a labourer a lesson. Eshan Meah, who was standing nearby handed over to him a *dao* with which Bedoo severely injured the coolie. Eshan Meah was rightly held guilty of abetment of the offence of causing grievous hurt. The court held that the supervisor had made known his intentions clearly. Despite this, when another person knowingly handed over a weapon, he must be presumed to be intentionally doing something in order to facilitate the commission of the crime, thereby abetting the act.

In *Ram Kumar v State of Himachal Pradesh* ,[43] the Supreme Court considered the case of a constable who dragged a young newly married 19-year old girl and her husband from the latter's brother's house. In the police station, the Head Constable took the girl to a room, repeatedly beat her and committed rape on her, while another constable kept watch outside holding the hapless husband, who was helplessly hearing the frantic screams of his wife. The Supreme Court held that the constable, who kept watch on the husband, by his conduct, had facilitated and thereby abetted rape.

ILLUSTRATIVE CASES

When Principal Offender is Acquitted in a Case Involving Charge of Abetting by Aiding

In *Trilok Chand Jain v State of Delhi* ,[44] the Supreme Court was considering the case of a person accused of abetting the principal offender, an inspector in the Delhi Electricity Supply Undertaking, of receiving a sum of money as bribe for providing electricity connection to the complainant. However, when the principal offender himself had been acquitted and exonerated by the trial court of committing the offending act, then nothing survived of the charge as there was no evidence that the appellant, a lower cadre employee, had demanded money. It was the particular case of the prosecution that it was the inspector who had demanded money. Thus, the accusation of the prosecution that the money was demanded by the appellant labourer for himself (as the principal offender had been acquitted) was held to be unsustainable and the person was acquitted. When the principal offender himself was acquitted, then it was held that the person accused of aiding could not be convicted.

Effect of Acquittal of Person Committing the Offence on Abettor

In *Jamuna Singh v State of Bihar* ,[45] the Supreme Court considered the issue of Jamuna Singh, accused of instigating another person to set fire to the hut of another, thereby committing an offence under s 436 read with s 109, IPC. However, the hut was set on fire not by the person instigated but another. Further, the Patna High Court had acquitted Jodha Singh, the person who allegedly set fire to the hut. In considering the chal-

lenge to the continued conviction of the appellant as the main person himself had been acquitted, the Supreme Court, after a detailed consideration of the case law, held:

> It cannot be held in law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettors' guilt depends on the nature of the act abetted and the manner in which the abetment was made. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence.[46]

In this case, the conviction of the accused Jamuna Singh was altered from one under s 436 read with s 109, IPC, to offence under s 436 read with s 115, IPC. Since the latter offence prescribed a lower sentence, the sentence of eight years' rigorous imprisonment for offence under s 436 read with s 109, IPC, was reduced to four years.

In *Madan Raj Bhandari v State of Rajasthan* ,[47] wherein the appellant, who was charged with having abetted with another in causing miscarriage to a woman, was convicted even though the woman was acquitted, the Supreme Court, relying upon the *Faguna Kanta*, reiterated that 'a charge of abetment fails ordinarily when the substantive offence is not established against the principal offender'.

In *Sunder v State* ,[48] the Allahabad High Court has ruled that only the charge of abetment by intentional aid fails when the person alleged to have committed that offence is acquitted of that offence. Conviction of the alleged abettors accused of abetment by aiding cannot obviously sustain as it postulates commission of the principal offence. If the perpetrator commits no offence, the aiding by another person, ostensibly becomes impossible.[49]

When Substantive Offence is not Established

When the substantive offence is not established and the principal offender is acquitted, then generally the abettor cannot be held guilty. In other words, when the substantive charge fails, then the charge of abetment also fails.

A line of Supreme Court rulings from *Faguna Kanta Nath v State of Assam* ,[50] *Jamuna Singh v State of Bihar* ,[51] to *Madan Raj Bhandari v State of Rajasthan* ,[52] was considered by the Supreme Court in *Haradhan Chakrabarty v Union of India* ,[53] in which the appellant was convicted for having abetted, with his superior army officer, theft of 250 wheel drums. The officer, who was the principal offender, and eight others who were accused of abetting him, were acquitted. Therefore, Haradhan Chakrabarty sought acquittal of the offence of abetment. The court, acquitting the petitioner, held:

> ...[U]nless the substantive offence against the principal offender is established, the question of the abettor being held guilty (under these circumstances) does not arise. The petitioner is alleged to have entered into a conspiracy along with eight others and abetted the commission of the offence. All the other alleged abettors are acquitted and the principal offender ...is also acquitted. And the petitioner alone remains in the picture as one having abetted the offence by entering into conspiracy. It is axiomatic that there cannot be a conspiracy of one. In *Topan Das v State of Bombay* ,[54] it was held that 'two or more persons must be parties to such an agreement and one person alone can never be held guilty of criminal conspiracy for the reason that one cannot conspire with oneself'.[55]

Having examined the scope of the provision of abetment in s 107, IPC, which stipulates abetment to commit a 'thing', we will examine s 108 which defines 'abettors' in relation to 'offences' they abet.

Section 108. Abettor.--A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

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

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

Illustrations

(a) *A* instigates *B* to murder *C*. *B* refuses to do so. *A* is guilty of abetting *B* to commit murder.
(b) *A* instigates *B* to murder *D*. *B* in pursuance of the instigation stabs *D*. *D* recovers from the wound. *A* is guilty of instigating B to commit murder.

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

Illustrations

(a) *A*, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as *A*. Here *A*, whether the act be committed or not, is guilty of abetting an offence.
(b) *A*, with the intention of murdering *Z*, instigates *B*, a child under seven years of age, to do an act which causes *Z*'s death. *B*, in consequence of the abetment, does the act in the absence of *A* and thereby causes *Z*'s death. Here, though *B* was not capable by law of committing an offence, *A* is liable to be punished in the same manner as if *B* had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.
(c) *A* instigates *B* to set fire to a dwelling-house. *B*, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of *A's* instigation. *B* has committed no offence, but *A* is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.
(d) *A*, intending to cause a theft to be committed, instigates *B* to take property belonging to *Z* out of *Z's* possession. *A* induces *B* to believe that the property belongs to *A*. *B* takes the property out of *Z*'s possession, in good faith, believing it to be *A's* property. *B*, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But *A* is guilty of abetting theft, and is liable to the same punishment as if *B* had committed theft.

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

Illustration

A instigates *B* to instigate *C* to murder *Z*. *B* accordingly instigates *C* to murder *Z*, and *C* commits that offence in consequence of *B*'s instigation. *B* is liable to be punished for his offence with the punishment for murder; and, as *A* instigated *B* to commit the offence, *A* is also liable to the same punishment.

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

Illustration

A concerts with *B* a plan for poisoning *Z*. It is agreed that *A* shall administer the poison. *B* then explains the plan to *C* mentioning that a third person is to administer the poison, but without mentioning *A*'s name. *C* agrees to procure the poison, and procures and delivers it to *B* for the purpose of its being used in the manner explained. *A* administers the poison; *Z* dies in consequence. Here, though *A* and *C* have not conspired together, yet *C* has been engaged in the conspiracy in pursuance of which *Z* has been murdered. *C* has therefore committed the offence defined in this section and is liable to the punishment of murder.

SCOPE AND INGREDIENTS OF SECTION 108

The major difference between ss 107 and 108 is that while the former covers the 'doing of a thing', the latter provision covers the abetment of an 'offence' specifically. Thus, s 108 defines abettor to be a person who abets:

(1) the commission of an offence; or
(2) the commission of an act which would be an offence if committed by a person capable of committing an offence in law.

The abettor could be either an instigator, or a conspirator, or a person giving aid to the commission of a crime as defined in s 107. The crucial aspect is that the abetment must be of an offence or an act which amounts to an offence. Hence, if the thing abetted is not an offence, then the person abetting will not be considered an abettor falling within the coverage of s 108 and cannot be held liable to punishment as provided in law.

A very important aspect of the definition of abettor is to be found in the explanations and illustrations provided with the main definition of abettor in s 108. The section itself states that for the offence of abetment, it is not essential that the person abetted should be capable in law of committing that offence, or that such person should have the same guilty intention as that of the abettor. Thus, if one employs a child below seven years or a lunatic to commit the offence, such persons will be treated in law as innocent agents.[56]

The definition of 'abettor' has been expanded and explained through five explanatory clauses which are part of the section itself. We shall examine these clauses briefly below.

Explanation 1: Abetment of Illegal Omission is an Offence

This may be despite the abettor himself not being bound to do that act . A case under this explanation arises when a private person instigates a police officer to leave a scene of a cognisable offence, which is his duty to prevent. Here, the policeman is guilty of an illegal omission and the private person is guilty of abetting the police officer in his illegal omission, although, the latter was not himself liable to do the act.

Explanation 2: Abetted Act Need not be Committed: Effect of Abetment is Immaterial

In this category, abetment depends upon instigation and not upon the effect it has upon another. The offence of abetment is complete with the instigation, notwithstanding the fact that the act abetted is not committed or the person abetted refuses to do the thing or in doing it, the expected result did not follow. To illustrate this, if *A* instigates *B* to defame *C*, even if *B* refuses to do so, *A* is liable as abettor by instigating *B* to defame *C*. Similarly, if *A* instigates *B* to murder *D*, and *B* in pursuance of the instigation stabs *D*, but *D* recovers from the wound, *A* is guilty of instigating *B* to murder in spite of the fact that the act of *B* did not produce the desired effect, i.e., the death of *D*.[57] In a case,[58] *A* handed over a certain amount to *B* to pay it to a Medical Officer as a bribe. But *B* misappropriated the amount, whereupon he was convicted. Subsequently, *A* was prosecuted and convicted for bribing the Medical Officer even though the latter was not bribed at all.

Explanation 3: Person Abetted Need not be Capable of Committing an Offence

There is no prerequisite of s 108 that for abetment, the person abetted should be capable by law of committing the offence, or that he should have any guilty intention or knowledge or should commit an offence. Thus, the explanation along with the illustration makes it clear that if a person has caused injury to another through innocent agents such as a child or lunatic, he will still be liable. The employment of an agent legally incompetent to commit an offence does not absolve the abettor from his criminal liability. The innocent agent is merely his tool and the abettor is really responsible.

Explanation 4: Abetment of an Abetment is an Offence

Abetment of an abetment is an offence when the principal abetment was an offence. In this case, the substantive abetment must be the abetment of an offence. It is not necessary that such an offence should be committed. For example, when *A*, the servant of *B* was approached by *C* with the intention of robbing *B*, who reported the fact to *B*, and *B*, wishing to entrap *C*, allowed *A* to assist *C* in robbing him, whereupon *A*, made over his master's goods to *C*, who was then prosecuted for abetment of theft by *A*. The question was whether *A* had committed the theft, and *C* abetted him. *A* could, on facts, not be convicted of the theft since he had

removed the goods with his master's consent. However, it was held that *C* was liable for abetment for the theft (which in fact, did not take place) using expln 4 and the illustration provided therein.[59]

Explanation 5: Abettor Need not Concert in Abetment by Conspiracy

In a conspiracy, it is not necessary that all the conspirators should have been aware of the details of the plot to make them liable. Very often, conspiracies are hatched in secrecy and all cannot be equally trusted with plans. Anyhow, all will be equal under this clause with the main criminal, even though they were not directly connected with him.

Section 108A. Abetment in India of offences outside India.--A person abets an offence within the meaning of this Code, who, in India, abets the commission of any act without and beyond India which would constitute an offence if committed in India.

Illustration

A, in India, instigates *B*, a foreigner in Goa, to commit a murder in Goa. *A* is guilty of abetting murder.[60]

SCOPE AND NATURE OF PROVISION

Section 108A was brought in through an amendment to the IPC in the year 1898. Under this section, the offence abetted outside India shall also be an offence punishable in India.

However, if the act in India amounted only to mere preparation, it cannot be punished in India. So, in the case where a wife named Baku, along with her husband Tukaram took their minor granddaughter Piri, a girl under six years of age, from Sholapur to a place in the Nizam's dominions (then not part of British India), her object being to dedicate her to the Goddess and thus make her an *aradhin murlin* (a prostitute generally), it was held that the mere removal of the girl from India did not amount to abetment. The accused were acquitted.[61]

PART B

LIABILITY OF AN ABETTOR

Section 109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.--Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

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

Illustrations

(a) *A* offers a bribe to *B*, a public servant, as a reward for showing *A* some favour in the exercise of *B*'s official functions. *B* accepts the bribe. *A* has abetted the offence defined in section 161.

(b) *A* instigates *B* to give false evidence. *B*, in consequence of the instigation, commits that offence. *A* is guilty of abetting that offence, and is liable to the same punishment as *B*.

(c) *A* and *B* conspire to poison *Z*. *A*, in pursuance of the conspiracy, procures the poison and delivers it to *B* in order that he may administer it to *Z*. *B*, in pursuance of the conspiracy, administers the poison to *Z*, in *A*'s absence and thereby causes *Z's* death. Here *B* is guilty of murder. *A* is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

OVERVIEW OF THE PROVISIONS OF SECTIONS 109 TO 120, INDIAN PENAL CODE 1860

Sections 109-120 prescribe the principles for assessing the extent of punishment liable to be imposed on various types of abettors under different situations. S 109 broadly deals only with situations in which the act abetted is actually committed in consequence of the abetment, but however there is no specific provision made in the IPC for the punishment of that abetment. In such a situation, the punishment due will be the same as provided for the offence abetted.[62] Thus, where specific provision has been made in the IPC, providing for punishment in cases of abetment, in those cases s 109 will not operate.[63]

FACTORS DETERMINING CRIMINALITY OF ABETTOR

There are four factors determining the extent of liability of the abettor. What act he had abetted and with what intention. What act was committed and with what intention.

Section 109 meets the situation when there was identity of intention between the abettor and the person abetted committing the act, and the act was committed as it was abetted, then the liability of the abettor and the principal offender is equal.

A complete identity of intention and act committed may not always be possible and there may exist variation or difference between the intention and the actual act committed, and its different combinations. Thus, where an act has been committed with different intention from that of the abettor, s 110 will apply; however, where the act abetted and the act done is act ually different, s 111 will be applicable. Similarly, s 113 will cover the field when the effect caused by the act abetted is different from that intended by the abettor.

In a like manner, ss 118-120 provide for a variety of ways in which an offence is facilitated by concealing the design or intention to commit such offences.

Section 114 covers a situation when the abettor is act ually present when the offence is being committed.

The remaining provisions in the chapter deal with the punishments covering the various forms of abetment. They, however, relate to three facts following abetment:

(1) Where no offence is committed, in which case the offender is punished for what is a mere attempt to stir up or to commit crime (ss 115-16);
(2) Where the act abetted is committed, in which case the offender is punished under ss 109 and 110;
(3) Where some act different but naturally flowing from the act abetted is committed, in which case, the abettor is punishable under ss 111, 112 and 113.

SCOPE OF SECTION 109

Active abetment at the time of the commission of the offence is covered by the provisions of s 109.[64] An abettor's presence is not always required for attracting s 109. He becomes liable even though he was not present when the perpetrator committed the abetted offence provided prosecution proves that he abetted the offence.[65] However, when he remains present, s 114 comes into operation.

An offence under this section act ually constitutes a substantive offence, and it may be so charged.[66] It creates a distinct offence though punishable in the context of other offences.[67] A person can be charged and convicted for abetting an offence if he has instigated another to commit a criminal act or renders intentional aid by act or omission or engages somebody to do an illegal act.[68] A charge under s 109, however, has to be along with some other substantive offence committed in consequence of abetment.[69] It is not permissible for a court to convict a person who is charged only the substantive offence.[70] The procedure applicable is the same as if the offence abetted is committed.[71] So, if the offence abetted is cognisable, then as applicable to other offences, the police may arrest a person accused of committing an offence under this section. Similarly, depending on the nature of the main offence abetted, other procedural provisions will apply as regards whether a warrant or summons will be warranted, regarding matters of bail, compounding of offences and the competency of the court to try the offence.

Section 109 is thus concerned only with the punishment of abetment and lays down nothing more than that if the IPC has not separately provided for the punishment of an abetment as such, then it is punishable with the imprisonment provided for the main offence.[72]

DISTINCTION BETWEEN SECTIONS 34, 109 AND 120B, INDIAN PENAL CODE 1860

In *Noor Mohammad Mohd Yusuf Momin v State of Maharashtra* ,[73] the Supreme Court elaborated on the difference between ss 34, 109 and 120B, IPC. This case involved the conviction of the appellant along with three others to a conspiracy to kill a neighbour Mohammad Yahya, with whom the appellant had been having a dispute over the right of passage and the right to collect water from a tap nearby. The trial court originally found only the person who was alleged to have stabbed the deceased, guilty of offence under s 302 and acquitted the other three. However, on an appeal against the acquittal filed by the state, the appellant and two others were convicted for offences under s 302 read with s 34, of the IPC, and additionally, the appellant for offence under s 302 read with s 109, IPC and sentenced him to life imprisonment. Since the conviction under s 302 read with 34 and 109, IPC, was challenged on the ground of insufficiency of evidence because of which grave injustice was done to the appellant, the Supreme Court entered into a detailed examination of the evidence on record. While discussing the manner in which the appellant had instigated the killing of the deceased and other circumstances, the court elaborated the distinction between the various sections as follows:

> So far as section 34 , Indian Penal Code, is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109 , Indian Penal Code , on the other hand may be attracted even if the abettor is not present when the offence abetted is committed, provided that he has instigated the commission of the offence or has engaged with one or more persons in a conspiracy to commit an offence and pursuant to that conspiracy someact or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. ...Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act, or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment, the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by section 107 , IPC .[74]

In the facts of the above case, the appellant was shown to have actively instigated others to murder the deceased. The conspiracy to kill the deceased was also held to have been established. Hence, the Supreme Court confirmed the conviction for offences under s 302 read with s 109, IPC. However, on the issue of conviction under ss 302/34 IPC, the court held that the appellant was not present on the spot of occurrence himself, though he was seen going behind the deceased in the company of three other men. Therefore, the conviction under s 302 read with s 34, IPC, alone was set aside.

Substitution of Offence and Conviction

In *Jai Narain Mishra v State of Bihar* ,[75] the Supreme Court considered the case of an accused who was accused of instigating others belonging to the Mishra community to attack members of the Tiwari family of village Bareja in Chapra district. The trial court had originally acquitted all the ten accused. On appeal by the state government, the Patna High Court convicted them for offences under ss 147, 148, 323, 324, 326 and 307 read with 109, IPC. However, when the Supreme Court examined the evidence, it found that in so far as the appellant Jai Narain (the person accused of instigating others) was concerned, the witness while tendering evidence during trial had stated that the accused had instigated others to kill him, in the statement made by him recorded as dying declaration, he had stated that the accused had only instigated others to 'assault the rascal'. This, the court felt, warranted a substitution of conviction from s 307 to s 324 read with s 109, IPC. The sentence of two years' imposed by the high court was, however, not disturbed, as it was felt appropriate for the offence committed.[76]

WHETHER DIFFERENT SENTENCE TO PRINCIPAL OFFENDER AND ABETTOR IS JUSTIFIED

In *Ashok Nivruti Desai v State of Maharashtra* ,[77] the Bombay High Court considered the question as to whether it was proper to sentence differently, the principal offender and the abettor, in a case of proved rape under s 376, IPC. In that case, the prosecutrix was taken by an auto driver to a remote place where his hut was situated and committed rape on her. On consideration of the evidence, the High Court confirmed the

conviction of the principal offender Ashok Desai and Shantabai who ensured that the prosecutrix did not run away and therefore abetted the commission of the offence of kidnapping and rape under ss 376 and 376/109, IPC, respectively. However, considering the different sentences, the court awarded five years rigorous imprisonment for the principal offender under s 376, IPC, and three years' rigorous imprisonment to Shantabai under ss 376/109, IPC. The court held: 'In such cases, courts should not make any distinction in the *quantum* of sentence to be awarded to the principal offender and that awarded to the offender who abetted the commission of the offence'.[78]

When abetment is not proved, then the accused can be acquitted.

In *Harabailu Kariappa v State of Karnataka* ,[79] there was a dispute between the deceased Kushalappa and *A1* and *A2* over cutting of trees from the forest land near the land of the accused, which resulted in the murder of the deceased. However, the court held that while the evidence proved clearly the direct role of *A1* and *A2*, there was no evidence to prove that the offence committed by *A1* and *A2* was with the abetment of *A3*. Hence, *A3* was acquitted.

However, the Supreme Court in *Mahendra Rai v Mithilesh Rai* ,[80] set aside the judgment of the Patna High Court acquitting the accused *A1* and *A2* of murdering a 12-year old boy as there was discrepancy in timings in preparation of the inquest report and the absence of names of the assailants in the same. After reassessing the evidence, the Supreme Court observed that the high court was in error on coming to a finding of innocence, as the facts established clearly that while *A2* held the boy who was sleeping in a cot below a mango tree in an orchard near his house, *A1* cut his neck with a *kakut* (chaff cutter). Thus, the Supreme Court affirmed the conviction of the trial court of offence under s 302, IPC, against *A1* and under s 301 read with s 109, IPC, against *A2*.[81]

Section 110. Punishment of abetment if person abetted does act with different intention from that of abettor.--Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor, and with no other.

PRINCIPLE UNDERLYING SECTION 110 AND SCOPE OF THE PROVISION

The law of abetment can be said to broadly encompass four dimensions: (1) the act abetted; (2) intention of the act done; (3) the abettor; and (4) the principal offender. While s 109 comprehends a situation when there is no variation between the abetment and the act, s 110 is actually meant as a supplement by providing that a variation between the intention and knowledge of the abettor and those of the person abetted is immaterial, so long as the act done is the same as the act abetted. Even the context when the act actually committed is different, is covered by the provision of s 111. Thus, s 110 provides that it does not matter whether the person abetted had the necessary intention or knowledge, so long as the act is committed, then the abettor shall be liable as though he himself had committed it with the requisite intention and knowledge.[82] This is not to suggest that the person abetted will be left free from legal liability. If he was an innocent agent, then he is held to be *respondeat superior*. If he is *particeps criminis*, then he must suffer as much as his mentor.

An illustration will make this clear. *A* orders *B* to kill *C*, and *B* kills him because he has a malice of his own against *C*, *A* is liable to the extent as if *B*'s act was due to the malice of *A*. Similarly, *A* asks a railway porter *B* to remove a certain luggage from the train, and the porter removes it believing it to be *A*'s, though *A* intended to steal it; he is liable for abetment of *B*'s theft, though *B* may be an innocent agent, and in which case he is not liable for his own act.[83]

Section 111. Liability of abettor when one act abetted and different act done.-- When an act is abetted, and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

Proviso.--Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Illustrations

(a) *A* instigates a child to put poison into the food of *Z*, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of *Y*, which is by the side of that of *Z*. Here, if the child was acting under the influence of *A's* instigation, and the act done was under the circumstances a probable consequence of the abetment, *A* is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of *Y*.

(b) *A* instigates *B* to burn *Z's* house. *B* sets fire to the house and at the same time commits theft of property there. *A*, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(c) *A* instigates *B* and *C* to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. *B* and *C* break into the house, and being resisted by *Z*, one of the inmates, murder *Z*. Here, if that murder was the probable consequence of the abetment; *A* is liable to the punishment provided for murder.

SCOPE AND APPLICABILITY OF PRINCIPLE OF PROBABLE CONSEQUENCE

Section 111 enunciates what is called in law, the principle of constructive liability. Thus, as contrasted to ss 109 and 110, which covered the situation when the act done is the act abetted, s 111 comprehends a situation when the act abetted is different from the act act ually committed. Based on the principle of criminal law that 'every man is presumed to intend the natural and probable cause of his act', the section stipulates that the abettor is liable for the act committed, though different from the act abetted, if the result is a natural and probable consequence of an act, which is likely or which can reasonably be expected to follow from such act. It follows that if an act cannot be expected to ensue as a result of the abetment, then it cannot be said to be the probable consequence of an act abetted. The act s constituting abetment are the same as provided for in s 107, namely, abetment by way of instigation, aiding and in pursuance of conspiracy.

Thus, the principle of probable consequence of an act can be described as an act which is likely or which can reasonably be expected to follow from such an act.[84] An unusual or unexpected consequence cannot be described as a probable one, since it is a well-established rule in criminal law that provisions have to be strictly construed. Hence, if a wider interpretation is given to the term 'probable consequence' in the section, it will be impossible to fix limits to an abettor's liability.

Section 112. Abettor when liable to cumulative punishment for act abetted and for act done.--If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Illustration

A instigates *B* to resist by force a distress made by a public servant. *B*, in consequence, resists that distress. In offering the resistance, *B* voluntarily causes grievous hurt to the officer executing the distress. As *B* has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, *B* is liable to punishment for both these offences; and, if *A* knew that *B* was likely voluntarily to cause grievous hurt in resisting the distress, *A* will also be liable to punishment for each of the offences.

PRINCIPLE UNDERLYING SECTION 112

This section merely extends in a logical manner, the principles regarding liability when an act has been committed in pursuance to an abetment. In a way, this section extends the doctrine of constructive liability. Thus, providing that an abettor is liable to the punishment of an offence which is committed in consequence of his abetment, which is different and apart from the intended offence, only materially enlarges the liability of the abettor to punishment for both the offence act ually abetted, as also that which was a probable consequence of the abetment, provided of course that the two offences are distinct.

Section 113. Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.--When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, caused a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the

same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Illustration

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

PRINCIPLE UNDERLYING SECTION 113

This section supplements the provision in s 112, which deals with the doing of a different act to the act abetted, while s 113 deals with a case where the act done is the same as the act abetted, but with a different effect. The liability of the abettor is consequently different in the two cases. In the earlier section, liability is contingent upon whether the act is a probable consequence of abetment. However, in s 113, the requirement for 'knowledge of the likelihood of the effect' has been provided. The measure of criminal responsibility in a case arising from s 111 is the probability of the consequence; however in s 113, it is not the probability, but the knowledge of the likelihood of the effect produced. Knowledge is subjective, but probability is objective. In this section, the facts warranting inference must be stronger.

Section 114. Abettor present when offence is committed.--Whenever any person, who is absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

SCOPE OF SECTION 114

There are three essential ingredients of the section:

(1) The abetment should be prior to the commission of the offence;
(2) The abetment must be complete by itself; and
(3) The abettor must be present at the time of the commission of the act .

If these ingredients are present, the section provides that the abettor shall be deemed to be liable for the punishment as if he had himself committed the offence. Thus, the section applies to a case where a person abets the commission of an offence sometime before it takes place and happens to be present at the time when the offence is committed, and is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps in the commission of the offence. In such a case, the person is guilty of committing the offence itself and not merely of abetment.[85]

It is based on this principle laid down by the Supreme Court in *State of Karnataka v Hemareddy* ,[86] setting aside the judgment of the Karnataka High Court acquitting the appellant of offences under s 467 read with 114, IPC, for forging some documents in respect of an alleged sale of some agricultural land. In that case, the appellant was alleged to have helped the other accused Pyatal Bhimakka, impersonate another person. Bhimakka, wife of Nagappa, the real owner of the land in question who had died in 1953, forged a document and took her to the sub-registrar's office (where documents of sale, mortgage etc are registered), helped her to affix the thumb to the document and get it registered. The high court had acquitted the appellant, although on facts it held that the offence under s 467 read with s 114, IPC, had been proved on a technicality, namely, on the question whether a private complaint could have been filed or whether the criminal complaint should have been filed under s 195(1)(b), CrPC, by the court before which a civil dispute over the same lands had been instituted. The Supreme Court, however, confirmed the conviction under s 467 read with 114, IPC, against the appellant and sentenced him to one year's rigorous imprisonment.[87]

It should be noted that s 114 is evidentiary in nature and not punitive because it establishes a presumption which is irrebuttable that actual presence plus prior abetment can mean nothing else but prior participation.[88]

The effect of the provision is that if a person is present at the commission of the offence, he is deemed to have committed it, not that he has act ually committed it. Thus, actual presence plus prior abetment can mean nothing else but participation.[89] That is the irrebuttable presumption raised by s 114 and brings the

case under s 34, IPC. This was the dictum of the Supreme Court in *Mathurala Adi Reddy v State of Hyderabad* .[90]

In this case, a group of about five to six people armed with guns, allegedly communists, came to the village of Alwal in Nalgonda District of Andhra Pradesh (as it is known now) on 27 January 1949, at 10 pm, abducted some persons and killed them. It was the prosecution case that the appellant instigated the others to fire, when he allegedly saw a group of people coming, resulting in firing causing two deaths. The Supreme Court felt that the very fact that the accused were armed, and were moving about in a planned manner indicated that they already had a common intention. This, the court said, is much more than instigation. Three eye witnesses had deposed saying that they heard the appellant say, 'people are collecting, let us fire' which brings out the common intention clearly. However, as the court explained:

> But if the evidence makes out no more than mere instigation, it is, even so, instigation by a person who is present at the scene of the offence when it is committed. In such a case, the instigator is deemed to commit the murder by virtue of s 114, Indian Penal Code .[91]

The principle evolved in the above case was referred to by the Orissa High Court to confirm in *Godabarish Mohapatra v State of Orissa* ,[92] the conviction of the trial court on *A-4*, Chandrasekhar for offences under ss 302, 324 and 326 read with 114, IPC. In that case, Chandrasekhar, *A-4*, called the hero of the entire episode, wanted to eliminate the deceased and his family with whom he had a property dispute. For this purpose, he arranged for three other people to attack the deceased with weapons. On the day of occurrence when the deceased and his family were returning from a festival, the accused attacked them. Under the instigation of Chandrasekhar, the other three accused inflicted blows with lethal weapons on the deceased killing him and injuring others in his family. Since *A-4* was instigating the other accused while remaining on the scene, he was deemed under s 114, IPC, to have committed the murder and sentenced to the life sentence (which was confirmed by the high court).[93]

QUANTUM OF PUNISHMENT: DISTINCTION BETWEEN SECTIONS 115 AND 116, Indian Penal Code 1860

There are three provisions providing for the quantum of punishment liable for different cases of abetment. Section 109 provides for the punishment that can be imposed when the act abetted is committed as a consequence of the abetment. In contrast, ss 115 and 116 provide for different punishments to be imposed when the offence is not committed in consequence of abetment. We shall first consider the provisions.

Section 115. Abetment of offence punishable with death or imprisonment for life--if offence not committed.--Whoever abets the commission of an offence punishable with death or imprisonment for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

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

Illustration

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

Section 116. Abetment of offence punishable with imprisonment--if offence be not committed.--Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both;

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

Illustrations

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

COMPARISON OF PROVISIONS IN SECTIONS 115 AND 116

Section 115 covers those abetments which are of offences for which the punishment is death or life imprisonment, and in which the acts abetted have not taken place. Moreover, no specific provision should have been made in the Code for punishment of such abetment. There are three probable outcomes of the abetment:

(1) First, the act abetted may have been completed. As stated in the illustration, if the murder had been completed, then the abettor would be liable for death or life imprisonment as it would be covered under s 109, IPC;
(2) Secondly, if the offence is not committed, then the abettor or instigator would be liable for imprisonment up to a term of seven years;
(3) Finally, if hurt is caused as a result of the abetment, then in such cases, the abettor or instigator could be liable for imprisonment which may extend to 14 years and also fine.

On the other hand, s 116 covers abetments of other types of offences which are liable for imprisonment other than life imprisonment. In such cases, the imprisonment may be for a term which may extend to one-fourth of the maximum term of imprisonment provided for that offence, or with fine as provided for that offence, or both.

A special provision made is in the case of public servant, whose duty it is to prevent offences, who themselves abet the commission of an offence. In such cases, the public servant is liable to a term of imprisonment up to one-half of the longest term provided, apart from fine.

Section 117. Abetting commission of offence by the public or by more than ten persons.--Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration

A affixes in public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. *A* has committed the offence defined in this section.

PART C

PUNISHMENT FOR CONCEALING DESIGNS OR PLANS TO COMMIT OFFENCES

Sections 118 - 120, IPC, deals with a special form of abetment by way of concealing of a design to commit crimes. The essence of the crime consists in the concealment, despite knowledge of the plans for committing an offence, thereby enabling the offence to be committed. Such concealment inherently involves two aspects:

(1) First, the criminal design on the part of persons intending to commit a crime;
(2) Secondly, the concealment by another or others of the design to commit the offence.

Sections 118-120 deal with concealment prior to the commission of the crime, in contrast to ss 202 and 203, IPC, which deal with concealment subsequent to the commission of the offence.

In this context, we may consider the difference between active conduct of concealment and passive non-disclosure. Concealment, to be punishable, ought to be arising from an act ive intent to conceal, and is applicable in general to persons who have an obligation or legal duty to disclose knowledge of the intention to commit a crime. As examples of this, we may consider ss 39 and 40 of the CrPC, which make it obligatory on the part of a public man and officer employed in connection with the affairs of the village to inform the public authorities about certain facts which might lead to the commission of an offence. Hence, the act of concealment to be punishable ought to be intentional or at least with the knowledge that non-disclosure will help in the commission of the offence.

Another aspect to be noted is that the three sections envisage voluntary concealment by any act or illegal omission, the existence of design to commit such offence or knowingly makes any false representation regarding such design or plan to commit an offence. Thus, under ss 176 and 177, IPC, persons who are legally bound to give notice, or to furnish information to public servants are punishable, if they omit to give notice or information or furnish false information, and special punishment is imposed if the information is required concerning the commission of an offence to prevent its commission or for apprehending the offender.

PENALTIES PROVIDED IN SECTIONS 118, 119 AND 120, Indian Penal Code 1860

Section 119 covers the concealment of design to commit offences by public servants, and ss 118 and 120 covers the concealment by others with the difference being that s 118 covers concealment of design to commit offences punishable with death or life imprisonment whereas s 120 covers concealment to commit offences which are punishable with other punishments. The different provisions can be shown in a tabular column thus:

Table 16.1 Punishment for Voluntarily Concealing

Nature of Act Abetted	If Offence Committed	Not Committed
If punishable with death or life sentence:		
(1) In case of public	10 years	- servant (s 119)
(2) Others (s 118)	7 years	3 years
If punishable with imprisonment:		
(1) In case of public	Half of the longest term and/or fine	Half of the longest servant (s 119) term and/or fine
(2) Others (s 120)	One-fourth of the longest term and/or fine	One-eighth of the longest term and/or fine

Section 118. Concealing design to commit offence punishable with death or imprisonment for life.--Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or imprisonment for life;

[94]'voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design' to commit such offence or makes any representation which he knows to be false respecting such design,

If offence be committed.--If offence be not committed.--shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, **if the offence be not committed.--**with imprisonment of either description, for a term which may extend to three years; and in either case shall be liable to fine.

Illustration

A, knowing that dacoity is about to be committed at *B*, falsely informs the Magistrate that a dacoity is about to be committed at *C*, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at *B* in pursuance of the design. *A* is punishable under this section.

Section 119. Public servant concealing design to commit offence which it is his duty to prevent.--Whoever, being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent;

[95] 'voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design' to commit such offence, or makes any representation which he knows to be false respecting such design;

If offence be committed.--shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both;

If offence be punishable with death, etc.--or, if the offence be punishable with death or imprisonment for life, with imprisonment of either description for a term which may extend to ten years;

If offence be not committed.--or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Illustration

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that *B* designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here *A* has by an illegal omission concealed the existence of *B*'s design, and is liable to punishment according to the provisions of this section.

Section 120. Concealing design to commit offence punishable with imprisonment.--Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

If offence be committed.--shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, **if the offence be not committed.--**to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

PART D

PROPOSALS FOR REFORM

The Fifth Law Commission suggested some substantive and penal reforms in the law relating abetment. A few prominent among them, with reasons advanced therefor,[96] are outlined here below:

(1) Recalling the reforms brought in 1913 in the law relating to conspiracy (ss 120A and 120B) and the consequential confusion regarding the application of s 107 *secondly* and ss 120A & 120B, the Law Commission opined that the offence of abetment by conspiracy (second paragraph of s 107) has lost its *raison d'etre* and therefore it suggested that the second paragraph of s 107 (and all subsequent references to it in ch 5) be omitted.

(2) Section 108, which defines 'abettor', is coached in a phraseology that is not strict in conformity with that of s 107, which defines 'abetment'. S 107 refers to 'abetment' as 'doing of a thing',

while s 108 defines 'abettor' as a person who abets 'the com-mission of an offence'. The Law Commission, therefore, recommended that these two provisions be made thematically compatible with each other.

(3) Perceiving the existing s 108A as another explanation of what constitutes abetment of an offence, the Law Commission suggested that s 108A be merged with s 108.

(4) With reference to s 109, it has made the following three significant proposals for reforms: (i) the words 'by this Code' appearing in the provision, which are unnecessarily restrictive in nature, be deleted to give effect to a special provision made in special or local Acts for the punishment of abetment; (ii) the words referring to abetment by conspiracy be deleted from the *Explanation* of s 109; and (iii) *illustrations* appended to the provision be omitted, as they, in its opinion, do not serve any useful purpose.

(5) The Law Commission suggested four major reforms in s 115 that deals with punishment for unsuccessful abetment of offences punishable with 'death or imprisonment for life'. They are: (i) s 115 be confined only to offences for which 'death is the only punishment or one of the punishments provided by law' and to the offences punishable with 'death or imprisonment for life'; (ii) imprisonment provided under it be rigorous imprisonment as only rigorous imprisonment is possible for the main offences; (iii) the word 'harm' appearing in the marginal note to second paragraph of s 115 be replaced by 'hurt' as the corresponding paragraph speaks of 'hurt' and not of 'harm', and (iv) s 115 be made inapplicable to abetments that are made punishable under any other law, and hence, the words 'by this Code' appearing in paragraph one of s 115, be deleted.

(6) The Law Commission suggested a few changes of far reaching consequences in s 116, which prescribes the punishment for abetting the offences punishable with imprisonment when the abetted offences are not committed. In the light of its proposals for reform in s 115, it, with a view to avoiding overlapping between the revised s 115 and s 116, recommended that s 116 should expressly exclude capital offences from its purview. It proposed that existing punishment provided in the first paragraph for abetting an offence, if it, as a consequence of the abetment, is not committed (i.e. one-fourth of the longest imprisonment provided for the offence) be enhanced to 'one-half of the maximum term provided for the offence'. However, referring to the second paragraph of s 116, which deals with two classes of cases, namely: (i) where the abettor is a public servant whose duty it is to prevent the commission of an offence and the person abetted is a private individual; and (ii) where the abettor is a private individual and the person abetted is a public servant whose duty it is to prevent the commission of an offence, the Law Commission recommended that a public servant abettor be punished with the 'full period of imprisonment' provided for the offence abetted instead of only 'one-half of the longest term' provided for the offence. However, when a private individual is an abettor and the person abetted is a public servant whose duty is to prevent the commission of an offence, it felt, should not be subjected to severe punishment.

(7) Recalling the growing tendency among adults to instigate and use minor children for committing crimes and even to earn their livings on the earnings of these minor children, the Law Commission suggested that a new penal provision (s 117A) (with severe punishment) be inserted in the IPC.

It is important to that the Indian Penal Code (Amendment) Bill 1978, modeled on the recommendations of the Fifth Law Commission, has incorporated almost all the above mentioned proposals for reform in the chapter 'Of Abetment'. Moreover, the Fourteenth Law Commission, when it was called upon to review the 1978 Bill, has not only endorsed all the proposals for reform recommended by the Fifth Law Commission but also approved of the relevant clauses of the Bill incorporating these recommendations.[97] However, the Amendment Bill lapsed due to dissolution of the *Lok Sabha*.

1 *Kartar Singh v State of Punjab* (1994) Cr LJ 3139(SC), para 62.

2 For details see, *Russell on Crime*, JW Cecil Turner (ed), vol 1, 12th edn, Stevens & Sons, London, 1964, p 131, *et seq*.

3 Under the Indian Penal Code, accessories after the fact are known as 'harbourers'.Section 52-A defines the term 'harbour' to include 'supplying of shelter, food, drink, money, cloths, arms, ammunition or means of conveyance, or assisting of a person by any means, to evade apprehension'.

4 *Malan v State of Maharashtra* AIR 1960 Bom 393, (1960) Cr LJ 1189(Bom) .

5 *Shrilal v State of Madhya Bharat* AIR 1953 MB 155, p 156.

6 AIR 1957 All 184, p 187.

7 AIR 1925 PC 1, p 6. For further comments, see ch 'Joint Liability'.

8 *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175; *State of Rajasthan v Kesa* (2002) Cr LJ 432(Raj) .

9 See ch 5: Mens Rea.

10 *State of Maharashtra v Abdul Aziz* AIR 1962 Bom 243, (1962) 64 BOMLR 16.

11 *Kartar Singh v State of Punjab* (1994) Cr LJ 3139(SC), para 69.

12 *Ramabtar Agarrualla v State* (1983) Cr LJ 122(Ori) .

13 *Ram Kumar v State of Himachal Pradesh* AIR 1995 SC 1965, (1995) Cr LJ 3621(SC) .

14 *State of Gujarat v Pradyuman Raman Lal Mehta* (1999) Cr LJ 736(Guj) .

15 *Baby John v State* AIR 1953 Tr & Coch 251; *Nazir Ahmad v Emperor* AIR 1927 All 730; Re *Lakshami Narayan Aiyer*AIR 1918 Mad 738.

16 *Muthammal v Maruthatla* (1981) Cr LJ 833(Mad) .

17 *Trilochan v Karnail* AIR 1968 Punj 416.

18 *Brij Lal v Prem Chand* AIR 1989 SC 1661.

19 *Ranganayaki v State by Inspector of Police* (2004) 12 SCC 521.

20 *Ramesh Kumar v State of Chhattisgarh* (2001) 9 SCC 618; *Sanju @ Sanjay Singh Sengar v State of Madhya Pradesh* AIR 2002 SC 1998, (2002) 5 SCC 371, (2002) Cr LJ 2796(SC) ; *Goura Venkata Reddy v State of Andhra Pradesh* (2003) 12 SCC 469.

21 As for example, when *A* tells *B* that he is going to murder *C* and *B* tells *A* that he may do as he wishes, but that he will be liable for the consequences and *A* murders *C*, then merely because *B* did not actively dissuade *A*, he does not become an instigator or abettor by approval.

22 *Tej Singh v State of Rajasthan* AIR 1958 Raj 169, pp 171-172.

23 (1977) Cr LJ (NOC) 96 (Cal).

24 For example see *State of Punjab v Iqbal Singh* AIR 1991 SC 1532 and *Pawan Kumar v State of Harya- na* AIR 1998 SC 958.

25 AIR 1991 SC 1532.

26 (1998) Cr LJ 952 (MP).

27 AIR 2003 SC 11, (2003) 1 SCC 217, (2003) Cr LJ 69(SC) .

28 *State of Karnataka v Anni Poojary* (2005) Cr LJ 2662(Kant) .

29 *Pawan Kumar v State of Haryana* AIR 2001 SC 1324, (2001) 3 SCC 628, (2001) Cr LJ 1679(SC) ;

30 *Pramatha Nath Talukdar v Saroj Ranjan Sarkar* AIR 1962 SC 876, (1962) Cr LJ 770(SC) .

31 Ibid, para 16. Also see *Kehar Singh v State (Delhi Administration)* AIR 1988 SC 1883; *Ranganayaki v State by Inspector of Police* (2004) 12 SCC 521. For further comments on s 120-A, see ch 17: Conspiracy, below.

32 *Saju v State of Kerala* AIR 2001 SC 175, (2001) Cr LJ 102(SC) .

33 *Bijoyananda Patnaik v Brinnand* AIR 1970 Cal 110; *Noor Mohammad Momin v State of Maharashtra* AIR 1971 SC 885, (1971) Cr LJ 793(SC) .

34 *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175; *Hemanta Kumar v State* (1993) Cr LJ 82(Cal) .

35 *Trilok Chand v State of Delhi* AIR 1977 SC 666, (1977) Cr LJ 254(SC) ; see also *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175; *Ramabatar Agarwalla v State of Orissa* (1983) Cr LJ 122(Ori) ; *CS Varadachari v CS Shanti* (1987) Cr LJ 1408(Mad) ; *Ram Nath v Emperor* AIR 1925 All 230.

36 *Dalpal Singh v State of Rajasthan* AIR 1969 SC 17, (1969) Cr LJ 262(SC) ; *Shri Ram v State of Uttar Pradesh* AIR 1975 SC 175; *Ranjitsing Brahmajeetsing Sharma v State of Maharashtra* (2005) 5 SCC 294.

37 *Raj Kumar v State of Punjab* (1983) Cr LJ 111(P&H) .

38 *Kali Churn Gangooly*(1873) 21 WR 11; see also Re *Latifkhan*(1895) ILR 20 Bom 394.

39 Re *Gopal Chunder Sirdar*(1882) ILR 8 Cal 728.

40 *Ramrup v Crown* AIR 1951 Cal 36.

41 *Subash Chandra Bebarta v State of Orissa* (1974) Cr LJ(Ori) .

42 (1874) 12 WR 527.

43 AIR 1995 SC 1965.

44 AIR 1977 SC 666; see also, *Mahendra Singh Chotelal Bhargad v State of Maharashtra* AIR 1998 SC 601.

45 AIR 1967 SC 553, (1967) Cr LJ 541(SC) .

46 AIR 1967 SC 553, (1967) Cr LJ 541(SC), paras 6 and 9.

47 AIR 1970 SC 436.

48 (1995) Cr LJ 3481 (All).

49 See *Faguna Kanta Nath v State of Assam* AIR 1957 SC 673, (1959) Cr LJ 917(SC) and *Dayaram Phukan v State of Assam* AIR 1967 Assam 66, (1967) Cr LJ 1270(Assam) .

50 AIR 1959 SC 673, (1959) Cr LJ 917(SC) .

51 AIR 1967 SC 553, (1967) Cr LJ 541(SC) .

52 AIR 1970 SC 436, (1969) 2 SCC 385.

53 AIR 1990 SC 1210.

54 AIR 1956 SC 33.

55 AIR 1990 SC 1210, para 9.

56 As they are entitled to exemption as provided in ss 82 and 84, Indian Penal Code 1860.

57 *State of Maharashtra v Pandurang Ramji* (1971) ILR Bom 1061.

58 *Provincial Government CP v Murlidhar* AIR 1942 Nag 74.

59 *Troylukho Nath Chowdhry*(1878) ILR 4 Cal 366.

60 The illustration is inapt as Goa now forms part of the Union Territory of India.

61 Re *Baku*(1900) ILR 24 Bom 287.

62 *State v Savithri* (1976) Cr LJ 37(Mad) .

63 Section 109, therefore, will not apply for ss 121-130 (abetting the waging of war) and ss 131-135 and138 (abetting mutiny or attempting to seduce a soldier, etc) where specific provision for punishments have been made.

64 *Jadu Nandan v Emperor* AIR 1937 Pat 317.

65 *Noor Mohammad Momin v State of Maharashtra* AIR 1971 SC 885, (1971) Cr LJ 793(SC) .

66 *Sohan Lal @ Sohan Singh v State of Punjab* AIR 2003 SC 4466, (2003) SCC 534, (2003) Cr LJ 4569(SC) ; *Gaddala Deshaiah v State of AP* (2005) Cr LJ 828(AP) .

67 *Joseph Kurian & Philip Jose v State of Kerala* (1995) Cr LJ 502(SC) .

68 *Ami Lal v State of Rajasthan* (1996) Cr LJ 1585(Raj) .

69 *Kehar Singh v State (Delhi Administration)* AIR 1988 SC 1883.

70 *Shrilal v State of MB* AIR 1953 MB 155; *Prasanna Kumar v Ananda Chandra* AIR 1970 Ori 10.

71 *Narsinha Narayan Chandar v Emperor* AIR 1931 Bom 199.

72 *Ranganayaki v State by Inspector of Police* (2004) 12 SCC 521.

73 AIR 1971 SC 885, (1971) Cr LJ 793(SC) .

74 Ibid, para 7.

75 AIR 1972 SC 1764.

76 Ibid, para 13.

77 (1995) Cr LJ 826 (Bom).

78 Ibid, para 17.

79 (1996) Cr LJ 321 (Kant).

80 (1997) 1 Crimes 41.

81 Ibid, para 17.

82 See, *Matadin v State of Maharashtra* 1999 Cr LJ 22(Bom) .

83 See s 108, expln 3, IPC.

84 *Girija Prasad Singh v Emperor* AIR 1935 All 346.

85 *Mahadeo Nath v Emperor* AIR 1941 Pat 550; *Vijayaranga Naidu*AIR 1927 Mad 1115.

86 AIR 1981 SC 1417, para 6.

87 Ibid, para 15.

88 Re *Muhammad Levval*AIR 1931 Mad 247.

89 *Kulwant Singh v State of Bihar* (2007) 15 SCC 670, 2007 (8) SCALE 655.

90 AIR 1956 SC 177.

91 Ibid, para 4.

92 (1999) 2 Crimes 32(Ori) .

93 Ibid, para 12.

94 Substituted by Act 10 of 2009, s 51, for "voluntarily conceals, by any act or illegal omission, the existence of a design" (w.e.f. 27-10-2009).

95 Substituted by Act 10 of 2009, s 51, for "voluntarily conceals, by any act or illegal omission, the existence of a design" (w.e.f. 27-10-2009).

96 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, paras 5.2-5.24.

97 See Law Commission of India, 'One Hundred and Fifty-Sixth Report: the Indian Penal Code', Government of India, 1997, paras 12.26 & 12.27.

CHAPTER 17

Criminal Conspiracy

(Indian Penal Code 1860,Sections 120A and 120B)

Section 120A. Definition of criminal conspiracy.--When two or more persons agree to do, or cause to be done,--

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

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

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

INTRODUCTION

Of the three categories of inchoate offences in common law, conspiracy is one of the most complicated laws. The law of conspiracy, act ually, may seem somewhat arbitrary. As Glanville Williams writes:

> If the mere intention of one person to commit a crime is not criminal, why should the agreement of two people to do it make it criminal? The only possible reply is that the law (or, if you prefer, the Establishment) is fearful of numbers, and that the act of agreeing to offend is regarded as such a decisive step as to justify its own criminal sanction.[1]

In a context of burgeoning crime and politically motivated offences over the last few decades, one of the branches of criminal law which has witnessed great challenges and consequently more expansion of the law, has been in the principles governing the law of conspiracy. Sensational cases like the cases involving the assassinations of Indira Gandhi, General Vaidya and Rajiv Gandhi, bribery cases involving prominent politicians, apart from regular criminal cases involving deliberate planning and execution, have all involved charges of conspiracy as the core allegation of the prosecution case. The scope and nature of conspiracy, and the degree of proof required to establish the same has been constantly evolving in recent years.

BRIEF HISTORY OF THE LAW OF CONSPIRACY IN INDIA

Originally, the IPC contained only two provisions by which conspiracy was made punishable. First, the provision of s 107, which made conspiracy by way of abetment punishable. The other was specific provisions involving offences which included conspiracies to commit them, as for example, in the definition of a thug (s 310), by way of belonging to a gang of dacoits (s 400) or thieves (s 401). In the former, an act or illegal omission had to take place in pursuance of conspiracy before they were liable for punishment,[2]whereas in the latter, membership of a gang of thieves or dacoits was essential to establish the charge of conspiracy against them. Thus, in the law, as it originally existed, some overt act by way of furthering the object of the conspiracy on the part of the accused was a pre-requisite for imposing criminal liability against them.

However, in 1868, the English common law on conspiracy was widened with the judgment of the House of Lords in the well-known case of *Mulcahy v R* ,[3] in which the judges ruled:

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

The *Mulcahy* dictum introduced the principle in common law that a mere agreement of two or more persons to do an unlawful act or a lawful actby unlawful means was sufficient to attract liability under conspiracy, even if no specific overt act had been committed. This development of the law in England found echo in the IPC, which was amended in 1870 by the Indian Penal code (Amendment) Act of 1870, in which the law of conspiracy was widened by the insertion of s 121A in the IPC, making it an offence to commit any of the offences punishable under s 121 (waging war or attempting to wage war against Government of India). Under this provision, it was not necessary that any act or omission had actually taken place in pursuance of the conspiracy. Thus, except in respect of offences specifically mentioned in s 121A, IPC, conspiracy per se was not made an offence under the IPC.

The position, however, changed with the Indian Criminal Law Amendment Act of 1913 (8 of 1913). It added ch V-A (ss 120A and 120B) to thePenal Code to assimilate the law of criminal conspiracy in India with that of England[4] and to give extended effect to the law of conspiracy in India. The Statement of Objects and Reasons of the Amending Act justified thus:

> The sections of the Indian Penal Code which deal directly with the subject of conspiracy are those contained in Chapter V and section 121-A of that Code. ...[E]xcept in respect of the particularised insection 121-A, conspiracy *per se*is not an offence under Indian Penal Code .
>
> On the other hand by the common law of England, if two or more persons agree together to do anything contrary to law, or to use unlawful means in carrying out of an object not otherwise unlawful, the persons who so agree, commit the offence of conspiracy. In other words, conspiracy in England may be defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the parties such conspiracy are liable to indictment.
>
> Experience has shown that dangerous conspiracies are entered into in India, which have for their object aims other than the commission of the offence specified in s 121-A of the IPC and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that, in the case of a conspiracy other than a conspiracy to commit an offence, some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes conspiracy a substantive offence...[5]

Thus, with the inclusion of ss 120A and 120B, the IPC now encompasses the law of conspiracy to cover the following:

(i) Conspiracy as a substantive offence (ch V-A: ss 120A and 120B);
(ii) Conspiracy as a form of abetment (ch V: s 107 *Secondly*);
(iii) Conspiracy to wage, attempt to or abet war against the Government of India (ch VI: s 121A), and
(iv) Involvement in specific offences (ch XVI: ss 310 and 311; ch XVII: ss 400, 401 and 402).

INGREDIENTS OF Section 120A , 1860

The main ingredients of s 120A, IPC, are:

(1) There should be two or more persons.
(2) There should be an agreement between themselves.
(3) The agreement must be to do or cause to be done:
    (a) an illegal act ; or
    (b) a legal act by illegal means.

The proviso to the section amplifies the scope of the liability as follows:

(1) In the case of a conspiracy to commit an offence, the mere agreement is sufficient to impose liability without the requirement that some overt act in furtherance of the conspiracy should have been committed.
(2) However, in the case of a conspiracy to do a legal act by illegal means, there ought to be some overt act which should have been committed by one or more parties to the agreement, apart from the agreement itself.

In *Mohd Khalid v State of West Bengal* [6] and *Devender Pal Singh v State (NCT of Delhi)* ,[7] the Supreme Court, after referring to the law relating to conspiracy in the USA and the UK, summarised the broad essentials of criminal conspiracy in India thus: (a) an object to be accomplished; (b) a plan or scheme embodying means to accomplish that object; (c) an agreement or understanding between two or more of the accused persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and; (d) an overt act, in pursuance of the agreement, in case of a non-offence act .

The essence of a criminal conspiracy embodied in s 120A is the unlawful combination and ordinarily the offence is complete when the combination is framed. Unless a statute so requires, no overt act need to be done in furtherance of the agreement and the object of combination need not be accomplished in order to constitute the criminal conspiracy. Mere knowledge, even discussion, of the plan to commit an illegal act, therefore, does not per se constitute a conspiracy. Knowledge of the main object and purpose of the conspiracy is a necessary requisite of conspiracy.[8]

The law of criminal conspiracy, as outlined in the IPC, takes the following two forms. They are: (i) where overt act is not necessary and an agreement per se is made punishable; and (ii) where over act is necessary. In the former, a mere agreement to commit an offence (without proof of any overt act in pursuance thereof) amounts to criminal conspiracy. In the latter form, a mere agreement to do or cause to be done an illegal act (other than an offence) or a legal act by illegal means does not amount to criminal conspiracy unless a party to the agreement commits some overt act in pursuance of the agreement.[9] Significance of these two forms of criminal conspiracy and of the requirement (or otherwise) of an overt act becomes evident if one recalls the definition of the term 'illegal', prefixing the term 'act', in s 120A. By virtue of s 43 of the IPC,[10] everything: (i) which is an offence;[11](ii) which is prohibited by law, and; (iii) which furnishes a ground for civil action[12] is an 'illegal' act.[13]

Criminalisation of conspiracy as a substantive offence is premised on the fact that a concerted design of the parties gives momentum to commission of the crime. The Supreme Court, explaining its rationale, observed:

> Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by the combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment.[14]

NATURE AND SCOPE OF THE LAW OF CONSPIRACY IN Section 120A , Indian Penal Code 1860

(1) Conspiracy is a substantive offence. The offence of criminal conspiracy exists in the very agreement between two or more persons to commit a criminal offence, irrespective of the further consideration whether or not the offence has act ually been committed or to break the law.[15]

(2) 'Agreement' is the rock bottom of criminal conspiracy. 'Agreement' is *sine qua non* for constituting the offence of criminal conspiracy. Its essence is the unlawful combination. It consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. It involves unity of object or purpose, rather than physical unity. Neither entertaining an evil wish[16] nor mere coincidence of blemish intentions among persons makes them parties to an agreement.[17] A mere thought of criminal character[18] or discussion to commit a crime[19] does not per se constitute agreement. It is complete when the combination is framed to commit an offence. It is immaterial whether anything has been done in pursuance of the unlawful agreement.[20]

(3) To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of conspiracy. Neither it is necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial act s. In reaching the stage of meeting of minds, two or more persons share information about doing an act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those, sharing the information, some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences.[21] Conspirators may appear and disappear from stage to stage in course of conspiracy.[22]

(4) If there are more than two persons involved in a conspiracy, and if it is shown that the object of the conspiracy has been achieved, then even if some of the other accused had been acquitted, the remaining accused (even if it is one) could be convicted under s 120B, IPC.[23]

(5) The gist of the offence of criminal conspiracy is to break the law. There is no condition imposed in the provision that all the parties should agree to do a single illegal act . The conspiracy may comprise the commission of a number of illegal acts. It is sufficient if the agreement to commit the illegal act s is established. In such a case, all of them will be held liable for the offence of conspiracy, although for individual offences, all of them may not be held liable.[24]

(6) The essence of the agreement to break the law is the agreement to do an illegal act. This implies that to establish the charge of conspiracy, knowledge about the involvement or indulgence in either an illegal act or a legal act by illegal means is necessary.[25]

(7) The essentials of a single conspiracy require that there must be a common design and a common intention of all to work in furtherance of the common design. A single conspiracy is separate and distinct from separate acts committed by different people without a common purpose. The nature of the role played by each participant member in such a conspiracy is succinctly stated by the Supreme Court in *Mohd Hussain Umar Kochra v KS Dalip Singhji* .[26] It said:'The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues till it is broken up. The conspiracy may de-

velop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar, general purpose. Where different groups of persons cooperate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators is then to work for the furtherance of the common design of his group only.'[27]

(8) When an offence is committed by different persons act ing in the same manner but independently, it cannot be said that there was necessarily a conspiracy. Similarity of methods followed by them does not establish a planned operation with common intention or consensus, hence, no conspiracy can be said to be established.[28]

(9) It is not necessary for all the conspirators to know each other. They may adopt many devices to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware of and in which each one of them must be interested. There may be unity of object or purpose, but there may be plurality of means, sometimes even unknown to one another, amongst the conspirators. The only relevant factor is that all means adopted and illegal act s done must be and purported to be in furtherance of the object of the conspiracy, even though there may be sometimes misfire or overshooting by some of the conspirators. Even if some steps are resorted to by some of the conspirators without the knowledge of the others, it will not affect the culpability of those others when they are associated with the objects of the conspiracy.[29]

(10) When the ultimate offence consists of a chain of actions, it is not necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator has done or would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.[30] It is also not necessary that each conspirator to either know all the details of the scheme or participate at every stage of the conspired act .[31]

(11) Every conspirator is liable for all the acts of the co-conspirators, if they are towards attaining the goals of the conspiracy, even if some of them had not act ively participated in the commission of the offences.[32]

(12) Where the agreement between certain persons is a conspiracy to do or continue to do something which is illegal, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence does not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact conspirators intended to do or the object they wanted to achieve. Consequently, even if the act s done by a conspirator in furtherance of the criminal conspiracy do not strictly amount to an offence, he is liable to be convicted under s 120B.[33]

(13) Conspiracy is a continuing offence and it continues to subsist and committed, whenever one of the conspirators does an act or a series of act s. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity.[34]And during its subsistence, whenever any one of the conspirators does an act or series of act s, he would be guilty.[35]

PROOF OF CONSPIRACY

(1) A conspiracy is always hatched in secrecy. It is a matter of common experience that direct evidence to prove conspiracy is rarely available. It is therefore impossible to adduce direct evidence of the same. The offence can only be proved largely from inferences drawn from acts or illegal omissions committed by the conspirators in pursuance of a common design.[36] The Supreme Court, reiterating the principle, observed:

'Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available. Offence of conspiracy can be proved by either direct or circumstantial evidence. It's not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference.'[37]

Therefore, the circumstances proved before, during and after the occurrence become relevant in determining complicity of the accused. The existence of conspiracy and its objects have to be inferred from the circumstances and conduct of the accused. However, the circumstances in a case, when taken together on their face value, should indicate the meeting of the minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. Such an inference must be premised on sound facts that eloquently exhibit the intended common design and its execution.[38] While appreciating the evidence of the conspiracy, it is, however, incumbent on a court to keep in mind the well-known rule governing circumstantial evidence, namely, each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible.[39] A mere suspicion, in the absence of direct or indirect evidence establishing prior meeting of mind, cannot be a ground for conviction for offence of criminal conspiracy.[40]

(2) Similarly, it was reiterated that conspiracy is generally a matter of inference to be deduced from special acts or illegal omissions of the accused done in pursuance of the common intention of the conspirators and the apparent criminal purpose in common amongst them.[41] There must be some evidence on record which establishes such a common design.[42]

(3) Since direct evidence is generally difficult to adduce in cases involving conspiracy charge,[43] the prosecution will rely on evidence of act s of various parties to infer that they were done in reference to their common intention. The prosecution will also generally tend to depend on circumstantial evidence.[44]However, it is essential that when an allegation of conspiracy is made, the court must enquire whether the persons involved therein are independently pursuing the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor is it necessary to prove the act ual words of communication. The evidence as to transmission of thoughts or sharing the unlawful design may be sufficient. The relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts, artfully arranged, so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict.[45]

(4) While considering the nature of proof requisite to prove conspiracy, it is not necessary for the prosecution to prove that the perpetrators expressly agreed to do or cause to be done an illegal act ; the agreement could be proved by necessary implication.[46]

(5) Conspiracy can be proved by circumstantial evidence; as it is the only type of evidence that is normally available to prove conspiracy. Therefore, an absence of direct evidence to prove presence of an accused in a crucial meeting cannot be a major infirmity.[47]

(6) Section 10of the Indian Evidence Act 1872, covering the principle of agency,[48] lays down the conditions for assessing the evidence of co-conspirators sufficient to prove conspiracy as against other conspirators. For this, however, three ingredients need to be covered:

(i) there should be prima facie evidence regarding the involvement of two or more people in forming an agreement;

(ii) if the above condition is fulfilled, then anything said, done or written by any one of them in reference to the common intention[49] will be evidence against the others; and

(iii) anything said, done or written by the conspirator after[50] the common intention was formed by any of them would be admissible.[51]

The Supreme Court in *State of Tamil Nadu v Nalini, (Rajiv Gandhi Assassination case),* [52] conducted an extensive review of the thitherto judicial pronouncements on the law of conspiracy and culled out a set of main principles governing the law of conspiracy.[53] They, in brief, are:

1. Under s 120A, IPC, offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or a legal act by illegal means. Overt act is considered to be an integral part of criminal conspiracy when a legal act is done by employing illegal means.
2. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is the intention to commit crime and joining hands with persons having the same intention. Not only the intention, there has to be an agreement to carry out the object of the intention, which is an offence. Only entertaining a wish, howsoever evil, is not sufficient to convict a person for criminal conspiracy.
3. Acts subsequent to the achieving of objects of conspiracy may tend to prove that a particular accused was a party to the conspiracy. Once the object of conspiracy is achieved, any subsequent act [like giving shelter to an absconding conspirator], which may be unlawful, does not make an accused a part of the conspiracy.
4. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects are to be inferred from the circumstances and the conduct of the accused.
5. Conspirators may, for example, be enrolled in chain, *A* enrolling *B*, *B* enrolling *C* and so on and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls ...persons may be members of a single conspiracy even though each is ignorant of the identities of many others, who may have diverse role to play. It is not the part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.
6. There have to, thus, be two conspirators and there may be more than that. To prove the charge of conspiracy, it is not necessary that the intended crime was committed or not. If committed, it may further help the prosecution to prove the charge of conspiracy.
7. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with the other conspirators at any time before the consummation of the intended objective, and all are equally responsible.
8. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy, but also the agreement. In the charge of conspiracy, the court has to guard itself against the danger of unfairness to the accused.
9. It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished... The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, act s and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time but may be reached by successive actions evidencing their joining of the conspiracy.
10. It is said that a criminal conspiracy is a partnership in crime, and that each conspiracy consists of a joint and mutual agency for a prosecution of a common plan. Everything said, written or done by any of the conspirators in the execution, or furtherance of the common purpose is deemed to have been said, done or written by each of them... A conspirator is not responsible, however, for act s done by a co-conspirator after termination of the conspiracy.
11. A man may join a conspiracy by word or deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And who one tacitly consents to the objects of the conspiracy and goes along with other conspirators, act ually standing by while the

others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

12. A conspiracy is not broken into several conspiracies when a new member joins the conspiracy and different individuals perform different act s. It is a continuous offence. It continues from the time of agreement to the time of its termination.
13. In the absence of proof, relatives or spouses providing food or shelter cannot be treated as members of a criminal conspiracy even though they may have knowledge about such a conspiracy.
14. In a joint trial of accused, the court is required to take care that admissible evidence against each accused does not cause prejudice to another. Though it is difficult to trace the precise contribution of each member of the alleged conspiracy, the court is required to look for cogent and convincing evidence against each one of the accused.

Section 120B. Punishment of Criminal Conspiracy.--

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

For purposes of punishment, s 120B divides criminal conspiracies into two classes. A party to a conspiracy to commit a serious offence, (ie an offence punishable with imprisonment for two years or with a more severe punishment), is, in the absence of express provision in the IPC, punished in the same manner as if he had abetted the offence. Conspiracies to commit any other offence (including offences punishable only with fine) and conspiracies to commit illegal acts other than offences are subjected to a uniform punishment, namely, imprisonment for a term up to six months with or without fine or both.

Section 120B, however, is required to read with s 196 of the CrPC. It mandates a court not to, without prior sanction of the Central Government or of the State Government, take cognisance of a criminal conspiracy to: (i) commit an offence against State (punishable under chapter VI); (ii) promote communal disharmony (s 153-A); (iii) insult a religion (s 295-A), and (iv) cause public mischief [s 505(1)]. A court, without prior approval of the Central Government or the State Government or the District Magistrate, cannot take cognizance of a criminal conspiracy to: (i) commit an act prejudicial to national integration (s 153-B), (ii) cause or promote enmity, hatred or ill-will between different racial or religious groups [s 505(2) & (3)], A court has to seek consent of the State Government or of the District Magistrate to take cognizance of a conspiracy to commit an offence punishable with imprisonment of a term less than two years. No consent of the concerned State Government or of the District Magistrate is, however, required when the criminal conspiracy relates to any of the offences covered under s 195 of the CrPC. The Central Government or the State Government or the District Magistrate, as the case may be, is, by virtue of s 196(3) of the CrPC, required to carry out, through the police, a preliminary investigation before according sanction or giving consent. However, for initiating criminal proceedings against parties to a conspiracy made abroad or on the high sea, ship or aircraft sanction only of the Central Government is required.[54]A conspiracy hatched in India to commit an unlawful act outside India does not require sanction of the Central Government.[55]

> It may, however, be pertinent to note that s 196, CrPC, does not create a bar against registering a case of criminal conspiracy or carrying investigation by the police agency or submitting a report of investigation to a Magistrate (in compliance with s 173, CrPC). None of these steps become violative of s 196, CrPC, and no illegality of any kind would be committed. S 196 merely bars a court from taking cognizance of it without the requisite sanction.[56]

NATURE AND SCOPE OF Section 120B

Section 120B is the punishing section for the offence of criminal conspiracy defined in s 120A, IPC.

To make a person liable for the offence of conspiracy, it is not necessary that the offender ought to have been present from the very beginning or even during the entire period of the conspiracy. A conspirator may come and leave the conspiracy at any time during the pendency of the conspiracy. Any and every such conspirator will be liable for the subsequent act s of other conspirators.[57]

When the conspiracy alleged is with regard to committing a serious crime of the nature contemplated in s 120B read with the proviso to s 120A, IPC, then, in that event, mere proof of agreement between the accused for commission of such a crime alone is enough to bring about conviction under s 120B and the proof of an overt act by the accused or by any one of them would not be necessary. There is no requirement that each and every one of the conspirators must commit some overt act towards the fulfillment of the object of the conspiracy. Since, in most cases, a conspiracy is conceived and hatched in complete secrecy, and only in rare cases is direct evidence available, circumstantial evidences which leads to an inference that an agreement between two or more people to commit an offence may be drawn.[58]

To be roped in with the aid of s 120B, however, there should be clear evidence that the accused was not only part of the conspiracy, but that he had knowledge about and consented to the conspiracy. Thus, in *Nand Kumar Singh v State of Bihar* ,[59] the accused was an LIC agent who was accused of conspiring with the co-accused Development Officer to get LIC policies issued on the basis of fake and forged documents and receiving premium commission and bonus in respect of those policies. However, when the forging of documents was done by the co-accused and there was no acceptable evidence that the co-accused did it with the knowledge and consent of the accused, then he could not be convicted under s 120B, IPC. The Supreme Court set aside the order of conviction. However, in another case involving forgery and encashing forged bank drafts in which the main accused, a bank employee, took a blank bank draft form on which *A5* forged the signatures of the agent, and *A3* opened an account in the name of a fictitious person and encashed the forged bank draft, the conviction of the accused under s 120B was held proper.[60]

EFFECT OF ACQUITTAL OF ACCUSED

Another issue normally encountered in conspiracy cases is when most co-accused are acquitted of the charges against them. It has consistently been held that if after acquittal, only one accused remains, then in the absence of a charge that the offence was committed by the named accused persons along with other unnamed accused persons, the effect of acquittal of all but one accused persons will result in the failure of the prosecution case itself.[61] One person can never be held guilty of conspiracy for the simple reason that one cannot conspire with oneself. Thus, in *BH Narasimha v Government of Andhra Pradesh* ,[62] since the other seven co-accused were acquitted and there was no allegation that there were other unnamed persons also involved in the conspiracy, the accused had to be acquitted.

In the famous *Hawala* case, the allegation was that the Jain brothers had bribed prominent politicians from different parties to obtain favourable contracts, with the bribe amounts being recorded in code in diaries. The discharge petitions filed by two of the accused politicians, VC Shukla and LK Advani, was dismissed by the Special Court as also by the high court. The Supreme Court, on further appeal, perused the prima facie material placed by the prosecution and concluded that the evidence was not such that it proved that the two politicians were parties to the conspiracy. This left the conspiracy dangling with the Jains as the only other party (especially as the prosecution had not framed charge that a conspiracy existed amongst and between the Jain brothers themselves). Since a conspiracy could not exist with just one party, the charge against the politicians under s 120B, IPC, was held not sustainable.[63]

In *P V Narasimha Rao v State (CBI/SPE)* ,[64]a Constitutional Bench of the Supreme Court was divided on the issue of whether the then Prime Minister PV Narasimha Rao, and other MPs (Members of Parliament) would be protected under art 105(2)(3) of the Constitution against the charge of having committed offences under s 13(2) read with s 13(1)(d)(iii) of the Prevention of Corruption Act 1988, and s 120B, IPC, read with ss 7, 12, 13(2), read with 13(1)(d)(iii) of the Prevention of Corruption Act 1988. The allegation was that they had paid a huge amount of money as bribe amounts to opposition party MPs to support the then ruling party government in a no-confidence motion in the*Lok Sabha* in July 1993. The majority of the judges, comprising Bharucha, Ray and Rajendra Babu JJ, held that the bribe-taker MPs who had voted in Parliament against the no-confidence motion were entitled to the protection of art 105(2) of the Constitution and were not an-

swerable in a court of law for alleged conspiracy and agreement.[65] However, this protection was held not available to bribe-giver MPs.[66]

The minority view of Anand and Agrawal JJ was that the protection could not extend to the offence of bribe giving and taking. In the view of Anand J:

> The offence of bribery is complete with the acceptance of the money or on the agreement to accept the money being concluded and is not dependent on the performance of the illegal promise by the receiver. Similarly, the offence of criminal conspiracy would be committed if two or more persons enter into an agreement to commit the offence of bribery. The criminal liability incurred by a Member of Parliament who has accepted bribe for speaking or giving his vote in Parliament in a particular manner thus arises independently of the making of the speech or giving of the vote by the member and the said liability cannot, therefore, be regarded as a liability, 'in respect of anything said or any vote given' in Parliament. The protection granted under article 105(2) cannot therefore be invoked by any member to claim immunity from prosecution on the substantive charge in respect of the offences punishable under section 7, 13(2) read with s 13(1)(d) and section 12 of the 1988 Act, as well as the charge of criminal conspiracy under s 120-B, IPC read with sections 7 and 13(2) and 13(1)(d) of the 1988 Act.[67]

However, acquittal of a sole co-conspirator on some technical grounds, rather than on facts,[68] or defect in framing charges against co-accused and thereby leaving behind a single person accused of criminal conspiracy,[69] does not warrant acquittal of the 'sole'.

FRAMING OF CHARGE

A question that may be reasonably asked is as to the nature of charge that should be pressed against an accused when the offences the offender is alleged to have committed consist both of conspiracy as also contains elements of abetment, apart from other distinct offences.

When a conspiracy is alleged, and the offenders are alleged to have committed a number of distinct offences in pursuance of the conspiracy, then it is open for the prosecution to separately charge a person with both the distinct offence of conspiracy under s 120B, as also the distinct offences alleged to have been committed by them.[70] If the alleged offences are said to have flown out of the conspiracy, the appropriate form of charge would be a specific charge in respect of each of those offences along with the charge of conspiracy.

In *S Swamirathnam v State of Madras* ,[71] the accused were tried for the offence of conspiracy to cheat members of the public and for specific offences of cheating in pursuance of that conspiracy. The period of conspiracy was alleged to relate to the years 1945-48 when the accused persons were alleged to have persuaded members of the public to buy counterfeit currency notes at half the value of the genuine notes, decamp with the money collected and subsequently posed as police officers, raided the premises of those who purchased the counterfeit notes and seized the only evidence to their nefarious deeds, viz, the counterfeit notes and got away. In the Supreme Court, the accused appellants challenged the charge of a single conspiracy arguing that there were several conspiracies and consequently it was illegal of framing a single charge of conspiracy. Negating this contention, the Supreme Court held that where the charge disclosed that there was a single conspiracy although spread over several years, there was only one object of the conspiracy, which was to cheat members of the public. The fact that over the years several others joined the conspiracy or that several instances of conspiracy took place in pursuance of the conspiracy does not change the conspiracy or split up a single conspiracy into several conspiracies. Hence, there was no misjoinder of charges and a single trial for trying the instances of cheating as in pursuance of one conspiracy and parts of the same transaction, was not improper.[72]

Another question that often arises is over the issue of whether to charge for abetment or conspiracy, especially where an offence is committed in pursuance of the conspiracy. This issue was examined by the Supreme Court in *State of Andhra Pradesh v Kandimalla Subbaiah* .[73] In this case, the court held:

> Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such conspiracy. There is no analogy between section 120B and section 109 , There may be an element of abetment in a conspiracy; but conspiracy is something more than abetment. Offences created by sections 109 and 120B, IPC , are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, that is abetment, when the allegation is that what a person did was something over and above that. Where a number of offences are

> committed by several persons in pursuance of the conspiracy it is usual to charge them with those offences as well with the offence of conspiracy to commit those offences. ...If the alleged offences are said to have flown out of the conspiracy, the appropriate form of charge would be a specific charge in respect of each of those offences along with the charge of conspiracy.[74]

When there are a number of accused, who are alleged to have committed an offence, of whom only a few have been named, it is advisable to give those particulars also in order to give a reasonable notice to the accused that he has been charged with some known accused who are named, as also unnamed persons, in committing the offence.[75] In deciding the question, whether more persons than one can be tried together, the court has to consider the nature of accusation made by the prosecution. If the accusation so made justifies a joint trial of more persons than one, the validity of such a trial cannot be challenged if the said accusation is established according to law.[76] Similarly, in a case of conspiracy, where specific offences are committed in pursuance of the said conspiracy, all persons that are party to that conspiracy and also concerned in the specific offences thus committed, can be tried jointly in the same trial.[77]

DIFFERENCE BETWEEN SECTION 120B AND SECTION 107, INDIAN PENAL CODE 1860

One of the important difference between s 107 providing for the offence of abetment by conspiracy, and ss 120A and 120B, is that while the former is punishable only if some act or illegal omission in pursuance of that conspiracy has been committed besides the agreement itself, the latter sections make the agreement itself an offence. The essence of the offence of criminal conspiracy is a bare agreement to commit the offence, whereas the abetment of conspiracy requires the commission of act or illegal omission pursuant to the conspiracy.[78] Thus, the introduction of ss 120A and 120B by way of an amendment to the original IPC in the year 1913, seems to have been to fill up a vital gap in the law, and to expand the law of conspiracy beyond the provisions of abetment by conspiracy provided in the second clause of s 107, IPC. Thus, while s 120A provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy falling under s 107, s 120B provides a punishment for criminal conspiracy, where no express provision is made in the IPC for punishment of such a conspiracy.

There is another dimension to be noticed about the provision in s 120B. This relates to the crucial terms which, in a sense, demarcates the scope of applicability of s 120B, namely, that only those offences are punishable for which 'no express provision is made in this Code for the punishment of such a conspiracy'. This implies that if the offence conspired to be committed is one which is already an offence under the IPC, then, s 120B will not apply. Similarly, when a conspiracy amounts to abetment under s 107, it is not necessary to invoke the provisions of ss 120A and 120B because the Code has made specific provisions for the punishment of abetment through ss 109, 114, 115 and 116, IPC. Hence, when a charge under s 107 exists, there is no need to frame a charge under s 120B.[79]

PROPOSALS FOR REFORM

The Fifth Law Commission of India[80] proposed the following two reforms:

(1) Recalling the wide ambit of existing definition of criminal conspiracy (s 120A) that takes into its fold an agreement to commit: (i) an offence, (ii) an illegal but not criminal act, and (iii) a legal act by illegal means, opined that the distinction made in s 120A between an agreement to commit an illegal but a non-criminal and an agreement to commit a legal act by illegal means is obscure and without any real difference as achievement of any object by illegal means necessarily involves the doing of something illegal or committing an illegal act. With a view to making the definition more precise, the Law Commission suggested that the offence of criminal conspiracy should be re-defined to confine it only to: (i) agreement to commit an offence punishable with death, imprisonment for life, or (simple or rigorous) imprisonment for a term of two or more years, and (ii) agreement to cause such an offence to be committed. It, through *explanations*, suggested that the commission, in pursuance of the agreement, of the offence as the ul-

timate or incidental object of the agreement or of any act or illegal omission be treated immaterial.

(2) Criminal conspiracy, under s 120B, should be made punishable: (i) with the punishment provided for the conspired offence, if it is committed in pursuance of the agreement, and (ii) with imprisonment for a term up to one-half of the longest term provided for the conspired offence, or with fine prescribed therefor, if no offence is committed in pursuance of the agreement.

However, the Fourteenth Law Commission[81] expressed its disagreement with these proposals for reform and suggested that these provisions be kept intact as they are working satisfactorily as residuary provisions. Recalling the distinct nature of the offence of criminal conspiracy and pleading that a petty offence may lead to an offence of serious nature and it would not be easy to separate such an offence from the conspired offence, the Law Commission declined to endorse the definition of criminal conspiracy proposed by the Fifth Law Commission. It also disfavored the suggested penal formula on the ground that it will make the phraseology of s 120B ambiguous.

1 Glanville Williams, *Textbook of Criminal Law: The General Part*, second edn, Stevens & Sons, London, 1983, Indian Reprint by Universal Publishing, New Delhi, 1999, p 420.

2 For detailed discussion, see ch 16, above.

3 (1868) LR 3 HL 306. The House of Lords in *Mogul Steamship Co v McGregor* [1892] AC 25 further explained that, an agreement which is immoral or against public policy or in restraint of trade, or otherwise of such a character that courts will not enforce it, is not necessarily a conspiracy. An agreement, to be a conspiracy, must be to do that which is contrary to or forbidden by law, as to violate a legal right or make use of unlawful methods, such as fraud or violence, or to do what is criminal. *Mulcahy* was followed in *Quinn v Leathem* [1901] AC 495, [1900-03] All ER 1(HL) and in *R v Brailsford* [1905] 2 KB 730.

4 However, Hari Singh Gour felt that the law of criminal conspiracy introduced by the 1913 Amending Act is wider than the English law of conspiracy. See, Hari Singh Gour, *Penal Law of India,* sixth edn, Law Publishers, Allahabad, p 508. But see, *Kehar Singh v State* AIR 1988 SC 1883, (1989) Cr LJ 1(SC) ; *Devender Pal Singh v State (NCT of Delhi)* (2002) 5 SCC 234, AIR 2002 SC 1661; *Mohd Khalid v State of West Bengal* (2002) 7 SCC 334; *Nazir Khan v State of Delhi* (2003) 8 SCC 461, AIR 2003 SC 4427, (2003) Cr LJ 5021(SC) .

5 *Gazette of India*, 1913, Part V, p 44. The fact however remains that the above change in the IPC was also brought about in the context of the growth in anti-British nationalist movement in India and the rapidly spreading anti-colonial struggles in different parts of colonial India. It may be interesting to note here that several penal laws containing draconian features were passed by the British to repress the growing anti-British freedom movement. See for example, the Statement of Reasons in passage of the Indian Penal Code (Amendment) Act 1923 (Act XX of 1923). Tragically, after independence, neither framers of the Constitution nor the later Governments thought it necessary to repeal these laws. For further criticism see, Shamsul Huda,*The Principles of Law of Crimes* (Tagore Law Lectures,1902), Eastern Book Co, Lucknow, Reprint 2011, ch 'Criminal Conspiracy'.

6 (2002) 7 SCC 334.

7 AIR 2002 SC 1661, (2002) 5 SCC 234.

8 *Mohd Amin v CBI* (2008) 15 SCC 49, 2008 (14) SCALE 240.

9 *KTMS Mohd v Union of India* (1992) 3 SCC 178; *Esher Singh v State of Andhra Pradesh* (2004) 11 SCC 585, AIR 2004 SC 3030; *K Hashim v State of Tamil Nadu* (2005) 1 SCC 237, AIR 2005 SC 128.

10 Section 43 says, 'the word 'illegal' is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil act ion;...'. See also *BG Barsay v State of Bombay* AIR 1961 SC.

11 For definition of 'offence', see s 40, IPC.

12 However, to constitute a ground for civil action under s 43, there must be a right in a party which can be enforced. It may be a breach of contract or a claim for damages or some such similar right accruing under any law. See, *R Sai Bharathi v J Jayalalitha* (2004) 2 SCC 9.

13 'Act' denotes a single as well as a series of act s (vide s 33, IPC).

14 *Devender Pal Singh v State (NCT of Delhi)* AIR 2002 SC 1661, (2002) 5 SCC 234, para 13. It is also reiterated in *Mohd Khalid v State of West Bengal* (2002) 7 SCC 334, 2002 (6) SCALE 238.

15 *Bimbadhar Pradhan v State of Orissa* AIR 1956 SC 469, (1956) Cr LJ 831(SC) .

16 *State of Tamil Nadu v Nalini* (1999) 5 SCC 253, AIR 1999 SC 2640.

17 *Leenart Schussler v Director of Enforcement* (1970) 1 SCC 152.

18 *R Venkatakrishnan v CBI* (2009) 11 SCC 737, AIR 2010 SC 1812.

19 *Sudhir Shantilal Mishra v CBI* (2009) 8 SCC 1, 2009 (11) SCALE 217; *Baldev Singh v State of Punjab* (2009) 6 SCC 564, 2009 (7) SCALE 493.

20 *Bimbadhar Pradhan v State of Orissa* AIR 1956 SC 469, (1956) Cr LJ 831(SC), see also *Devender Pal Singh v State (NCT of Delhi)* (2002) 5 SCC 234, AIR 2002 SC 1661; *Mohd Khalid v State of West Bengal* (2002) 7 SCC 334; *Yogesh v State of Maharashtra* AIR 2008 SC 2991, (2008) 10 SCC 394; *Baldev Singh v State of Punjab* (2009) 6 SCC 564; *Chaman Lal v State of Punjab* (2009) 11 SCC 721, AIR 2009 SC 2972.

21 *State of Tamil Nadu v Nalini* AIR 1999 SC 2640, (1999) Cr LJ 3124(SC) ; *KR Purushothaman v State of Kerala* (2005) 12 SCC 631, AIR 2006 SC 35.

22 *Raghuvir Singh v State of Bihar* AIR 1987 SC 149, (1987) Cr LJ 157(SC) .

23 *Bimbadhar Pradhan v State of Orissa* AIR 1956 SC 469, (1956) Cr LJ 831(SC) ; *Mohd Arif @ Ashfaq v State of NCT of Delhi* (2011) 13 SCC 621, 2011 (3) Crimes 228(SC) .

24 *BG Barsay v State of Bombay* AIR 1961 SC 1762, (1961) 2 Cr LJ 828(SC) .

25 *State of Maharashtra v Som Nath Thapa* AIR 1996 SC 1744.

26 AIR 1970 SC 45.

27 Ibid, para 15.

28 *Fakhruddin v State of Madhya Pradesh* AIR 1967 SC 1326, (1967) Cr LJ 1197(SC) .

29 *Yash Pal v State of Punjab* AIR 1977 SC 2433, (1977) 4 SCC 540; see also, *RK Dalmia v Delhi Administration* AIR 1962 SC 1821; *Mohd Hussain Umar Kochra v Dalip Singhji* AIR 1970 SC 45; *Nazir Khan v State of Delhi* (2003) 8 SCC 461, AIR 2003 SC 4427, (2003) Cr LJ 5021(SC) .

30 *State of Maharashtra v Som Nath Thapa* AIR 1996 SC 1744.

31 *Ajay Agarrual v Union of India* AIR 1993 SC 1637, (1993) Cr LJ 2516(SC) ; *State of Himachal Pradesh v Kishanlal Pardhan* AIR 1987 SC 773, (1987) Cr LJ 709(SC) .

32 *State of Himachal Pradesh v Kishanlal Pardhan* AIR 1987 SC 773, (1987) Cr LJ 709(SC) .

33 *Lennart Schussler v Director of Enforcement* AIR 1970 SC 549; *Mohd Hussain Umar Kochra v Dalip Singhji* AIR 1970 SC 45; *KS Narayanan v S Gopinathan* (1982) Cr LJ 1611(Mad) ; *PK Narayanan v State of Kerala* (1995) 1 SCC 142.

34 *Ajay Agarwal v Union of India* AIR 1993 SC 1637, (1993) Cr LJ 2516(SC) ; *KR Purushothaman v State of Kerala* (2005) 12 SCC 631, AIR 2006 SC 35.

35 *Damodar v State of Rajasthan* AIR 2003 SC 4414; *K Hashim v State of Tamil Nadu* (2005) 1 SCC 237, (2005) Cr LJ 143(SC) .

36 *Shivanarayan Laxminarayan Joshi v State of Maharashtra* AIR 1980 SC 439; *Kehar Singh v State (Delhi Administration*) AIR 1988 SC 1883, (1989) Cr LJ 1(SC) ; *State of Kerala v P Sugathan* (2000) Cr LJ 4584(SC) ; *State* (*NCT of Delhi*) *v Jaspal Singh*(2003) 10 SCC 586.

37 *Devender Pal Singh v State (NCT of Delhi)* AIR 2002 SC 1661, (2002) 5 SCC 234, para 14; reiterated in *Nazir Khan v State of Delhi* (2003) 8 SCC 461,, AIR 2003 SC 4427, (2003) Cr LJ 5021(SC), para 18.

38 *State (Delhi Administration) v VC Shukla* AIR 1980 SC 1382, (1980) 2 SCC 665; *Noor Mohd v State of Maharashtra* AIR 1971 SC 885; *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru* (2005) 11 SCC 600, (2005) Cr LJ 3950(SC) .

39 *State (NCT of Delhi) v Ravi alias Munna* (2000) Cr LJ 1125(Del) ; *KR Purushothaman v State of Kerala* (2005) 12 SCC 631, AIR 2006 SC 35.

40 *PK Narayanan v State of Kerala* (1995) 1 SCC 142; *Sattan alias Satyendra & Ors v State* (2001) Cr LJ 676(All) .

41 *Shivanarayan Laxminarayan Joshi v State of Maharashtra* AIR 1980 SC 439. Also see *Ammini v State of Kerala* AIR 1998 SC 260, (1998) Cr LJ 481(SC) .

42 *Vijayan alias Rajan & Anr v State of Kerala* AIR 1999 SC 1086, (1999) Cr LJ 1638(SC) ; see also, Re *Ram Raju*(1999) Cr LJ 4164(Raj) ; *Chandu Mahato v State of Bihar* (2000) Cr LJ 4472(Pat) ; *State of Kerala v P Sugathan* (2000) Cr LJ 4584(SC) ; *Saju v State of Kerala* (2001) Cr LJ 102(SC) .

43 *Hira Lal Hari Lal Bhagwati v CBI* (2003) 5 SCC 257, AIR 2003 SC 2545.

44 *Yogesh v State of Maharashtra* (2008) 10 SCC 394, AIR 2008 SC 2991.

45 *Kehar Singh v State (Delhi Administration)* AIR 1988 SC 1883, (1989) Cr LJ 1(SC), at paras 272 &

46 *Mohd Usman Mohd Hussain Maniyar v State of Maharashtra* AIR 1981 SC 1062; *Lal Singh v State of Gujarat* (2001) Cr LJ 978(SC) .

47 *EK Chandrasenan v State of Kerala* (1995) Cr LJ 2060(SC) ; *State of Madhya Pradesh v SB Johari* (2000) 2 SCC 57; *John Pandian v State Represented by the Inspector of Police, Tamil Nadu* (2010) 14 SCC 129, 2011 (1) KLJ 15.

48 *State of Tamil Nadu v Nalini* AIR 1999 SC 2640, (1999) Cr LJ 3124(SC) ; *Saju v State of Kerala* (2001) 1 SCC 378, 2001 AIR 175.

49 Confession of co-accused can be used as evidence against another. See *Baburao Bajirao Patil v State of Maharashtra* (1971) 3 SCC 432.

50 Statement made after the accused are arrested is not admissible as by that time the alleged conspiracy comes to an end. See, *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru* (2005) 11 SCC 600, (2005) Cr LJ 3950(SC) .

51 *Bhagwan Swarup Lal Bishan Lal v State of Maharashtra* AIR 1965 SC 682; *Kehar Singh v State* AIR 1988 SC 1883, (1989) Cr LJ 1(SC) ; *State of Rajasthan v Darbara Singh* (2000) Cr LJ 2906(Raj) ; *Saju v State of Kerala* (2001) 1 SCC 376, 2011 AIR 175; *Mohd Khalid v State of West Bengal* (2002) 7 SCC 334, 2002 (6) SCALE 238; *Jogendra Sarswathi Swamigal v State of Tamil Nadu* (2005) 2 SCC 13, AIR 2005 SC 716.

52 AIR 1999 SC 2640, (1999) Cr LJ 3124(SC) .

53 Ibid, para 574.

54 S 188, Cr PC.

55 *Vinod Kumar Jain v State (through CBI)* (1999) Cr LJ 669(Del) .

56 *State of Karnataka v Pastor P Raju* (2006) 6 SCC 728, AIR 2006 SC 2825.

57 *R Balakrishna Pillai v State* (1996) Cr LJ 757(Ker) .

58 *Suresh Chandra Bahri v State of Bihar* AIR 1994 SC 2420, (1994) Cr LJ 3271(SC) .

59 AIR 1992 SC 1939.

60 *Anicete Lobo v State of Goa Daman and Diu* AIR 1994 SC 1613, (1994) Cr LJ 1582(SC) .

61 *Bhagat Ram v State of Rajasthan* AIR 1972 SC 1502, (1972) Cr LJ 909(SC) ; *Fakhruddin v State of Madhya Pradesh* AIR 1967 SC 1326, (1967) Cr LJ 1197(SC) ; *Topandas v State of Bombay* AIR 1956 SC 33, (1956) Cr LJ 138(SC) ; *Girza Shankar Misra v State of Uttar Pradesh* AIR 1993 SC 2618.

62 AIR 1996 SC 64, (1995) 4 SCC 704.

63 *Central Bureau of Investigation v VC Shukla* AIR 1998 SC 1406, at paras 48, 51.

64 AIR 1998 SC 2120.

65 Ibid, paras 96, 98, 141 and 181.

66 Ibid, paras 142, 151, 181, 96 and 98.

67 Ibid, paras 49-50.

68 *Pradumma v State of Maharashtra* (1981) Cr LJ 1873(Bom) .

69 *Sanichar Sahni v State of Bihar* (2009) 7 SCC 198.

70 *State of Andhra Pradesh v Kandimalla Subbiah* AIR 1961 SC 1241, (1961) Cr LJ 302(SC) .

71 AIR 1957 SC 340, (1957) Cr LJ 422(SC) .

72 Ibid, para 7.

73 AIR 1961 SC 1241, (1961) Cr LJ 302(SC) .

74 Ibid, para 9.

75 *Topondas v State of Bombay* AIR 1956 SC 33, (1956) Cr LJ 138(SC) .

76 *Bhagat Ram v State of Rajasthan* AIR 1972 SC 1502, (1972) Cr LJ 909(SC) .

77 *Kadiri Kunhahammad v State of Madras* AIR 1960 SC 661, (1960) Cr LJ 1013(SC) .

78 *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru* (2005) 11 SCC 600, (2005) Cr LJ 3950(SC) .

79 *Ranganayaki v State by Inspector of Police* (2004) 12 SCC 521.

80 See Law Commission of India, 'Forty- Second Report: The Indian Penal Code ', Government of India, 1971, paras 5.37 & 5.39.

81 See Law Commission of India, 'One Hundred Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 4.07, 4.08, & 4.13.

[redacted]: Criminal Law,12th Edition/[redacted] Criminal Law 2014/CHAPTER 18 Joint Liability

CHAPTER 18

Joint Liability

(Indian Penal Code 1860,Sections 34 to 38)

INTRODUCTION

An individual may commit a crime with his own hands or through an innocent agent. He may share in the commission of the offence though he does not commit it personally.

If a person personally commits a crime, there will not be much difficulty in ascertaining his culpability. However, if he shares in the commission of a crime, it becomes comparatively difficult to find the extent of 'participation' or 'contribution' in the commission of the offence and his corresponding 'criminal liability'.

In offences involving more than one person, a very important question to be considered, therefore, is as to the liability of various persons participating in the offence, especially when they have committed different act s in the course of committing the same offence.

However, the IPC contains a few provisions that lay down some basic rules of criminal liability of individuals who commit a crime in a group or share with others the commission of a crime. Sections 34 to 38 of the IPC govern criminal liability of individual members of such a group for accomplishing the criminal act through a concerted criminal endeavor. In other words, these provisions deal with liability of individuals for their 'co-operative criminal act '. Section 37 lays down a rule that where an offence is committed by means of several acts, a person who does any of these act s and intentionally co-operates in the commission of that offence is guilty of the whole offence; while s 34 deals with liability of an individual for sharing 'intention' when 'several persons' and participating in the 'criminal act' done 'in furtherance of the common intention of all'. And s 38, which in ultimate analysis is converse of s 34, lays down that when several persons are engaged in or concerned with the commission of a criminal act and do different acts, they may be held responsible for their different act s. Sections 35 and 36 offer a sort of explanation regarding commission of a criminal act

requiring knowledge or intention done by several persons and that an offence may be committed by partly an act or an omission, respectively. Section 35, which complements the main rule laid down in s 34, deals with a situation where an offence requires a particular criminal intention or knowledge and is committed by several persons. Each of them who join the act with such knowledge or intention is liable in the same way as if it were done by him alone with that intention or knowledge.

The provision in the IPC, which deals with the principle of joint liability in cases where different persons share a common intention, is covered by s 34, which is as follows:

Section 34. Acts done by several persons in furtherance of common intention.--When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Before we begin a discussion on the scope and ambit of the section, it is important to note that the term 'act' referred to in s 34 has to be read in the context of s 33, IPC, which reads as follows:

Section 33. 'Act', 'Omission'.--The word 'act' denotes as well a series of act s as a single act: the word 'omission' denotes as well a series of omissions as a single omission.

It is clear from ss 34 and 33, that the term 'criminal act ' refers to more than a single act, and would cover an entire series of act s, where these acts are done in succession and are closely connected in such a way that they cannot be separated from each other, with different intentions being assigned to different act s.

When so considered, it is clear that the section is intended to meet cases in which it is difficult to distinguish between the criminal acts of individual members of the group, who all act in furtherance of their common intention. Section 34 gives a statutory recognition to the common sense principle that if two or more persons intentionally do a thing jointly, it is the same as if each of them had done it individually.[1]

While no *illustration* has been provided in the definition, which appears in the chapter on 'General Explanations', it is said to be based on the decision laid down in *Reg v Cruise* .[2] In this case, a constable and his assistants had gone to arrest a person *A*, in his house. There were three other persons *B*, *C* and *D*. On seeing the police constable, *B*, *C* and *D* came out of the house, gave him a blow and drove away the constable and his assistants. The court evolved the 'doctrine of joint liability', and held that each member of the group, i.e., *B*, *C* and *D*, were equally liable and responsible for the blow, irrespective of whether only one of them had actually struck the blow.

It is interesting to note that the original version of s 34 did not contain the terms, 'in furtherance of the common intention'. It was only through an amendment in 1870,[3] that the principle of joint liability came to be incorporated in the IPC in the form as we know it today.

SCOPE OF THE PRINCIPLE OF JOINT LIABILITY AS PROVIDED IN SECTION 34

There are three main ingredients of the section:

(1) A criminal act must be done by several persons;
(2) The criminal act must be to further the common intention of all, and
(3) There must be participation of all persons in furthering the common intention.[4]

It is quite apparent that just as the term 'act' in the section refers to a series of acts as a single act, so also the coverage of the provision is attracted only when there are more than one person involved in committing the criminal act. This is based on the common sense principle that when several persons are alleged to have committed a criminal act, then there is every possibility that different members would have actively given encouragement, help, protection and support, as also act ively participated or otherwise engaged in the commission of the criminal act itself. Thus, even though a particular act may have been committed by an individual, where common intention exists, and they had all acted in furtherance of that common intention, then all of them are held liable for the offence.

One of the earliest of cases where the scope of s 34 was considered at length was *Barendra Kumar Ghosh v King Emperor* .[5] In this case, the accused was the only person apprehended for the murder of the Postmaster of Shankaritola Post Office on 3 August 1923. On that day, several persons appeared at the door of the backroom of the Post Office where the Postmaster was counting his money and demanded the money. They fired pistols at him and he died almost immediately. While all the accused fled the place without taking any money, the accused, Barendra Kumar, alone was chased and caught by the Post Office assistants with a pistol in his hand. It was his defense that he was only standing guard outside the Post Office, and that he was act ually compelled to stand so by the other accused and thus he did not have the intention to kill the Postmaster. His conviction for murder under s 302 read with s 34, IPC, was confirmed by the Calcutta High Court. In the appeal before the Privy Council, Lord Sumner, while dismissing the appeal against the conviction, held:

> Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself; for 'that act ' and 'the act' in the latter part of the section must include the whole act ion covered by a criminal act 'in the first part, because they refer to it... In other words, 'criminal act ' means that unity of criminal behaviour which results in something for which an individual would be responsible, if it were all done by himself alone, that is, in a criminal offence.[6]

The essence of joint liability under s 34 is the intentional joint criminal act by several persons in furtherance of common intention. The essence, thus, is simultaneous consensus of the minds of persons participating in the criminal act ion to bring about a particular result.[7] However, it is not necessary that the act of several persons must be same or identically similar. What is required is that these act s must be actuated by the same common intention.[8] It requires prior concert or pre-arranged design to commit a criminal act by several persons. In *Girija Shankar v State of Uttar Pradesh* ,[9] the Supreme Court, referring to the nature of s 34, observed:

> The section does not say 'the common intention of all', nor does it say 'an intention common to all'. Under the provisions of section 34, the essence of the liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.[10]

SCOPE OF 'COMMON INTENTION'

There must be a general intention shared by all the persons concerned. A furtherance of the common design is a condition precedent for convicting each one of the persons who take part in the commission of the crime, and the mere fact that several persons took part in a crime, in the absence of a common intention, is not sufficient to convict them of that crime. This principle came to be enunciated in *Mahboob Shah v Emperor* ,[11] wherein the Privy Council, speaking through Sir Madhavan Nair, very succinctly expounded the scope of the operation of s 34 thus:

> Under section 34 of the Penal Code, the essence of liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is so then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. ... Care must be taken not to confuse same or similar intention with common intention; the partition which divides 'their bonds' is often very thin; nevertheless, the distinction is real and substantial and if overlooked will result in miscarriage of justice. In their Lordships' view, the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.[12]

There are several dimensions to the discussion on the nature of common intention. These are:

(1) The common intention should be shown to be premeditated;[13] i.e., it must be shown that there was a prior meeting of minds[14] which act ivated the common intention leading to the commission of the criminal act. However, there may be incidents in which common intention may develop on the spot, after the offenders have gathered.

(2) Proof of common intention will rarely be available directly. It has to be culled out from the facts and circumstances of the case.

(3) There is a difference between 'common intention' and 'same or similar' intention. Depending on the nature of the intention, not only will liability differ, but also the nature of conviction and sentence to be awarded. Section 34 can be invoked only when the accused shares a common intention and not when they share a similar intention.[15]

(4) Unless common intention is proved, individual offenders will be liable only for their individual act s. The mode of proving common intention should be such as to exclude doubts about the prevalence of the common intention mobilising the offenders into action. However, if there is any doubt, then the benefit of doubt should be given to the accused.[16]

WHAT IS COMMON INTENTION? GUIDING PRINCIPLES

Section 34 is only a Rule of Evidence and Does Not Create a Substantive Offence

If two or more persons intentionally do a thing jointly, it is just the same as if each of them had done individually. As noticed in *Barendra Kumar Ghosh v King Emperor* ,[17] the section deals 'with the doing of separate act s, similar or diverse, by several persons, if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself'.

This principle that the provision only lays down the rule or principle of joint liability and does not create a separate offence, was considered by the Supreme Court in *Gurdatta Mal v State of Uttar Pradesh* .[18] In this case, the question that arose was over the operation of s 34 in the context of the right to private defence as provided in s 96, IPC. In this case, the accused persons were alleged to have attacked the deceased person's party in the agricultural fields of latter party when they were harvesting the crop. Earlier in the day, the deceased, Gurcharan Lal, had given a written complaint of threat at the local police station, resulting in two police constables being sent along with them. The complainant side had also taken a photographer with them. As harvesting was proceeding, the accused party armed with guns, spears and *lathis* entered the field despite the warning of the police constable, and shot at the complainant party killing three persons including the photographer. The defence of the accused was that there was a dispute existing over possession of the land, and that it was the complainant party which had attacked them, and that they had exercised their right to private defence of property. It was also their stand that they did not have any intention to kill the deceased. It was in this context that the Supreme Court observed:

> It is well settled that section 34 of the does not create a distinct offence: it only lays down the principle of joint criminal liability. The necessary conditions for application of section 34 of the Code are common intention to commit an offence and participation by all the accused in doing act or act s in furtherance of that common intention. If these two ingredients are established, all the accused would be liable for the said offence; that is to say that if two or more persons had common intention to commit murder and they had participated in the acts done by them in furtherance of that common intention, all of them would be guilty of murder.[19]

In *State of Madhya Pradesh v Deshraj* ,[20] the apex court, echoing the principle, observed:

> Section 34 has been enacted on the principle of joint liability in the doing of a criminal act . The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime... The true contents of the Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself.... The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.[21]

The immediate implication of the proposition that s 34 is merely a rule of evidence, and not a substantive offence, is that s 34 will come into play even when no specific charge thereunder is leveled against accused if evidence shows that there was pre-arranged plan to commit a criminal act.[22] Absence of charge under s 34 is not fatal by itself unless prejudice to the accused is shown.[23]

The Common Intention should be Prior or Antecedent to the Occurrence

The general principle is that common intention as defined in s 34 implies a pre-arranged plan and to convict an accused, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. This was emphasised by the Supreme Court in *Pandurang v State of Hyderabad* ,[24] in which it was elaborated as follows:

> Now in the case of section 34, we think it is well established that a common intention pre-supposes a prior concert. It requires a pre-arranged plan before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. ... Accordingly, there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely, the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the specific section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none would be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one, he cannot be convicted of the murder, however clearly an intention to kill could be proved in this case...[25]

In this case, however, the Supreme Court did notice the fact that prior concert need not be something always very much prior to the incident, but could well be something that may develop on the spot, on the spur of the moment. This takes us to the next aspect of the law.

Common Intention may Develop during the Course of the Occurrence and could Develop on the Spot

In such a case, however, there should be cogent material available on the basis of which the court can arrive at a finding and conclusion that the accused are vicariously liable for the act of the other accused.

This principle was explained succinctly by Bose J in the *Pandurang*case. According to him, the plan need not be elaborate nor is it necessary that a long interval of time is required. It could arise and be formed suddenly. For example, if a man shouts at bystanders asking them to help him to kill a particular person, and they through their acts or speech, extend their support to him and also act ually join him; in such a case, there has been a necessary meeting of minds; however hastily formed or rudely conceived, a pre-arranged plan has come into existence. Since pre-arrangement and pre-meditated concert are essential ingredients to the offence of joint liability, in such a situation, the acts of the various persons will be liable for coverage under the provisions of s 34, IPC.

Another decision which considered this principle extensively is the case of *Kripal v State of Uttar Pradesh* .[26] In this case, there was a long standing property dispute between members of an extended family. The deceased, Jiraj, was walking towards his field along with two labourers who were walking in front. The labourers were first accosted by the three accused near a well and threatened from going ahead. They were also beaten up by the accused by the blunt part of a spear handle. When Jiraj, who reached the spot a few minutes later, remonstrated with the accused, he was attacked by the three accused in the course of which he was stabbed by one of the accused in his jaw, because of which he died. In the course of the same incident, a brother of Jiraj was also murdered. Originally, 13 persons were accused of the crime. The trial court acquitted 10 of them, but convicted the three accused of offences under s 304(1), IPC, but acquitted them of charge under s 302, IPC. On appeal filed by the state, the High Court of Allahabad set aside the acquittal under s 302. Two of the accused were sentenced to death and the third to life imprisonment. On the issue of common intention, arising suddenly the Supreme Court ruled:

> The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous con-

> sensus of their minds to bring about a particular result can be said to have developed and thereby intended by all of them, is a question that has to be determined on the facts.[27]

The Supreme Court, however, differed with the high court over the sudden development at the spur of the moment of a common intention to kill Jiraj. The only common intention established on facts, was the intention to beat Jiraj with dangerous weapons which were likely to cause grievous hurt. However, the death of Jiraj was the individual act of one of the accused, who, actuated by pre-existing enmity, stabbed him to death with the spear. He alone was convicted for offence under s 302 and death sentence was confirmed.

In several later judgments[28]also, the Supreme Court upheld the view that common intention may develop on the spur of the moment. However, in such cases, the court held, there has to be cogent material to arrive at the finding to hold all the accused vicariously liable for the criminal act s by invoking s 34. If this is not available, then the individual accused will be liable only for their individual acts.

Common Intention is Different from Same or Similar Intention

Again, common intention that developed on the spur of the moment has to be viewed against the specific circumstances of the case.

This principle came to be considered in *Dukhmochan Pandey v State of Bihar* .[29] In this case the complainant had sent about 20 labourers to his field for transplanting paddy. At about noon of that day, the accused party numbering about 200 people, assembled as a mob, armed with various deadly weapons came to the field and asked the labourers to stop work. When the complainant objected to this, two accused directed the mob to kill the labourers. Soon thereafter, the two accused fired from their respective guns into the group of labourers. Thereafter, the mob also started assaulting the labourers with their weapons. The village which had been tense for some time had an executive magistrate and a police party stationed in a different part of the village. As the official and the police party came to the spot on hearing about the incident, the accused fled from the spot. Two persons died in the incident. The death was established to have been caused by shock and haemorrhage caused by injuries inflicted with sharp pointed weapons.

The question raised before the Supreme Court was whether the mob which had the common object to prevent the labourers from working in the field, had developed, on the spot, the common intention to commit murder. The court, observing that intention can be formed previously or may develop at the spur of the moment, emphasised that:

> ... [C]ommon intention which developed at the spur of the moment is different from a similar intention act uated [*sic*] a number of persons at the same time, and ... the said distinction must be borne in mind which would be relevant in deciding whether section 34 of the Indian Penal Code can be applied to all those who might have made some overt act on the spur of the moment... The distinction between a common intention and a similar intention may be fine, but is nonetheless a real one and if overlooked, may lead to miscarriage of justice.[30]

The court held that the mere fact that the accused persons were armed with some weapons would not be sufficient to attribute common intention to all of them to commit the murder. The evidence on record, it was held, showed that while the common object was to prevent the labourers, on the spur of the moment because of a *lalkara*(shout) being given, the mob assaulted the labourers. The court stressed the need to sift, through evidence on record, those act s which could be considered as that flowing out of a 'common intention' arising from a 'meeting of minds and fusion of ideas' in prosecution of which the overt acts flowed out.

'Mere presence of accused together is not sufficient to hold that they shared the common intention to commit the offence in question.[31]

Common intention, thus, does not mean similar intention of several persons. They are not synonymous. They are two different concepts of law. It is necessary that the intention of each one of 'several persons' be known to each other for constituting 'common intention'. Same intention of several persons does not constitute common intention unless they share it with each other.[32] Therefore, in cases where all persons having same or similar intention are physically present at the same time and at a place where offence is being committed are not jointly responsible for the offence committed. Each one will only be liable for his act s.[33]

Joint Liability in Context of Free Fight

The issue of the liability of different members of a group of people divided into mutually antagonistic or hostile groups, especially when there is a free fight between them, is one of the most difficult aspects of the law of joint liability. This is so, as apart from the difficulty of assessing the specific role of each individual member of the assaulting party, the court will also have to assess whether common intention can be proved. In *Balaur Singh v State of Punjab* ,[34] a similar question was raised. There were four persons, each belonging to two groups who attacked each other. One person who sustained grievous injuries died six days after the incident. Both the trial court and the high court had held that there was a free fight between the parties and therefore each and every assailant was accountable for their own individual acts committed. Based on the nature of injuries inflicted and the type of weapon used, the courts sentenced the assailants variously to one to two years' of rigorous imprisonment. However, with regard to the conviction under s 302 and life sentence on one accused, the court held that in a free fight, there was a movement of body of the victims and assailants, who are themselves participants or expected participants in the cross assault on each other. In such a situation, it will be difficult to specifically ascribe to one accused the intention to cause injuries sufficient to cause death. Hence, under the circumstances, the conviction was altered from ss 302 to 304(II), IPC, and the sentence altered from life to seven years rigorous imprisonment.

PARTICIPATION IN THE CRIMINAL ACT

The second, and important limb for the operation of the principle of joint criminal liability, is the necessity of participation in the criminal act by all those who are charged with the offence. Participation is thus a necessary element or condition precedent to a finding of joint liability. Interestingly, a question arose in the context of conviction under s 409 read with s 34, IPC, for misappropriation by a public servant. The question was whether the direction of the trial judge to the jury that despite the non-presence of the accused when the offence was act ually committed, if the accused remained behind the scene, he can be convicted under s 34 was proper and legal. The Supreme Court in *Shreekantiah Ramayya Munipalli v State of Bombay,* [35] elaborated thus:

> ...[I]t is the essence of the section that the person must be physically present at the actual commission of the crime. He need not be present in the act ual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or the other at the time the crime is act ually committed. The antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by s 109, and the stage of commission when the plans are put into effect and carried out. Section 34 is concerned with the latter.[36]

The court pointed out that the Privy Council had, in *Barendra Kumar Ghosh v King Emperor* ,[37]emphasised that the thrust in s 34 was on the word 'done' and that 'actual presence' plus prior abetment can mean nothing else but participation. Further, participation and joint action 'in the act ual commission of crime' are, in substance, matters which stand in antithesis to abetments or attempts.[38]

While participation in action is a necessary condition for liability under s 34, it is not necessary in all cases for participation to be in the form of physical presence. This principle came to be explained as the ratio in *Shreekantiah* case[39] that the first accused could not held to be liable as he was not present at the scene of occurrence, came to be pressed in another case of misappropriation. The Supreme Court explained that the ratio developed in the *Shreekantiah's* case could not be considered to lay down a principle of universal application, as it was suited only to the peculiar facts of that case alone. Thus, in *Jaikrishnadas Manohardas Desai v State of Bombay* ,[40] it was explained that in offences involving physical violence, presence of the accused, apart from participation, was essential. However, in other cases involving non-physical violence, like in cases of misappropriation, cheating and the like, physical presence could not be a condition precedent to come to a finding of joint liability. The apex court observed:

> ...[T]he essence of liability under section 34is to be found in the existence of common intention animating offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offender sought to be

> rendered liable under s 34 is not, on the words of the statute, one of the conditions of its applicability... [T]he leading feature of section 34 of the Indian Penal Code is anticipation in action. To establish joint liability for an offence, it must, of course, be established that a criminalact was done by several persons; the participation must be in doing the act not merely in its planning. A common intention--a meeting of mind--to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of section 34. But this participation need not in all cases be by physical presence. In offence involving physical violence, normally presence on the scene of the offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse act s which may be done at different times and places...[41]

It is thus clear that in cases involving physical violence to individuals and property, once participation is proved, then the accused persons would be jointly liable for the criminal acts, even when it is not clear who among the accused had act ually inflicted the fatal blows. Thus, in a crime involving an unlawful assembly, which had a common object and intention to kill one Tarlok Singh, the question raised was whether the court could convict the appellants even when a number of other accused had been acquitted. In *Jagir Singh v State of Punjab* ,[42] the court held that where there was a clear finding that accused nos 1 and 5 had participated in the offence with four other unknown accused, and in pursuance of the common intention committed the murder, then even though other co-accused had been acquitted, the accused would still be liable, since they shared a common intention with the other four co-accused whose identities were not established. Their conviction under s 302 read with s 34, IPC, was therefore sustained.

An interesting question arose in *Jai Bhagwan v State of Haryana* ,[43] about a situation when common intention is proved and no clear, specific overt acts are attributed to the accused from a situation in which participation is proved and common intention is absent. In the above case, the deceased and his sons went to the lands of the accused over which a dispute had been simmering for years. They were related to each other. On the day of occurrence, when the deceased had reached the land owned by *A-2*, the mother of the accused nos 1 and 3 exhorted them to attack the deceased party. They were already armed with weapons and thus launched a murderous attack. It was not a case of a free fight and it could be said that they did not intend to cause injuries inflicted by them. The court thus held that once common intention is proved and no overt act is attributed to the individual accused, s 34 will be attracted, as essentially it involved vicarious liability, however if participation in the crime of the accused is proved but there is no common intention, then s 34 cannot be invoked.[44] On this reasoning, the court confirmed the conviction of *A-1* and *A-3* under s 304(I) read with s 34, IPC, but however reduced the sentence from seven to five years. As regards *A-2*, the court held that since he was the owner of the land into which the deceased party had trespassed, he was entitled to claim protection under s 104, IPC, of the right of defence of property, although he had caused grievous injury with dangerous weapon. He was therefore acquitted of the offence under s 326, IPC.

In *Nand Rastogi v State of Bihar* ,[45] the Supreme Court, reiterating the thitherto-established legal position, emphasised that it is not necessary that each one of the accused must assault a deceased to come within the purview of s 34. It is enough that they have shared a common intention to commit a crime by doing their assigned, similar or diverse, act s. But physical presence of all of the several persons at the scene of the crime is necessary.[46] However, mere presence of a person at the time of commission of an offence by his confederates is not, in itself, sufficient to bring his case within the purview of s 34, unless community of designs is proved against him.[47] Similarly, mere distancing himself from the scene itself cannot absolve him from criminal liability.[48]

For applying s 34, it is not necessary to show, as a rule, some overt act on the part of the accused.[49]The establishment of an overt act is not a requirement of law to allow s 34 to operate. A criminal act done in furtherance of intention of all by an accused need not be overt, even a deliberate and conscience covert act is enough to bring such a person within the ambit of s 34.[50]

ABSENCE OF OVERT ACTS--NO PROOF OF COMMON INTENTION

Effect

A curious case came up for consideration in *Rangaswami v State of Tamil Nadu* .[51] In this case, *A-3*, who was convicted by the trial court for committing offences contrary to s 302 read with s 34; s 307 read with ss

34, and 506 of the IPC, came before the Supreme Court with the plea that insofar as he was in friendly terms with *A-1* and *A-2*, he did not share the common intention with them to kill the deceased or to attack the deceased's companion, and that it was by chance that he happened to be at the spot of occurrence and had not participated in the offence otherwise. In this case, *A-1* and *A-2* had prior enmity with the deceased, who was accused of murdering the brother of *A-1*, and had actually been released on bail. The occurrence took place in the *bazaar* after the deceased and his friend were returning from the judicial magistrate's court. On detailed consideration of the evidence, the court held that while the presence of *A-3* was established, there was no evidence to show that he shared common intention with the other accused to do away with the deceased or that he knew about the plan to attack the deceased when he was returning from the court. Except that he was on friendly terms with *A-1* and *A-2*, he had no scores to settle with the accused or his friend, had not assisted in the attack made by them on the deceased and had actually not even uttered a word of instigation to the other accused.

The Supreme Court considered the curious conduct of the accused surrendering to the police subsequently. The court said:

> ...[I]t cannot warrant a conclusion that there was a prior meeting of minds between *A-3* on the one hand and *A-1* and *A-2* on the other ....It may well be that *A-3* may have thought that if he did not go to the Police Station when *A-1* and *A-2* themselves going, he would be incurring their displeasure and also inviting the suspicion of the Police authorities about his complicity in the offence. In such circumstances, *A-3* cannot be held constructively liable for the acts of *A-1* and *A-2*.[52]

A-3 was therefore acquitted of all charges.[53]

There have been a number of cases in which the Supreme Court has acquitted an accused for lack of any overt act s or for absence of evidence of common intention. In this regard, reference may be made to *Chhotu v State of Maharashtra* ,[54]*Swaran Singh v State of J&K,* [55] and *Bengai Mandal @ Begai Mandal v State of Bihar* .[56]

However, in this connection it is significant to note that the prosecution is not obliged to establish, as a requirement of law, an overt act on the part of an accused to attract s 34. It is required just to prove that several persons did the criminal act in question and the accused has shared the common intention.[57]

Proof of Common Intention: Rule for Evaluating Evidence

As Hari Singh Gour notes in his *Penal Law of India*,[58] the simplest method of proving common intention is through direct evidence of conspiracy. However, not only is this hard to come by, but most often, the evidence is by way of the evidence of approvers or accomplices which courts consider unsafe to rely upon unless it is corroborated in material particulars. Failing this evidence or its material corroboration, resort must be had to other facts and circumstances of the case to examine community of interest and the existence of common intention between and amongst the various participants in the crime.

Conduct of Parties as Evidence for Proving Common Intention

One of the most important aspects of evidence is the conduct of the parties subsequent to the formation and execution of common intention, even in cases where the intention was formed on the spur of the moment. In such circumstances, the Supreme Court said:

> It is true prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case... All that is necessary to have is direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or as we prefer to put it in the time-honoured way, 'the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis'.[59]

The existence of meeting of minds and the consequential common intention, thus, is a question of fact to be proved as a matter of inference from the circumstances of a case at hand. However, such an inference must

be premised on the incriminating facts established by the prosecution beyond reasonable doubt[60] and not on bare conjecture, surmise or suspicion. Common intention should never be drawn unless it is a necessary deducible from the totality of circumstances of a case at hand that point that the accused shared it with others.[61] A court need to take into account, along with other factors, the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, the nature of injury caused by one or some of them,[62] background of the incident and the nature of weapon used to cause the injuries,[63]for determining common intention. It may also be determined from the conduct of the offenders unfolding itself during course of act ion and the declaration made by them just before mounting the attack.[64] In other words, a court is required to look into the totality of the circumstances for arriving at a judicial conclusion whether an accused had a common intention to commit the offence.[65] However, common intention essentially being a state of mind and can only be gathered by inference drawn from facts and circumstances established in a given case, no earlier decisions involving almost similar facts can either be used as precedent or relied upon for determining common intention in the case at hand.[66] A court, however, should not draw the inference of common intention readily. It must be drawn with a certain degree of assurance.[67]

Circumstantial Evidence as Proof of Common Intention

In *Mahboob Shah v Emperor* ,[68] the Privy Council, referring to proof of common intention, observed:

> ...[I]t is difficult if not impossible to procure direct evidence to prove the intention of an individual, in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case... [T]he inference of common intention within the meaning of the term of section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.[69]

The apex court in *Pandurang v State of Hyderabad* ,[70] in a tone similar to that of the Privy Council, also reiterated: 'The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case'.[71]

In *Badruddin v State of Uttar Pradesh* ,[72] the Supreme Court held that 'though establishing common intention is a difficult task':

> ...[Y]et, however difficult it may be, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of mind of all the assailants to commit the offence, be it prearranged or on the spur of the moment, but it necessarily must be before the commission of the crime. Where direct evidence is not available, it has to be inferred from the circumstantial evidence.[73]

In *Rajesh Govind Jagesha v State of Maharashtra,* [74] the Supreme Court held that no direct evidence for common intention is necessary. It can be inferred from attendant circumstances of the case and conduct of parties. In *Anil Sharma v State of Jharkhand* ,[75] admitting that direct proof of common intention is seldom available, the apex court asserted that the prosecution, in order to bring home the charge of common intention, has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34.[76]

Necessity of Overt Act for Proving Common Intention

The question of whether the absence of proving overt act would prohibit fastening guilt through the provision of s 34 came to be considered by the Supreme Court in *Krishnan v State of Kerala* .[77] In this case, the deceased was killed by his own brother and their nephew, who. were armed with knives. The nephew inflicted knife injury on the deceased's head. Before he could inflict more injuries, *PW 1*, caught him and forced him to throw his knife. The brother of the deceased however continuously stabbed the deceased due to which he died soon thereafter. The trial court acquitted the accused. However on appeal, the High Court of Kerala, convicted them for committing offence under s 302 read with s 34, IPC, and sentenced them to life imprisonment. By the time the matter reached final hearing before the Supreme Court, the brother of the deceased had died. It was the contention pressed by the nephew that since there was no proof to show that he had inflicted knife injuries, and since there were no overt acts alleged against him, he could not be convicted under s 34.

On the question of whether it was obligatory for the prosecution to establish overt act to invoke s 34 IPC, Hansaria J of the Supreme Court held:

> It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of an overt act is not a requirement of law to allow s 34 to operate inasmuch as this section gets attracted when 'a criminal act is done by several persons in furtherance of a common intention of all. What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when overt act is established *qua* each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: *res ipsa loquitur*.[78]

Based on the above reasoning, the court held that accused shared the common intention of killing the deceased and the criminal act had been done in furtherance of the intention. As the judge put it, ' Section 34 did not require anything more to get attracted'.

In *Ramashish Yadav v State of Bihar,* [79] the Supreme Court considered the case of two groups of people who clashed over a land dispute. The accused side was armed with weapons. Two accused were convicted under s 302 read with 34, IPC, by the Supreme Court. After considering the evidence, the Supreme Court held that prior concert or meeting of minds may be determined from conduct of offenders unfolding itself and by declarations made by them. On this ground, the two accused who merely held the deceased, were held not to have shared common intention and hence acquitted.

APPRECIATION OF EVIDENCE--BENEFIT OF DOUBT TO BE GIVEN TO ACCUSED

In *Brijlala Prasad Sinha v State of Bihar* ,[80] the Supreme Court had to consider the case of a number of policemen who were accused of staging an encounter killing and actually killing in cold blood three innocent persons. In this case, information reached the Station House Officer (SHO) of Barachatti Police Station in Bihar that a Maruti van with criminals had been seen speeding on the highway and that there had been indiscriminate firing from the van. On receiving the information, the police officials rushed from the police station. The Maruti van was forced to stop on account of a traffic jam. The police officials came near the Maruti van and started indiscriminately firing into it killing the three occupants. Three police officers were convicted of offence under s 302 read with s 34, IPC, and while the SHO was sentenced to death, the other two officers were sentenced to life imprisonment. Similarly, three police constables who act ually fired from rifles which killed the three occupants were convicted for murder and sentenced to life imprisonment.

It was the case of the appellant that he was not part of the police party which had chased the Maruti van and that he had left the station separately and had actually reached the occurrence spot half an hour later. The Supreme Court therefore had to consider the issue of whether all the police personnel could be held guilty by taking recourse to s 34, IPC. The court noted that a common intention can only be inferred from the act s of the parties. For an inference of common intention to be drawn:

> ...[T]he evidence and circumstances should establish without any room for doubt that a meeting of minds and fusion of ideas had taken place amongst different accused and in prosecution of it, the overt acts of the accused flowed out as if in obedience to the command of a single mind. If on the evidence there is doubt as to the involvement of a particular accused in the common intention, the benefit of doubt should be given to the said accused persons.[81]

On the above-mentioned criterion for consideration of the evidence on record and the circumstances of the case, the appellant was acquitted, while the conviction and sentence of other accused under s 302 read with s 34, IPC, were confirmed. The death sentence of one of the convicts was modified to life imprisonment.

In *Idrish Bhai Daudbhai v State of Gujarat* ,[82] the Supreme Court has categorically ruled that if the prosecution has failed to bring any material on records to show that there had been any pre-concert or pre-arranged plan so as to hold that an accused had any common intention to commit the alleged offence, the accused deserves a benefit of doubt and the consequential acquittal.

EFFECT OF ACQUITTAL OF CO-ACCUSED IN CONVICTION USING SECTION 34

The consensus of judicial opinion regarding the effect of acquittal of co-accused on the other accused is to the effect that if the facts proved or circumstances established do not disprove the inference of common intention, then the remaining accused are liable to conviction using the principle of joint liability contained in s 34. However, if the very basis of inferring common intention is shaken, then the individual accused will be liable only for their respective act s.

A case arising from trade union rivalry in which a leader was murdered, and in which out of the six accused persons only two were convicted under s 302 read with s 34, IPC, and the rest were acquitted by the Madras High Court, came to be considered in *Nadodi Jayaraman v State of Tamil Nadu* .[83] The Supreme Court held that in cases where a large number of persons are involved and in the commotion, injuries were caused to the prosecution witnesses, it becomes the duty of the court to determine the common intention which could be attributed to those accused who stand convicted, where some of the co-accused are acquitted. In this regard, the nature of weapons used, the nature of incident, the background to the incident should be properly considered to help determine common intention. In the case, the court held that common intention had not been properly established beyond doubt and five of the co-accused had been acquitted, the prosecution needed to establish the specific injuries caused by the accused in order to convict them for the same. While the two remaining accused certainly did not cause all the injuries to the deceased, he (the deceased) nevertheless did succumb to the injuries caused collectively. Hence, the accused can be held to be liable for causing culpable homicide not amounting to murder under s 304(II), IPC, and sentenced to the period already undergone, amounting to more than five years.

The principle, however, is that if the acquitted co-accused reduce the number of accused to that below which a common intention cannot exist, ie, only one accused, then conviction using s 34 cannot be resorted to, unless it is proved that he shared a common intention with persons other than the acquitted accused and the offence was committed in furtherance of that common intention.[84]

However, if after acquittal, the number of accused remaining are more than two and are proved to have entertained the common intention, then they will still be liable. Thus, in the case of *Bharwad Mepa Dana v State of Bombay* ,[85] four accused along with others were accused of having the common intention of causing the murder of three brothers. After the acquittal, four accused remained. When it was argued that s 34 could not be pressed, the court observed after considering other case laws on the subject, that after acquittal four co-accused remained, who shared the common intention with others whose identity was not established. They also shared the common intention. Therefore, it was held that they would be liable for conviction for murder using s 34, IPC.

Even in a situation when all the accused but one have been acquitted of the alleged offence, it is possible to convict even a solitary accused under s 302 with the aid of s 34.[86]

EFFECT OF CHARGE AGAINST ACCUSED UNDER SECTION 149, AND NOT SECTION 34, Indian Penal Code 1860

It has been repeatedly held that the effect of wrongly charging a person under s 149, IPC, and later substitution of s 34, does not fatally affect the prosecution case as the substitution must be held to be a formal matter, and unless prejudice has been caused to the accused, does not materially affect the prosecution case. This has been held in *Amar Singh v State of Haryana* ,[87] in which the conviction for offence under s 302 read with s 34, IPC, though charged under s 302, read with s 149, IPC, was held to be not illegal when the facts proved and evidence adduced would have been the same if the accused had been charged under s 302 read with s 34, IPC. In such a case, failure to charge the accused would not result in a prejudice. A similar decision was given in *Bhoor Singh v State of Punjab* .[88] In the latter case, the accused was charged for offence under s 302, read with 149, IPC, but convicted under s 302 read with 34, IPC. Though there was no

specific charge under s 34, IPC, this amounts only to an irregularity. All the circumstances showing concert and participation in joint criminal action by all the three appellants were duly put to examination under s 342 CrPC (s 313, as renumbered after amendment in 1973). Hence, the appellants were fully aware of the nature of the offence with which they were charged. Therefore, there was also no question of prejudice caused to the accused because of the substitution, and it was held that no illegality was caused because of the substitution.

The apex court has ruled that although there is a difference between common object and common intention, they both deal 'with combination of persons who become punishable as sharers in an offence' and a charge under s 149 does not create any bar for convicting a person by applying s 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all. Persons charged under s 302 read with s 149, therefore, can be convicted under s 302 read with s 34, IPC.[89] In *Chittarmal with Moti v State of Rajasthan* ,[90] the Supreme Court, reiterating the principle, observed:

> It is well settled by a catena of decisions that section 34 as well as section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for act s of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus, they have a certain resemblance and may to some extent overlap. ...[A]nd it is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both sections 34 and section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of section 34 for section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of section 149 is, therefore, no bar in convicting the appellants under section 302 read with section 34, if the evidence discloses commission of an offence in furtherance of the common intention of them all.[91]

COMMON INTENTION VERSUS COMMON OBJECT: A COMPARATIVE ANALYSIS

Both ss 34 and 149, IPC, deal with issues of constructive liability. In other words, a situation when criminal liability attaches to persons for act s not necessarily done by them. There are, however, differences in the scope and nature of operation of the two offences which needs to be understood. As stated earlier, the difference becomes crucial when a charge under s 149, IPC, is sought to be substituted at a later stage for a charge under s 34 of the IPC, especially when some accused are acquitted and the number of accused falls below five. In such contexts, the court would have to carefully examine the evidence to see whether some element of common intention exists which makes the accused persons criminally liable. We consider the main differences below:

(1) Section 34 only lays down a principle of joint criminal liability and does not create a separate offence.[92]On the other hand, s 149 creates a specific offence being located in ch VIII, 'Of Offences Against Public Tranquillity'. Thus, membership in an unlawful assembly itself is specifically made liable to punishment. While s 34 creates joint criminal liability, in which if individuals share a common intention and do acts furthering the same, then all of them are held liable for all act s committed. On the other hand, s 149 creates 'constructive criminal liability' for acts done in prosecution of the common object of the assembly, provided the essential conditions for being an unlawful assembly are fulfilled.

(2) 'Common intention' in s 34 is undefined and therefore unlimited in its operation, while 'common object' in s 149 cannot go beyond the five objects specifically indicated in s 141 of the IPC.[93]

(3) The crucial difference between common intention and common object is that while common intention requires prior meeting of mind and unity of intention, common object may be formed without these ingredients.[94] It is quite possible to consider a situation when the common object of the members of the unlawful assembly is one, but the intention of the participants may differ. Thus, under s 149, if any member of the unlawful assembly commits an offence, others are also liable, although, they may not have had the same intention, but only shared the common object. This is of course if either of the two conditions are satisfied, namely: (i) the offence was

committed in prosecution of the common object of the assembly; or (ii) that the offence committed is of such nature that other members knew it likely be committed in prosecution of the common object.

(4) While in s 34, the crucial factor is that of 'participation', in s 149, membership of the unlawful assembly is a sufficient precondition. Thus, in s 149, there is no need for act ive participation or contribution for attaining the common intention.[95]

(5) For invoking s 34, it is sufficient if there are more than two persons involved; however, in s 149, there have to be a minimum of five persons and more to attract coverage of the provision.

(6) For offence under s 34, some overt act, however small, is a pre-requisite for being made liable. However, in s 149, the mere fact of being an unlawful assembly itself is sufficient to fix liability.

In *Nanak Chand v State of Punjab* ,[96] the Supreme Court, delving into the distinction between ss 34 and 149 of the IPC, observed:

> There is a clear distinction between the provisions of sections 34 and 149, IPC , and the two sections are not to be confused. The principal element in section 34 , IPC , is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation section 34 provides that each of them would be liable for that crime in the same manner as if all the act s resulting in that crime had been done by him alone. There is no question of common intention in section 149 , IPC . An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there is no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled.[97]

A ruling of the Allahabad High Court in *Om Prakash v State* [1] offers a very clear distinction between ss 34 and 149 of the IPC, which makes it difficult for the editor to resist the temptation to quote it extensively. Justice Beg, while deliberating on the contrast between these two provisions, observed thus:

> ... Whereas section 34 , IPC, does take into account the fact of the participation of every individual offender in the offence which is therein described as a 'criminal act' as well as his mental state which is therein connoted by the word 'intention', section 149 of the IPC completely ignores both these factors. ...[A] perusal of section 34 , IPC , shows that it deals with an offence from two aspects, the first of which may be described as the physical and the second as the mental aspect. The physical aspect of the offence referred to the above has been described as the 'criminal act' in section 34 , IPC . This criminal act according to section 34 , IPC, must be 'done by several persons'. The emphasis in this part of the section is on the word *done*. It naturally follows from this that before a person can be convicted by following the provision of section 34 , IPC , that person must have done something along with other persons. ...[T]he 'criminal act', therefore, contemplated in section 34 , IPC , is a joint act which is the result of several persons individually act ing in a particular manner. Every individual member of the entire group charged with the aid of section 34 , IPC , must therefore be a sharer in the joint act which is the result of their combined act ivity.
>
> This is in sharp contrast with the situation under section 149 , IPC , under which it is not at all necessary that every individual member of the unlawful assembly should have himself participated in the commission of the criminal act which is termed as *offence* in that section.
>
> The result is that under section 149 , IPC, a person might be liable for the offence even though he himself did not act ually join in perpetrating it, nor was the offence committed in his immediate presence. ...This is not the position under section 34. When a charge is framed with the application of section 34 , IPC , the accused is informed that he is being charged with an offence in which he himself participated along with others. ...[U]nder section 149 , IPC , the entire emphasis both in respect of the physical act as well as in respect of the mental state is placed on the assembly as a whole, [whereas] under section 34 , IPC , the weight in respect of both is divided and is placed both on the individual member as on the entire group.[2]

However, a view has also been expressed that these two provisions to some extent overlap each other.[3]

Section 35. When such an act is criminal by reason of its being done with a criminal knowledge or intention.--Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or in-

tention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

Section 34 deals with an act pursuant to the formation of a common intention. Section 35 creates what is known as 'like intention'. Section 34 raises the issue of criminality because of participation in the intention. Section 35 stipulates, however, that when an act is criminal by reason of its being done with a criminal intention or knowledge, each of such persons who join in the act with the same knowledge or intention will be liable for the action as though committed by him alone. However, if the individuals act differently in intention and knowledge then they are liable only to the extent of their intention or knowledge. Importantly, for s 34, there is no need to prove intention or knowledge as against each accused. In any case for a charge under s 34, the accused can rebut the charge by setting up an intention which is not criminal. However, under s 35, the accused has nothing to rebut unless the prosecution has proved criminal intention or knowledge as against each accused. Thus, liability under s 34 is for common intention, for offence under s 35, the extent of criminal intention or knowledge as against each accused.

Section 36. Effect caused partly by act and partly by omission.--Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Illustration

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

This section establishes the legal position that when an offence is due in part to an act and partly due to an omission, then the legal consequence is the same as if the offence was committed entirely by acts or omissions. The illustration is quite explicit in giving a graphic understanding of the scope of the section.

Section 37. Co-operation by doing one of several acts constituting an offence.-- When an offence is committed by means of several act s, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Illustrations

(a) *A* and *B* agree to murder *Z* by severally and at different times giving him small doses of poison. *A* and *B* administer the poison according to the agreement with the intent to murder *Z*. *Z* dies from the effects of the several doses of poison so administered to him. Here *A* and *B* intentionally co-operate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their act s are separate.

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

(c) *A*, a jailor, has the charge of *Z*, a prisoner. *A*, intending to cause *Z's* death, illegally omits to supply *Z* with food; in consequence of which *Z* is much reduced in strength, but the starvation is not sufficient to cause his death. *A* is dismissed from his office, and *B* succeeds him. *B*, without collusion or co-operation with *A*, illegally omits to supply *Z* with food, knowing that he is likely thereby to cause *Z's* death. *Z* dies of hunger. *B* is guilty of murder, but, as *A* did not co-operate with *B*, *A* is guilty only of an attempt to commit murder.

Section 38. Persons concerned in a criminal act may be guilty of different offences.--Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration

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

A person who aids and abets another in conduct which results in a criminal offence will not necessarily share the exact guilt of the principal, since his foresight of the consequences will not necessarily be the same as that of the principal, so that each may have a different form of mens rea, and this may differentiate their respective criminal liability. Thus, it has been stated long ago:

> Where several persons are present at the death of a man, each may be charged with different degrees of homicide in the indictment, as one with murder, another with manslaughter. For if there be no malice in the party striking but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. The converse is also true. But where the *mens rea* of each participant is the same, then each is fully guilty of the crime committed.[4]

Thus, s 38 provides different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of criminal act are set in motion by one intention or by the other.

Section 38 pre-supposes that there is an absence of common intention, otherwise, the parties would be governed by s 34. It is not only when there is an absence of common design that there is room for discrimination. Such a case would arise, where in a sudden quarrel, a person is struck down by two or more persons.

DISTINCTION BETWEEN 'ACT' AND 'OMISSION'

The legal nature and consequences of an 'act' and of an 'omission' being the same, it follows that it matters not in the eye of law whether the criminal injury (eg, murder) be caused either by an act (eg, beating) or by omission or omissions (eg starving) or partly by one and partly by the other (beating and starving). This is what is stated in s 36.

Under s 37, anyone supplying a link (by way of an act or omission) to the chain, or a series of acts or omissions which causes the evil, is liable for that consequent evil, as if he were the author of the whole chain of act s and omissions.

DIFFERENCE BETWEEN SECTION 34 AND SECTION 37

The distinction between ss 34 and 37 is that while the former requires a common intention for a criminal act done by several persons (i.e., unity of criminal behaviour which results in a criminal offence), in which case each act or becomes liable as if that act was done by him alone, s 37 deals with intentional co-operation (which, it was pointed out by Lord Sumner in *Barendra Kumar's* case,[5] may not be the same as a common intention) in an offence committed by means of several act s and punishes such co-operation (provided that it consists in doing any one of those acts either singly or jointly with any other person) as if it constituted an offence itself. Now, if, as Lord Sumner says, intentional co-operation may not be the same as a common intention, it must include act ion, contribute to the offence and is done with the knowledge that the offence is afoot, though without sharing the exact intention to commit a particular offence.

Under s 37, cooperation is carried out by acts which lead to the commission of the crime, and the act s are done consciously towards that purpose. Hence, under this section, a positive act or omission such as giving poison or not giving food must be proved in order to impose liability. Act ual participation in the actus reus must be established. What has to be proved under s 34 is common intention to commit the crime and the completion of the crime. The accused is made constructively liable under s 34, even though he may not have had any act ual participation in the crime.

Section 37 can have no application to a case where a number of persons were charged with causing simple and grievous hurt by use of *lathis*, as it cannot be said that there were several acts which resulted in the offence of causing grievous or simple injuries. The case more appropriately falls under s 34, as there can be no doubt that there was a common intention amongst the accused to commit a crime punishable under the IPC.[6]

The Supreme Court in *Afradin Sheikh v State of West Bengal* ,[7] has examined the application of s 34 in relation to conviction under s 304, Pt II. The deceased went to a particular place for a peaceful purpose and im-

mediately after his arrival there, he was chased by two of the accused and caught and felled to the ground. After this, the remaining four accused appeared and beat the deceased with diverse weapons, while those who were not armed held him pinned to the ground. The conviction of all the six accused for culpable homicide not amounting to murder in furtherance of the common intention under s 304, Pt II, read with s 34 was held legal. The second part of s 304 speaks of knowledge and does not refer to intention, which is mentioned only in first part. Section 34, of course refers to common intention. So, it was argued on behalf of the accused persons that s 34 could not be called in aid when the conviction is sought to be laid under Pt II of s 304, which refers only to knowledge. But the Supreme Court rejected that contention and held that s 34 can rightly be applied along with s 304, Pt II. The 'knowledge' referred to in the latter part is the knowledge of the likelihood of death. If it could be said that knowledge of this type was possible in the case of each one of the accused, there is no reason why s 304, Pt II cannot be read with s 34. The common intention is with regard to the criminal act, ie, the act of beating. If the result of the beating is the death of the victim and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, i.e., beating them, there is no reason why ss 34 or 35 should not be read with the second part of s 304 to make each individual liable.

The requirement of s 34, i.e., the existence of the common intention before the criminal act is perpetrated, was held to have been completely satisfied in this case because the six accused could not but by prior concert have appeared simultaneously at the scene, chased and overthrown the victim, held him down and beaten him. Provided, there is common intention, the whole of the result, i.e., the totality of the result perpetrated by several offenders, is attributable to each offender, notwithstanding that individually they may have done separate act s.

In *Jagir Singh v State of Punjab* ,[8] six named accused persons *A*, *B*, *C*, *D*, *E* and *F* were charged under s 302 read with s 34, IPC, for committing murder of *G*. As there was mistake in identity of *C*, *D* and *E*, they were acquitted. *F* was also acquitted giving him the benefit of doubt. In these circumstances, it was contended on behalf of *A* and *B* that they could not be convicted of the offence under s 302 read with s 34. The Supreme Court rejected that contention and held them guilty and confirmed the sentence of death imposed by the high court. There was clear evidence that the accused *A* and *B* participated in the offence with four other unidentified persons. The court held, that though it was not known which particular person or persons gave the fatal blow, it was clear that murder was committed by six culprits including *A* and *B* in furtherance of the common intention of all. Hence, each of them was liable for murder, as though it had been committed by him alone. The principle embodied in s 34, IPC, is participation in some action with the intention of committing a crime. Once participation is proved, s 34 is attracted.

In *Prabhu Babaji Navle v State of Bombay* ,[9] the appellant was charged along with four named persons under s 302 read with s 34. As the others were acquitted, the Supreme Court held that the appellant alone could not be convicted of the offence under s 302 read with s 34. On the facts of that case, it was not possible to reach a conclusion that the appellant shared the common intention with other unknown person or persons.

PROPOSALS FOR REFORM

The Fifth Law Commission of India in its Report on the Indian Penal Code,[10] expressing its satisfaction to ss 35-38 and thereby offering no suggestions for improvements thereof, offered two proposals for reform in s 34 only.

Acknowledging the contribution of the *Barendra Kumar Ghose* dictum of the Privy Council in clearing the ambiguity in the phraseology of s 34, the Law Commission, however, with a view to bringing better clarity for easier understanding of the provisions of s 34, proposed the words 'several persons' be substituted by 'two or more persons'.[11]

The Indian Penal Code (Amendment) Bill 1978, incorporating the Law Commission's suggestion, proposed, through its cl 13, to substitute words 'several persons' by 'two or more persons' in ss 34-38, IPC. But the Bill lapsed due to the dissolution of*Lok Sabha* in 1980.

The Fourteenth Law Commission[12] also endorsed the proposals for reforms recommended by the Fifth Law Commission and incorporated in the 1978 the Amendment Bill.[13]

1 *Shri Ganesh v State of Mysore* AIR 1958 SC 672; *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, (2001) 3 SCC 673.

2 (1838) 8 C & P 541.

3 The Indian Penal Code (Amendment) Act 1870 (27 of 1870). These words are inserted in the section to make the Indian law at par with the English law.

4 *Parichhat v State of Madhya Pradesh* AIR 1972 SC 535; *Chandrakant v Murgyappa Umrani v State of Madhya Pradesh* AIR 1999 SC 1557; *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, (2001) 3 SCC 673, ; *Mithu Singh v State of Punjab* AIR 2001 SC 1929, (2001) 4 SCC 193; *Parasa Raja Manikyala Rao & Anr v State of AP* AIR 2004 SC 132, (2004) Cr LJ 390(SC) ; *Girija Shankar v State of Uttar Pradesh* AIR 2004 SC 1308; *Surinder Singh v State of Punjab* (2006) 13 SCC 533, (2007) Cr LJ 49(SC) ; *Hardeep Sinh v State of Haryana* (2008) 12 SCC 39, AIR 2008 SC 3113.

5 AIR 1925 PC 1.

6 Ibid, at p 7.

7 *Lallan Rai v State of Bihar* (2003) 1 SCC 268; *Aizaz v State of Uttar Pradesh* (2008) 12 SCC 198, (2008) Cr LJ 4374(SC) .

8 *Raju Pandurang Mahale v State of Maharashtra* (2004) Cr LJ 1441(SC) ; see also *Anil Sharma v State of Jharkhand* (2004) Cr LJ 2527(SC) ; *State of Uttar Pradesh v Atul Singh* AIR 2009 SC 2713, (2009) 14 SCC 203.

9 AIR 2004 SC 1808, (2004) 3 SCC 793.

10 Ibid, para 10. Also reiterated in *Anil Sharma v State of Jharkhand* (2004) Cr LJ 2527(SC) and *Janak Singh v State of Uttar Pradesh* (2004) 11 SCC 385, (2004) Cr LJ 2533, AIR 2004 SC 2495; *Hari Ram v State of Uttar Pradesh* (2004) 8 SCC 146; *Saravanan v State of Pondicherry* (2005) Cr LJ 117(SC) .

11 AIR 1945 PC 118.

12 In *Ram Nath v State of Madhya Pradesh* AIR 1953 SC 420, the Supreme Court has approved the *Mahboob* dictum. In *Krishna Govind Patil v State of Maharashtra,* AIR 1963 SC 1413, the Supreme Court not only reiterated the same view but also stressed that the prosecution need to lead evidence of facts, circumstances or conduct of the accused from which his common intention can safely be gathered by a court.

13 *Devilal v State of Rajasthan* AIR 1971 SC 1444,1971 Cr LJ 1132SC ; *Papu alias Susanta Das v State* (1999) Cr LJ 738(SC) ; *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, (2001) 3 SCC 673, (2001) Cr LJ 1462(SC) .

14 However, a distinct previous plan is not necessary for a charge under s 34. See, *Sita Ram v State of Bihar* (1976) Cr LJ 800(SC) .

15 *State of Uttar Pradesh v Rohan Singh* (1996) Cr LJ 2884(SC) ; *Hari Chand v State of Delhi* (1996) Cr LJ 1701(SC) ; *Jai Bhagwan v State of Haryana* AIR 1999 SC 1083; *Abdul Sayeed v State of Madhya Pradesh* (2010) 10 SCC 259, 2010 (4) Crimes 86 SC.

16 See *Brijlala Prasad Sinha v State of Bihar* AIR 1998 SC 2443; *Adalat Pandit v State of Bihar* (2010) 6 SCC 469.

17 AIR 1925 PC 1, at p 7.

18 AIR 1965 SC 257.

19 Ibid, para 9.

20 AIR 2004 SC 2764, (2004) Cr LJ 1415(SC) .

21 Ibid, paras 5 & 6.

22 See *Garib Singh v State of Punjab* AIR 1973 SC 460; *Yogendra v State Bihar* (1984) Cr LJ 386(SC) ; *Dhanna v State of Madhya Pradesh* AIR 1996 SC 2478, (1996) 10 SCC 79; *State of Andhra Pradesh v K Srinivasulu Reddy* AIR 2004 SC 3305.

23 *Anil Sharma v State ofjharkhand* (2004) 5 SCC 679, AIR 2004 SC 2294;, *Dhaneswar Mahakud v State of Orissa* AIR 2006 SC 1727, (2006) 9 SCC 307.

24 AIR 1955 SC 216.

25 Ibid, at para 37. The Supreme Court relied on *Mahboob Shah v Emperor* AIR 1945 PC 118 and *Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1.

26 AIR 1954 SC 706.

27 Ibid, para 6.

28 See as illustration *Risideo Pande v State of Uttar Pradesh* AIR 1955 SC 334; *Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413; *Ram Tahal v State of Uttar Pradesh* AIR 1972 SC 254; *Sheoram Singh v State of Uttar Pradesh* AIR 1972 SC 2555, *Vasudevan Vishwambharan v State of Kerala* (1994) Cr LJ 1522(SC) ; *Rajesha Govind Jagesha v State of Maharastra* AIR 2000 SC 160, (2000) Cr LJ 380(SC) ; *Lallan Rai v State of Bihar* (2003) 1 SCC 268.

29 AIR 1998 SC 40.

30 Ibid, para 6. Also see, *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, (2001) 3 SCC 673, (2001) Cr LJ 1462(SC) .

31 *State of Uttar Pradesh v Rohan Singh* (1996) Cr LJ 2884(SC) ; *State of Uttar Pradesh v Rajvir* (2007) 15 SCC 545; *Arun v State* AIR 2009 SC 1256, (2009) 4 SCC 615; *State of Uttar Pradesh v Sahrunnisa* (2009) 15 SCC 452, AIR 2009 SC 3182.

32 *Dajya Moshaya Bhil v State of Maharashtra* AIR 1984 SC 1717; *Hanuman Prasad v State of Rajasthan* (2009) 1 SCC 507.

33 *Papu alias Susanta Das v State* (1999) Cr LJ 738(SC) . Also see *Dani Singh v State of Bihar* (2004) Cr LJ 3228(SC), (2004) 13 SCC 203.

34 AIR 1995 SC 1956.

35 AIR 1955 SC 287. It is significant to note that in this case, there was alleged misdirection to the jury by the trial judge, which was upheld by the Supreme Court. Though the jury system for conduct of trials was scrapped in India by the major changes introduced in 1973, the principle enunciated by the Supreme Court however remains valid.

36 Ibid, para 23.

37 AIR 1925 PC 1.

38 AIR 1955 SC 287, para 23, quoting the *Barendra Kumar Ghosh* case.

39 *Shreekantiah Ramayya Munipalli v State of Bombay* AIR 1955 SC 287.

40 AIR 1960 SC 889, (1960) Cr LJ 1250(SC) .

41 Ibid, para 7. Also see *Ramaswami Ayyangar v State of Tamil Nadu* (1976) 3 SCC 779, AIR 1976 SC 2076; *Dani Singh v State of Bihar* (2004) Cr LJ 3228(SC), (2004) 13 SCC 203.

42 AIR 1968 SC 43.

43 AIR 1999 SC 1083.

44 This view was reiterated in *Surendra Chauhan v State of Madhya Pradesh* AIR 2000 SC 1436, (2000) Cr LJ 1789(SC) . In this case, the appellant was convicted under s 314 read with s 34, IPC, for taking the deceased, with whom he had illicit relation, to a doctor to terminate her pregnancy. The doctor was neither competent nor approved under the Medical Termination of Pregnancy Act 1971, and his clinic did not have basic facilities. The doctor was convicted under s 314 of the IPC. The Supreme Court confirmed the conviction, but reduced the sentence from seven years to one-and-a-half years rigorous imprisonment and enhanced the fine from Rs 10,000 to Rs 25,000.

45 (2002) 8 SCC 9.

46 *Krishnan v State* (2003) 7 SCC 56.

47 *Malkhan Singh v State of Uttar Pradesh* AIR 1975 SC 12, (1975) 3 SCC 311; *State of Punjab v Bakhshish Singh* AIR 2009 SC 1510; *Mrinal Das v State of Tripura* (2011) 10 SCALE 55, 2012 Bom CR (Cri) 187.

48 *Lallan Rai v State of Bihar* (2003) 1 SCC 268, AIR 2003 SC 333.

49 *Hari Ram v State of Uttar Pradesh* (2004) 8 SCC 146.

50 *State of Uttar Pradesh v Pavitri Devi* (2001) Cr LJ 1462(SC) ; see also, *Bala Ramchandran v State of Kerala* (2001) Cr LJ 2372(SC) ; *State v Sidharth Vashisth alias Manu Sharma* (2001) Cr LJ 2404(SC) ; *Gopi Nath v State of Uttar Pradesh* (2001) Cr LJ 3514(SC) .

51 AIR 1989 SC 1137.

52 Ibid, para 10.

53 For similar decision of the Supreme Court in the identical facts see *Swaminathan v State of Tamil Nadu* AIR 2011 SC 1592, (2011) Cr LJ 1683(SC) .

54 AIR 1997 SC 3501, (1997) Cr LJ 4394(SC) .

55 AIR 2000 SC 2017, (2000) 5 SCC 668, (2000) Cr LJ 2780(SC) .

56 AIR 2010 SC 686, (2010) Cr LJ 1420(SC), (2010) 2 SCC 91.

57 *Krishnan v State of Kerala* (1996) Cr LJ 4444(SC) ; *Anil Sharma v State of Jharkhand* (2004) Cr LJ 2527(SC) .

58 Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 316.

59 *Pandurang v State of Hyderabad* AIR 1955 SC 216, para 34.

60 *Bhaba Nandan Barma v State of Assam* AIR 1977 SC 2252, (1977) 4 SCC 396; *Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413; *Idris Bhai Daudhbhai v State of Gujarat* (2005) 3 SCC 277, (2005) Cr LJ 1422(SC) .

61 *Shyama v State of Uttar Pradesh* (2001) Cr LJ 1419(All) ; *Subramani v State of Tamil Nadu* (2002) 7 SCC 210; *Krishnan v State* (2003) 7 SCC 56.

62 *Ramesh Singh alias Photti v State of Andhra Pradesh* (2004) 11 SCC 305, (2004) Cr LJ 3354(SC) .

63 *Pipal Singh v State of Punjab* (2001) Cr LJ 740(SC) ; but see *Ajai Sharma v State of Rajasthan* (1999) 1 SCC 174.

64 *Ramashish Yadav v State of Bihar* AIR 1999 SC 3830, (1999) 8 SCC 555, (2000) Cr LJ 12(SC) ; *Balram Singh v State of Punjab* AIR 2003 SC 2213, (2003) 11 SCC 286; *Idris Bhai Daudhbhai v State of Gujarat* (2005) 3 SCC 277, (2005) Cr LJ 1422(SC) .

65 *Parasa Raja Manikyala Rao v State of Andhra Pradesh* AIR 2004 SC 132, (2004) Cr LJ 390(SC) .

66 *Ramesh Singh alias Photti v State of Andhra Pradesh* (2004) 11 SCC 305, (2004) Cr LJ 3354(SC) .

67 *Bengai Mandal @ Begai Mandal v State of Bihar* AIR 2010 SC 686, (2010) Cr LJ 1420(SC), (2010) 2 SCC 91.

68 AIR 1945 PC 118.

69 Ibid, paras 5 & 7.

70 AIR 1955 SC 216.

71 Ibid, para 34.

72 AIR 1998 SC 3243, (1998) 7 SCC 300; see also *Surendra Mohan v State of Madhya Pradesh* AIR 2000 SC 1436, (2000) Cr LJ 1789(SC) .

73 Ibid, para 4.

74 AIR 2000 SC 160, (2000) Cr LJ 380(SC) ; see also *BN Srikantiah v State of Mysore* AIR 1958 SC 672.

75 AIR 2004 SC 2294, (2004) 5 SCC 679, (2004) Cr LJ 2527(SC) ; see also *State of Madhya Pradesh v Deshraj* (2004) Cr LJ 1415(SC), AIR 2004 SC 2764; *Ramesh Singh alias Photti v State of Andhra Pradesh* (2004) 11 SCC 305, (2004) Cr LJ 3354(SC) ; *Janak Singh v State of Uttar Pradesh* AIR 2004 SC 2495, (2004) 11 SCC 385, (2004) Cr LJ 2533(SC) ; *Hari Ram v State of Uttar Pradesh* (2004) 8 SCC 146.

76 Also see *Hemchand Jha v State of State of Bihar* (2008) Cr LJ 3203, (2008) 11 SCC 303; *Chaman v State of Uttaranchal* AIR 2009 SC 1036, (2009) Cr LJ 978(SC) ; *Sripathi v State of Karnataka* AIR 2010 SC 249, (2009) 11 SCC 660.

77 AIR 1997 SC 383.

78 Ibid, para 15.

79 (1999) 8 SCC 555, (2000) Cr LJ 12(SC) .

80 AIR 1998 SC 2443.

81 Ibid, para 11.

82 (2005) 3 SCC 277, (2005) Cr LJ 1422(SC) .

83 AIR 1993 SC 777.

84 *Wasim Khan v State of Uttar Pradesh* AIR 1956 SC 400; *Harshad Singh v State of Gujarat* AIR 1977 SC 710; *Birpal Singh v State of Uttar Pradesh* AIR 1977 SC 2083.

85 AIR 1960 SC 289, (1960) Cr LJ 424(SC) .

86 *Mangu Khan v State of Rajasthan* (2005) 10 SCC 374, (2005) Cr LJ 1748(SC) .

87 AIR 1973 SC 2221. The court relied upon *Karnail Singh v State of Punjab* AIR 1954 SC 204.

88 AIR 1974 SC 1256.

89 *Kartar Singh v State of Punjab* AIR 1961 SC 1787; *Ram Tahal v State of Uttar Pradesh* AIR 1972 SC 254; *Methela Pothuraju v State of Andhra Pradesh* AIR 1991 SC 2214; *Jadu Yadava v State* (1994) Cr LJ 1209(SC) ; *Dhanna v State of Madhya Pradesh* (1996) Cr LJ 3516(SC) ; *Gajjan Singh v State of Punjab* (1998) Cr LJ 3609(SC) ; *Madhu Yadav v State of Bihar* (2002) 5 SCC 724; *Karman Ram Narsaih v State of Andhra Pradesh* (2004) Cr LJ 4277(SC) .

90 AIR 2003 SC 796, (2003) 2 SCC 266, (2003) Cr LJ 889(SC) .

91 Ibid, para 14. See also *Anil Sharma v State of Jharkhand* (2004) Cr LJ 2527(SC) .

92 *Dhansai v State of Orissa* AIR 1969 Ori 105, (1969) Cr LJ 626(Ori) ; Re *Fac Zulla*AIR 1921 Cal 241; *Hemchand Jha v State of Bihar* (2008) Cr LJ 3203, (2008) 11 SCC 303.

93 *Dani Singh v State of Bihar* (2004) Cr LJ 3328(SC) ; *bhupendra Singh v State of Uttar Pradesh* AIR 2009 SC 3265, (2009) 12 SCC 447.

94 *Chittarmal with Moti v State of Rajasthan* AIR 2003 SC 796, (2003) 2 SCC 266, (2003) Cr LJ 889(SC) ; *Maranadu v State by Inspector of Police, Tamil Nadu* (2008) Cr LJ 4562(SC), 2008 (12) SCALE 420; *Raj Nath v State of Uttar Pradesh* AIR 2009 SC 1422, (2009) 4 SCC 334.

95 *Jaswant Singh v State of Haryana* AIR 2000 SC 1833, (2000) 4 SCC 484, (2000) Cr LJ 2212(SC) .

96 AIR 1955 SC 274.

97 Ibid, para 9.

1 AIR 1956 All 241.

2 Ibid, para 12.

3 *Karnail Singh v State* AIR 1954 SC 204; *Chittarmal with Moti v State of Rajasthan* AIR 2003 SC 796, (2003) 2 SCC 266, (2003) Cr LJ 889(SC) ; *Mrinal Das v State of Tripura* (2011) 10 SCALE 55, 2012 Bom CR (Cri) 187.

4 *Russell on Crime*, JW Cecil Turner (ed), 12th edn, Stevens & Sons, London, 1964, p 150.

5 AIR 1925 PC 1.

6 *Makka v State of Uttar Pradesh* AIR 1952 All 435, (1952) Cr LJ 797(All) .

7 AIR 1964 SC 1263, (1963) Cr LJ 350(SC) .

8 AIR 1968 SC 43.

9 AIR 1956 SC 51.

10 Law Commission of India, 'Forty- Second Report: The Indian Penal Code ', Government of India, 1971.

11 Ibid, para 2.63.

12 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997.

13 Ibid, para 12.08.

CHAPTER 19

Of Punishments

(Indian Penal Code 1860,Sections 53 to 75)

PART A

PRELUDE

There is no uniform sentencing policy in the country and sentences reflect the individual philosophy of the judges. On one hand, we have judgments of Krishna Iyer J, who has developed in a series of pronouncements what should be the nature of sentencing policy in India, which truly reflect the dictum that every saint has a past and every sinner a future.[1] The vagaries of sentencing was tellingly pointed out by Krishna Iyer J in *Rajendra Prasad v State of Uttar Pradesh* ,[2] which though in the context of death sentence, is nevertheless relevant in terms of what factors influence sentencing even in other offences:

> Law must be honest to itself. Is it not true that some judges count the number of fatal wounds, some the nature of the weapon used, others count the number of corpses or the degree of horror and yet others look at the age or sex of the offender...with some judges, motives, provocations, primary or constructive guilt, mental disturbance and old feuds, the savagery of the murderous moment or the plan which has preceded the killing, the social milieu, the sublimated class complex and other odd factors enter the sentencing calculus.... A big margin of subjectivism, a preference for old English precedents, theories of modern penology, behavioural emphasis or social antecedent, judicial hubris or human rights perspectives, criminological literacy or fanatical reverence for outworn social philosophers buried in the debris of time except as part of history--this plurality of forces plays a part in swinging the pendulum of sentencing justice erratically.[3]

The issue of the focus of punishment was considered in *State of Gujarat v Hon'ble High Court of Gujarat* ,[4] in which the issue before the Supreme Court was regarding payment of minimum wages to prisoners who are made to work as part of their punishment. Thomas J, after considering the principles outlined by Krishna Iyer J, once again highlighted what ought to be the essential thrust of sentencing policy in India by saying:

> Reformation should -- be the dominant objective of a punishment and during incarceration every effort should be made to recreate the good man out of convicted prisoners. An assurance to him that his hard labour would eventually snowball into a saving for his own rehabilitation would help him to get stripped of the moroseness and desperation in his mind while toiling with the rigours of hard labour during the period of his jail life. -- Reformation and rehabilitation of a prisoner are of great public policy. Hence, they serve a public purpose.[5]

But this approach of understanding the main thrusts of sentencing--rehabilitative, reformative, retributive and deterrent--has received different handling, depending on a wide variety of factors, some of which have been graphically outlined by Krishna Iyer J, referred to above. In contrast is the note of caution sounded by Wadhwa J in the same judgment that too much stress should not be placed on reformative theory. Emphasis must also be given to the fact that the rights of victims of crime ought not to be forgotten. Just as the rights of prisoners and issue of prison reforms have to be given importance, the rights of the victim equally needed to be given primacy.

While there can be no objection that the needs of victims should not be overlooked, it is when the nature of crime and the criminal are juxtaposed,[6] that the divergent attitudes of judges influencing a wide range of often differing sentences gets exposed.

The issue of disparity in sentencing is most apparent in death penalty cases. In fact, this was one of the issues raised before the Supreme Court in *Suresh Chandra Bahri v State of Bihar* .[7] The court noted:

> The criticism of judicial sentencing has raised its head in various forms--that it is inequitable as evidence in disparate sentences; that it is ineffective, or that it is unfair being either inadequate or in some cases harsh. It has often been expressed that there is a considerable disparity in sentencing an accused found to be guilty of some offence.[8]

It is an indisputable fact that the incidence of crime has been on the increase in the last few decades. Many crimes of extreme brutality have also been witnessed during this period. It is when considering some of these, that courts have been forced to take a hard look at the nature of sentencing--whether the focus of sentencing is deterrent, retributive, rehabilitative, or reformative. Thus, in *Dhananjoy Chatterjee alias Dhana v State of West Bengal* ,[9] the Supreme Court stressed the retributive aspect of punishment. The court noted that there are admitted disparities in criminal sentencing by courts, especially in violent crimes against women. While some criminals receive harsh sentences, others get grossly different sentence for an essentially equivalent crime. This apart, shockingly, a large number even go unpunished, thereby encouraging the criminal and in the end making the judicial system suffer by weakening the system's credibility. The court finally said; 'Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime'.[10]

The dictum laid down by the court in the above case was subsequently followed in *Ravji alias Ram Chandra v State of Rajasthan* ,[11] in which the apex court stated:

> It is the nature and gravity of the crime but not the criminal which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime, which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal.[12]

A court, thus, is expected to operate the sentencing system in such way that imposed sentence reflects the conscience of the society and responds to 'the society's cry for justice against the criminal'.[13]

A detailed debate on the nature of disparity in sentencing, not just in death penalty cases but also in other offences, requires greater deliberation which may be outside the scope of this chapter. However, one aspect is very clear--there is a crying need for evolving a comprehensive and well-formulated sentencing policy for the country, so as to ensure that the disparities in sentencing, as noticed in *Dhananjoy Chatterjee's* case is avoided.[14]

PART B

INTRODUCTION

The stage of punishment is the final process of the criminal jurisprudence system. As is well-known, one of the fundamental tenets of criminal law is that a person is considered innocent until proved guilty. The nature of proof requires that the evidence must prove beyond reasonable doubt the guilt of the person accused of various offences. The method of proof is through conduct of trial. Once the court comes to a conclusion, based on evaluation of the evidence admitted before it, that the accusations are proved against the accused, it has to decide on the quantum of punishment to be awarded to the accused. The principles determining the nature and extent of punishment to be prescribed by the trial court are to be found in ch III, IPC, titled 'Of Punishments'.

The chapter is essentially composed of the following five broad subject areas:

(1) The first set of provisions are from ss 53 to 60 providing for different types of punishments, which courts can award including death sentence, life imprisonment and imprisonment for other periods, whether the sentence should be served as rigorous or simple imprisonment and so on. These provisions also provide for commutation of the death sentence or life sentence in special circumstances by the State or Central Government concerned;
(2) Provisions relating to imposition of fines, including provisions for alternate sentences, if fines are not paid and so on; the related provisions are ss 63-70, IPC;
(3) Nature of punishment for offences made up of several offences as provided in ss 71 and 72;
(4) Solitary confinement as punishment and limits to its imposition in ss 73 and 74;
(5) Enhanced punishment for certain offences in case of offenders who have been convicted previously in other cases as provided in s 75.

PART C - SENTENCING POLICY

FUNDAMENTAL PRINCIPLES FOR IMPOSITION OF DIFFERENT TYPES OF PUNISHMENTS

Section 53. Punishments.--The punishments to which offenders are liable under the provisions of the Code are--

First.--Death;

Secondly.--Imprisonment for life;

Thirdly.--[***];[15]

Fourthly.--Imprisonment, which is of two descriptions, namely:--

(1) Rigorous, that is, with hard labour;
(2) Simple;

Fifthly.--Forfeiture of property;

Sixthly.--Fine.

Scope of Section 53

Section 53 , IPC, essentially determines the nature of punishment that a judge can impose on the accused when the accusations against the accused have been proved beyond doubt. The section itself indicates that the discretion of the judge is severely limited by the various options enumerated in the section, namely, death sentence, life imprisonment, imprisonment for lesser periods with rigorous or simple imprisonment, or fine or combination of imprisonment with fines. Newer methods of penalising an offender, which includes punishments like being permitted to stay outside prisons but having to do community service, open air prisons and so on, clearly fall out of the scope of the punishment that judges can award. It is this aspect of the IPC formulated by Lord Macaulay that has been criticised[16] on the ground that it is based on considerations of retribution and is punitive in character, not oriented towards reformation of criminals and not supportive of modern trends in criminology, which suggest different approaches to treatment of offenders.

Section 53 is applicable only for offences prescribed in the IPC and not to offences prescribed under other laws. While for some offences, the IPC itself provides minimum sentences, in most other offences, the trial court itself has wide discretion to award sentences based on what the court determines as appropriate, given the nature of the offence, the manner in which the offence was carried out, the previous conduct of the accused and other mitigating factors, as also factors called aggravating factors. As the Supreme Court discussed in *Surja Ram v State of Rajasthan* ,[17] for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been conducted are 'to be delicately balanced in a dispassionate manner. Such balancing is indeed a delicate task'. The court went on to refer to a US Court judgment, *Dennis Councle McGautha v State of California* [(1971) 402 US

183], which pointed out that no formula of a full proof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment, as an infinite variety of circumstances may affect the gravity of the crime of murder. Thus, in the absence of any full proof formula 'which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime of murder, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitable distinguished'.[18]

AWARDING APPROPRIATE SENTENCE IS THE DISCRETION OF THE TRIAL COURT

The US judgment referred to by the Indian Supreme Court above, succinctly states the basis of one of the well-recognised principles of sentencing, namely, the nature of the punishment to be awarded is recognised as falling within the discretion of the trial court.

There are several dimensions to the issue of appropriate sentence to be awarded. Firstly, once the court is convinced about the prosecution story, then conviction has to follow. At this stage, it is important to recognise the distinction between the nature of proof and the circumstances in which the offence has been committed. The former, i.e., nature of proof, is important in the consideration of whether, based on the evidence presented by the prosecution, the accused has been proved guilty, and if so, of the offence committed by the accused. The nature of proof has nothing to do with the character of punishment to be imposed by the court. At the stage of determining appropriate sentence, what the court considers are whether there are any mitigating factors which can be said to lessen the guilt of the accused or reduce the enormity of the offence committed. We may note as examples of mitigating circumstances factors, like provocation, offence committed unintentionally in the heat of the moment, age of the accused and so on. Once the court is satisfied that there are mitigating circumstances, then it will be justified in imposing the lesser of two sentences provided in law. Thus, the question of what sentence to be imposed is for the court to decide in all the circumstances of the case with particular reference to any extenuating circumstances. But the nature of proof has no relation to the question of punishment to be imposed.[19]

In *Deo Narain Mandal v State of Uttar Pradesh* ,[20] the Supreme Court, in similar vein, has made the following reflective observation on the nature of judicial discretion and its exercise by a court. It observed:

> In criminal cases awarding of sentence is not a mere formality. Where the statute has given the court a choice of sentence with maximum and minimum limit presented then an element of discretion is vested with the court.
>
> This discretion cannot be exercised arbitrarily or whimsically. It will have to be exercised taking into consideration the gravity of offence, the manner in which it is committed, the age, the sex of the accused, in other words the sentence to be awarded will have to be considered in the background of the fact of each case and the court while doing so should bear in mind the principle of proportionality. The sentence awarded should be neither excessively harsh nor ridiculously low.[21]

The extent to which the power to impose appropriate punishment is within the discretion of the trial court was explained by the Supreme Court in *Bed Raj v State of Uttar Pradesh* ,[22] in which the court considered the issue of the power of the appellate court to enhance the sentence imposed:

> A question of a sentence is a matter of discretion and it is well-settled that when discretion has been properly exercised along accepted judicial lines, an Appellate Court should not interfere to the detriment of the accused person except for very strong reasons which must be disclosed on the face of the judgment ...in a matter of enhancement there should not be interference when the sentence passed imposes substantial punishment. Interference is called for only when it is manifestly inadequate.[23]

One such case came up before the Supreme Court in which the *de facto* complainant[24] challenged the judgment of the high court before the apex court. In this case, the trial court had convicted the accused for offence under ss 302, 323 and 325 read with s 149, IPC, and sentenced the accused to life imprisonment. On appeal, the high court, however, converted the conviction against the accused from offence under s 302, IPC, to offence under s 304, Part I, IPC. However, considering the circumstances of the case, the court sen-

tenced them to period already undergone, but enhanced the fine to Rs 12,000 to be paid to the family of the deceased. The *de facto* complainant, however, challenged the substitution of the offence and reduction of the sentence. The Supreme Court explained the principle in *Sham Sunder v Puran* ,[25] as follows:

> The court in fixing the punishment for any particular crime should take into consideration the nature of the offence, the circumstances in which it was committed and the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of the offence.[26]

The Supreme Court, on reassessing the evidence, felt that the sentence imposed by the high court was grossly and entirely inadequate as to involve a failure of justice. In order to meet the ends of justice, the sentence was enhanced to five years rigorous imprisonment. The fine amount was ordered to be refunded to the accused persons.

When Appellate Courts Can Interfere with Sentence Imposed

In an earlier case, *Dalip Singh v State of Punjab* ,[27] the Supreme Court clarified the context in which the appellate court could interfere with the sentence imposed by the lower court. Thus, when discretion has been exercised along accepted judicial lines, an appellate court should not ordinarily interfere to the detriment of an accused except for very strong reasons, which must be disclosed on the face of the judgment.

As stated earlier in *Bedraj* case, in the matter of enhancement, there should not be interference when the sentence imposes substantial sentence. Interference will be warranted only when the sentence is manifestly inadequate. An interesting issue arose in *State of Karnataka v Krishrappa* ,[28] in which the Karnataka High Court reduced the sentence from 10 years to 4 years, imposed on a 49-year old man, accused of raping a 7-8 year old girl, on the ground that he was a chronic drinker and was an 'unsophisticated and illiterate citizen belonging to the weaker section'. The Supreme Court, while reversing the ruling, reiterated that punishment in rape cases should not be based on the social status of the accused or victims, but based on the manner in which crime was committed. The apex court observed that for a heinous crime like rape, there cannot be different standards for illiterate labourers from rural areas, set aside the sentence reduced by the high court and restored the sentence imposed by trial court.[29]

The judicial trend of 'no-leniency' in rape cases is exhibited by the Supreme Court in its pronouncements in *Ainal Uddin Ahmad v State of Assam* ,[30]*State v Rameshwar* ,[31]*State v Babblu Barkare @ Dalap Singh* ,[32] and *State of Madhya Pradesh v Saleem @ Chamaru* [33] also. These dicta reveal the view that reducing sentence below a reasonable minimum punishment merely on the ground that the accused is illiterate or from rural area or poor is unsustainable.

However, High Courts, through their judicial pronouncements, have shown their scant regard to the legislative minimum punishment provided for rape.[34] But the apex court, whenever it has found that the lower courts have allowed the accused to go with unreasonably lower punishment than the stipulated one for the offence of rape, has either remitted the cases for fresh consideration on the issue of sentence or has set aside the lower courts' sentence and awarded the stipulated minimum punishment.[35]

PRINCIPLE FOR SENTENCING

In every criminal case, two aspects have to be borne in mind. First, the heinousness or enormity of the crime; and secondly, the particular circumstances under which the accused has committed the crime. Since punishment is the mode by which the state enforces its laws against offenders, the court, before imposing sentence, has to consider the totality of circumstances before awarding punishment, which should be both appropriate and just.

While sentencing is the discretion of the trial court judge, the sentence must be such as serves as deterrence to others. While the maximum sentence to be awarded is the discretion of the judge, the exercise of the discretion should disclose that a reasonable balance has been maintained between the seriousness of the crime and the punishment imposed. While courts should not pass a sentence disproportionately severe as compared to the nature of the offence committed, they should also be careful not to award a sentence that is grossly inadequate and would fail to have any deterrent effect. The court should weigh the sentence with

reference to the crime committed and the circumstances of the case, and not with reference to anything which may happen subsequently. It has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.

Punishment disproportionate to the crime committed or undue sympathy to an accused, in the long run, will not only be detrimental to the social interests and the justice system but will also undermine the public confidence in the efficacy of criminal law and make a common man to lose his faith in the courts and justicing system.[36] Imposition of sentence without considering its effect on the social order would, in many cases, be, in reality, a futile exercise. In *State of Uttar Pradesh v Shri Kishan* ,[37] the Supreme Court observed:

> Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of the law and society could not long endure under such serious threats. It is, therefore, duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was committed etc... The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence.[38]

Emphasising importance of proportionate sentence in the administration of criminal justice, the apex court, somewhere else, observed:

> The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice, it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.[39]

We may summarise some of the key elements in the different dimensions underlying sentencing principles in India.

(1) The maximum punishment prescribed should not automatically follow upon a conviction;[40]
(2) In judging adequacy of sentence, the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of the punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would ordinarily be taken into account by courts;[41]
(3) The court has to bear in mind the necessity of proportion between an offence and the penalty;[42]
(4) Where the court imposes the maximum sentence allowed under the law, it should record its reasons for doing so;[43]
(5) In order to judge the appropriateness of the sentence, the court should take into account subsequent notoriety, which the convict acquired.[44]

AGGRAVATING CIRCUMSTANCES

The following circumstances are generally considered as factors which the sentencing court takes into consideration in awarding higher sentences, otherwise called as aggravating circumstances:

(1) Deliberate violence--especially when it is in addition to another crime, in which case the offender can expect little sympathy from the court;
(2) Use of lethal weapons;
(3) Wanton or deliberate cruelty and malignity;
(4) Treachery as when a man is falsely induced to believe another, thereby walking into a trap or ambush and getting killed or seriously injured;
(5) Nature of injury, particularly highlighting the cruel manner in which it is caused, as for example, when a person is clubbed or stabbed to death, or is crushed or deliberately poisoned;
(6) Motives, which will, of course, play a very important role in determining sentence.[45]

PART D - TYPES OF PUNISHMENTS

Having thus considered the broad sweep of s 53, we may now consider the specific punishments provided for in the section, namely: (1) death sentence; (2) imprisonment for life; (3) imprisonment, rigorous with hard labour, or simple; (4) forfeiture of property, and (5) fine.[46]

(1) DEATH SENTENCE

Death sentence is the harshest of punishments provided in the IPC, which involves the judicial killing or taking the life of the accused as a form of punishment. The question of whether the state has the right to take the life of a person, howsoever gruesome the offence he may have committed, has always been a contested issue between moralists who feel that the death sentence is required as a deterrent measure (if for nothing else), and the progressives who argue that judicial taking of life is nothing else but court-mandated murder.[47]

The IPC provides for capital punishment (imprisonment for life as an alternative punishment) for the following offences:

(1) Treason, as in waging, attempting, or abetting war against the Government of India (s 121);
(2) Abetment of mutiny (s 132);
(3) Perjury resulting in the conviction and death of an innocent person (s 194, second paragraph);
(4) Murder (s 302);
(5) Abetment of a suicide by a minor or an insane person or an intoxicated person (305);
(6) Attempted murder by a life convict, if hurt is caused (s 307, second paragraph);
(7) Dacoity accompanied with murder (s 396).

It is important to note that in the above-mentioned categories of offences, the death sentence only sets the upper limit of punishment. There is not a single offence in the IPC that is made punishable with mandatory sentence of death.[48]

Procedure When Death Penalty is Imposed

It is clear that capital punishment is awarded only in two categories of offences, namely, treason and murder. However, the judges, in the offences punishable with sentence of death and alternatively with life imprisonment have to make critical choice between the two permissible punitive alternatives, *viz*, death sentence and imprisonment for life. The statutory provisions do not provide any guidelines as to when the judges should impose capital punishment in preference to imprisonment for life, or to award lesser sentence of life imprisonment. A wide judicial discretion in opting for either of the punishments is vested with the judiciary.[49] When the court decides that death penalty is the appropriate sentence to be imposed in the light of the circumstances of the case, the nature of the offence committed and the absence of mitigating factors, then the court under the provisions of s 354(3) of the CrPC has to give 'special reasons' as to why it came to this conclusion. It will be pertinent to consider the wordings in s 354(3), CrPC, which reads as follows:

> ...When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgement shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

The above provision was brought in 1973 into the CrPC necessitating the court to give 'special reasons' for awarding death penalty. This was in contrast with the earlier provision which made death penalty the rule, in case the court came to the conclusion of guilt of murder against the accused, and the requirement that the court was required to give special reasons only when awarding life sentence.[50] The present provision makes it mandatory for the court sentencing to death to record the special reasons. Thus, under the existing law, life imprisonment is made the normal sentence for murder and death sentence is allowed to be passed only in exceptional cases.

There is yet another procedural safeguard provided in the context of award of death sentence. Section 366 , CrPC , provides that once the sessions court awards death sentence, then the court has to submit it to the high court for confirmation. This is meant to provide a second level of review of the evidence, so that the ex-

treme penalty may be considered afresh by a higher judicial forum. The high court may confirm the sentence, or pass any other sentence warranted by law or annul the conviction.[51] If a woman sentenced to death is found to be pregnant, the high court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to imprisonment for life.[52]

Constitutional Validity of Death Penalty

The constitutional validity of death penalty was considered by a Constitutional Bench of the Supreme Court in *Bachan Singh v State of Punjab* .[53] The reference to the Constitutional Bench came about, as the Bench hearing the case noticed that there was a conflict between two rulings of the Supreme Court on the issue of the validity and scope of the provision which enabled imposition of death penalty. The two cases were the Constitutional Bench ruling in *Jagmohan v State of Uttar Pradesh* ,[54] which declared death penalty to be constitutionally valid, and the ruling of another three-member Bench in *Rajendra Prasad v State of Uttar Pradesh* ,[55] in which a majority of two judges, namely, Krishna Iyer and DA Desai JJ, ruled that when the trial court comes to a conclusion that the accused is guilty of murder, then the state through the prosecutor should be called upon by the court to state whether the extreme penalty is called for; and if the answer is in the positive, the court should call upon the prosecutor to establish, if necessary by leading evidence, facts for seeking the extreme penalty of law. Those reasons and the evidence would comprise special reasons as put forward by the state, on which basis the court could decide whether to award death penalty or not. However, the accused would be permitted to rebut the evidence, but the only consideration would be about the sentence and not about guilt. Further, the majority held (with Sen J dissenting) that the focus of determining 'Special Reason' was not to be the crime, but the criminal.[56]

The Constitution Bench, by a majority of four judges comprising Chandrachud CJ (then Chief Justice), Sarkaria (who wrote the main judgment), AC Gupta and NI Untwalia JJ, after a lengthy discussion on the issue, including comparing the law on death penalty in some other countries like the US and UK, went on to uphold the constitutional validity of death penalty. The court went on to differ from the ruling of Krishna Iyer J in *Rajendra Prasad* case[57] on the issue of whether the court imposing death penalty should relate not to the crime, but to the criminal and stated instead that:

> ...[T]he court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them.[58]

The majority ruling went on to state the principle guiding the imposition of death sentence as follows:

> It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroads of legislative policy outlined in section 354 (3) viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.[59]

Bhagwati J delivered the minority ruling, holding that s 302, in so far as it provides for death penalty as an alternative to life sentence, is unconstitutional and ultra vires, and violative of arts 14 and 21 of the Constitution. His opinion, however, was delivered after nearly two years.[60]

Evolving Parameters for Imposition of Death Sentence

The Supreme Court's ruling that death sentence ought to be imposed only in the 'rarest of rare cases' was expanded in *Machhi Singh v State of Punjab* .[61] The following propositions were culled out by the Supreme Court from the guidelines indicated in the *Bachan Singh* case.[62] They are:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty, the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the crime;

(iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, inter alia, the following questions may be asked and answered:

  (a) Is there something uncommon about the crime, which renders sentence of imprisonment for life inadequate and calls for a death sentence?

  (b) Are the circumstances of the crime such that there is no alternative, but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

In *Lehna v State of Haryana* ,[63] the Supreme Court, referring to the *Bachan Singh* and the *Machhi Singh* cases, has also explained the circumstances that constitute 'rarest of rare cases'. It observed:

> In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:
>
> (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
>
> (2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder or gains of a person *vis--vis* whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
>
> (3) When murder of a member of a Scheduled Caste of minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
>
> (4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number or persons of a particular caste, community, or locality, are committed.
>
> (5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person and the murderer is in a dominating position, or a public figure generally loved and respected by the community.[64]

However, one finds a number of judicial dicta of the apex court wherein these guidelines with respect to death sentence are not followed in cases of multiple murders. For instance, in *Ram Anup Singh v State of Bihar* ,[65]wherein the accused killed all the members of the family and the act of the accused, in the words of the court, was 'certainly inhuman, cruel and dastardly act', the court set aside his death sentence and awarded him imprisonment for life with a condition that the convict be not released before completing the act ual term of 20 years. In *Sahdeo v State of Uttar Pradesh* ,[66] wherein an unlawful assembly killed eight persons, the court converted sentence of death awarded to the convicts into life imprisonment. A police constable, who fired gunshots causing death of his three colleagues, including one officer who initiated disciplinary action against the accused, was allowed by the apex court to go with imprisonment for life. It reduced sentence of death of the convict to life imprisonment.[67] Similar was the response of the apex court to the accused doctor involved in multiple murders of his in-laws. The court awarded him life imprisonment with the

condition that he would be not entitled to any remissions during auspicious occasions.[68] In *Des Raj v State of Punjab* ,[69] wherein the appellant was sentenced to death by the trial court and confirmed by the High Court for causing death of three, the apex court declined to treat it as a rarest of rare case on the ground that the courts below carried away by the gravity of the offence and the accompanied aggravated factors and have not given due consideration to mitigating circumstances. It, on a careful balancing of the aggravating and mitigating circumstances, felt that the aggravating circumstances noticed by the High Court do not outweigh much less overwhelmingly the mitigating circumstances.

Recently, in *Brajendra Singh v State of Madhya Pradesh* ,[70] the Supreme Court has laid down a copule of guiding principles for the courts to follow while determining the case at hand is the 'rarest of rare case' for imposing death sentence. They are:

1. In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.
2. Life imprisonment is the rule and death sentence is an exception.
3. The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.
4. The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

These indicators for the exercise of judicial discretion may collectively or otherwise weight in the mind of the Court while exercising its jurisdiction and judicial discretion. These factors may assist the court in its endeavour to do complete justice between the parties. However, the apex court preferred the courts not to fetter their judicial discretion by attempting to make the excessive enumeration of these indicators, in one way or another.[71]

Sentencing Procedure: Mandatory Provision of Section 235(2) , Code of Criminal Procedure , 1973

The discussion on capital punishment will not be complete unless the procedural safeguards provided in s 235(2), CrPC, are also considered. The section runs as follows:

Section 235. Judgment of Acquittal or Conviction.--

(1) After hearing arguments and points of law (if any), the judge shall give a judgment in the case.
(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

In short, the provision of s 235(2), CrPC, is that once on the basis of evidence before the court, the trial judge comes to a conclusion that the guilt of the accused has been proved beyond doubt, then the judge has to inform the accused about the fact that he is going to be convicted, and then give a chance to the accused to place such circumstances or factors about himself that he may think will help mitigate the case against him so that the court may consider the factors put forward by the accused to sentence him to a lower term of punishment.

The provisions of s 235(2) have been held by the Supreme Court to be mandatory, particularly in death penalty cases.

This was the ratio of the Supreme Court in *Santa Singh v State of Punjab* ,[72] where non-compliance with s 235(2) was held to be not just a mere irregularity, but to be an illegality which vitiates the sentence. The court noticed that there are two stages at the end of a trial. First is when the court assesses the evidence and comes to a conclusion whether the accused is to be acquitted of the charges against him or to be convicted. Once the court comes to a conclusion that the accused should be convicted, then the court ought to give a chance to the accused to place mitigating facts before the trial court. For until that time, the accused was merely concentrating on defending his case during trial. It is to enable him to place other factors that support a plea for lesser sentence that the provision for hearing him in s 235(2), CrPC, was introduced. The apex court explained the reason thus:

> The reason is that a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances--extenuating or aggravating--of the offence, the prior criminal record, if any, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety, and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence and therefore the legislature felt that for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused. Hence, the new provision in section 235(2).[73]

The court then considered the meaning of the term 'hear the accused' in s 235(2), CrPC, and held that the term meant that the accused and the prosecution could not only place oral arguments, but also other evidence for consideration by the court to arrive at an appropriate sentence. If it was limited only to hearing oral arguments, the court noted, 'the hearing would be rendered devoid of any meaning and it would become an idle formality'. Failure on the part of the trial judge to comply with the requirement to hear the accused as provided in s 235(2), CrPC, was held not to be curable under s 465, CrPC, as by its very nature, the violation of a mandatory provision was held to be an illegality and not just a mere irregularity, which could not be set right. On this construction of s 235(2), the Supreme Court remitted the case involving death sentence to the trial judge for fresh consideration on the aspect of sentence.[74]

In *Allauddin Mian v State of Bihar* ,[75] the Supreme Court once again considered the issue of effect of violation of the mandatory provision of s 235(2). It held that the requirement to hear the accused was based on the consideration that it should satisfy the rule of natural justice. The court elaborated:

> It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or evidence to tender on the question of sentence. This is all the more necessary since the Courts are generally required to make a choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose: it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the Court to choose the sentence to be awarded....[T]here can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality.[76]

The Supreme Court went on to state that as a 'general rule' 'the Trial Courts should after recording conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender'.[77]

However, it is pertinent to note that the Supreme Court, in *Tarlok Singh v State of Punjab* ,[78] held that the appellate court, in appropriate cases, can give an opportunity to the parties in terms of s 235(2), if such an opportunity was denied by the trial court. Realising that the trial court did not give an opportunity [under s 235 (2) of the CrPC] to the appellant-accused to show cause as to why lesser sentence of life imprisonment should not be inflicted, the Supreme Court ruled:

> ...[I]t may well be that in many cases sending the case back to the Sessions Court may lead to more expense, delay and prejudice to the cause of justice. ...[I]t may be more appropriate for the appellate Court to give an opportunity to the parties in terms of section 235(2) to produce the materials they wish to adduce instead of going through the exercise of sending the case back to the trial Court. This may in many cases, save time and help produce prompt justice.[79]

It is further interesting to note that subsequently the Allahabad High Court[80] and the Madras High Court,[81] when they found that the accused-appellants in the respective cases were not given the opportunity of hearing on question of sentence under s 235(2) of the CrPC and that death penalty had been awarded to them,[82] afforded the said opportunity to them at the appellate stage.

Illustrative Case Laws Involving Death Sentences (When Death Sentences were Confirmed)

(1) State of Tamil Nadu v Nalini[83]

This case involved 26 persons accused of being involved in the conspiracy to assassinate former Prime Minister of India, Rajiv Gandhi, in Sri Perumbudur near Madras (Chennai) on 21 May 1991. All the 26 accused had been sentenced to death by the trial judge, who was a designated TADA court judge.[84] Of these 26, the Supreme Court finally confirmed the conviction under s 120-B read with 302, IPC, against six accused only, namely, Nalini (*A-1*), Santhan (*A-2*), Murugan (*A-3*), Robert Pyas (*A-9*), Jayakumar (*A-10*), Ravichandra @ Ravi (*A-16*) and Perarivalan @ Arivu (*A-18*). The rest of the accused were acquitted. Of the six persons convicted of the murder, the death sentences of only four accused, namely, Nalini, Santhan, Murugan[85] and Perarivalan alone were confirmed. Here too, there was a division on the issue of confirmation of death sentence against Nalini between Wadhwa and Quadri JJ who confirmed, and KT Thomas J who felt the death penalty should be converted to life sentence.

According to Thomas J, the following were the relevant considerations for converting the sentence from death to life imprisonment in the case of Nalini:

> Another consideration which we find difficult to overlook is -- she is the mother of a little female child who would not have even experienced maternal huddling as that little one was born in captivity. Of course, the maxim *Justicia non novit patrem nee matrem* (justice knows no father nor mother) is a pristine doctrine. But it cannot be allowed to reign with its rigour in the sphere of sentence determination. As we have confirmed the death sentence passed on the father of that small child, an effort to save its mother from gallows may not militate against *jus gladii* so that an innocent child can be saved from orphan hood.

The judge had also noted earlier that:

> ...[C]onsidering the fact that she belongs to the weaker sex and her helplessness in escaping from the cobweb of Sivarasan and company, the mere fact that she became obedient to all the instructions of Sivarasan, need not be used for treating her conduct as amounting to 'rarest of rare cases' indicated in *Bachan Singh*'s case.[86]

In contrast, however, Wadhwa J noted that it was not as though Nalini did not understand the nature of the crime and her participation. She was a willing party to the crime. The court has to consider both the crime and the criminal. The judge raised the question: 'What about the children, wives and husbands of those who died? Cruelty of the crime committed has known no bounds. The crime sent shock waves in the country'.[87] He thus felt that the death penalty on the four accused ought to be confirmed. Similarly, Quadri J noted that Nalini, as an Indian, joined the gang of conspirators to assassinate Rajiv Gandhi, only because of her love for Murugan *(A-3*, her husband and also sentenced to death), and thus played her part in the conspiracy which resulted in the assassination of Rajiv Gandhi. It was also noted by him that 'the facts strongly suggest her participation was not the result of helplessness but a well-designed action with her free will to make her part of the contribution to the unholy plan and wicked conspiracy'.[88] Thus, the death sentence on all the four accused was confirmed.

(2) Jai Kumar v State of Madhya Pradesh[89]

In this case, the accused Jai Kumar was sentenced to death by the trial court for having killed his sister-in-law, who was pregnant, and her eight-year old daughter, allegedly for the reason that he had become enraged because his sister-in-law had not given him enough food. However, his own mother tendered evidence that he had made an attempt to rape the deceased sister-in-law, and encountering resistance from her, committed the crime. The manner in which he committed the offence was gruesome. He locked his mother inside a room, and thereafter went into the room of the deceased by removing bricks near the door, going into the room and killing her. After that, he decapitated her head and hung it from a tree in a jungle nearby. He had also taken the eight-year old niece (daughter of the deceased woman) and killed her with an axe saying that he was offering her as a sacrifice to *Mahuva Maharaj* and thereafter buried her in sand, covered with stones. The Supreme Court noted that the mitigating factors were hardly sufficient to balance out the aggravating circumstances. The age of the accused being only 22 years was

held not to be a consideration for the murders of a 30-year old woman and her eight-year old daughter, which were effected in a cold-blooded manner, while the two victims were in a helpless and hapless situation. The manner in which the bodies were dealt with after committing the murder did not permit any consideration of commutation of death sentence to life imprisonment. The facts established the depravity and criminality of the accused in no uncertain term. The court stated:

> In the present case, the savage nature of the crime has shocked our judicial conscience. The murder was cold-blooded and brutal without any provocation. It certainly makes it a rarest of rare case in which there are no mitigating or extenuating circumstances.[90]

(3) Suresh Chandra Bahri v State of Bihar[91]

In this case, the accused was alleged to have conspired with several others to kill his wife and two young children. The main grouse that Suresh Bahri had against his wife was that she was interfering in his property dealings and wanted to sell their Ranchi house so that they could migrate to America with the sale proceeds and settle there with their children. The main accused enticed her to come to Ranchi from Delhi on the pretext that a sale deed for selling the house was to be executed on 11 October 1983, and killed her on the night of 10 October itself. The evidence disclosed that the murder was committed in an extremely brutal, diabolical, gruesome and revolting manner. Her body was then cut into two and disposed. Similarly, the two children were taken to a farm house after telling them that they were going for a pleasure trip, and killed there. Their bodies were cut into pieces and thrown in the Varuna river. Considering the fact that it was the father himself who had committed such gruesome murder, the Supreme Court confirmed the death sentence as the matter came into the 'rarest or rare' categories.

(4) Dhananjoy Chatterjee alias Dhana v State of West Bengal[92]

In offences involving gender crimes, the Supreme Court gave the following guidelines:

> In recent years, the rising crime rate - particularly violent crime against women, has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminal get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime, and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate, making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. The measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of victim of crime and the society at large while considering imposition of appropriate punishment.[93]

(5) Sushil Murmu v State of Jharkhand[94]

In this case the Supreme Court was called upon to adjudge the propriety of death sentence for sacrificing a nine-year old child in the most brutal and diabolic manner. The child was killed in a grotesque and revolting manner. The Court, after referring to the decisions in the *Bachan Singh* and the *Machhi Singh* and taking cognisance of the brutality involved, declared that the case at hand falls within the 'rarest of rare' category of cases. It, therefore, upheld the death sentence awarded to the convict and dismissed the appeal.

(6) Holiram Bardolai v State of Assam[95]

The Supreme Court confirmed the death sentence by agreeing that the case at hand, wherein the accused-appellant committed multiple murders in pre-meditated, brutal and vicious manner, was within the

category of 'rarest of rare' cases deserving death sentence. The court listed the following aggravating circumstance against the accused for confirming the death sentences awarded to him by the lower court and confirmed by the high court. These were: (i) it was a case of cold-blooded murder; (ii) the accused-appellant was leading the gang; (iii) the victims did not provoke or contribute to the incident; (iv) two victims were burnt to death by locking them in a house from outside; (v) one of the victims was a young boy of about six years, who, somehow, managed to come out of the burning house, but was mercilessly thrown back into the fire by the appellant; (vi) the dragging of one the deceased by the appellant to his house and then cutting him into pieces in broad daylight in the presence of bystanders; (vii) the entire incident took place in the broad daylight and the crime was committed in the most barbaric manner to deter others from challenging the supremacy of the appellant in the village; and (viii) the entire incident was pre-planned by the accused-appellant. The court did not find any mitigating circumstance in favour of the accused.

Illustrative Cases When Death Sentence has been Commuted to Life Imprisonment

(1) Om Prakash v State of Haryana[96]

In this case, the accused Om Prakash, who was working in the army (Border Security Force), was accused of killing seven members of a rival family. While the high court confirmed the trial court's conviction of death sentence, the Supreme Court noticed certain factors, which according to the court, mitigated against the awarding of death sentence. The evidence on record indicated that there was a dispute between the appellant and the deceased family over a land and house. Since the deceased party was politically and financially powerful and well-connected, the complaints made by the accused to the police and other authorities proved futile. In such a circumstance, the offence came to be committed. The Supreme Court held:

> In our view, even though this is a gruesome act on the part of the appellant, yet it is a result of human mind going astray because of constant harassment of the family members as narrated above. It can be termed as a case of retribution or act for taking revenge. No doubt, it would not be a justifiable act at all, but the accused was feeling morally justifiable on his part. Hence, it would be difficult to term it 'rarest of rare' case. Further, this is not a crime committed because of lust for wealth or women, that is to say, murders are neither for money such as extortion, dacoity or robbery; nor even for lust and rape; it is not an act of anti-social element, kidnapping and trafficking in minor girls or of an anti-social element dealing in dangerous drugs which effects the entire moral fibre of the society and kills number of persons; nor is it crime committed for power or political ambitions or part of organised criminal act ivities. It is a crime committed by the accused who had a cause to feel aggrieved for injustice meted to his family members at the hands of the other party.[97]

The court, therefore, reduced the sentence of death to life imprisonment.

(2) Rajendra Rai v State of Bihar[98]

In this case, the accused was alleged to have killed one Bir Bahadur Rai with his *hasua* and severed his neck. The deceased came to the site of occurrence when he heard his mother shout when she saw the accused appellant Rajendra Rai kill her husband Krishnandan Rai with a *hasua*, a sharp edged weapon. The evidence disclosed that there had been a land dispute between the accused and the deceased. On the day of occurrence, it appeared that the deceased Krishnandan had tied his buffalo in the disputed field which had infuriated the accused and thus the incident happened on the spur of the moment. The evidence did not also disclose that there was premeditation or plan to murder the deceased or that it was done in a cold-blooded manner. Hence, it was held not to fall in the category of rarest of rare cases. The sentence against the accused was therefore converted from death sentence to life imprisonment.

(3) Kishori v State of Delhi[99]

This case, amongst others, related to the large scale deaths of Sikhs following the anti-Sikh riots that erupted all over Delhi on the day Indira Gandhi, the then Prime Minister, was assassinated by two Sikh security men in Delhi on 31 October 1984. In the present case, the appellant was alleged to have been part of a mob of over 300 persons attacked the house of the deceased persons at about 12 am, of October 31--1-November 1984 causing the death of Inder Singh, Sajjan Singh and Hosiar Singh. The Supreme

Court noted that the evidence clearly confirmed the guilt of the accused sufficient to confirm the conviction. However, on the question of sentence, the court held:

> Experts in criminology often express that when there is collective action, as in the case of a mob, there is diminished individual responsibility unless there are special circumstances to indicate that a particular individual had act ed with any premeditation such as by use of a weapon not normally found. If, however, a member of such a crowd picks up an article or a weapon which is close by and joins the mob, either on his own volition or at the instigation of the mob playing no role of leadership, we may very well say that such a person did not intend to commit all the acts which a mob would commit left to himself, but did so under the influence of collective fury...
>
> We may notice that the act s attributed to the mob of which the appellant was a member at the relevant time cannot be stated to be a result of any organised systematic activity leading to genocide. Perhaps, we can visualise that to the extent there was an unlawful assembly and to the extent that the mob wanted to teach stern lesson to the Sikhs there was some organisation; but in that design they did not consider that women and children should be annihilated which is a redeeming feature...[1]

Thus, the act of the mob was stated not to be the result of any organisation or any group indulging in violent activities, formed with any purpose or method, so as to call it an organised act ivity. The act of the mob, in such a context, was said to be the result of temporary frenzy. Since the appellant did not play the role of leader of the mob, though his conviction was confirmed, the death sentence was converted to life imprisonment.

(4) State v Paltan Mallah & Ors[2]

In this case, where the trial court awarded death sentence to the accused for killing a trade union leader, the Supreme Court, in view of more than 14 years of the incident, converted the death sentence into life imprisonment.

(5) Sambhal Singh v State of Uttar Pradesh[3]

The accused-appellant, along with his three sons, killed their own kith and kin on a spur of the moment without pre-planning. The trial court convicted them under s 302 read with s 34 of the Penal Code and sentenced to death by treating the homicide as 'rarest of the rare' case. The Allahabad High Court, however, rejected the confirmation of the death sentence and converted it to a sentence of life imprisonment on the ground that the appellant was an old man and had been in military and served nation while the other accused were very young and participated in the said incident under moral influence of their father.

(6) Swamy Shraddananda v State of Karnataka[4]

The appellant, a convict of murder, was awarded sentence of death by the trial court and was confirmed by the High Court as a rarest of rare case deserving capital sentence. But the Supreme Court reduced his death sentence to imprisonment for life on account of his old (64 years) age and he was in the custody for 16 years, The apex court has noted that old-age has emerged as a mitigating factor during the post-*Bacahn Singh* era. The old age of convict justifies commuting his death sentence to life imprisonment.

(7) Mulla & Anr v State of Uttar Pradesh[5]

In this case the Supreme Court has used economic depravity, along with old age and about 15 years in the custody, of the convict for converting death sentence into imprisonment for life. The apex court observed:

> We at no stage suggest that economic depravity justify moral depravity, but we certainly recognize that in the real world, such factors may lead a person to crime. -- [W]e believe, socio-economic factors might not dilute guilt, but they may amount to mitigating circumstances. Socio-economic factors lead us to another related mitigating factor, i.e. the ability of the guilty to reform. It may not be misplaced to note that a criminal who commits crimes due to his

> economic backwardness is most likely to reform. This Court on many previous occasions has held that this ability to reform amount to a mitigating factor in cases of death penalty.[6]

COMMUTATION OF DEATH SENTENCE BY THE STATE OR CENTRAL GOVERNMENT

Section 54. Commutation of sentence of death.--In every case in which sentence of death shall have been passed, the appropriate Government may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

Scope

The IPC itself provides the power to the state or Central Government (see s 55, IPC) to commute, without the consent of the offender, death sentence for any other punishment provided in the IPC. This power of the appropriate government to commute the sentence is co-extensive to the powers under s 433 of the CrPC;[7] which similarly empowers the 'appropriate government' to commute a sentence of death for any other punishment provided in the IPC. It should be noted that this power of the 'appropriate government' to commute the death sentence (under s 54, IPC) is not curtailed by the power of the President to grant commutation of death sentence under art 72 of the Constitution of India . In fact, this is specifically stated in art 72(3) of the Constitution, which reads that nothing shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

The power of commutation under s 433 of the CrPC is the exclusive domain of the executive and it is not available even to a higher appellate court. No court can mandate the appropriate government to commute a sentence. Such a direction would amount to usurpation of power by the court that does not vest with it. Nevertheless, an appellate court may direct an appropriate government to consider commutation of sentence. The apex court, delving into the judicial propriety of the direction issued by the Punjab & Haryana High Court ordering the government premature release of the convict forthwith, ruled:

> ...[T]he direction given by the High Court was not at all appropriate or permissible in law. The mandate of Section 433 CrPC enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts. ...The direction of the High Court therefore to prematurely release the respondent and set him at liberty forthwith could not have been made. That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 CrPC vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside.[8]

In *Delhi Administration (Now NCT of Delhi) v Manohar Lal* ,[9] wherein the Supreme Court was called upon to adjudge the judicial propriety of the Delhi High Court's order commuting sentence of imprisonment in lieu of enhanced fine and directing the Delhi Government to regularise the accused's case in accordance with s 433(c) of the CrPC, the Supreme Court, reiterating the above-mentioned dictum, held:

> From the nature and content of the order passed by the High Court in this case, it could be seen that no discretion or liberty whatsoever has been left with the State Government to exercise powers under Section 433 (d), CrPC , as the discretion the same being part of the residuary sovereign power of the State. So far as the case on hand is concerned, not only the High Court has decided to commute but issued a mandatory direction to the Government with no discretion or liberty left with it, except to 'formalise the same', on payment of the fine amount specified by the Court. This is nothing but assuming powers where there are none for the High Court and where the statute concerned specifically entrusts it to only the appropriate Government. The appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner.[10]

Another dimension to be noted here is that art 161 of the Constitution empowers the Governor of a state to grant pardon, to suspend, remit or commute the sentence against any convicted person, including a person sentenced to death. The difference is only slight between art 161 and s 54, IPC/s 433, CrPC, and that too,

regarding procedure. The Governor, to exercise power under art 161 to commute a death sentence, has to seek the advice from the Council of Ministers. However, while the state government (or the Union Government in appropriate cases), may on its own initiative, commute the death sentence, the Governor to exercise the power under art 161, has to receive a petition in this regard.[11]

The power under arts 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as, ss 432, 433 or 433A of the CrPC or by any Prison Rules. But the President or the Governor, as the case may be, are obligated to act on the advice of the Council of Ministers and to exercise the power reasonably and rationally keeping in view reasons germane and relevant for the purpose of law, mitigating circumstances and/or commiserative facts necessitating the commutation and factors like interest of the society and public interest.[12]

In *Union of India v V Sriharan @ Murugan* ,[13] the Supreme Court, in a writ petition praying it to quash the letter written by the Chief Secretary, Government of Tamil Nadu, to the Secretary, Government of India wherein the State of Tamil Nadu proposes to remit the sentence of life imprisonment and to remit V Sriharan and others who were convicted in the Rajiv Gandhi Assassination case in pursuance of commutation of death sentence by the Supreme Court,[14] framed the following questions for the consideration of the Constitution Bench. They were:

(i) Whether imprisonment for life in terms of s 53 read with s 45 of the IPC meant imprisonment for rest of the life of the prisoner or a convict undergoing the imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of *Swamy Shraddananda*,[15] a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

(ii) Whether 'appropriate government' is permitted to exercise the power of remission under s 432/433 of the CrPC after the parallel power has been exercised by the President under art 72 or the Governor under art 161 or by the Supreme Court in its Constitutional power under art 32 as in this case?

(iii) Whether s 432(7) of the CrPC clearly givers primacy to the executive power of the Union and excludes the executive power of the State where the power of Union is co-extensive?

(iv) Whether the Union or the State has primacy over the subject-matter enlisted in List III of Seventh Schedule of the Constitution of India for exercise of power of remission?

(v) Whether there can be two 'appropriate Governments in a given case under s 432(7) of the CrPC?

(vi) Whether *suo moto* exercise of power of remission under s 432(1) is permissible in the scheme of the section if, yes whether the procedure prescribed in sub-clause (2) of the same section is mandatory or not?

(vii) Whether the term 'consultation' stipulated in s 435(1) of the CrPC implies 'concurrence'?

Stressing that all the above-mentioned issues are of utmost critical concern for the whole of the country, as the decision on these issues will determine the procedure for awarding sentences in the criminal justice system, the Supreme Court directed to list them before the Constitution Bench for its consideration.[16]

(2) IMPRISONMENT FOR LIFE

Section 53,*secondly*, of the Penal Code provides for imprisonment for life. Technically, imprisonment for life means a sentence of imprisonment running throughout the remaining period of a convict's natural life. As regards the nature of imprisonment, it has been held to be rigorous imprisonment, and not simple imprisonment. This was held in *KM Nanavati v State of Maharashtra* ,[17] and also in *Naib Singh v State of Punjab* ,[18]in which it was stated that imprisonment for life meant 'rigorous imprisonment for life', that is, till the last breath of the convict. It means imprisonment for the whole of the remaining period of the convicted person's natural life. The accused awarded life imprisonment, therefore, has to be retained in jail for rest of his life. Even a state Act equates life imprisonment with imprisonment for 20 years, a convict does not entitle an automatic release on expiry of such term of imprisonment including remission. He can, however, be released if the appropriate government passes a separate order remitting the unexpired portion of his sentence.[19]Imprisonment for life is not equivalent to imprisonment for 14 years or 20 years. There is no provision

either in the Penal Code or in the CrPC whereby life imprisonment could be treated as 14 years or 20 years without there being a formal remission by the appropriate government. Responding to a contention of a life convict, who has been confined for a period more than 21 years, that his further confinement is illegal and he, therefore, is liable to be set at liberty forthwith, the Supreme Court held that imprisonment for life is not 14 or 20 years and that under s 53 of the IPC, imprisonment for life means rigorous imprisonment for life because 'the sentence of imprisonment for life was substituted for transportation for life' and punishment of deportation beyond sea was considered to be the most dreaded form of punishment'.[20]

In this context, we need to consider the provisions of ss 55 and 57, IPC, which state as follows.

Section 57. Fractions of terms of punishment.--In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.

Scope of Section 57

Under this section, imprisonment for life is reckoned as equivalent to imprisonment for 20 years.[21] A prisoner cannot be released automatically at the end of 20 years. An important case, where the Supreme Court came to examine the scope of s 57 is that of *Gopal Vinayak Godse v State of Maharashtra* .[22] Godse, who was the brother of the assassin of Mahatma Gandhi, Nathuram Godse, filed a petition for habeas corpus before the Supreme Court stating that he had earned remissions for good conduct and other categories amounting to 2963 days, and that he had served more than 20 years in prison, and under the provision of s 57, which stipulated a period of 20 years for life sentences, he ought to be released. The Constitutional Bench of the Supreme Court, however, clarified that there is no provision of law which stated that life imprisonment is for a period of 20 years. Thus, unless the appropriate government formally decides to use its powers of remission or commutation under s 55, IPC, or s 402, CrPC,[23] life imprisonment would be held to be for the whole of the remaining period of the convicted person's natural life.[24]

This view was reiterated in *State of Madhya Pradesh* v *Ratan Singh*.[25] The Supreme Court held that it was the discretion of the government to choose to exercise its discretion to remit either the whole or a part of the sentence under s 401 (equivalent to s 432 of the present CrPC). The discretion of the appropriate government to remit or refuse to remit was such that no writ can be issued directing the state government to release the prisoner. Another question arose in this petition. The respondent Ratan Singh was originally convicted and sentenced in Madhya Pradesh. However, later on his request, he was shifted to Punjab. On the completion of 20 years of imprisonment, he filed a writ petition before the Punjab & Haryana High Court stating that since the relevant prison rules of that state permitted the release of prisoners after they had completed 20 years, he should be set free. The writ petition was allowed and he was set free. Hence, the Madhya Pradesh State Government challenged this before the Supreme Court. On this score, the court held that the appropriate government would have to be the government of the state in which the person was convicted and not the state government of the prison where he may be transferred to. If, at the end of 20 years, an application was made to the government of the transferred prison, that government can only forward it to the government in whose jurisdiction the person was originally tried and convicted.[26]

S 57 has limited operation as it has to be used only for the purpose of calculating fractions of terms of punishment and for no other purpose. in no sense it conveys that imprisonment for life means imprisonment for twenty years.[27]

Is Life Sentence for a Period of 14 Years?

To examine this question, we need to consider the provision of s 55, IPC, as also ss 432 and 433, CrPC.

Section 55. Commutation of sentence of imprisonment for life.--In every case in which sentence of imprisonment for life shall have been passed, the appropriate Government may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

Section 55A. Definition of 'appropriate government'.--In sections 54 and 55 the expression 'appropriate Government' means,--

(a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced.

By amendment to the CrPC in 1978, a new provision was introduced namely, s 433A, which provided that notwithstanding the provision of s 432, which empowered the appropriate government to remit or commute sentences, in cases where life sentence was imposed for an offence for which death is one of the punishments provided in law, or where the death sentence is commuted under s 433 into one of life imprisonment, such person shall not be released unless he had served at least 14 years of imprisonment. The scope of this provision was examined by the Supreme Court in *Ashok Kumar @ Golu v Union of India* .[28] It held:

> ...[W]here a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under section 432, in which case the remission would be subject to limitation of section 433A of the Code, or constitutional power has been exercised under art 72/161 of the Constitution.[29]

In simple terms, what this means is that even if the state government decides to use its powers under s 432, CrPC, to suspend or remit the life sentence of a convict, under the provision of s 433A, CrPC, the person will not be considered for release, unless he has served a minimum period of 14 years in prison. However, if the President, by exercising his powers under art 72 or the Governor under art 161 of the Constitution, decides to remit or commute the life sentence, then that will have immediate effect, even if the convict has not actually spent 14 years in prison. Section 433A cannot override the constitutional power conferred by arts 72 and 161 of the Constitution on the President and the Governor, respectively.

It is, thus, clear that life sentence does not automatically mean a period of 14 years. The convict does not have the right to demand his release at the completion of 14 years in jail. The appropriate government may, however, choose to exercise its power to suspend or remit the life sentence using powers under s 432, CrPC.

Different courts have since followed this ratio. Thus, in *Lakki v State of Rajasthan* ,[30] the Rajasthan High Court held that there cannot be automatic release at the end of 14 years, and that unless the state government decides to commute and release, the prisoner will have to remain imprisoned even beyond 14 years. In *Mahak Singh v State of Uttar Pradesh* ,[31] the Allahabad High Court held that life imprisonment does not end at the end of 14 years, unless remitted by the state government.

A conjoint reading of ss 45 and 47 of the IPC and of ss 432, 433 and 433A of the CrPC makes it clear that 'imprisonment for life' means imprisonment till the last breath'. However, ss 432 & 433 of the CrPC empower the 'appropriate Government' to suspend, remit or commute sentences, including a sentence of death and life imprisonment, But s 433A imposes a fetter on the right. In no case sentence of imprisonment for life, even with remission earned, can be lesser than 14 years. A convict awarded sentence of imprisonment for life has to undergo imprisonment for at least 14 years. Remission earned by him can only be considered at the end of the term. However, provisions of s 433A do not affect the constitutional pardon powers vested in the President (under art 72) and the Governor (under art 161).[32] Their clemency power remains unfettered for the reason that constitutional powers cannot be restricted by statutory provisions.[33]

Distinction between 'Commutation' under Section 55 , 1860, and 'Remission' under Section 433 , Code of Criminal Procedure 1973

In the case of commutation under s 55, IPC, the punishment is altered to one of a different sort than that originally proposed while in the case of remission the amount of punishment is reduced without changing the character of punishment. To illustrate, if an accused is released from prison at the end of 14 years, which was commuted for the life sentence originally imposed under s 55, IPC, the accused will not be regarded as being under the sentence of life imprisonment. On the other hand, an accused whose life imprisonment has been remitted under s 433, CrPC, will still be regarded as being under sentence of life imprisonment.

Section 53A. Construction of reference to transportation.--

(1) Subject to the provisions of sub-section (2) and sub-section (3), any reference to "transportation for life" in any other law for the time being in force or in any instrument or order having effect by virtue of any such law or of any enactment repealed shall be construed as a reference to 'imprisonment for life'.
(2) In every case in which a sentence of transportation for a term has been passed before the commencement of the Code of Criminal Procedure (Amendment) Act, 1955 (26 of 1955), the offender shall be dealt with in the same manner as if sentenced to rigorous imprisonment for the same term.
(3) Any reference to transportation for a term or to transportation for any shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted.
(4) Any reference to "transportation" in any other law for the time being in force shall,--
    (a) if the expression means transportation for life, be construed as a reference to imprisonment for life;
    (b) if the expression means transportation for any shorter term, be deemed to have been omitted.

(3) IMPRISONMENT

Imprisonment is ordinarily confinement of a convict in a penal institution. The IPC recognises two types of imprisonment, namely, rigorous and simple. Section 53*fourthly* says:

Fourthly.--Imprisonment, which is of two descriptions, namely:--

(1) Rigorous, that is, with hard labour;
(2) Simple.

In case of rigorous imprisonment, unlike the simple imprisonment, a convict is put to hard labour such as grinding corn, digging earth, drawing water, construction of roads and dams, cutting fire-wood, bowing wool, making furniture, etc. in the case of simple imprisonment, a prisoner is merely confined to jail and is not put to any work.

The IPC exhibits three patterns of offences that are punishable by imprisonment. Some offences are subjected exclusively to either rigorous or simple imprisonment. Some offences are made punishable by either or both of the forms (rigorous or simple) of imprisonment. In the last category of offences, a trial court is empowered to award either of the two forms of imprisonment. In such offences, it has the discretion to direct that it would be wholly rigorous, wholly simple or partly rigorous and partly simple. It has to specify in its judgment the part of imprisonment that stipulates rigorous imprisonment and the period of such sentence, and similarly for simple imprisonment. Section 60 of the Penal Code, which deals with conviction for offence for which punishment is imprisonment of either description, says:

Section 60. Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.--In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

The offences in which an offender is punished with rigorous imprisonment without the alternative of simple imprisonment are:

(i) Giving fabricating false evidence with intent to procure conviction of a capital offence (s 194).
(ii) House-trespass in order to commit an offence punishable with death (s 449).

An offender is made punishable with simple imprisonment only in the following offences:

(i) Public servant unlawfully engaging in trade, or unlawful buying or bidding for property (ss 168 and 169).
(ii) A person absconding to avoid service of summons or other proceedings from a public servant or preventing service of summons or other proceedings, or preventing publication thereof; or not attending in obedience to an order from a public servant (ss 172-174).
(iii) Intentional omission to produce a document to a public servant by a person legally bound to produce such document; or intentional omission to give notice or information to a public servant by a person legally bound to give; or intentional omission to assist a public servant when bound by law to give assistance (ss 175, 176 and 187).
(iv) Failure to render assistance (s 178).
(v) Refusing oath when duly required to take oath by a public servant; or refusing to answer a public servant authorized to question or refusing to sign any statement made by a person himself before a public servant (ss 178-180).
(vi) Disobedience to an order duly promulgated by a public servant if such disobedience causes obstruction, annoyance, or injury (s 188).
(vii) Escape from confinement negligently suffered by a public servant; or negligent omission to apprehend, or negligent sufferance of escape, on the part of a public servant in cases not otherwise provided for (ss 223, 225A).
(viii) Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding (s 228).
(ix) Continuance of nuisance after injunction to discontinue (s 291).
(x) Wrongful confinement (341).
(xi) Defamation and knowingly printing or selling defamatory matter (ss 500-502).
(xii) Uttering any word, or making any sound or gesture, with an intention to insult the modesty of a woman (s 509).
(xiii) Misconduct in public by a drunken person (s 510).

The IPC also provides for maximum as well as minimum term of imprisonment for specified offences. The maximum term of imprisonment that can be awarded for an offence under the IPC is 20 years (s 57). The lowest term of imprisonment stipulated under the Code is 24 hours (s 510). However, the minimum is unlimited. The minimum term of imprisonment, however, is fixed in the following four offences:

(i) If, a person commits rape, he is punished with imprisonment (rigorous or simple) of a term not less than seven years [s 376(1)].
(ii) If, a person commits custodial rape, he is punished with rigorous imprisonment for a term not less than ten years [s 376(2)].
(iii) If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, he is punished with imprisonment of not less than seven years (s 397).
(iv) If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, he is punished with imprisonment of not less than seven years (s 398).

In all other offences the imprisonment prescribed is the maximum and it is left to the discretion of the judge to award within the limits of the maximum prescribed.

Minimum Wages for Prisoners

The issue of the scope of s 53, which prescribes that rigorous imprisonment shall mean hard labour, came up for consideration before the Supreme Court in *State of Gujarat v Hon'ble High Court of Gujarat* .[34] The issue was whether prisoners, who are required to do hard labour as part of their punishment, should necessarily be paid minimum wages for such work. The High Courts of Kerala,[35] Gujarat,[36] and Himachal Pradesh,[37] had ruled that extracting work from prisoners without paying wages for it would amount to violation of art 23 of the Constitution and thus prisoners were entitled to minimum wages; to the contrary, the Andhra Pradesh High Court[38] held that it did not amount to violation of art 23 to extract work from prisoners as part of their punishment without paying wages for the same.

The Supreme Court noted that the mandate of s 53-*fourthly*, clearly stipulated that in the event rigorous imprisonment was awarded, then such punishment included the obligation to put in labour or work on the part of the prisoner. Thus, the jail authorities are enjoined by law and mandated by court to impose hard labour on prisoners sentenced to rigorous imprisonment. By so compelling, the jail officials could not be said to be committing offences under s 374, IPC (unlawful compulsory labour). However, this would not apply to prisoners sentenced to simple imprisonment or detention under various preventive detention laws or even undertrial prisoners.

(4) FORFEITURE OF PROPERTY

The punishment of forfeiture of property is ancient in origin. Section 53,*fifthly* of the Penal Codeprovides for forfeiture of property as a form of punishment. It continued until 1921 when it was abolished by the Indian Penal Code (Amendment) Act 1921 (16 of 1921) which repealed ss 61 and 62 of the Code. Now, absolute forfeiture of all property of the offender has ceased to be a form of punishment.

However, there are three offences in the IPC in which the offender is liable to forfeiture of his property specified therein. They are:

(i) Committing depredations or making preparations for committing depredations on the territories of Power in alliance or at peace with the Government of India is punished with forfeiture of property used or intended to be used in committing, or acquired by, such depredation (s 126).
(ii) Receiving property taken in the commission of war or depredation is punished with forfeiture of property so received (s 127).
(iii) Public servant unlawfully buying or bidding for property on his own name or in the name of another is punished with confiscation of the purchased property (s 169).

It is, nevertheless, interesting to note that the Supreme Court has recommended that ss 61 and 62 (repealed in 1921) need to be re-introduced in the Code for having deterrent effect on those who are bent upon to accumulate wealth at the cost of the society by misusing their post or power.[39]

(5) FINE

Fine is forfeiture of money by way of penalty. It was justified by the Drafters of the IPC on the ground of its universality, though, they admitted that its severity should be proportionate to the means of the offender, since the sentence, not only affects him, but also his dependents.[40]

As regards imposition of fine as a sentence, the IPC provides for four categories:

(i) Offences in which fine is the sole punishment and its amount is limited (see ss 137, 155, 171-177, 278, 283, 294, 154 and 157, the last two offences carry unlimited fines).
(ii) Offences in which fine is an alternative punishment, but its amount is limited.
(iii) Offences in which it is an additional imperative punishment, but its amount is limited.
(iv) Cases in which it is both an imperative punishment and its amount is unlimited, (see ss 123 -124, 126-134, 380, 444 and 475).

Amount of Fine should not be Excessive

A court has a wide discretion in quantifying fine to be imposed, particularly where no amount of fine is stipulated in a penal provision. However, a court is expected to see that the fine imposed should not be excessive. It has also to ensure that the amount of fine imposed should be within the means of the accused to pay though he must be made to feel the pinch of it.[41] The amount of fine considered to be excessive when it would be impossible or very difficult for the convict to pay it or is wholly disproportionate to the nature of offence committed by him. The authors of the Penal Code, justifying such a vast judicial discretion, advised a judge:

> It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to rich... A just and wise judge, even if entrusted with a boundless discretion, will not, under ordinary circumstances, sentence such an offender (a poor) to the fine of a hundred rupees. And the limit of a

> hundred rupees will leave it quite in the power of an unjust or inconsiderable judge to inflict on such an offender all the evil which can be inflicted on him by means of fine.[42]

Further, s 63, drafted with above spirit, mandates a court not to award excessive fine to an offender. It says:

Section 63. Amount of fine.--Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

The sentence of fine should be imposed individually and not collectively. The amount of fine imposed should not also be unduly harsh or severe.

In *Philip Bhimsent Aind v State of Maharashtra* ,[43] the accused had been convicted and sentenced to life imprisonment for offence under ss 302, 307, 392/397 and 394, IPC, and also ordered to pay an amount of Rs 5,000 as fine, on each count (for offences under ss 302 and 307). The Bombay High Court considered the fact that the accused was just 19 years old, and a house servant and would not be able to pay the fine. The High Court said:

> While deciding the question of *quantum* of fine to be imposed, the courts should always bear in mind that there should be some sort of nexus between the amount of fine sought to be imposed and the potentiality of the accused to pay the same. There is no point in imposing such an enormous amount as fine, which is beyond the paying capacity of the accused to pay.[44]

The court thereafter reduced the fine amount from Rs 5,000 on each count to Rs 1,000 for each count.

In *Zunjarrao Bhikaji Nagarkar v Union of India* ,[45] the appellant was serving as a Commissioner of Central Excise. As a quasi-judicial authority under the Central Excise Act, he had conducted an adjudicatory proceeding against a limited company, and came to the conclusion that the assessee company had clandestinely manufactured and cleared the excisable goods wilfully and evaded the excise duty. As a result, the appellant had ordered confiscation of the goods. However, he had failed to impose fine against the company.

The Supreme Court clarified that offences such as s 325, IPC, provided for both punishment which may extend to seven years, and also for fine. Reading s 63 with the provision, it is clear that the fine amount, not being quantified, is unlimited, but should not be excessive. However, the terms 'shall also be liable for fine', was interpreted to mean that the court had perforce to impose penalty which has to be 'commensurate with the gravity of the offence and the extent of the evasion', in addition to imposing punishment of imprisonment. As the court explained it, 'it would appear from the language of the section that sentences of both imprisonment and fine are imperative. It is the extent of fine which has been left to the discretion of the court'.[46] The general principle running through the provision is that that amount of fine should not be harsh or excessive.[47]

Sentence of Imprisonment for Non-payment of Fine

Sections 64-69 of the Penal Code deal with sentence of imprisonment for non-payment of fine and different contours thereof.Section 64 confers a general power on the courts to award the sentence of imprisonment in default of payment of fine in all cases in which fine can be imposed to induce the offender to pay the fine; while the subsequent sections regulate the character and duration of sentence of imprisonment in default of payment of fine.

Section 64, which is self-explanatory, reads:

Section 64. Sentence of imprisonment for non-payment of fine.--In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine,

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, in which imprisonment shall be in excess of any other imprisonment to which he may be have been sentenced or to which he may be liable under a commutation of a sentence.

Section 65. Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.--The term for which the Court directs the offender to be imprisoned in default of a payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Scope of Section 65

When the court sentences an accused for a punishment, which includes a fine amount, it can specify that in the event the convict does not pay the fine amount, he would have to suffer imprisonment for a further period as indicated by the court, which is generally referred to as default sentence. Section 65 , IPC , fixes the maximum period that can be imposed as default sentence in case the convicted person does not pay the fine amount, as one-fourth of the maximum period fixed for the offence the accused person is convicted of. This came to be considered by the Supreme Court in *Ram Jas v State of Uttar Pradesh* .[48] In this case, the accused had been convicted for offences under ss 420/511, 467, 468 and 471 read with s 120B, IPC, and awarded a cumulative sentence of three years rigorous imprisonment and a fine of Rs 3,000 and in default of payment of fine, to two years rigorous imprisonment. On appeal, the Allahabad High Court convicted the accused to offence under s 419 read with s 109, IPC, reduced the sentence to two years rigorous imprisonment, but maintained the fine amount at Rs 3,000. The default sentence was not stipulated.

The Supreme Court pointed out that the high court had convicted the accused for an offence not charged with originally. Apart from this, the offence under s 419, IPC, carried a maximum sentence of only three years rigorous imprisonment. Although, the high court did not stipulate the default sentence, it would have to mean that the original default sentence fixed by the trial court was valid, i.e., for a period of two years. In such a case, when s 65 mandated a maximum period of one-fourth of the maximum period, amounting to nine months as default sentence for non-payment of the fine amount. Thus, the default sentence of two years becomes illegal when the conviction is altered to one under s 419/109, IPC. The Supreme Court therefore remitted the matter to the high court for fresh consideration.

In *Kuna Maharana v State of Orissa* ,[49] the Orissa High Court considered the case of the appellant who had been convicted under s 325 to two years rigorous imprisonment and fine of Rs 1,000 and in default, to suffer imprisonment for one year. The accused had served the two years sentence, and had also served five months of the default sentence prescribed, when he challenged the quantum of default sentence before the Orissa High Court. The high court held that s 65 prescribes a period of 1/4th of the maximum period that can be imposed on an offender. However, the trial was held before the First Class Judicial Magistrate, who under ss 29 and 30, CrPC, was empowered to award a maximum of three years sentence only in any offence. Since this was the maximum that the magistrate could sentence, it followed that the default period was one-fourth of the three year maximum specified in law, amounting to nine months. Hence, the period over and above this period of nine months was held to be illegal and without jurisdiction. In view of the circumstance, where the accused had already undergone five months default sentence, the high court directed that the custodial sentence be limited to the period already undergone.[50]

In *Chhajulal v State of Rajasthan* ,[51] a Judicial Magistrate of First Class convicted the accused under s 406, IPC, to two years rigorous imprisonment and fine of Rs 5,000 with a default sentence of one year rigorous imprisonment in case the fine amount was not paid. The Supreme Court held that the magistrate's power to pass sentence was limited by s 32 (old CrPC equivalent to s 29 of the present CrPC) to three years, and since s 65 mandated that the default sentence could be up to a maximum of one-fourth of the sentence, the default sentence that he could impose was up to a maximum of nine months. Thus, the default sentence of one year he had ordered for non-payment of fine was in excess of his powers. The court reduced the default sentence to six months imprisonment.

Section 66. Description of imprisonment for non-payment of fine.--The imprisonment which the court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

Section 67. Imprisonment for non-payment of fine, when offence punishable with fine only.--If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months

when the amount of fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

Scope of Section 67

The imprisonment can only be simple imprisonment. The default sentences would be applicable only if the court were to impose fines on the accused.

Law not Prescribing any Imprisonment for Non-payment of Fine

Even if a statute does not provide that default sentence of imprisonment can be imposed for non-payment of fine when imposition of fine is the only punishment, it has been held that when the provisions of s 30, CrPC, and ss 40 and 67, IPC, are considered together, the position becomes clear that a sentence of simple imprisonment can be imposed, even though, no such provision exists for imposing imprisonment for default in paying fines.[52]

Section 68. Imprisonment to terminate on payment of fine.--The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

Section 69. Termination of imprisonment on payment of proportional part of fine.--If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration

> *A* is sentenced to a fine of one hundred rupees and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, *A* will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while *A* continues in imprisonment, *A* will immediately be discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, *A* will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of expiration of those two months, or at any time later, while *A* continues in imprisonment, *A* will be immediately discharged.

A careful reading of the above provisions dealing with sentence of imprisonment in default of payment of fine discloses the following seven rules. They are:

First, when an offender is sentenced to fine, the court may direct that the offender shall, in default of payment, suffer a term of imprisonment which may be in excess of any other imprisonment to which he may have been sentenced for that offence, or to which he may be liable under a commutation of sentence (s 64). Secondly, when the offence is punishable with imprisonment as well as fine, the imprisonment in default of payment of fine shall not exceed one-fourth of the term of imprisonment which is maximum fixed for offence (s 65). Thirdly, such extra imprisonment in default of fine may be of any description, that is, simple or rigorous (s 66). Fourthly, where the offence is punished with fine only, the imprisonment in default of payment of fine shall be simple and according to the following scale: for fine of Rs 50 or less-imprisonment for two months or less; for fine of Rs 100 or less--imprisonment for four months or less; for fine of above Rs 100--imprisonment for six months or less (s 67). Fifthly, such imprisonment shall terminate whenever the fine is either paid or levied by a process of law (s 68). Sixthly, a proportional payment or levying of fine causes a proportional reduction of the term of imprisonment (s 69). Seventhly, the period during which a warrant for realization of fine could be executed is six years or during imprisonment. The death of the offender does not discharge from liability any property which would after his death be legally liable for his debts (s 70).[53]

Recovery of Fine

Section 70. Fine leviable within six years, or during imprisonment--Death not to discharge property from liability.--The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under a sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the of-

fender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

Section 71. Limit of punishment of offence made up of several offences.--Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any of such offences.

Illustrations

(a) *A* gives *Z* fifty strokes with a stick. Here *A* may have committed the offence of voluntarily causing hurt to *Z* by the whole beating, and also by each of the blows which make up the whole beating. If *A* were liable to punishment for every blow, he might be imprisoned for fifty years, one for each year. But he is liable to only one punishment for the whole beating.

(b) But if, while *A*, is beating *Z*, *Y* interferes, and *A* intentionally strikes *Y*, here, as the blow given to *Y* is not a part of the act whereby *A* voluntarily causes hurt to *Z*, *A* is liable to one punishment for causing hurt to *Z*, and to another for the blow given to *Y*.

PART E - CONVICTION FOR DOUBTFUL OFFENCES

Section 72. Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.--In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offences for which the lowest punishment is provided if the same punishment is not provided for all.

PART F - SOLITARY CONFINEMENT

Section 73. Solitary confinement.--Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say--

a time not exceeding one month if the term of imprisonment shall not exceed six months;

a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year;

a time not exceeding three months if the term of imprisonment shall exceed one year.

Section 74. Limit of solitary confinement.--In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

Scope of the Sections Providing Solitary Confinement

Solitary confinement is separation and keeping in isolation, the convict prisoner within jail. It is one of the harshest forms of punishment within jail. As such, locking up persons in jails involves removing them from the company of family, friends and curtails free movement in society. As if this were not sufficient, when solitary confinement is ordered, it has a still more damaging effect on the individual.

Thus, solitary confinement means the complete isolation of a prisoner from all human contact and confinement in a cell, so arranged, that he has no direct interaction with or sight of any human being, and no employment or instruction.

The Madras High Court in *Munuswamy v Crown* ,[54] held that solitary confinement should not be ordered, unless, there are special features appearing in the evidence, such as extreme brutality or violence or unparalleled atrocity in the commission of the offence.

The Madras High Court in *Perarivalan v IG, Prisons* ,[55] held that this amounted only to a disciplinary measure in order to prevent his mingling with other prisoners or to ensure his own security. Hence, it would not amount to punishment. It will not amount to both solitary confinement or separate cellular confinement.

However, the Supreme Court has held in *Sunil Batra v Delhi Administration* ,[56] and *Charles Sobraj v Superintendent, Central Jail* ,[57]that solitary confinement means harsh isolation of a prisoner from the society of fellow prisoners by cellular detention. Sections 29 and 30 of the Prison Act are penal in character and so must be imposed only in accordance with the procedure which follows fair procedure, in the absence of which, the confinement will be violative of art 21 of the Constitution.

In view of the severity and harshness of solitary confinement, the framers of the Code have specifically provided that in no case the sentence of solitary confinement may be imposed for more than a period of 14 days at a time, and it must be imposed in intervals. Further, solitary confinement can be awarded for the offences under the IPC only. It cannot be awarded unless where punishment is rigorous imprisonment and it is not part of the substantive offence. It, therefore, cannot be awarded as a part of imprisonment in default of fine.

PART G - ENHANCED PUNISHMENT

Section 75. Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.--Whoever, having been convicted,--

(a) by a Court in India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards,

(b) [***][58]

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject to every such subsequent offence to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years.

Scope of Section 75

Section 75 makes repeated offenders of offences falling under the provisions of ch XII or XVII of the Penal Code, liable for higher punishment than what they would otherwise be liable for. Chapter XII provides for offences relating to coins and government stamps, and ch XVII relates to offences against property. In such cases, the IPC specifies that previous conviction with three year term of imprisonment or more will, if the person is convicted again for similar offences under the related chapters, be liable to enhanced punishment including life imprisonment or imprisonment for a term up to 10 years.

PART H - COMPENSATION TO VICTIMS OF CRIME FROM WAGES OF PRISONERS

After a detailed consideration of the law, the Supreme Court, in *State of Gujarat v Hon'ble High Court of Gujarat* ,[59] evolved the following guidelines:

(1) It is lawful to employ the prisoners sentenced to rigorous imprisonment to do hard labour whether he consents to do it or not.

(2) It is open to the jail officials to permit other prisoners also to do any work, which they choose to do, provided such prisoners make a request for that purpose.

(3) It is imperative that the prisoner should be paid equitable wages for the work done by them. In order to determine the quantum of equitable wages payable to prisoners, the state concerned shall constitute a wage fixation body for making recommendations. We direct each state to do so as early as possible.
(4) Until the state government takes any decision on such recommendations, every prisoner must be paid wages for the work done by him at such rates or revised rates as the government concerned fixes, in the light of the observation made above.[60]
(5) We recommend to the state concerned to make law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode.[61]

The above judgment sets at rest the issue of whether prisoners sentenced to do hard labour, because of the fact that they were sentenced to rigorous imprisonment, should be paid wages. However, the issue of what constitutes *equitable wages* (the term used by the Supreme Court), will be a subject matter of dispute with different interpretations. A further dimension is that prison conditions are not the same as at the time when the IPC was written. Nor are prisoners of the same educational or occupational status as before. Modern trends in criminology and penology, particularly, laying stress on rehabilitative administration, are advocating that skills and knowledge of prisoners, in areas apart from hard labour, should be utilised and not wasted in mere labour. In such cases, what would constitute equitable wages may be open for debate. However, the fact that prisoners should be paid wages, is an advancement in the law concerning the rights of prisoners, and a progress in the area of prison reform and jurisprudence.

PART I - PROPOSALS FOR REFORM

The Fifth Law Commission[62] delved into the feasibility of inclusion of banishment, externment for a term from a specified locality, corrective labour, compensation to victims of crime, and public censure as forms of punishment. It declined to recommend banishment and externment as forms of punishment. Taking inspiration from the Soviet experience, it, however, recommended that corrective labour should be provided for as punishment. Recalling the utility of compensating victims of crime and noting the existing three patterns of compensating victims of a crime, namely: (i) compensation by the state; (ii) compensation by offender either by asking him to pay it from the fine imposed or a specified amount; and (iii) duty to repair the damage done by the offence, and the existing provisions in the CrPC enabling courts to order payment of compensation, the Law Commission favored the payment of compensation to crime victims out of fine imposed on the offender. With a view to giving prominence in the IPC to the payment of compensation out of fine imposed and to conferring substantive powers on trial courts to this effect, it recommended that a new section (s 62) should be inserted in the IPC empowering a court, *inter alia*, to direct that the whole or any part of the fine realized from the offender be paid by way of compensation to crime victim. It also suggested that a court, by inserting a new section (s 76A) in the Penal Code, should be allowed 'to cause the offender's name and place of residence, the offence and the punishment imposed be published at the offender's expense in newspapers, when a person is convicted for committing offences punishable under chapter 12, chapter 13, ss 272 to 276, ss 383 to 389, ss 403 to 409, ss 415 to 420 or chapter 18 of the Penal Code.

With specific reference to forms of 'punishment' prescribed in s 53, IPC, the Law Commission offered the following substantive proposals:

(1) The sentence of death, in the light of conditions existing in India, should not be abolished. A person under the age of 18 years at the time of commission of the offence, however, should not be sentenced to death.
(2) The sentence of imprisonment for life should be retained in the Code and it should be explicitly made rigorous.
(3) Life imprisonment should not be replaced by imprisonment for a specified period of 20 years.
(4) The existing number of offences (more than 40) made punishable by life imprisonment in the Penal Code, however, should be reduced (to 16).

(5) 'Simple imprisonment' should be made imprisonment with 'compulsory light labour' as a life of complete idleness, even for a short period, is neither good for a prisoner nor conducive for prison discipline.
(6) The distinction between 'rigorous' and 'simple' imprisonment should be done away with by allowing a court to award 'imprisonment' and leaving it to jail authorities and Prison Rules to regulate the kind of work to be taken from particular classes of prisoners.
(7) Ss 73 and 74, dealing with solitary confinement, should be deleted.
(8) S 75, dealing with habitual offenders and recidivism, should be redrafted on the lines suggested by it.

The Indian Penal (Amendment) Bill 1972, in the light of proposals for reforms suggested by the Fifth Law Commission, sought to add three new forms of punishments in s 53 of the IPC. They were: (i) externment; (ii) compensation to victims of crime; and (iii) public censure. However, externment as a form of punishment did not find place in the Bill. But it proposed to add four new types of punishments in s 53, namely, (i) community service; (ii) disqualification from holding office; (iii) order for payment of compensation; and (iv) public censure. The Amendment Bill, though passed by *Rajya Sabha*, however, could not take effect of law as it lapsed due to dissolution of *Lok Sabha*.

The Fourteenth Law Commission[63] endorsed the proposed explanatory changes recommended by the Fifth Law Commission regarding imprisonment for life ('that is, with hard labour'), rigorous imprisonment ('that is, with hard labour') and simple imprisonment ('that is, with light labour'). It also delved deep into the recommended new forms of punishment and gave its considered responses thereto.

It, perceiving that 'community service' is neither a real form of 'punishment' nor a pragmatic proposal, declined to endorse the community service as a formal punishment. 'Disqualification from holding office' proposed by the Fifth Law Commission also did not find favour with the Fourteenth Law Commission. It declined to endorse it on the ground that most of the Service Rules in vogue invariably disqualify delinquent public servants and other persons holding offices in corporations, companies, registered societies, on conviction, to hold an office. Similarly, it opined that it would be inappropriate to add to s 53 the 'payment of compensation to a crime victim' as punishment. It advanced three reasons in support of its view. They are: *first*, the judicial dictum of the Supreme Court in *Delhi Domestic Working Women's Forum v Union of India & Ors* [64] and *Bodhisattawa Gautam v Subhra Chakraborty* [65] has not only directed the Government to set up Criminal Injuries Compensation Board (CICB) but also recognised a crime victim's right to seek compensation. *Second*, the Fourteenth Law Commission in one of its earlier Reports on the Code of Criminal Procedure[66] has proposed insertion of s 357A in the CrPC, providing for a Victim Compensation Scheme to be designed by state governments[67] (in addition to s 357 of the CrPC authorising Courts to order payment of compensation to victims of crime). *Thirdly*, the payment of compensation, in its opinion, depends upon a number of circumstances and it, therefore, need not be in the form of punishment. However, realising and recalling the greater potentials of public censure as an additional deterrent punitive measure, the Commission endorsed the proposal of the earlier Law Commission for adding 'public censure' as a form of additional punishment to s 53. However, it recommended that the imposition 'public censure' be left to the discretion of the sentencing court.

The Fourteenth Law Commission, supporting the proposal of the Fifth Law Commission for deletion of solitary confinement from the Penal Code as well as clause 26 of the 1978 Amendment Bill giving effect to the proposal, has endorsed the deletion of solitary confinement. However, it desired to keep solitary confinement alive in cases of prison indiscipline.

However, it would be of interest to note that the Committee on Reforms of Criminal Justice System (the Justice Malimath Committee)[68] proposed the following four proposals for reform in the field of 'Punishment'. They are: First, noting that the highest punishment provided in s 53 of the Penal Code is death sentence and imprisonment for life next to it and that there is no punishment lower than death penalty and higher than life imprisonment in vogue in India and drawing inspiration from the US, the Committee proposed that 'imprisonment for life without commutation or remission' be inserted in s 53 of the Code as a form of punishment higher than life imprisonment but lower than capital punishment. It also recommended that the state governments, by an appropriate amendment, be disallowed to remit or commute the awarded 'imprisonment for life without commutation or remission'. However, it opined that the constitutional power of pardon of the President and a State Governor be kept intact.[69] Secondly, recalling the fact that the amount of fines was fixed before about one and a half century and the value of the rupee has since gone down considerably, the

Committee, like the Fourteenth Law Commission, has stressed the need to have a fresh look at, and upward revision of, the quantum of fines provided in the IPC. It recommended that the fine amount be increased by 50 times.[70] Thirdly, it recommended that s 64 providing for sentence of imprisonment for non-payment of fine be done away with and s 65 setting limit to imprisonment for non-payment of fine be deleted from the Code. Fourthly, ss 66-69 also be deleted from the IPC and the sentence of community service of specified period be provided for the offences mentioned in these provisions.[71]

The Justice Malimath Committee has suggested a statutory committee, headed by a former judge of the Supreme Court or a former chief justice of a High Court experienced in criminal law with members representing the prosecution, legal profession, police, social scientist, for preparing guidelines on sentencing.

1 See for example, *Giasuddin v State of Andhra Pradesh* AIR 1977 SC 1926; *Hiralal Mallick v State of Bihar* AIR 1977 SC 2236, (1977) Cr LJ 1921(SC) .

2 AIR 1979 SC 916.

3 Ibid, para 19.

4 AIR 1998 SC 3164.

5 Ibid, para 33.

6 See *Shobhit Chamar v State of Bihar* AIR 1998 SC 1693, (1998) 3 SCC 455. Justice Krishna Iyer's proposal that once the guilt of the person is established, at the stage of sentencing the court should separate the criminal from the crime and not see them together propounded in *Rajendra Prasad*'s case was specifically disapproved of by the majority ruling in *Bachan Singh v State of Punjab* AIR 1982 SC 1325. For further discussion, see 'death sentence', below.

7 AIR 1994 SC 2420. For further comments, see 'case laws involving death sentence', below.

8 Ibid, para 101.

9 (1994) 2 SCC 220.

10 This aspect has been elaborated in a later portion of this chapter on death sentence cases.

11 AIR 1996 SC 787, (1996) 2 SCC 175.

12 Ibid, para 25. The same point of view is also reiterated by the Supreme Court in *Union of India v Kuldeep Singh* AIR 2004 SC 827, (2004) 2 SCC 590, (2004) Cr LJ 836(SC) ; *State of Uttar Pradesh v Shri Kishan* (2005) Cr LJ 333(SC), and *State of Madhya Pradesh v Saleem @ Chamaru* (2005) Cr LJ 3433(SC) .

13 *State of Madhya Pradesh v Ghanshyam Singh* AIR 2003 SC 3191, (2003) 8 SCC 13, (2003) Cr LJ 4339(SC) . See also *Union of India v Kuldeep Singh* (2004) Cr LJ 836(SC) ; *State of Karnataka v Puttaraja* AIR 2004 SC 433, (2004) 1 SCC 475, (2004) Cr LJ 579(SC) ; *Dalwadi Govindbhai v State of Gujarat* (2004) Cr LJ 2767(Guj) ; *Dhananjoy Chatterjee alias Dhana v State of West Bengal* (1994) 2 SCC 220.

14 However, the Supreme Court in *Jagmohan Singh v State of Uttar Pradesh,* AIR 1973 SC 947, has opined that the exercise of judicial discretion on well-recognised principles is the safest possible safeguards for the accused.

15 Penal servitude - Repealed by Act 17 of 1949 (wef 6 April 1949).

16 *Shivaji Sahebrao Bobade v State of Maharashtra* AIR 1973 SC 2622.

17 AIR 1997 SC 18, (1997) Cr LJ 51(SC) .

18 Ibid, at para 18.

19 *Vadivelu v State of Madras* AIR 1957 SC 614, para 16.

20 AIR 2004 SC 5150, (2004) 7 SCC 257.

21 Ibid, para 8.

22 AIR 1955 SC 778.

23 Ibid, at para 15.

24 In criminal law, the state, as protector of the interests of the society at large, becomes the complainant in all prosecutions launched in court after police investigation has been initiated. The person who first gives the complaint on which basis the FIR is recorded, launching the criminal administration system has no role once the complaint has been registered as the state is seen as the party continuing further prosecution. The person who gives the complaint is called the *de facto* complainant, or the complainant in fact or the first informant, while the state is called the *de jure*complainant, or the complainant in law. The Code of Criminal Procedure, 1973 provides the procedure if the police refuses to register a complaint, or if after investigation, the police intimate the court that no case is made out to prima facie prove the allegations made in the FIR or complaint.

25 AIR 1991 SC 8.

26 Ibid, para 8.

27 AIR 1953 SC 364, (1953) Cr LJ 1465(SC) . See also *Narsingh v State of Uttar Pradesh* AIR 1954 SC 457, (1954) Cr LJ 1167(SC) .

28 (2000) Cr LJ 1793 (SC).

29 *State of Madhya Pradesh v Bhagwat* (2005) 11 SCC 141. See also *State of Madhya Pradesh v Bane Singh* (2005) 12 SCC 367.

30 (2004) Cr LJ 1171 (SC).

31 (2005) Cr LJ 912 (SC).

32 (2005) Cr LJ 3117 (SC).

33 (2005) Cr LJ 3433 (SC).

34 For example see, *Devalla Raghavulu v State* (2005) Cr LJ 1041(AP) ; *Arun v State* (2005) Cr LJ 1044(Bom) ; *Burla Venugopalkrishnan v State of Andhra Pradesh* 2005 Cr LJ 1164(AP) ; *Banasari Singh v State ofjharkhand* (2005) Cr LJ 1532(Jhar), and *Chinnakondu Kondaiah v State of AP* (2004) Cr LJ 3901(AP) .

35 For instance, see, *State v Makhmal Khan* (2005) Cr LJ 4363(SC) ; *State of Madhya Pradesh v Balu* (2005) Cr LJ 335(SC) : (2005) 1 SCC 108; *State of Madhya Pradesh v Munna Choubey* (2005) Cr LJ 913(SC) ; *State v Parasaran* (2005) Cr LJ 4365(SC) ; and *State v Balaram* (2005) Cr LJ 4371(SC) .

36 See *Mahesh v State of Madhya Pradesh* AIR 1987 SC 1346, (1987) Cr LJ 1073(SC) ; *State of Madhya Pradesh v Ghanshyam Singh* AIR 2003 SC 3191, (2003) 8 SCC 13, (2003) Cr LJ 4339(SC) ; *State of Karnataka v Puttaraja* AIR 2004 SC 433, (2004) 1 SCC 475, (2004) Cr LJ 579(SC) ; and *Surjit Singh v Nahara Ram* AIR 2004 SC 4122, (2004) 6 SCC 513, (2004) Cr LJ 3879(SC) .

37 (2005) Cr LJ 333 (SC).

38 Ibid, pp 334-335.

39 *Lehna v State of Haryana* (2002) 3 SCC 76, para 25.

40 *Prem Chand Santramdas v State of Bihar* AIR 1951 SC 14.

41 *Ramashraya Chakravarti v State of Madhya Pradesh* AIR 1976 SC 392, (1976) Cr LJ 334(SC) .

42 *Adamji Umar Dalal v State of Bombay* AIR 1952 SC 14, (1953) Cr LJ 542(SC) .

43 *Harnam Singh v Emperor* AIR 1926 Lah 239, p 240, (1927) Cr LJ 186(Lah) .

44 *Tahsildar Singh v State of Bihar* AIR 1958 All 214, (1958) Cr LJ 324(All) .

45 Hari Singh Gaur, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 434.

46 The framers of the Penal Codehad also thought of, but rejected, three other forms of punishment, namely, dismissal from office, pillory and exhibition of the offender on a donkey, and flogging or whipping. However, the Whipping Act of 1864 added in the Penal Code the corporal punishment of whipping as punishment for certain offences. But subsequently it was abolished in 1955 in view of its inhuman, cruel and barbaric nature.

47 See, Law Commission of India, 'Thirty-Fifth Report: Capital Punishment', Government of India, 1967.

48 The Supreme Court declared s 303 of the Indian Penal Code 1860, providing for mandatory death sentence for murder by a life-convict, unconstitutional for it not being in tune with arts 14 and 21 of the Constitution of India . See*Mithu v State of Punjab* AIR 1983 SC 473.

49 The Supreme Court has upheld the constitutional validity of such a wide judicial discretion and justified it owing to impossibility of laying down sentencing norms as facts and circumstances of no two cases can be alike and wrong judicial option, if any, is liable to be corrected by superior courts. See *Jaganmohan Singh v State of Uttar Pradesh* [1973] 2 SCR 541.However, recently the Justice Malimath Committee, with a view to bringing predictability and certainty in sentencing, recommended that a Statutory Committee headed by a retired judge of the Supreme Court or of a high court having experience in criminal law matters and comprising representatives of prosecution, legal profession, the police, social scientists and women, be constituted to suggest sentencing guidelines. See, Government of India, 'Committee on Reforms of Criminal Justice System', Ministry of Home Affairs, New Delhi, March 2003, para 14.4.5.

50 Under the Code of Criminal Procedure of 1898,which was overhauled in 1973, the normal sentence for the offences punishable with imprisonment for life and alternatively by sentence of death was death sentence and if a court wanted to depart from the normal rule had to give reasons for doing so.The Code of Criminal Procedure (Amendment) Act of 1955 left it to the courts to pass, in their discretion, for reasons to be recorded, either the sentence of death or life imprisonment.

51 S 368, CrPC.

52 S 416, CrPC.

53 AIR 1980 SC 898, (1980) Cr LJ 636(SC) .

54 AIR 1973 SC 947.

55 AIR 1979 SC 916.

56 Ibid, paras 92-94.

57 Ibid.

58 AIR 1980 SC 898, (1980) Cr LJ 636(SC), para 199.

59 Ibid, para 207.

60 The lengthy ruling of Bhagwati J is to be found in *Bachan Singh v State of Punjab* AIR 1982 SC 1325.

61 AIR 1983 SC 957.

62 AIR 1982 SC 1325.

63 (2002) 3 SCC 76.

64 Ibid, paras 22 & 25. Also reiterated in *Sushil Murmu v State of Jharkhand* (2004) 2 SCC 338, (2004) Cr LJ 658(SC) .

65 (2002) 6 SCC 868.

66 2004 Cr LJ 2876 (SC).

67 *Mohd Gayassudin Khan v State of Bihar* (2004) Cr LJ 395(SC) . But see, *Vasant Vithu Jadhav v State of Maharashtra* (2004) Cr LJ 1786(SC), wherein a police constable who opened fire in a public place and killed his colleague was sentenced to five years' imprisonment.

68 *Reddy Sampath Kumar v State* (2005) Cr LJ 4131(SC) .

69 (2007) 12 SCC 494.

70 AIR 2012 SC 1552, (2012) 1883 (SC).

71 Ibid, para 23.

72 AIR 1976 SC 2386.

73 Ibid, para 3.

74 Ibid, paras 6-8.

75 AIR 1989 SC 1456, (1989) Cr LJ 1466(SC) .

76 Ibid, para 10.

77 Ibid.

78 AIR 1977 SC 1747, (1977) 3 SCC 218, (1977) Cr LJ 1139(SC) .

79 Ibid, para 4.

80 *Brij Bhushan Sharma v State of Uttar Pradesh* 2001 Cr LJ 1864(All) .

81 *Principal Sessions Judge, Virudhunagar District at Srivilliputhur v State by Inspector of Police, Srivilliputhur* 2004 Indlaw MAD 95.

82 The Gujarat High Court held that minimum sentence under s 302 of the Penal Code is life imprisonment and when this minimum sentence is imposed, providing of an opportunity of hearing on question of sentence under s 235 of the CrPC does not arise; see *State of Gujarat v Hitesh Kumar* (1999) Cr LJ 4346(Guj) and *State of Gujarat v Gandabhai Govindbhai* (2000) Cr LJ 92(Guj) . Justice KT Thomas of the Supreme Court, (minority view), also opined that a trial court is not under obligation to hear the accused on the question of sentence if it does not propose to impose death penalty on the convicted person but only life imprisonment. See *Ram Dev Chauhan v State of Assam* (2001) Cr LJ 2902(SC) .

83 AIR 1999 SC 2640.

84 The case was registered under the Terrorist and Disruptive Act ivities (Prevention) Act, 1987 (TADA) and involved offences both from TADA as also IPC, apart from other related enactments like the Explosive Substances Act, the Arms Act, the Wireless Act, the Foreigners Act, and so on.

85 Murugan and Nalini were married and their daughter was born in captivity. This was one of the factors which weighed with Thomas J discussed shortly hereafter.

86 AIR 1999 SC 2640, paras 353 and 354. As noted in the chapter on conspiracy, the Governor of Tamil Nadu commuted the death sentence of Nalini for reasons similar to those of Thomas J. The mercy petitions of the other three men were rejected.

87 Ibid, para 628.

88 Ibid, paras 716-717.

89 AIR 1999 SC 1860.

90 Ibid, paras 20-24.

91 AIR 1994 SC 2420.

92 (1994) 2 SCC 220.

93 Ibid, paras 14-15.

94 (2004) 2 SCC 338, (2004) Cr LJ 658(SC) .

95 (2005) Cr LJ 2174 (SC).

96 AIR 1999 SC 1332.

97 Ibid, para 17.

98 AIR 1999 SC 996. See also *Ramadhir Basu v State of West Bengal* (2000) Cr LJ 1417(SC), wherein the death sentence was commuted as there was not even the remotest desire on the part of the accused to kill the father and grandparents. The subsequent events happened unexpectedly and the accused killed out of the fear, that he would be named as the murderer of his friend's mother.

99 AIR 1999 SC 382.

1 AIR 1999 SC 382, paras 9 and 13. The decision in this case was followed in subsequent cases involving killings of Sikhs following Indira Gandhi's assassination to commute death sentences. See *Kishori v State (NCT), Delhi* (2000) Cr LJ 756(SC) ; *Manoharlal Munna v State (NCT) Delhi* (2000) Cr LJ 581(SC) .

2 (2005) Cr LJ 4384 (SC).

3 (2004) Cr LJ 1533 (All).

4 (2008) 13 SCC 767, AIR 2008 SC 3040.

5 AIR 2010 SC 942, (2010) 3 SCC 508.

6 Ibid, para 54.

7 Section 433. Power to Commute sentences.--The appropriate Government may, without the consent of the person sentenced, commute- (a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860); (b) a sentence for imprisonment for life, for imprisonment for a term not exceeding fourteen years; (c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine; (d) a sentence of simple imprisonment, for fine.

8 *State of Punjab v Kesar Singh* AIR 1996 SC 2512, para 2.

9 AIR 2002 SC 3088, (2002) 7 SCC 222, (2002) Cr LJ 4295(SC) . [The dictum is subsequently followed in, and relied upon, in *State (Government of NCT of Delhi) v Prem Raj* (2003) 7 SCC 121.]

10 Ibid, para 6.

11 A clemency petition to the Governor may be presented by the convicted person himself, his relations, or any other person concerned. See *Triveniben v State of Gujarat* AIR 1989 SC 1335, (1990) Cr LJ 1810(SC) .

12 *State (Govt of NCT of Delhi) v Prem Raj* (2003) 7 SCC 121, paras 8 and 14; see also *Government of Andhra Pradesh v MT Khan* (2004) 2 SCC 267; *Sanabonia Satyanarayan v Government of Andhra Pradesh* (2003) 5 SCC 343.

13 (2014) 5 SCALE 600.

14 *V Sriharan @ Murugan v Union of India* (2014) 2 SCALE 505.

15 (2008) 13 SCC 767.

16 (2014) 5 SCALE 600, para 48 & 49.

17 AIR 1962 SC 605; see also *State of Madhya Pradesh v Ratan Singh* AIR 1976 SC 1552.

18 AIR 1983 SC 855, (1983) Cr LJ 1345(SC) ; see also *Sat Pal v State of Haryana* (1992) 4 SCC 172.

19 *Laxman Naskar (Life Convict) v State of West Bengal* AIR 2000 SC 2762, (2000) 7 SCC 626, (2000) Cr LJ 4017(SC) .

20 *Mohd Munna & Kartik Biswas v Union of India* (2005) 7 SCC 417, (2005) Cr LJ 4124(SC) ; see also, *Premlal v State* (2005) Cr LJ 1145(MP) .

21 For legislative intent of the provision see, *Pandit Kishorilal v Emperor* AIR 1945 PC 64.

22 AIR 1961 SC 600. Followed and affirmed in *Ashok Kumar v Union of India* AIR 1991 SC 1792, (1991) 3 SCC 498.

23 This refers to the provision in the old Code; the corresponding provision is s 433 of the present Code of Criminal Procedure.

24 AIR 1961 SC 600, paras 5-8.

25 AIR 1976 SC 1552.

26 Ibid, para 9.

27 *Lakki v State of Rajasthan* (1996) Cr LJ 2965(Raj) ; *Swami Shiruddanunda v State of Karnataka* AIR 2008 SC 3040, (2008) 11 SCC 767.

28 AIR 1991 SC 1792, (1991) Cr LJ 2483(SC) .

29 Ibid, para 12.

30 (1996) Cr LJ 2965 (Raj).

31 AIR 1999 All 274.

32 *Ramraj @ Nanhoo @ Bihnu v State of Chhattisgarh* AIR 2010 SC 420, (2010) 1 SCC 573, (2010) Cr LJ 2062(SC) .

33 *State of Haryana & Ors v Jagdish & Harpal,* AIR 2010 SC 1690, (2010) 4 SCC 216.

34 AIR 1998 SC 3164. For further analysis and comments, see KI Vibhute, 'Compulsory Hard Prison Labour and the Prisoners' Right to Receive Wages: Constitutional *Vires* and Judicial Voices', Journal of the Indian Law Institute, vol 40, 2000, p 1.

35 *In the Matter of: Prison Reforms Enhancement of Wages of Prisoners*AIR 1983 Ker 261.

36 *Jail Reforms Committee v State of Gujarat* (decided on 31 January 1985), quoted in *Gurudev Singh v State of Himachal Pradesh* AIR 1992 HP 76, which was the main case in appeal in *State of Gujarat v Hon'ble High Court of Gujarat* AIR 1998 SC 3164.

37 *Gurudev Singh v State of Himachal Pradesh* AIR 1992 HP 76.

38 *Poola Bhaskara Vijayakumar v State of Andhra Pradesh* AIR 1988 AP 295.

39 *Shobha Suresh Jumani v Appellate Tribunal, Forfeiture Property* AIR 2001 SC 2288, (2001) 5 SCC 755, (2001) Cr LJ 2583(SC) .

40 See Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note A, p 97.

41 *Jivan Trikan v Kutch Government* AIR 1950 Kutch 73.

42 See Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note A, p 97.

43 1995 Cr LJ 1694 (Bom).

44 Ibid, para 29.

45 AIR 1999 SC 2881.

46 Ibid, paras 37 & 38.

47 *Shantilal v State of Madhya Pradesh* (2007) 11 SCC 243, 2007 (10) SCR 727.

48 AIR 1974 SC 1811.

49 (1996) Cr LJ 170 (Ori).

50 Ibid, paras 7 & 8.

51 AIR 1972 SC 1809.

52 *Kishanlal Sindhi v Executive Officer, Notified Area Council, Padampur* (1980) Cr LJ 365(Ori), p 366.

53 RC Nigam, *Law of Crimes in India*, Asia, London, 1965, pp 246-247.

54 AIR 1947 Mad 386, (1947) 1 Mad LJ 336.

55 (1992) Cr LJ 3125 (Mad); see also, *Velambal v State of Tamil Nadu* (1981) Cr LJ 1506(Mad) (DB) .

56 AIR 1978 SC 1675; (1978) 4 SCC 494.

57 AIR 1978 SC 1514.

58 Omitted by Act III of 1951.

59 AIR 1998 SC 3164.

60 Six weeks time (from date of judgment, ie, 24 September 1998) was given to state governments to fix the interim wages. By June 2000, the wage fixing committees of Kerala, Andhra Pradesh and Rajasthan had reportedly submitted proposals for payment of equitable wages in prisons in the respective states.

61 Ibid, para 51.

62 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, paras 3.11; 3.25; 3.32; 3.38; 3.42-3.44; 3.48, and 3.80-3.89.

63 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 2.11-2.16, & 12.21.

64 (1995) 1 SCC 14.

65 (1996) 1 SCC 490.

66 Law Commission of India, 'One Hundred and Fifty-Fourth Report: The Code of Criminal Procedure, 1973', Government of India, 1996.

67 S 357A, outlining victim compensation scheme by State Government, is inserted in the CrPC in 2008. See, the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2008).

68 Government of India, 'Committee on Reforms of Criminal Justice System', Ministry of Home Affairs, New Delhi, March 2003.

69 Ibid, para 14.7.

70 The Fourteenth Law Commission, however, recommended the fine amount be, at least, increased by twenty times. See, its 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, para 2.09.

71 Government of India, 'Committee on Reforms of Criminal Justice System', Ministry of Home Affairs, New Delhi, March 2003, para 14.9.

CHAPTER 20

Jurisdiction

(Indian Penal Code 1860,Sections 1 to 5)

INTRODUCTION

Preamble to the Indian Penal Code, through its opening sentence 'Whereas it is expedient to provide a generalPenal Codefor India', makes it crystal clear that the Indian Penal Code (IPC) provides theGeneral Penal Code of India, impliedly assuming the possibility of existence of other special penal statutes.

The Penal Code, by virtue of s 1, 'extends to the whole of India', barring the territory of 'the State of Jammu and Kashmir'. 'The territory of India' comprises: (a) the territories of the States; (b) the 'Union Territories' specified in the First Schedule; and (c) such other territories as may be acquired.[1] However, s 18 of the Penal Code, for the purpose of the IPC, defines 'India' to mean 'the territory excluding the State of Jammu and Kashmir'. The State of Jammu and Kashmir, in view of the special status it enjoys on account of art 370 of the Constitution of India , has separately enacted laws covering its territories. It has a separate code, the Jammu and Kashmir Ranbir Penal Code, which is a replica of the IPC.

INTRA-TERRITORIAL AND EXTRA-TERRITORIAL JURISDICTION

One of the established general principles is that enforcement of law, by its nature, is territorial. Ordinarily, no state allows another state to enforce its laws within its territory. In consonance with this rule, jurisdiction of courts is intra-territorial. A penal statute, as a rule, has intra-territorial operation. A person committing an act or omitting to do an act contrary to the penal statute is made amenable to a competent criminal court. However, sometimes, a penal statute may have extra-territorial operation in the sense that it may empower a court to exercise its jurisdiction over citizens of the state even if they have committed a crime beyond jurisdictional limits of the state concerned. In other words, operation of a penal statute may be intra-territorial as

well as extra-territorial operation. The IPC exhibits both the patterns of operation, namely, intra-territorial jurisdiction and extra-territorial jurisdiction.

INTRA-TERRITORIAL JURISDICTION

Section 2 of the deals with the intra-territorial operation of the IPC. It makes the Code applicable to every person in any part of India for every act of commission or deed of omission in contravention of the Code. It reads:

Section 2. Punishment of offences committed within India.--Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

Scope of Section 2: Personal Jurisdiction

The section declares the jurisdictional scope of operation of the IPC to offences committed within India. The emphasis on 'every person' makes it very clear that in terms of considering the guilt for any act or omission, the law shall be applied equally without considerations of caste, creed, nationality, rank, status or privilege. The crucial aspect to be noted here is that the Code makes no distinction between an Indian citizen and a foreigner, for offences committed in India.[2]

Is a Foreigner Liable under the Indian Penal Code 1860?

While on the issue of offences committed by foreigners, it should be noted that it is not a defence that the foreigner did not know that he was committing a wrong, the act itself not being an offence in his own country.

Further, the foreigner cannot also plead ignorance of the laws of the land, as a defence to escape prosecution and conviction. Whether the laws of the country should be published outside India also, so that foreigners can know about the laws in India, was an issue raised in *State of Maharashtra v Mayer Hans George* .[3] It was held in this case that it is not necessary for the law to be published or made known outside India. In this case, the respondent Mayer Hans George was a foreign national, who left Zurich on 27 November 1962 for Manila by a Swiss plane. The flight passed through Bombay where it stopped in transit. In Bombay, he did not embark and was sitting inside the plane. At that time, based on prior information, customs officials conducted a personal search and found that he was carrying 34 kg of gold in the form of gold slabs, which were kept inside his jacket. According to the Notification of the Reserve Bank of India dated 8 November 1962, which was published on 24 November 1962, restrictions were placed on transit of gold carried from a place outside India to another place outside India. The transit passengers were required to make a declaration in the 'Manifest' for transit in the cargo of the carrier. Since George had not made such a declaration, he was arrested and subsequently charged for importing gold into India in contravention of the prevalent law. He was also sentenced to one year's rigorous imprisonment by the trial court, which was set aside by the Bombay High Court on appeal. However, the state government filed an appeal before the Supreme Court.

One of the main grounds urged was that Mayer Hans George was not aware of the notification imposing condition that a declaration should be made of 'transshipment cargo' when brought by any person in a plane transiting India. The Supreme Court held:

> It is obvious that for an Indian law to operate and be effective in the territory where it operates *viz*, the territory of India, it is not necessary that it should either be published or be made known outside the country... it would be apparent that the test to find out effective publication would be publication in India, not outside India so as to bring it to the notice of everyone who intends to pass through India... Ignorance of it (the published notification) by the respondent who is a foreigner is, in our opinion, wholly irrelevant.[4]

On the ground that knowledge of the existence or content of a law by an individual would not always be relevant, save on the question of the sentence to be imposed, the court, while upholding the conviction of Mayer Hans George, however, ruled that the sentence alone be reduced for the period already undergone.

Similarly, the personal presence of the accused in India at the time of the commission of the offence is not essential to make the person liable for offences committed under the IPC. This was established in the case of *Mobarik Ali Ahmed v State of Bombay* .[5] The Supreme Court perceiving that the basis of jurisdiction under s 2 of the IPC is the locality where the offence is committed and that the corporal presence of the offender in India is immaterial, upheld conviction of Mobarik Ali, a Pakistani national, for cheating even though he, while staying in Karachi, made false representations through letters, telephone conversations and telegrams to the complainant in Bombay and thereby induced him to part with money at Bombay. It held that the offence was committed by the accused at Bombay even though he was not physically present there.

Similarly, if a foreigner, not residing in India, starts the train of his crime out of India, but the crime is completed in India, he will be liable under the IPC. Further, as the offence of conspiracy is a continuing offence, the visit of a foreign national into the country after his having entered into the conspiracy, would give jurisdiction to Indian courts.[6]

'Every Person' Distinct from 'Any Person'

In the *Mobarik Ali* case, the Supreme Court considered the scope of s 2 and in particular explained the scope of the section through interpreting the terms 'every person' by contrasting it to the terms 'any person' appearing in ss 3 and 4(2), IPC, itself. The court clarified that the distinction between the two usages is 'indicative of the idea that to the extent that the guilt for an offence committed within India can be attributed to a person, every such person without exception is liable for punishment under the Code'. On the question whether the terms 'within India' should be read as to delimit the scope of 'every person' the court stated:

> The plain meaning of the phrase 'every person' is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed. This section must be understood as comprehending every person without exception barring such as may be specifically exempt from criminal proceeding or punishment thereunder by virtue of the Constitution [see art 361(2) of the Constitution] or any statutory provision or some well-recognised principles of international law such as sovereigns, ambassadors, diplomatic agents and so forth accepted in the municipal law.[7]

The IPC, thus, for its operation makes no distinction between Indians based on their caste, race, religion, socio-politico-economic status. Authors of the Code, in their prefatory address to the Governor-General-in Council, justified the principle thus:

> We have not proposed to except from the operation of this Code any of the ancient sovereign houses of India residing within the Company's territories... We will only beg permission most respectfully to observe that every such exception is an evil; that it is an evil that any man should be above the law; that it is still greater evil that the public should be taught to regard as a high and enviable distinction the privilege being above the law; that the longer such privileges are suffered to last, the more difficult it is to take them away; that there can scarcely ever be a fairer opportunity for taking them away than at the time, when the Government promulgates a new Code binding alike on persons of different races and religions; and that we greatly doubt whether any consideration, except that of public faith, solemnly pleaded, deserves to be weighed against the advantages of equal justice.[8]

Exemption from Coverage of the Indian Penal Code 1860

Though s 2 makes all persons, irrespective of their nationality, rank, race, religion or caste, liable to be punished under the Penal Code, there are some persons who are kept outside jurisdiction of criminal courts. Such exemptions are premised on constitutional or statutory provisions or some well-established and practiced norms of public international law. A mention of these categories, here below, will suffice the purpose.

(1) Article 361(2) of the Constitution of India protects criminal proceedings against the President of India or the governor of a state, in any court, during the time they hold office.

(2) In accordance with well-recognised principles of international law, foreign sovereigns are exempt from criminal proceedings in India, the principle being that the exercise of such jurisdiction would be incompatible with the regal dignity.[9]

(3) This immunity is also enjoyed by the ambassadors and diplomats of foreign countries who have official status in India. This protection is extended to all secretaries and political and military attaches, who are formally part of the missions. The exemption is based on the premise that these dignitaries are representatives of the independent sovereigns or of the states that send them.

(4) Corporations and companies can also be found guilty of committing offences under the IPC. In this context, reference may be made to s 11 of the IPC which stipulates that the term 'person' includes a company, association, whether incorporated or not. The issue of whether a company should be made liable for the acts of its employees or agents, has to be necessarily considered in the facts and circumstances of each case, the nature of the offence committed, the nature of criminal act ion committed by its employees and so on. It is crucial here to note that the company cannot be made liable for the individual offences that may be committed by its employees in their individual or personal capacities, such as committing assault, murder, fraud, misappropriation and so on, which essentially require corporal punishment.

The moot question when we consider the issue of criminal liability of a body corporate is over the issue of requisite mens rea, activating the commission of the alleged crime. In *State of Maharashtra v Syndicate Transport Company (P) Ltd,* [10] the Bombay High Court held that a body corporate ought to be indictable for criminal act s or omissions of its Directors or authorised agents or servants, whether or not, they involve mens rea, provided they have acted or have purported to have act ed under the authority of the corporate body or in pursuance of the aims and objects of the body corporate. The knowledge and intention of the managers of the body corporate are to be imputed to it.

It is salutary to note that the Supreme Court in *Superintendent and Remembrancer of Legal Affairs, West Bengal v Corporation of Calcutta* ,[11] a majority of seven judges in a nine-member Constitutional Bench, held that the state and its extensions or public bodies or corporations are liable to criminal proceedings unless specifically exempted from such coverage.[12]

(5) The territorial jurisdiction of the IPC also covers its ships, aircrafts, whether armed or unarmed, and the private ships of its citizens on the high seas or in foreign tidal waters, as also foreign ships within the limits of the maritime zone which extends up to 12 nautical miles measured from the appropriate base line. This zone also includes the bays, gulfs and straits surrounding the country's seacoast.

(6) Alien enemies cannot be tried by criminal courts for their acts of war.

(7) Foreign armies, which are by consent on the soil of a foreign country, are exempted from the jurisdiction of the state on whose soil they are.

(8) Men-of-war on the warships of a foreign state are exempted from jurisdiction of the state within whose territorial jurisdiction they are.

Section 5--An Exception to Section 2

Section 5 of the Code, which is a saving clause to s 2 and excludes the operation of the IPC in those cases where separate provisions have been made by a special or local law to deal with such offences mentioned therein, reads:

Section 5. Certain laws not to be affected by this Act.--Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.

Scope of Section 5

This section, obviously, operates as an exception to s 2 of the IPC. What the section provides is that it excludes the operation of the IPC in those cases for which special legislations have been made by any local or special law to deal with such offences. The principle underlying the saving clause in s 5 is the Latin expression, *generalia specialibus non derogant*, which means general words do not repeal special laws or legislations. Special laws have been defined in s 41 of the IPC to mean 'a law applicable to a particular subject' while local laws have been defined in s 42 of the IPC, to mean 'a law applicable to a particular part of India'.

The expression 'special law' means a provision of law which is not applicable generally, but which applies to a particular or specified subject or class of subjects.[13] It is a law enacted for special cases, in special circumstances, in contradistinction to the general rules of the law laid down, as applicable generally to all cases with which the general law deals.[14] It is a generally accepted principle that whenever a conflict occurs between a general law and a special law, then the special law will prevail.[15] But, if there is no conflict, then the effect may be given to both. However, a person cannot be punished twice, once for the special law and the other for IPC offences.

The personnel of the Army, Navy and Air Force are governed by the provisions of the Army Act 1950, the Navy Act 1957, and the Indian Air Force Act 1950 respectively, concerning offences of mutiny and desertion committed by them. Section 5 of the IPC keeps these statutes, like any other special and local laws, operationally intact.

EXTRA-TERRITORIAL JURISDICTION

Sections 3 and 4 deal with extra-territorial operation of the IPC. Provisions of these sections extend the jurisdiction of courts in India over citizens of India beyond the territorial limits of India. The rationale behind such an extension of jurisdiction is based on the assumption that every sovereign state has a legitimate right to regulate and govern its own native-born subjects everywhere and anywhere.[16]Sections 3 and 4, IPC, read as under.

Section 3. Punishment of offences committed beyond, but which by law may be tried within, India.--Any person liable, by any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.

Section 4. Extension of Code to extra-territorial offences.--The provisions of this Code apply also to any offence committed by--

(1) any citizen of India in any place without and beyond India;
(2) any person on any ship or aircraft registered in India wherever it may be.
(3) [17] any person in any place without and beyond India committing offence targetting a computer resource located in India.

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

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

Illustration

A, who is a citizen of India, commits a murder in Uganda. He can be tried and convicted of murder in any place in India in which he may be found.

Scope of Sections 3 and 4, Indian Penal Code 1860

Both these sections, as stated earlier, deal with offences committed beyond the territorial limits of India.

Section 3 gives criminal jurisdiction to Indian courts to try any person for offences committed beyond India, as though it had been committed in India. Such a person may or may not be a citizen of India. The condition placed is that the offence alleged to have been committed by the person is made liable under the Indian law. Two conditions have to be fulfilled before s 3 is pressed into service: *first*, there should be an allegation that a person (whether a citizen of India or not) has committed outside India an act which, if committed in India, would be punishable under the IPC, and *secondly*, that person is liable under some Indian law to be tried in India for that offence. When both these conditions are satisfied, the accused person is required to be dealt

with according to the provisions of the IPC in the same manner as if the culpable act had been committed in India.[19]

Section 4 expands on s 3, while at the same time clarifying that the provisions of the IPC shall apply:

(i) in case of Indians, for any offence committed outside and beyond India; and
(ii) in case of 'any person' (thereby meaning others), for offences committed by them in any ship or aircraft registered in India, wherever it may be.

Section 3 enables Indian courts to try persons who have committed offences outside India. One of the earliest cases in which the Supreme Court examined the scope of ss 3 and 4, IPC, was in the case of *Rao Shiv Bahadur Singh v State of Vindhya Pradesh* .[20] In this case, Shiv Bahadur Singh and another person were the Minister for Industries and the Secretary to the Industries Department of the then United State of Vindhya Pradesh. The State of Panna was one of the component states of Vindhya Pradesh (now part of Madhya Pradesh). Diamonds were extensively found and mined in a place called Panna. In the year 1936, the Panna Durbar (Government) entered into a 15-year lease contract with the Panna Diamond Mining Syndicate to operate the diamond mines. In October 1947, when the two above-named persons were the Minister and Secretary, the permission to mine was abruptly terminated on the ground that the syndicate was not carrying on operations properly. By February 1949, it was alleged that the two persons had conspired together and were demanding money for the purpose of revoking the cancellation orders. They were also alleged to have received, as a first installment, illegal gratification to the tune of Rs 25,000 at the Constitution House, Delhi. They were prosecuted for offences under ss 120B, 161, 465 and 466, IPC, for demanding and receiving illegal gratification. The trial court acquitted them. However, the appellate court convicted them under ss 120B, 161, 465 and 466, IPC, and sentenced to three years' rigorous imprisonment and fine of Rs 2,000. The Supreme Court was of the view that though the offence of giving gratification money took place outside the State of Panna (at Delhi), ss 3 and 4, IPC, clearly covered the field, and when read with s 188 of the Criminal Procedure Code, permitted the prosecution to be launched against the appellants. Hence, the conviction of the appellants, including the extra-territorial offence said to have been committed by the first appellant, was held not to be open for challenge.[21]

About Liability of a Foreigner for Offences Committed in India

An Indian citizen is liable for prosecution for anything done in a foreign land, if the act committed is an offence in India, although, the same may not be an offence in the foreign country, where it is committed. Likewise, a foreigner, even if he had not been in India at the time the actual occurrence took place would still be liable if the act was completed in India. These issues came to be considered in the case of *Mobarik Ali Ahmed v State of Bombay* .[22]

In this case, Mobarik Ali, a Pakistani national, who operated from Karachi, had entered into a contract with the complainant at Goa for the supply of 1,200 tonnes of rice. In this regard, he had entered into a long correspondence with the complainant as also his agent in Bombay through telephone calls, telegrams, letters and finally by sending some emissaries as his agents to conclude the deal on the spot and collect payments. Although, he collected over Rs five and a half lakhs, he did not honour his commitment. He did not respond to any of the letters of the complainant. The accused actually fled from Pakistan to London, where he was caught and extradited to India to face trial in another criminal case in Bombay. Although, three other persons were arrayed as accused along with him, he alone stood for trial as the others could not be apprehended. The trial court convicted him for offence under s 420 read with s 34, IPC on three counts, and convicted him to two years rigorous imprisonment on the first count with fine of Rs 1,000, to months on the second count and fine of Rs 1,000, and two months rigorous imprisonment on the third count; the substantive sentences on the second and third counts were directed to run concurrently. The conviction and sentences were confirmed by the Bombay High Court on appeal.

One of the major grounds canvassed before the Supreme Court was that the accused could not be tried for the offences in India, as he was not a citizen of India, that at the time when the offence was allegedly committed, he was not resident in India. The Supreme Court, however, held as follows:

(1) A foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time.
(2) Section 2 , IPC, applies to a foreigner, who has committed an offence within India notwithstanding that he was corporeally present outside.
(3) Being a foreign national does not imply that the foreigner will not be liable for criminal act s in the country. In fact, nationality cannot be a limiting principle in respect of criminal jurisdiction, which is primarily concerned with security of the state and of the citizens of the state.[23]

Liability of a Foreigner Who Obtains Indian Citizenship After Committing an Offence as a Foreigner

The IPC clearly stipulates that if an Indian commits an offence outside India, he will be criminally liable, as ss 3 and 4, IPC, confer jurisdiction on Indian courts to try the offences. However, if a foreigner commits an offence outside India as a foreigner, and subsequently, he acquires Indian citizenship, the fact that he has subsequently become an Indian citizen will not make such person criminally liable for the act committed, even if such act is considered an offence in Indian law. This ratio came to be evolved in *Central Bank of India Ltd v Ram Narain* .[24]

In this case, the respondent Ram Narain was a resident of Multan, which after partition became part of Pakistan. Just before Independence, he was allowed a cash credit limit of Rs 3 lakhs by the Central Bank of India branch at Mailsi. He had pledged stocks worth Rs 1,90,000 at the time of partition. The bank's allegation was that he owed the bank Rs 1,40,000. Besides, he was found to have recovered the stocks of cotton that he had pledged and illegally diverted and sold the same at Karachi on 9 November 1947. Later on, he migrated to India and settled down in Gurgaon. The Central Bank of India claimed the money from him, but to no avail. Thereafter, they secured sanction to prosecute from the Central Government under s 188, CrPC, from the East Punjab Government, and filed a criminal complaint against him for offences under ss 380 and 454, IPC. Ram Narain raised a preliminary objection as to jurisdiction on the ground that at the time the offence was alleged to have been committed he was a Pakistani national, and the offence was committed in Pakistan. Hence, he was not liable for the offence. The fact that he subsequently acquired Indian citizenship, it was contended, did not give the Indian courts jurisdiction to proceed with the case. The trial court and the additional session's judge rejected his contention. However, the Simla High Court accepted his plea. This was appealed against by the bank before the Supreme Court.

The Supreme Court held that the provisions of s 4 of the IPC, and s 188 of the CrPC plainly meant that if at the time of commission of the offence, the person committing it is an Indian, then, even if the offence is committed outside India, he is subject to the jurisdiction of Indian courts. This rule is based on the principle that *qua* (i.e. as against) citizens, jurisdiction is not lost on account of venue of the offence. If, however, at the time of commission of the offence, the accused person is not an Indian citizen, then the provisions of these sections have no application whatsoever. The fact of acquisition of citizenship subsequent to the committing of the offence does not confer jurisdiction on courts retrospectively for trying offences committed at a time when that person was neither an Indian citizen nor even domiciled in there.[25]

Effect of Reading Sections 3 and 4, Indian Penal Code 1860, with Section 188 , Code of Criminal Procedure 1973

The discussion on the scope of ss 3 and 4, IPC, makes it clear that courts in India have extra-territorial jurisdiction to try offences committed on land, high seas, and air by Indian nationals or others. The procedure with regard to prosecuting cases of offences committed outside India has been provided in s 188 of the CrPC. It provides as follows.

Section 188. Offences committed outside India.--When an offence is committed outside India--

(a) by a citizen of India, whether on the high seas or elsewhere; or
(b) by a person, not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

Provided that, notwithstanding in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

The word 'found' in the above provision has been held to mean the place where the person is found by the court. Section 188 deems the offence to be committed within the jurisdiction of the Court where the accused may be found. How the person reached that place did not matter. In *Veer Savarkar*'s case,[26] the court held that the contention that the accused had been brought into the country illegally would be of no consequence. Similarly, how a person was 'found' in a particular place, was held to be immaterial. It so happened that a person appeared before a court after receiving summons to appear; in this case, when the person was arrested there, he was said to have been 'found' there.[27] It does not matter whether he comes voluntarily or in answer to summons or under illegal arrest. It is enough that the court should find him present when it comes to take up the matter.[28]

The Supreme Court, in *Om Hemrajani v State of Uttar Pradesh & Anr* ,[29] after a review of the thitherto cases on s 188 of the CrPC, explaining purport and ambit of s 188, CrPC, observed:

> The scheme underlying Section 188 is to dispel any objection or plea of want of jurisdiction at the behest of a fugitive who has committed an offence in any other country. If such a person is found anywhere in India, the offence can be inquired into and tried by any Court that may be approached by the victim. The victim who has suffered at the hands of the accused on a foreign land can complain about the offence to a Court, otherwise competent, which he may find convenient. The convenience is of the victim and not that of the accused. It is not the requirement of Section 188 that the victim shall state in the complaint as to which place the accused may be found. It is enough to allege the accused may be found in India. The Court where the complaint may be filed and the accused either appears voluntarily pursuant to issue of process or is brought before it involuntarily in execution of warrants, would be the competent Court within the meaning of Section 188 of the Code as that Court would find the accused before him when he appears. ...[I]t is possible for a complainant to file a complaint against an accused in any Court in the country. But then we cannot compare the question of convenience of the accused at the cost of victim's convenience. Between the two, the convenience of the latter has to prevail.[30]

However, proviso of s 188, CrPC, makes it clear that no offence committed abroad is triable without prior sanction of the Central Government.

There are, thus, two crucial issues which affect the case of considering the jurisdiction of Indian courts, and verily the prosecution also. The question that poses itself when we consider the import of ss 3 and 4, IPC, along with s 188, CrPC, is whether the Indian courts have jurisdiction to enquire into the issues at all, and whether the prior sanction of the Central Government is required for launching investigations or prosecutions. These issues, particularly, the question of the need for prior sanction, came to be examined in four separate writ petitions before the Kerala High Court.

The first case was that of *Remia v Sub-Inspector of Police, Tanur* .[31] In this case, the mother, widow and brother of one Sulaiman, filed a complaint with the Inspector of Police, Tanur, stating that one Ali, had murdered Sulaiman. The sub-inspector refused to register a complaint as the offence had been alleged to have been committed in Sharjah, outside his territorial limits. The Kerala High Court after examining ss 3, 4, IPC, and s 188, CrPC, held that such refusal was illegal. It further held that previous sanction of the Central Government was not necessary at the pre-enquiry stage, which essentially means the stage of investigation of the crime. Since the person suspected of the offence was a citizen of India, the police, it was held, had jurisdiction to investigate.

This decision was followed by a Division Bench of the same high court in *Muhammad v State of Kerala* .[32] It was held that not only was prior sanction not required, if need be, it could be obtained at pre-trial stage. The Division Bench also considered the earlier Supreme Court ruling in *Delhi Administration v Ram Singh* ,[33] in which the term 'dealt with' in s 4 was held to mean not only investigation, inquiry and trial, but also other aspects.

The Division Bench ruling in the *Muhamad* case was, however, distinguished and not followed by a single judge of the same high court in *Samarudeen v Assistant Director of Enforcement, Trivandrum* .[34] In this case, the writ petitioner contended that he was working as a salesman in Daman, Saudia Arabia. In 1992, he had arranged for his cousin brother to come over to Daman for a job. Since he could not find a suitable opening for him, he decided to set up a hotel by obtaining 95,000 riyals. However, in April 1992, the said cousin was found to have decamped with the money. The petitioner rushed to his home town in Kerala and sometime later the cousin was found to have returned. The petitioner, therefore, wrote to the enforcement authorities alleging foreign exchange violation by channelising money through *hawala* conduits. The respondent, En-

forcement Directorate, contended that the facts did not disclose any foreign exchange offence to have been committed. The police also refused to register a case.

The single judge differed from the ruling of the Division Bench in the *Muhamad* case, and held that the ruling in that case was *per incuriam*, as the Division Bench had not considered the provisions of ch 12 of the CrPC, dealing with investigations. The single judge also held that he was not required to follow the Division Bench ruling, as it had failed to consider several important sections of the CrPC. Finally, the court stated that the police have no jurisdiction to investigate the offences committed outside the territorial jurisdiction of the state, and moreover, previous sanction of the Central Government under s 188, CrPC, was a prerequisite for launching investigations.

However, soon thereafter in another case, *Muhammed Sajeed v State of Kerala* ,[35] another single judge considered a similar case, in which the petitioner was alleged to have misappropriated a sum of 1077 riyals (Rs 8,41,488) from the complainant, one Mohamad Haneefa, while both of them were staying in Riyadh, UAE, and that this amount had to be repaid to the employer of Mohamad Sajeed by Haneefa, who had secured the job for Sajeed. In this case, the single judge upheld the order of the Division Bench and concluded that the order of the single judge in the *Samarudeen*'s case was *per incuriam*. After a detailed consideration of the contending judgment, the single judge held that what is prohibited in s 188, CrPC, is only inquiry and trial without previous sanction of the Central Government. However, the definition of 'inquiry' and 'investigation' in ss 2(h) and 2(g) of the CrPC clearly shows that:

> Investigation generally consists of the examination of various persons and reduction of their statements into writing, search of places or seizure of things considered necessary for the investigation and formation of the opinion as to whether on the material collected, there is a case to place the accused before the magistrate for trial. For taking necessary steps for the same, a charge-sheet can be filed under s 173. These proceedings of a police officer, which come under investigation, are not in any way prohibited or controlled by the proviso to s 188 of the Code. In other words, sanction of the Central Government is not necessary for purposes of investigation into offences committed outside India.[36]

The court observed that:

> When offences committed by Indian citizens employed overseas are on the increase, this Court has to bear in mind that it is dangerous to disturb the decisions of this Court holding the field for a period of two years and unsettle the investigation in progress in the matter of these offences.[37]

ADMIRALTY JURISDICTION

The jurisdiction to try offences committed on the high seas is known as the admiralty jurisdiction. It is premised on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she is flying.

It does not matter where the ship or boat is, whether it is in the high seas or on rivers, whether it is moving or stationery, having been anchored for the time being.

Admiralty jurisdiction extends over: (1) offences committed on Indian ships on the high seas; (2) offences committed on foreign ships in Indian territorial waters, and (3) piracy.

The 'admiralty jurisdiction,' was originally not available for prosecuting offenders for offences committed in the high seas in local magistrate's courts. However, with the passing of the Admiralty Offences Act 1894 and the Merchant Shipping Act 1894, magistrates are conferred jurisdiction to try and dispose of all offences committed by any person 'upon the sea or in any river, creek or place'. The term 'any person' makes it clear that it is not just Indians, but also others, who will be held liable for offences committed in Indian ships and aircraft which are registered in India.

PROPOSALS FOR REFORM

The Fifth Law Commission has made two major proposals for reforms pertaining to extra-territorial operation of the IPC and saving clause in the form of existing s 5 of the Code.[38] They are:

(1) Endorsing the existing extra-territorial application of the IPC, it, with emphasis, suggested that an alien in government service should be also brought within the ambit of the IPC for committing, in his individual or private capacity, offences outside India contrary to ch VI (Offences against the State), ch VII (Offences relating to the Army, Navy and Air Force), and ch IX (Offences relating to public servants) of the IPC. Accordingly, it recommended certain changes in the existing s 4 of the IPC and s 188 of the CrPC.[39]

(2) Recognising saving clause in the form of s 5 of the IPC, the Commission, however, suggested that it be made simpler without losing its legal effects.[40]

However, no subsequent traces of these reforms are found either in the Indian Penal Code (Amendment) Bill 1978, predominantly premised on the Fifth Law Commission's Forty-second Report on the Indian Penal Code or in deliberations of the Fourteenth Law Commission on the Indian Penal Code .[41]

1 Constitution of India, art 1(3).

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

3 AIR 1965 SC 722.

4 Ibid, para 44. It should be noted that this was the majority view of Ayyangar and Mudholkar JJ, Subba Rao J differed in his view and held that if the offender was shown not to have known or be aware of the notification, then he lacked the requisite mens rea for committing the offence. If such prosecutions were allowed, it would only result in causing harassment of innocent persons, who while traveling in transit through India, may be unwittingly carrying prohibited gold ornaments, which they may not have declared. However, in view of the majority decision, the conviction was sustained.

5 AIR 1957 SC 857, (1957) Cr LJ 1346(SC) .

6 *Saleem-ud-Din v State* (1971) ILR 1 Del 432.

7 *Mobarik Ali Ahmed v State of Bombay* AIR 1957 SC 857, (1957) Cr LJ 1346(SC), para 26.

8 Madras Report, p XX, Law Commissioner's Draft Penal Code, cited in RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 270.

9 Re *The Parlement Belge*(1880) 5 PD 197; 'The immunity of an ambassador from the jurisdiction of the courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, upon the faith of being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be', per Brett LJ, at p 200. Referred to in KD Gaur, *A Textbook on the Indian Penal Code*, second edn, Universal Law Publishing, 1998, at p 4.

10 AIR 1964 Bom 195, (1964) Cr LJ 276(Bom) .

11 AIR 1967 SC 997, (1967) Cr LJ 950(SC) .

12 Also see, 'Criminal Liability of a Corporation' in ch 4, 'Mens Rea', above..

13 *Anjanabai Yeshwantrao v Yeshwantrao Daulatrao* AIR 1961 Bom 154.

14 *Kaushalya Rani v Gopal Singh* AIR 1964 SC 260.

15 *JK Cotton Mills v State of Uttar Pradesh* AIR 1961 SC 1170.

16 RC Nigam, *Law of Crimes in India*, Asia, London, 1965, p 276.

17 Inserted by Act 10 of 2009, s 51 (w.e.f. 27-10-2009).

18 Substituted by Act 10 of 2009, s 51 (w.e.f. 27-10-2009).

19 *Kari Singh v Emperor* (1912) ILR 40 Cal 433, p 439.

20 AIR 1953 SC 394, (1953) Cr LJ 1480(SC) .

21 Ibid, paras 22 -23.

22 AIR 1957 SC 857, (1957) Cr LJ 1346(SC) .

23 Ibid, paras 27- 29.

24 AIR 1955 SC 36, (1955) Cr LJ 152(SC) .

25 Ibid, paras 5, 8 & 10.

26 *Emperor v Vinayak Damodar Savarkar* (1910) 12 Cr LJ 256(Bom), (1910) Bom LR 296.

27 *Feroze v State of Maharashtra* (1964) 2 Cr LJ 533(Bom) .

28 *Sahebrao Bajiraov Suryabhan Ziblaji & Ors*AIR 1948 Nag 251.

29 AIR 2005 SC 392, (2005) 1 SCC 617, (2005) Cr LJ 665(SC) .

30 Ibid, paras 16 &17.

31 (1993) Cr LJ 1098 (Ker).

32 (1994) 1 KLT 464(DB) .

33 AIR 1962 SC 63, (1962) Cr LJ 106(SC) .

34 (1995) Cr LJ 2825 (Ker).

35 (1995) Cr LJ 3313 (Ker).

36 Ibid, para 18.

37 Ibid, para 19.

38 c ch 1, Preliminary.

39 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code', Government of India, 1971, paras 1.18 & 1.19.

40 Ibid, para 1.20.

41 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997.

CHAPTER 21

Offences Against the State

(Indian Penal Code 1860,Sections 121 to 130)

INTRODUCTION

From time immemorial, states have enacted laws to safeguard their own interests and to preserve and protect themselves. This chapter corresponds to the law of high treason in England. The underlying presumption in this chapter is that every person is the subject of the state and is under an obligation to owe allegiance to the state and abide by its sovereignty.

The offences against the state, as outlined in ch VI of the IPC, may be broadly classified in the following five categories depending upon their gravity and nature. They are:

(1) Waging, or attempting or conspiring to wage, or collecting men and ammunition to wage war against the Government of India (ss 121, 121A, 122, and 123).
(2) Assaulting the President of India or Governor of a State with intent to compel or restrain the exercise of any lawful powers (s 124).
(3) Sedition (s 124A).
(4) War against a power at peace with the Government of India (s 125) or committing depredations on the territories of such power (ss 125-126) or receiving property taken by war or depredation (s 127).
(5) Permitting or aiding or negligently suffering the escape of, or rescuing or harbouring, a state prisoner (ss 128-130).[1]

However, for the sake of better understanding, these five categories may be further re-grouped into the following four broad thematic groups, namely:

(1) Waging war (against the Government of India and against any power).
(2) Assault on high officials.
(3) Escape of a state prisoner.
(4) Sedition.

PART A - WAGING WAR

WAGING WAR AGAINST THE GOVERNMENT OF INDIA

Section 121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India.--Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Illustration

A joins an insurrection against the Government of India. *A* has committed the offence defined in this section.

'Whoever'

The term 'whoever' in the section indicates that the provisions of this section are applicable both to citizens and foreigners. Everyone who wages or attempts or abets war against the Government of India is liable under this section. A citizen owes allegiance to the state by birth or naturalisation, and a foreigner due to the fact that he is permitted to reside within the territory of the state. The tacit condition for a foreigner, who has been given permission to reside in the country, is that just as he relies upon the state for protection, so also the state expects him to subject himself to the laws of the land.[2]

'Waging War'

A reading of the section reveals that the section deals with three aspects of waging war. Each aspect deals with a different stage of waging war against the government: (1) abetment; (2) attempt; (3) the act ual war. A unique feature of this section is that it places at par all the three stages of waging war. Whether it is the attempt to commit the offence or the abetment of the offence or whether the offence has actually been committed, the section imposes the same punishment. Under the general law, a distinction is made for the purposes of punishment between abetment, which has succeeded and abetment which has failed. However, as far as s 121 is concerned, the legislature treats both in the same manner. The offence of abetment under this section is a distinct and complete offence.

The reasoning behind treating an abetment which has succeeded and an abetment which has not succeeded on par, is because the crime is treated as the highest of offences against the state. It has also to do with the peculiarity of the offence. If the offence of waging war against the state is successfully committed, the criminal is secure from punishment because the government itself is subverted. In respect of other offences, the threat to the offender is after the completion of the offence. For instance, a murderer is in a more precar-

ious condition after he has killed his victim; or a thief after he has taken away the object. But, an offender under this section is totally out of danger if he successfully wages war against the government and dislodges the government. The penal law becomes impotent against a successful rebel. Therefore, it was thought fit that even the beginning stages of a rebellion must be treated with great harshness and not treated under the ordinary law of abetment.

The expression 'waging war' means waging war in the manner usual in war.[3] It imports a person arraying himself in defiance of the government in like manner and by like means as a foreign enemy would do, having gained footing in the realm. The waging of war is the attempt to accomplish by violence any purpose of a public nature.[4] A deliberate and organised attack upon the government forces and government offices amounts to a waging of war.[5]

Intention

Intention to wage war against the government is the most essential ingredient under this section. So, it is not sufficient to show that the accused have attempted to obtain arms, ammunition, etc. The prosecution must also show that the seizure of arms was part and parcel of a larger operation to overthrow the state. If the acquiring of arms and the organising of people is for personal advantage or for a private purpose, then it will not come under the provisions of this section.

A pledge to overthrow capitalism and private ownership and to work for the establishment of a socialist state does not amount to waging war against the state, because every person is entitled to propagate the political faith of his choice.[6]

Sedition and Abetting War

The offences of sedition and abetting war are separate and distinct. As long as a man only tries to incite persons and inflame feelings of hatred against the state, it amounts to sedition. It is only when this incitement is translated into clear act ion, that the offence of abetment is committed. Mere making of speeches threatening to wage war, will not amount to abetment.

Conspiracy to Wage War

121A. Conspiracy to commit offences punishable by section 121.--Whoever within or without India conspires to commit any of the offences punishable by section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation.--To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

Section 121A thus deals with the two kinds of conspiracies, namely, conspiracy to wage war (or to attempt or abet) against the Government of India, and conspiracy to overawe, by means of criminal force or the show of criminal force.

A conspiracy to commit offences punishable under s 121, IPC, is punishable as a substantive offence. Therefore, this section seeks to punish people for an act which may not even amount to an abetment of an offence. This section obviously deals with conspiracies which have a political object of overthrowing the existing government.

The offence of conspiracy is complete, as soon as two or more persons agree to do or cause to be done, an illegal act or a legal act by illegal means. The translation of this agreement into further concrete action is not required. The agreement itself is enough to constitute an offence under this section. A mere slogan that the government can be changed by an armed revolution does not prove the existence of a conspiracy of overawing the government. The word 'overawe' clearly imports more than the creation of apprehension of alarm or fear. It connotes the creation of a situation, in which the government is compelled to choose between yielding to force or exposing the government or the members of the public to a very serious danger.[7]

Preparation to Wage War

Section 122. Collecting arms, etc, with the intention of waging war against the Government of India.--Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

This section makes the mere preparation to commit the offence of waging war against the state, an offence. The purpose of this section is to nip in the bud any attempts to wage war. However, from the preparations made, it is necessary also to establish that the intention of the accused is to wage war. Unless such intention is proved, the offence under this section cannot be established.

Concealment of Design to Wage War

Section 123. Concealing with intent to facilitate design to wage war.--Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the Government of India, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

In order to prove an offence under this section, the following ingredients have to be established:

(1) The existence of a design to wage war against the Government of India;
(2) That the accused had knowledge of such design;
(3) That he concealed the same;
(4) That by doing so, he intended to facilitate the waging of such war or had knowledge that it was likely to facilitate the waging of war.

WAGING WAR AGAINST POWER

War Against Asiatic Power

Section 125. Waging war against any Asiatic Power in alliance with the Government of India.--Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the Government of India or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

This section has been introduced to protect friendly relations with Asiatic Powers. This is to prevent Indian citizens from going into the territory of other countries and then coming back to India for their security. It is premised on the sprit of international peaceful co-existence and on an international obligation of a state to respect the sovereign power of another state.

However, the word 'power', suffixing the word 'Asiatic', is defined neither in the IPC nor in the General Clauses Act 1897. The dictionary meaning of the word is 'state with international influence'.

Depredation in Friendly Countries

Section 126. Committing depredation on territories of power at peace with the Government of India.--Whoever commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Government of India, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

This section makes the commission of depredation or plunders on the territories of states at peace with the Government of India. Its scope is wider than that of s 125. It is applicable to any foreign country at peace with India whereas s 125 is applicable only to Asiatic Power.

The term 'depredation' means plunder. It is pillaging by men or animals. Depredation, to be punishable under this section, must be plundering by a band of men in foreign territory for the purpose of general robbery. An

attack of a similar nature on individual property amounts to theft or robbery. If the plundering is general without reference to any individual, then it amounts to depredation.

Receiving Property Taken by War or Depredation

Section 127. Receiving property taken by war or depredation mentioned in sections 125 and 126.--Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

Section 127 , IPC, punishes a person receiving any property obtained in war or in depredation. In order to establish an offence under this section it is necessary to prove that the person receiving the property was aware that it was property received in the commission of the offence of waging war against any Asiatic power in alliance with the Government of India or in the commission of depredation on territories of power at peace with the Government of India.

PART B - ASSAULT ON HIGH OFFICIALS

Section 124. Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power.--Whoever, with the intention of inducing or compelling the President of India, or Governor of any State, to exercise or refrain from exercising in any manner any of the lawful powers of such President or Governor, assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force, or the show of criminal force, or attempts so to overawe, such President or Governor, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

This section, in ultimate analysis, is an extension of third clause of s 121A. It provides a deterrent sentence for assault or wrongful restraint of persons holding high office. The object of the section is to protect high officials so as to enable them to function freely without fear of personal harm in the course of discharge of their duties.

PART C - ESCAPE OF A STATE PRISONER

Section 128. Public servant voluntarily allowing prisoner of State or war to escape.--Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 129. Public servant negligently suffering such prisoner to escape.-- Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

Section 130. Aiding escape of, rescuing or harbouring such prisoner.--Whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in India, is said to escape from lawful custody if he goes beyond the limits which he is allowed to be at large.

Sections 128-130 are in respect of state prisoners. Section 128 makes it an offence for a public servant to voluntarily allow a prisoner of state or war to escape. It is punishable with imprisonment for life or imprisonment up to 10 years and fine. Section 129 punishes a public servant who allows a state prisoner or a prisoner of war to escape due to his negligence. An offence under this section is punishable with simple imprisonment for a term up to three years and fine. Section 130 punishes any person who knowingly aids or assists a state prisoner or prisoner of war to escape from lawful custody or harbours such a prisoner. It stipulates that in order to establish an offence thereunder, the person aiding or assisting should have knowledge that the person assisted is a state prisoner or prisoner of war. The punishment under this section may extend to imprisonment for life or imprisonment for a term up to 10 years with fine.

Sections 128 and 129 are in respect of public servants, while s 130 is applicable to all persons.

The term 'State prisoner' refers to a person who has been arrested to maintain peace and tranquility with other friendly nations and for the security of the Indian state. A 'prisoner of war' is one who in war is taken in arms. Those who are not in arms, or who being in arms submit and surrender themselves, are not prisoners of war. They are treated merely as prisoners until the termination of hostilities.

PART D - SEDITION

INTRODUCTION

Section 124A deals with law of sedition in India. It was originally s 113 [8] of Macaulay's Draft Penal Codeof 1837. It was proposed to be included in the Penal Code. However, for unaccountable reasons, it was omitted from thePenal Code when the IPC was enacted in 1860. However, the need for such a provision was felt in 1870 when s 124A [9]was placed in the statute book by the Indian Penal Code (Amendment) Act 1870 (Act XXVII of 1870). It was, however, later on, replaced, with minor changes, by s 124A of the Indian Penal Code (Amendment) Act 1898 (Act IV of 1898).[10]After some inconsequential changes made by the Adoption of Laws Order issued in 1937, 1948, and 1950 and by the Part B States (Law) Act 1951, the present s 124A reads as under:

Section 124A. Sedition.--Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.--The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2.--Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.--Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

A careful reading of s 124A, in the backdrop of evolution in the Common Law of sedition and its entry into the IPC, reveals that the provisions of s 124A, as observed by Sinha CJ, are based on the principle that 'every State, whatever its form of Government, has to be armed with the power to punish those who by their conduct, jeopardise the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder'.[11] The very existence of the state, obviously, will be in jeopardy, if the government by law is subverted. Hence, the continued existence of the government is an essential condition for the stability of the state.

Though the provisions of s 124A of the IPC are based on the Common Law of sedition, the offence of sedition, as known and understood in England, is a more comprehensive term than what is contained in s 124A, IPC. What is embodied in the latter section is only one aspect of the law of sedition, namely, seditious libel or

publication of matter calculated to bring the sovereign or the government into hatred or to excite disaffection towards them.

MEANING OF 'SEDITION'

The full meaning of sedition was explained by Lord Fitzgerald in his address to the jury in *Reg v Alexander Martin Sullivan* ,[12] which was later followed in *Reg v Burns* ,[13] thus:

> Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the Empire. The objects of Sedition generally are to induce discontent and insurrection, and to stir up opposition to the Government and bring the administration of justice into contempt, and the very tendency of sedition is to incite the people into insurrection and rebellion. Sedition has been described as disloyalty in act ion, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war, or to bring into hatred or contempt the Sovereign or the Government, the laws or Constitution of the realm and generally all endeavours to promote public disorder.[14]

Subsequently, in *Reg v Aldred* ,[15] Coleridge J also attached similar attributes to 'sedition' when he observed that the 'word sedition in its ordinary natural significance denotes a tumult, an insurrection, popular commotion or an uproar; it implies violence or lawlessness in some form'.

Stephen, delving into definition of sedition under the English law, observed:

> Sedition may be defined as conduct which has, either as its object or as its natural consequence, the unlawful display of dissatisfaction with the Government or with the existing order of society. The seditious conduct may be by words, by deed, or by writing. Five specific heads of sedition may be enumerated according to the object of the accused. This may be either:
>
> 1. to excite disaffection against the King, Govern-ment or Constitution, or against Parliament or the administration of justice;
> 2. to promote, by unlawful means, any alteration in Church or State;
> 3. to incite a disturbance of the peace;
> 4. to raise discontent among the King's subjects;
> 5. to excite class hatred.
>
> It must be observed that criticism on political matters is not of itself seditious. The test is the manner in which it is made. Candid and honest discussion is permitted. The law only interferes when the discussion passes the bounds of fair criticism. More especially will this be the case when the natural consequence of the prisoner's conduct is to promote public disorder.[16]

A combined reading of the above mentioned expositions of 'sedition' under the English law and their comparison with the phraseology of s 124A of the IPC disclose that the definition of 'sedition' in s 124A is much narrower as it, unlike in Common Law, is limited to exciting disaffection towards the government established by law. Further, promotion of public disorder in some form or other, which is considered to be an essential ingredient of seditious conduct in England, is not brought out in the wording of s 124A. Therefore, merely exciting or attempting to excite feelings of disaffection, hatred or contempt, irrespective of whether or not disorder follows or is likely to follow therefrom, towards the government established by law is made punishable in India.

In *Queen Empress v Jogendra Chunder Bose* ,[17] the then Chief Justice of Calcutta High Court held that a person who excites or attempts to excite a feeling contrary to affection is liable for sedition. Strachey J of the Bombay High Court, in *Queen Empress v Bal Gangadhar Tilak* ,[18] also offered same interpretation to s 124A wherein he held that the offence of sedition as outlined in s 124A 'consists in exciting or attempting to excite in others certain feelings towards the Government' and 'not' in 'the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small'.[19]

The Supreme Court of India also holds the view that merely doing of certain act s that would bring the Government established by law into hatred or contempt is the decisive ingredient of 'sedition'.[20] However, raising some slogans only a couple of times that do not evoke any reaction from anyone in the public cannot attract s 124A. some a more overt act is required to bring the act under s 124A.[21]

ESSENTIAL INGREDIENTS OF Section 124A

'Words, Signs, Visible Representation or Otherwise'

As per s 124A, the manner in which seditious activities can be carried out is by words, either spoken or written, or by signs or by visible representation, or otherwise. The terms 'words' and 'signs' present no difficulty in understanding. The next term used is 'visible representation'. This term is not defined. It really means any form of communication which is visible to the eye. It includes pictures or dramatic performances in a mime show where no words are spoken. The meaning is conveyed by gestures and motions and dramatic act ions of the performers.[22] The next words 'or otherwise' indicate the universality of the means by which the offence may be committed. Distribution or circulation of seditious material will also constitute an offence.[23]

'Brings or Attempts to Bring into Hatred or Contempt'

As per s 124A, words either spoken or written signs, visible representation or other means should be exercised in such a manner as to bring or attempt to bring into hatred or contempt towards the government established by law. What is contemplated under this section is not the actual causing of hatred or contempt, but even an attempt to do so. So, ultimately, whether he act ually fails or succeeds is not material. It is sufficient if he even attempts at causing hatred or contempt.

However, the law is not concerned with just the mere feeling of hatred or contempt which may lie in the hearts of persons. Obviously, the law cannot fathom the innermost feelings of any person and punish them for the same. However, the law steps in, when this inner feeling of hatred or contempt excites disaffection against the state.[24]

'Excite Disaffection'

Explanation 1 to the section states that 'disaffection' includes disloyalty and all feelings of enmity. The term 'disaffection' has been the subject matter of considerable interest and controversy in courts. Most of the judgments are all pre-independence ones. However, the debate was finally put to rest by the Supreme Court in *Kedar Nath v State of Bihar* .[25] In this case, a Constitutional Bench of the Supreme Court, after exhaustive discussion of the case law, authoritatively laid down as to what is the meaning of the words, 'excite disaffection'.

In this case, the accused was charged for sedition for making the following speech:

> Today, the dogs of the CID are loitering around Barauni. Many official dogs are sitting even in this meeting. The people of India drove out the Britishers from this country and elected these Congress *goondas* to the *gaddi* and seated them on it. Today, these Congress *goondas* are sitting on the *gaddi* due to mistake of the people. When we drove out the Britishers, we shall strike and turn out these Congress *goondas* as well. These official dogs will also be liquidated along with these Congress *goondas*. These Congress *goondas* are banking upon the American dollars and imposing various kinds of taxes on the people today. The blood of our brothers--*mazdoors* and *Kisans*--is being sucked. The capitalists and the *zamindars* of this country help these Congress *goondas*. These *zamindars* and capitalists will also have to be brought before the people's court along with these Congress *goondas*.
>
> On the strength of the organisation and unity of *Kisans* and *mazdoors,* the Forward Communist Party will expose the black deeds of the Congress *goondas*, who are just like the Britishers. Only the colour of the body has changed. They have today established a rule of *lathis* and bullets in the country. The Britishers had to go away from this land. They had airplanes, guns, bombs and other weapons with them.
>
> The Forward Communist Party does not believe in the doctrine of vote itself. The party had always been believing in revolution and does so even at present. We believe in that revolution, which will come and in the flames of which the

> capitalists, *zamindars* and the Congress leaders of India, who have made it their profession to loot the country, will be reduced to ashes and on their ashes will be established a government of the poor and the down-trodden people of India.
>
> It will be a mistake to expect anything from the Congress rulers. They (Congress rulers) have set up Vinoba Bhave in the midst of the people by causing him wear a *langoti* in order to divert the people's attention from their mistakes. Today, Vinoba is playing a drama on the stage of Indian politics. Confusion is being created among the people. I want to tell Vinoba and advise his agents, 'you should understand it that the people cannot be deceived by this *Yajna*, illusion and fraud of Vinova'. I shall advise Vinoba not to become a puppet in the hands of Congressmen. Those persons, who understand the *Yajna* of Vinoba, realise that Vinova is an agent of the Congress government.
>
> I tell you that this Congress Government will do no good to you.
>
> I want to tell the last word even to the Congress tyrants, 'You play with the people and ruin them by entangling them in the mesh of bribery, black marketing and corruption. Today the children of the poor are hankering for food and you Congressmen are assuming the attitude of *Nawabs* sitting on the chairs'.

The Supreme Court traced the entire case law on the matter. The first case in India that arose under the section was *Queen Empress v Jogendra Chunder Bose* .[26] At the time, the jury system was prevalent in India. The then Chief Justice of the Calcutta High Court, Sir Comer Petheram, explained to the jury the meaning of 'disaffection' in the following words:

> Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him. The meaning of the two words... If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed, a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers of readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling.[27]

In *Queen Empress v Bal Gangadhar Tilak* ,[28] Strachey J of the Bombay High Court explained the law to the jury in these terms:

> It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite; he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial except perhaps in dealing with the question of punishment... if a man excites or attempts to excite feelings of disaffection great or small, he is guilty under this section.[29]

The Full Bench of the Allahabad High Court in *Queen Empress v Amba Prasad* ,[30] interpreted the word 'disaffection' not as meaning mere absence or negation of love or goodwill, but a positive feeling of aversion, which is akin to ill-will, a definite insubordination of authority or seeking to alienate the people and weaken the bond of allegiance, a feeling which tends to bring the government into hatred and discontent, by imputing base and corrupt motives to it.

However, the Federal Court of India, in *Niharendu Dutt Majumdar v King Emperor* ,[31] struck a different note. Sir Maurice Gwyer CJ, speaking for the court, held that the gist of the offence of sedition is incitement to violence; mere abusive words are not enough. The act s or words complained of must incite public disorder or must cause reasonable anticipation or likelihood of public disorder in order to constitute 'disaffection'. He observed:

> The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilisation and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of Government that in our opinion, the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it, seek... to disturb its tranquility, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency.[32]

The Judicial Committee of the Privy Council, in *King Emperor v Sadashiv Narayan Balerao* ,[33] approved of the interpretation placed to the word 'disaffection' by the Calcutta, Bombay and Allahabad High Courts, and disapproved of the 'ratio' of *Niharendu Dutt Majumdar* stating that the Federal Court proceeded on a wrong construction of s 124A, IPC, and it took a view opposed to that expressed in earlier cases.[34] It also held that the expression 'excite disaffection' did not include 'excite disorder'.

The Supreme Court of India in *Kedar Nath*'s case, however, opined that the interpretation given by the Federal Court is what would be in harmony with art 19 of the Constitution.

In *Balwant Singh v State of Punjab* ,[35] the accused were alleged to have raised some slogans on the day Smt Indira Gandhi, the then Prime Minister of India was assassinated, in a crowded place. The accused were government servants. The prosecution case was that they raised slogans a couple of times, which however did not, evoke any response from the public. No disturbance whatsoever was caused and the people in general were unaffected and carried on with their act ivities. The Supreme Court held that mere raising of casual slogans, once or twice by two individuals, alone cannot be said to be aimed at exciting or attempting to excite hatred or disaffection towards the government as established by law in India. The court felt that the police officials 'read too much' into the slogans and exhibited lack of maturity and sensitivity in arresting the two government servants.

In *Bilal Ahmed Kaloo v State of Andhra Pradesh* ,[36] a Kashmiri youth was arrested in Hyderabad on charges of sedition. The only evidence adduced against him was that he was spreading news that members of the Indian army were indulging in commission of atrocities against Kashmiri Muslims. Even the charge framed against him was bereft of any allegation that the accused acted in any manner against Government of India or the state government. The Supreme Court deprecated the manner in which the trial court recorded conviction, when there was not only no evidence, but also even the charges framed did not contain the essential ingredients of the offence. The court condemned the mechanical order of conviction of citizens in such serious offences and advised that more care should be taken before the liberty of a citizen is interfered with.

'Government Established by Law'

Section 17 , IPC, defines government as denoting 'the Central Government' or 'the Government of a State'. The term 'government established by law' has to be understood as being distinct from the government formed by a particular ruling party or the bureaucracy running the government.

In the famous *Chirol* case,[37] during the trial of Lokmanya Bal Gangadhar Tilak in 1919, the replies of Tilak to the question put in cross-examination by Sir Edward Carson, show the distinction between the two in an interesting manner.

In an article, Tilak made a distinction between the criticism of a government and the criticism of a bureaucracy. Carson in the course of cross-examination asked, 'But a Government must consist of officials. It is not an abstract entity ?' Tilak replied, 'A house consists of rooms but a room does not mean a house'.

Thus, criticism of a particular government or campaigning to bring down a particular government by a particular ruling party, will not amount to exciting disaffection towards 'the government established by law'.

The Supreme Court, in *Kedar Nath*'s case,[38] held that the expression 'the government established by law' has to be distinguished from the persons for the time being engaged in carrying on the administration.

> 'Government established by law' is the visible symbol of the state. The very existence of the state will be in jeopardy if the government established by law is subverted. Hence, the continued existence of the Government established by law is an essential condition of the stability of the State. That is why 'sedition', as the offence in section 124A has been characterized, comes under Chapter VI, relating to offences against the State. ... [A]ny written or spoken words, etc, which have implicit in them, the idea of subverting Government by violent means, which are compendiously included in the term 'revolution,' have been made penal by the section... [D]isloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or act s of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence.[39]

'Expressing Disapprobation'--Explanations 2 and 3

The word 'disapprobation' means disapproval. Explanations 2 and 3 provide that as long as a person does not excite or attempt to excite hatred, contempt or disaffection, then expressing disapproval of the act s of the government in order to bring about change by lawful means or criticising or disapproving the administration, does not constitute an offence under this section. In other words 'commenting in strong terms upon the measures or acts of the government or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of these act s or measures by lawful means',[40] is not attracted by this section.

The purpose of the explanations is to give adequate protection from penal action to freedom of speech and expression. It is for the purpose of giving greater latitude to the media and others to openly criticise the government and the ministers.

In a democratic country, criticism of governmental measures and administrative act ion are to some extent unavoidable; they are made for the purpose of enlisting popular support and in considering the effect of such criticism, no serious notice ought to be taken of the crude, blundering attempts or rhetorical exaggerations by which nobody is likely to be impressed. With the change of times, the effect of criticism of governmental measures and administrative action also changes what was damaging contempt or hatred of a bureaucratic government is not so of a popular government--a government which can neither afford to be hypersensitive nor impervious to criticism.[41]

CONSTITUTIONAL VALIDITY OF Section 124A

After the Constitution of India came into operation, the constitutional vires of the provisions of s 124A of the IPC was assailed on the ground that it contravenes the 'freedom of speech and expression' guaranteed under art 19 of the Constitution of India .

In *Tara Singh Gopichand v State* ,[42] in which for the first time the constitutional validity of s 124A was put to judicial scrutiny, it was contended that the section goes against the letter of spirit of art 19(1)(a) of the Constitution that guarantees the freedom of speech and expression. The East Punjab High Court declared the section ultra vires to the Constitution as it curtailed the freedom of speech and expression in a manner not permitted by the Constitution. The court was of the opinion that s 124A has no place in the new democratic pattern of polity adopted by India. It observed:

> India is now a sovereign democratic state. Governments may go and be caused to go without the foundations of the State being impaired. A law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change which has come about.[43]

However, subsequently, the Constitution First (Amendment) Act, 1951,[44] added two words of wide amplitude, namely, 'in the interest of' and 'public order' in art 19(2) dealing with the restrictions that can be put through law on the freedom of speech and expression guaranteed under art 19(1)(a).

Nevertheless, the Allahabad High Court, in spite of the changes brought in art 19(2) of the Constitution, in *Ram Nandan v State of Uttar Pradesh* ,[45] held that s 124A imposed restrictions on the freedom of speech and expression not in the interest of general public and thereby infringed the fundamental right of freedom of

speech. It, therefore, declared s 124A as ultra vires to the Constitution as it cannot be saved by the expression 'in the interest of public order'.[46]

However, a Constitutional Bench of the Supreme Court, through its pronouncement in *Kedar Nath v State of Bihar* ,[47] has put the judicial ambivalence to rest. Recalling that art 19(1)(a) of the Constitution guarantees the freedom of speech and expression and art 19(2) allows reasonable restrictions thereon 'in the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence', it held that any law which is enacted 'in the interest of public order' can be saved from the vice of constitutional invalidity. The court observed:

> ...[T]he security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a view to punishing offences against the state, is undertaken. Such a legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the *sine qua non* of a democratic form of Government that our Constitution has established... But, the freedom has to be guarded against becoming a licence for vilification and condemnation of the Government established by law, in words which incite violence or have a tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder.[48]

The Supreme Court quoted with approval the judgment of the Federal Court and said that if the interpretation of the offence of sedition is held in consonance with the views expressed by the Federal Court in the case in *Niharendu Dutt*'s case, then the law of sedition under s 124A will be within the permissible limits laid down in cl (2) of art 19 of the Constitution. After discussing, with analysis, the thitherto judicial pronouncements on s 124A, the apex court opined that:

> ... If we accept the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder or reasonable apprehension thereof, the section may lie within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression...[49]

But,

> ... If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the section would make it unconstitutional in view of article 19(1)(a) read with clause (2) (of article 19).[50]

Referring to the well-settled judicial practice that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the court has to lean in favour of the former construction, the apex court ruled:

> The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the section aims at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. ...[T]he explanations appended to the main body of the section make it clear that criticism of public measures or comment on Government act ion, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc., which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order.[51]

Nevertheless, the apex court is conscious of the fact that the line dividing preaching disaffection towards the Government and legitimate political act ivity in a democratic set up is very thin and wavy. It cannot be neatly drawn. It cannot be ascertained with precision that where legitimate political criticism of the Government in power ends and disaffection begins.[52]

PART E - PROPOSALS FOR REFORM

The Fifth and the Fourteenth Law Commissions of India have a offered a couple of proposals for reform of far reaching consequences in the offences relating to 'waging war', 'sedition' and other offences against the state. They are sketched here below.

WAGING WAR

Waging War Against the Government of India

The Fifth Law Commission has not proposed any reforms in s 121 dealing with waging war against the Government of India. However, it recommended three major reforms in s 121A, dealing with conspiracy to wage war against the Government of India and conspiracy to overawe, by means of criminal force, the Central or a state government. They are:

(1) Recalling that the provisions of s 121A, in view of ss 1 and 4 of the IPC, cannot have extra-territorial application to bring within its ambit a conspiracy to wage war entered into by foreigners outside India, it suggested that the words 'within or without India' appearing in the beginning of s 121A need to be deleted as they are no more of any practical utility or significance.
(2) The idea of conspiracy to overawe by criminal force should also be extended to overawing of the Parliament of India as well as of a State Legislature.
(3) Keeping in view the gravity of the offence of conspiracy to overawe, by criminal force or show of criminal force, the Central or a State Government, it suggested that the existing punishment of 'imprisonment of either description' need to be substituted by 'rigorous imprisonment'.[53]

However, the Indian Penal Code (Amendment) Bill 1978, did not incorporate either of the suggestions. The Fourteenth Law Commission, which reviewed the IPC in the light of the 1978 Bill, refused to endorse the first two recommendations on the ground that the words 'the Central Government or any State Government' appearing in the existing s 121A are sufficiently wide to cover the words 'the Parliament or the State Legislature' as the legislative is an essential part or wing of every democratic government.'[54] It, endorsing the third suggestion of the Fifth Law Commission, recommended that the words 'imprisonment of either description' should be substituted with 'rigorous imprisonment'.[55]

The Fifth Law Commission, with surprise, noticed that the law relating to waging war against the Government of India does not take into its ambit an act of assisting India's enemies, a significant aspect of treason. Taking clue from the penal statutes of the US and of Canada, it, with a view to removing the identified lacuna, proposed insertion of a new provision (s 123A) in the IPC. The proposed s 123A sought to hold a person assisting, in any manner, an enemy at war with India or the armed force of any country against whom the armed forces of India are engaged in hostilities, responsible and to subject him to rigorous imprisonment for a term up to ten years with fine.[56] The proposed new provision found place in the Amendment Bill of 1978 as well as received endorsement from the Fourteenth Law Commission.[57]

Waging War Against Power

The Fifth Law Commission opined, and rightly so, that the reference in s 125 to 'Asiatic Power' is now meaningless, and the words 'in alliance or' are unnecessary. Therefore, it suggested that the expression 'the Government of any Asiatic Power' appearing in s 125 should be replaced by 'the Government of any foreign State' to make the provision more relevant. It also opined that the punishment provided for the offence (life imprisonment) is unduly harsh and it therefore recommended that it may be scaled down to 'imprisonment for a term up to ten years with fine'.[58]

This recommendation of the Commission was incorporated in the Amendment) Bill of 1978. However, the suggestion for reducing the quantum of punishment was not incorporated in the Bill.[59] The Fourteenth Law Commission has shown its favour to the proposal for reform.[60]

The Fifth Law Commission, with the same perception in mind, also suggested that the words 'any Power in alliance or at peace with the Government of India' in s 126, dealing with depredation on territories of power at

peace with the Government of India, should be replaced by the words 'any foreign state at peace with India'.[61]

ASSAULT ON HIGH OFFICIALS

The Fifth Law Commission stressed that the provisions of s 124, making assault on the President of India and on state governor a treasonable offence, should be extended to heads of legislatures and the higher judiciary and be appropriately redrafted.[62]

SEDITION

Delving into the law relating to sedition as outlined in s 124A of the IPC, the Fifth Law Commission has identified three major defects in it. First, s 124A, because of 'the pernicious tendency or intention underlying the seditious utterance', has not been expressly related to the interests of integrity or security of India or of public order. Secondly, s 124A does not take into account 'disaffection' towards: (i) the Constitution; (ii) the Legislatures; and (iii) the administration of justice, even though disaffection towards all these would be as disastrous to the security of the state as disaffection towards the Government of India. Thirdly, the punishment provided under s 124A for sedition is 'very odd' as it could be either imprisonment for life, or an imprisonment for a period up to three years only, and nothing in between. The Commission suggested that these defects, by redrafting s 124A, be removed.[63]

The Commission also felt that insults to the book of constitution, the national flag, the national emblem, and the national anthem, be made punishable by rigorous or simple imprisonment for a term up to three years or fine or both as disrespect to these things are not only unpatriotic act s but are also likely to cause a disturbance of public order. It recommended insertion of a new section (124B) in the IPC incorporating its suggestions.[64]

Both the proposals for reform found place in the Amendment) Bill of 1978 and received support from the Fourteenth Law Commission. Recalling that the Prevention of Insults to National Honour Act 1971 was enacted in pursuance of the Fifth Law Commission's recommendation, the Fourteenth Law Commission, however, felt it unwarranted to have the proposed penal provision (s 124B) in the IPC.[65]

1 *Ratanlal & Dhirajlal's the Indian Penal Code,* VR Manohar & Avtar Singh (eds), thirty-third edn, LexisNexis Butterworths Wadhwa Nagpur, 2010, Reprint 2011, p 219. 'Or receiving property taken by war or depredation (s 127)' is added to '4' above.

2 Hari Singh Gour, *Penal Law of India*, vol 2, 11th edn, Law Publishers, Allahabad, 1998, p 1185.

3 *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021(SC) .

4 *Hasrat Mohani v Emperor* (1922) 24 Bom LR 885.

5 *Kunhi Kadir v Emperor* AIR 1922 Mad 126.

6 *Umayyathantagatatu Puthen Veetil Kuzhi Kadir v Emperor* (1922) 42 Mad LJ 108, *Vasu Nair v State of Travancore and Cochin* AIR 1955 Tra &Coch 33, (1955) Cr LJ 414(TC) . A similar view is expressed by the Supreme Court in *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021(SC), para 38.

7 *Aravindan v State of Kerala* (1983) Cr LJ 1259(Ker) .

8 'Whoever, by words, either spoken or intended to be read, attempts to excite feelings of disaffection to the Government established by law in the territories of the East India Company, among any class of people who live under the Government shall be punished with imprisonment for life or for any term... to which fine may be added, or with simple imprisonment for a term which may extend to three years, to which fine may be added, or with fine'.*Explanation*--Such a disapprobation of the measures of the Government as is compatible with disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments, on the measures of the Government, with the intention of exciting only this species of disapprobation is not an offence within this clause'.

9 A few changes were effected in the section to read it as: 'Whoever, by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with

imprisonment for a term which may extend to three years, to which fine may be added, or with fine'. However, *Explanation* was kept unaltered. For further details see, RB Tewari, 'Law of Sedition in India', in Indian Law Institute, *Essays on the Indian Penal Code*, Indian Law Institute, New Delhi, 2005, p 281, *et seq*.

10 A comparative reading of the old and the current s 124A reveals that in the former the offence consisted in exciting or attempting to excite 'feelings of disaffection to the Government established by law' but in the latter bringing or attempting to bring into 'hatred or contempt towards the Government established by law' is also made punishable.

11 *Kedar Nath v State of Bihar* AIR 1962 SC 955.

12 (1868) 11 Cox's Criminal Cases 44.

13 (1873) 16 Cox's Criminal Cases 355.

14 (1868) 11 Cox's Criminal Cases 44, at p 45. The Supreme Court also quoted with approval in *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021(SC) .

15 (1909) 22 Cox's Criminal Cases 1, p 3.

16 Stephen, *Commentaries on the Law of England*, vol IV, 1950, pp 141-142.

17 (1891) ILR 19 Cal 35.

18 (1897) ILR 22 Bom 112.

19 Ibid, p 135; but see, *Queen Empress v Ramchandra Narain* (1897) ILR 22 Bom 152.

20 See, *Bilal Ahmed Kaloo v State of Andhra Pradesh* AIR 1997 SC 3483, (1997) 7 SCC 431, (1997) Cr LJ 4091(SC) .

21 *Balwant Singh v State of Punjab* AIR 1995 SC 1785, (1995) 3 SCC 214.

22 (1909) Cr LJ 456 (Mad).

23 *Raghubir Singh v State of Bihar* AIR 1987 SC 149, at p 158.

24 (1906) Cr LJ 1 (Bom).

25 AIR 1962 SC 955.

26 (1891) ILR 19 Cal 35.

27 Cited in *Kedar Nath v State of Bihar* AIR 1962 SC 955, at para 12.

28 (1897) ILR 22 Bom 112.

29 Ibid, p 134.

30 (1897) ILR 20 All 55.

31 AIR 1942 FC 22.

32 Ibid, p 26.

33 LR 74 IA 89.

34 *Queen Empress v Bal Gangadhar Tilak* (1897) ILR 22 Bom 112, and *Besant v Advocate-General of Madras* (1919) ILR 43 Mad 146.

35 AIR 1995 SC 1785, (1995) 3 SCC 214.

36 AIR 1997 SC 3483, (1997) 7 SCC 431, (1997) Cr LJ 4091(SC) .

37 In 1915, Bal Gangadhar Tilak had filed a suit for defamation against Sir Valentine Chirol of the London Times. Sir Edward Carson, a leading member of the English Bar and a known terror as a cross-examiner, first agreed to appear for Tilak. But, later he returned the brief, changed sides and appeared for Valentine Chirol, when the case came up for hearing.

38 *Kedar Nath v State of Bihar* AIR 1962 SC 955.

39 Ibid, para 36.

40 *Queen Empress v Amba Prasad* (1897) ILR 20 All 55.

41 *Niharendu Dutt Majumdaar v Emperor* AIR 1942 FC 22.

42 AIR 1951 East Punjab 27.

43 Ibid, p 29.

44 The Amendment was necessitated by the divergent views expressed by the Supreme Court of India in *Romesh Thappar v State of Madras* AIR 1950 SC 124 and *Brij Bhushan v State of Delhi* AIR 1950 SC 129 regarding the scope of art 19(2) vis--vis the freedom of speech and expression.

45 AIR 1959 All 101, (1959) Cr LJ 128(All) (FB).

46 However, the Patna High Court in *Debi Soren v State* AIR 1954 Pat 254, held s 124-A is intra vires to the Constitution as the expression 'in the interest of public order' appearing in art 19(2) of the Constitution is wide enough to encompass in it the provisions of s 124A.A view has also been expressed that s 124A is partly void and partly valid. In *Indramani Singh v State of Manipur* AIR 1955 Manipur 9, it has been held that s 124A which seeks to impose restriction on exciting mere disaffection or attempting to excite disaffection is ultra vires, but the restriction imposed on the freedom of speech and expression which makes it punishable to excite hatred or contempt towards the Government established by law in India is ultra vires.

47 *Kedar Nath v State of Bihar* AIR 1962 SC 955.

48 Ibid, para 37.

49 Ibid, para 38.

50 Ibid, para 38.

51 Ibid, para 38.

52 *Nazir Khan v State of Delhi* AIR 2003 SC 4427, (2003) 8 SCC 461, (2003) Cr LJ 5021(SC) .

53 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, para 6.8. A similar recommendation was also made with reference to ss 122 and 123, see para 6.9.

54 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code, Government of India, 1997, para 7.08.

55 Ibid, para 7.09.

56 Law Commission of India, 'Forty- Second Report: The Indian Penal Code ', Government of India, 1971, para 6.7.

57 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, para 7.11.

58 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, para 6.21.

59 See the Indian Penal Code (Amendment) Bill 1978, cl 49.

60 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, para 7.25.

61 Law Commission of India, 'Forty-Second Report: The Indian Penal Code', Government of India, 1971, para 6.22.

62 For text see, ibid, para 6.10.

63 For text of the revised s 124A, see ibid, para 6.19.

64 Ibid, para 6.20.

65 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, Para 7.21.

CHAPTER 22

Offences Relating to Army, Navy and Air Force

(Indian Penal Code 1860,Sections 131 to 140)

INTRODUCTION

Chapter VII of the IPC deals with certain offences which might be committed by the civilian population in relation to the defence personnel. It punishes persons who, not being soldiers or sailors themselves, abet soldiers and sailors in committing gross breaches of discipline. The laws which govern the Army, Navy and Air Force cannot generally reach such offenders, because the act of insubordination, etc, which they abet, however grave as a breach of military discipline, may be no offence, or a very trivial one under IPC. However, it is important to note here that the act s committed by the service personnel, which otherwise fall under this chapter, are not governed by the IPC as these persons, by virtue of s 139,[1] are amenable to the respective Acts to which they are subjected to. It, thus, aids and supports, from the civilian angle, of the Army, Navy and Air Force Act s which are designed to maintain perfect discipline in the armed forces.

OFFENCES RELATING TO THE ARMY, NAVY AND AIR FORCE

The following offences relating to the army, navy and air force find place in the IPC.

Abetment of Mutiny

Sections 131 and 132 deal with abetment of mutiny and attempt to seduce defence personnel from duty. They read as follows.

Section 131. Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty.--Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Government of India or attempts to seduce any such officer, soldier, sailor or airman from his allegiance or his duty, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--In this section the words 'officer', 'soldier', 'sailor' and 'airman' include any person subject to the Army Act, 1950 (46 of 1950), the Naval DisciplineAct, the Indian Navy (Discipline) Act, 1934 (34 of 1934), the Air Force Act or the Air Force Act, 1950 (45 of 1950), as the case may be.

Section 132. Abetment of mutiny, if mutiny is committed in consequence thereof.--Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Government of India, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

A plain reading of these provisions reveals that the former, inter alia, deals with liability of a person who abets mutiny, which is not followed by act ual mutiny, and attempts to seduce defence personnel, while the latter deals only with liability of a person for abetting mutiny, when mutiny is committed in pursuance of the abetment. Section 132, in view of gravity of the offence, stipulates harsher punishment than s 131 for abetting mutiny.

However, the term mutiny is defined neither in the IPC nor in either of the penal provisions dealing therewith. Mutiny; in common parlance is perceived as an extreme collective insubordination or the combination of two or more persons to resist or to induce others to resist lawful military authority. Acts of a riotous nature di-

rected against the Government of civil authorities rather than against military supervisor seem also constitute mutiny.

A charge of mutiny framed under s 131 needs to be supported by proof of instigation or other modes of abetment stipulated in s 107 of the IPC and of the intention to incite mutiny. While the offence made punishable under s 132 needs evidence of the fact the mutiny has been committed in pursuance of the abetment.

An attempt to seduce defence personnel lies in the act of appealing it to come out of allegiance or to breach duty. It is a sort of incitement for breach of allegiance or of duty.

Abetment of Assault by an Officer on a Superior Officer

Sections 133 and 134 punish the abetment of an assault[2] by an officer on a superior officer. Section 133 deals with liability of an abettor of such an assault when the abetted assault is not committed, while s 134 punishes such an abetment when the offence of abetment is committed in pursuance of the abetment. Section 134, thus, is an aggravated form of the offence described under s 133. These penal provisions, which are self-explanatory, read as under.

Section 133. Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.--Whoever abets an assault by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Government of India, on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 134. Abetment of such assault, if the assault is committed.--Whoever abets an assault by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India, on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Abetment of Desertion

Sections 135 and 136 prescribe punishment for abetting and harbouring a deserter respectively.

Section 135 makes mere abetment for desertion punishable. It is not necessary that the abetted desertion take place. Desertion means unlawful abstention from duty with no intention of returning to it. Intention not to report back for duty is the essence of desertion. Therefore, a mere overstay after the sanctioned leave does not amount to desertion, unless it is motivated with no return for duty. It will merely be treated as 'absence without leave'. Section 135, dealing with this aspect of offence relating to the army, navy and air force, states:

Section 135. Abetment of desertion of soldier, sailor or airman.--Whoever abets the desertion of any officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 136 makes intentional harbouring of a deserter an offence. An intentional concealment of a known deserter, with a view to avoiding his apprehension, makes a person 'harbourer' and thereby culpable under s 136. A person harbouring a deserter, (i.e., concealing him or aiding or assisting him in concealing himself or aiding or assisting in his rescue) is similar to an 'accessory after the fact', as explained under the English law.

However, a wife of a deserter cannot be held guilty under the penal provision even if she receives and conceals her husband, who has deserted. The term 'harbour' is explained in s 52A of the IPC. A simple reading of s 136, which is reproduced below, reveals these aspects of the offence.

Section 136. Harbouring deserter.--Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Government of India, has deserted, harbours such officer, soldier, sailor or airman, shall be punished with imprisonment of either description for a term, which may extend to two years, or with fine, or with both.

Exception.--This provision does not extend to the case in which the harbour is given by a wife to her husband.

Section 137 makes the master or a person in charge of a merchant ship, on board of which a deserter has concealed himself, criminally liable. Culpability of the master or a person in charge of a merchant ship is premised on neglect of his duty. He will be liable under the section, even if he was, in reality, ignorant of the self-concealment of a deserter. When a deserter is found 'concealed on board of a vessel', s 137 presumes that the master or a person in charge of the vessel knows that a deserter is there and that he harbours the deserter. His 'honest' neglect of duty or laxity in the maintenance of discipline on board or ignorance, therefore, will not save him from the liability. A reading of s 137, reproduced below, supports the impression. It reads:

Section 137. Deserter concealed on board merchant vessel through negligence of master.--The master or person in charge of a merchant vessel, on board of which any deserter from the Army, Navy or Air Force of the Government of India is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

Abetment of an Act of Insubordination

Section 138, which makes a person liable for abetting an act of insubordination, can be made applicable only in those cases of abetment which are actually followed by the act s of insubordination. Further, it requires that the abettor had the requisite knowledge of the act of insubordination. Though the 'act of insubordination' is not defined, it seems that it takes into its ambit 'any willful breach of the discipline by a soldier or sailor or airman'. The section reads:

Section 138. Abetment of act of insubordination by soldier, sailor or airman.--Whoever abets what he knows to be an act of insubordination by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of the Government of India, shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Wearing Garb

Section 140 punishes the wearing of the dress of a soldier, sailor or airman, with a view to inducing others to believe that he is in the 'service' at the present time. So merely wearing a soldier's garb without the specific intention, does not amount to an offence under s 140. Thus, it punishes those who personate soldiers, sailors or airmen. It states as under.

Section 140. Wearing garb or carrying token used by soldier, sailor or airman.-- Whoever, not being a soldier, sailor or airman in the Military, Naval or Air service of the Government of India, wears any garb or carries any token resembling any garb or token used by such a soldier, sailor or airman with the intention that it may be believed that he is such a soldier, sailor or airman shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

PROPOSALS FOR REFORM

The Fifth Law Commission has offered a set of significant proposals for reform in the Chapter to make it more relevant and comprehensive. A few prominent points for proposal are mentioned here below[3]:

(1) With a view to widening scope of the Chapter, the Law Commission suggested that the Chapter should not only be confined to Army, Navy and Air Force but should also be extended to all other armed forces of the Union of India. It, accordingly, recommended the present caption of the Chapter *Offences Relating to the Army, Navy and Air Force* should be changed to *Offences Relating to the Armed Forces* and that the key expressions, 'armed forces', 'officer', and 'member', should be comprehensively defined in the proposed new s 130A.

(2) Referring to the kinds and quantum of punishment provided for abetment to mutiny, not committed in consequence thereof or otherwise, and for attempt to seduce a defence personnel (ss 131 & 132, IPC), it opined that the punishment of imprisonment for life provided for abetment to mutiny that is not committed in consequence of the abetment and for an attempt to seduce defence service personnel is unduly harsh. It suggested that abetment of mutiny by an officer or a member of armed forces should be punished: (i) with death or imprisonment for life or with rigorous imprisonment for a term up to fourteen years (in lieu of the existing ten years), if mutiny is committed in pursuance of the abetment, and (ii) with rigorous imprisonment for a term up to ten years, if mutiny is not committed in pursuance of the abetment. An attempt to seduce an officer or member of the armed forces from his duty, it opined, should be made punishable by rigorous imprisonment for a term up to ten years with fine.

(3) Noticing that s 135 of the Code, dealing with abetment of desertion, unlike other provisions of the same chapter, does not distinguish between cases where the abetment of desertion is successful and where it is unsuccessful and it, in either case, provides for imprisonment for a term up to two years, the Commission, in the light of punishment provided for desertion under the Army, the Navy, and the Air Force Act s, feels that the punishment provided under s 135 be increased to five years' imprisonment in cases where desertion takes place in consequence of the abetment.

(4) It also recommended an enhancement of punishment (from imprisonment for a term up to six months to for a term up to two years) in cases of abetment of an act of insubordination when the abetment is successful.

(5) It recommended deletion of existing s 137, holding the master or a person in charge of a merchant vessel on board of which a deserter is concealed due to neglect of duty of such a master or person, as it 'does not appear to be of any consequence'.

(6) It suggested that two new provisions, s 138A and 138B, dealing respectively with inciting mutiny or an act of insubordination and dissuading from recruitment to armed forces, be added to the present chapter. Both the proposed offence should be made punishable with simple or rigorous imprisonment for a term up to three years, or with fine, or with both.

The Indian Penal Code (Amendment) Bill 1978, premised on recommendations of the Fifth Law Commission, gives effect to these proposals for reform.

The Fourteenth Law Commission has not only endorsed the proposed reforms but also approved contents of the 1978 Bill incorporating those suggestions.[4]

However, these proposals are not yet transformed into statutory provisions as the 1978 Amendment Bill, as mentioned earlier, lapsed in 1978 due to the dissolution of the *Lok Sabha* during that year.

1 Indian Penal Code 1860, s 139 reads: 'No person subject to the Army Act, 1950 (46 of 1950), the Naval DisciplineAct, the Indian Navy (Discipline) Act, 1934 (34 of 1934), the Air Force Act, or the Air Force Act, 1950 (45 of 1950), is subject to punishment under this Code for any of the offences defined in this Chapter.'

2 For definition of 'assault', see s 351 of the Indian Penal Code 1860.

3 For further details see, Law Commission of India, 'Forty-Second Report: The Indian Penal Code, Government of India, 1971, paras 7.2; 7.3; 7.5; 7.7; 7.8, & 7.10.

4 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, ch XII.

[redacted]: Criminal Law,12th Edition/[redacted] Criminal Law 2014/CHAPTER 23 Offences Against Public Tranquillity

CHAPTER 23

Offences Against Public Tranquillity

(Indian Penal Code 1860,Sections 141 to 160)

INTRODUCTION

This chapter refers to 'Offences against the Public Tranquility', which are mentioned in ch VIII (ss 141-160) of the IPC. Offences against public tranquility, which are commonly known as 'group offences' and lead to disturbance of public peace, hold a middle place between the offences against the state on the one hand, and crimes against person and property on the other. They may be divided into the following groups.

(1) Unlawful assembly:
   (a) unlawful assembly-defined (s 141);
   (b) being member of an unlawful assembly (s 142);
   (c) punishment (s 143);
   (d) joining or continuing in an unlawful assembly armed with deadly weapons (s 144);
   (e) joining or continuing in an unlawful assembly knowing it has been commanded to disperse (s 145);
   (f) liability for constructive criminality (s 149);
   (g) rendering aid in various ways (ss 150, 152, 154, 157 and 158).

(2) Rioting:
   (a) rioting-defined (s 146);
   (b) punishment (s 147);
   (c) rioting with deadly weapon (s 148); and
   (d) aiding a riot in various ways (ss 152, 154-156, and 158).

(3) Belonging to an assembly of five or more persons when ordered to disperse (s 151).
(4) Affray: (a) affray-defined (s 159) and (b) punishment (s 160).
(5) Promoting enmity between different classes (ss 153A, 153AA, and 153B).

Let us delve further in each one these in sequence.

PART A - UNLAWFUL ASSEMBLY

OBJECT

The underlying objective of criminalisation of unlawful assembly is to discourage tumultuous assemblage of persons to preserve public peace. It forbids resort to criminal force by five or more persons to do any of the act s set out therein. The basic justification seems to be two fold. First, offences committed by in groups give encouragement to the accomplices, and secondly, in cases of crimes committed by a group, the prosecution not only carries heavy responsibility of ascertaining and proving contribution and complicity of individual member of the group in commission of the crime but also, most of the times, finds it difficult to accomplice it. The Penal Code, like other overseas penal statutes, provides for vicarious liability to deter people from committing crimes in groups and sparing the prosecution from the onerous task of proving specific actus reus accompanied with the requisite mens rea.[1]

DEFINITION

Section 141. Unlawful assembly.--An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is--

First.--To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second--To resist the execution of any law, or of any legal process; or

Third.--To commit any mischief or criminal trespass, or other offence; or

Fourth.--By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.--By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

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

INGREDIENTS

A plain reading of s 141 reveals that the essence of 'unlawful assembly' is the combination of five or more persons for committing an offence. To constitute an 'unlawful assembly', the following ingredients need to be established:

(1) That there was an assembly of five or more persons;
(2) They must have a common object; and
(3) The common object must be one of the five specified in the section.

Five or More Persons

The first and the foremost essential condition of an unlawful assembly is that it should consist of at least five or more persons, who should meet for a common object. All need not have the same object to begin with; it is enough, if the common object is developed subsequently. An assembly of less than five is not an unlawful assembly within the meaning of s 141 and cannot, therefore, form the basis of the offence.[2] However, the mere fact that some among the accused persons have evaded justice or acquitted or are not brought to trial, and thereby reduces the number of persons below five, will make s 141 (and consequential s 149) inapplicable,[3] unless there are some other unidentified or unnamed persons involved in the commission of the crime.

In *Mohan Singh v State of Punjab* ,[4] wherein five named persons were charged under s 302 read with s 149, IPC, for committing murder as members of unlawful assembly, and two of them were acquitted by the high court by giving them the benefit of doubt, the Supreme Court held that the remaining three accused, in the absence of any evidence to show that there were, besides those five named, some other unnamed or unidentified persons involved in the act, could not be convicted as members of the unlawful assembly. It, however, opined that the acquittal of some of the five or more persons named in the charge and tried, and thereby reducing the number less than five, does not necessarily either displace or affect the validity of the charge under s 149, if the court is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five who have not been identified and so have not been named.[5]

In *Ram Bilas Singh v State of Bihar* ,[6] after a careful analysis of the thitherto cases,[7] the Supreme Court has identified the situations that justify conviction of accused as members of unlawful assembly even their number is reduced to less than five. It ruled that 'it is competent to a court to come to the conclusion that there was an unlawful assembly of five or more persons, even if less than that number have been convicted by it if: (i) the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act and evidence led to prove this is accepted by the court; (ii) or that the first information report and the evidence shows such to be the case even though the charge does not state so; (iii) or that though the charge and the prosecution witnesses named only the acquitted and the convicted accused persons there is other evidence which discloses the existence of named or other persons'. However, in cases (ii) and (iii), the court, before conviction, has to see that 'no prejudice has resulted to the convicted person by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence'.[8]

They must have a Common Object

The word 'object' means purpose or design. In order to make it 'common', all the persons who compose an unlawful assembly must share it.[9] The 'same' object may not necessarily be 'common' object, and it becomes so only when it is known to and shared by all the members of the assembly. In other words, the expression 'common object' implies that the object must be shared and possessed by all the members of the assembly. The object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. There must be 'community of object'. There must be some present and immediate purpose of carrying it jointly into effect.[10] The presence of common object is a *sine qua non* of unlawful assembly. A mere meeting of five or more than five persons to only deliberate or arrange some plans for future act ions to be carried out individually rather than jointly, therefore, does not constitute an unlawful assembly.[11] An unlawful assembly may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it.[12]

'Common object', being entertained in the human mind, is merely a mental attitude. No direct evidence, therefore, can be available to prove 'common object'. It is a question of fact to be determined on the basis of facts and circumstances of a case at hand. Though no hard and fast rule can be laid down regarding the circumstances from which common object can be culled out, it may reasonably be gathered from the nature of the assembly, the kind of arms it carried and the manner they are used, behaviour of the assembly members prior or at or after the incident, and acts and language the members used while using the arms carried.[13]Unless it is evident from the circumstances that the accused shared the common object by their act s or actions, a court is expected to refrain from inferring unlawful assembly.[14]

If only four out of five assembled persons have the common object and not the fifth, it is not an unlawful assembly. But mere assemblage will not make a meeting unlawful. Persons may meet in a theatre to amuse themselves. In such a case, they meet, but do not 'assemble' within the meaning of the clause. The word 'assemble' implies the meeting of persons who assemble for a common purpose with the intention of furthering it. The gist of the offence is conduct, which will, or may, lead to a breach of peace. A meeting of 50,000 is not by itself enough to make an assembly unlawful. Similarly, simple onlookers or family members of the parties involved cannot *ipso facto* become members of the unlawfully assembly, unless they are either act ively participated in the violence or encouraged violence.

The explanation appended to the section makes it clear that pre-concert is not necessary. In the case of *Moti Das v Bihar* ,[15] it was held by the Supreme Court that an assembly which was lawful to start with, became unlawful, the moment one of them called on the others to assault the victim and they in response to his invitation started to chase the victim, who was running away. It was further held that it was legitimate to infer from the above facts, the intention of those who chased the victim in response to a call of that kind.

Object Must be one of Those Specified in Section 141

The object must be one of the following referred to in the section:

(i) Overawing the Central or a state government or its officers;
(ii) Resistance to the execution of legal process;
(iii) Commission of mischief, criminal trespass or any other offence;
(iv) Forcible possession and dispossession of property;
(v) Illegal compulsion.[16]

Overawing the Central or a State Government or its Officers

The gist of the offence consists in overawing, by show of criminal force, the Central or a State Government or a public servant in the lawful discharge of his duty. The word 'overawe' means the creation of apprehension or alarm or fear. A person is said to overawe another when he restrains the other by awe, fear or superior influence. However, from the mere presence of a crowd, intention to overawe will not be presumed. Thus, when a procession was organised to give vent to popular indignation against local police force, mere shouting of objectionable and provocative slogans by the members does not amount to overawing the police as such words are not likely to inspire terror. But when members also resort to pelting stones on the police force, resulting in actual injuries to members of police force, removing trolleys and burning them, such act s amount to overawing them.[17] Similarly, when a sub-inspector of police was going

to re-arrest a person who escaped from his custody, a crowd of villagers carrying *lathis* began to assemble and the sub-inspector arresting the man considered their appearance formidable; it was held that the persons forming the crowd could not be said to have caused illegal obstruction, nor could they be said to have constituted an unlawful assembly. Intentional firing on the police by extremists comes within the ambit of s 141 of the Code.[18]

Resistance to the Execution of Legal Process

The word 'resistance' connotes some overt act. However, mere words with no inclination to put them into effect do not amount to 'resistance'. The expressions 'execution of law or legal process' connote the carrying out the provisions of law or execution of an act warranted by law and measures according to law, respectively. In order to succeed in proving resistance to the execution of law, it is necessary for the prosecution to prove that: first, there was a law that could be executed, secondly, there was execution of the law, and thirdly, there was resistance to it.[19] It is, however, needless to mention that the act resisted must be a legal act .

Commission of Mischief, Criminal Trespass or Any Other Offence

This clause specifies two offences, namely, mischief[20] and criminal trespass,[21] along with 'any other offence'.[22] A simple reading of the clause, which makes an assembly unlawful if its common object is to commit any 'mischief' or 'criminal trespass' or 'other offence', does not reveal the legislative intent of using these two specific offences in addition to 'any offence'. Nevertheless, the clause is not restricted only to 'mischief' and 'criminal trespass'. In view of s 40, IPC, the clause is held to cover all offences, both against person and property.[23] It says: 'offence under this clause means a thing punishable under the Code or under any such special or local law if punishable under such law with imprisonment for a term of six months or upwards whether with or without fine.' According to the ordinary principles of interpretation, the 'other offence' must be *ejusdem generis*, falling within the same species as the previous two offences viz, mischief or criminal trespass. Otherwise, the preceding enumeration becomes unnecessary.[24]

Forcible Possession and Dispossession

This portion of the section is not free from doubt. As it stands, it would seem to prevent the use of force for:

(a) Taking or obtaining possession of any property movable or immovable, corporeal or incorporeal;
(b) To enforce any right; and
(c) To enforce any supposed right.

Obtaining Possession

The first clause relating to possession and dispossession is particularly ambiguous, if it is taken in conjunction with the second clause. The crucial question is as to whether a person having a perfect right to property is under no circumstances entitled to vindicate that right by the use of force. If so, the clause is in sharp conflict with the general principles of English law, and the right of private defence as described in s 105, para 3 of the IPC.

Suppose, a person is surrounded by dacoits who rob him of his property, he has undoubtedly the right of defending himself against his assailants and, for this purpose, he may enlist the co-operation of others. Suppose, now five persons so assist him in beating off the dacoits, are they not entitled to use force to take (i.e., recover) possession of the property. To deny them that right would be absurd and yet this is what the clause leads up to. Then, again, suppose that a person is entitled to a land, and has been in undisputed possession of it. If another commits a trespass, has he no right of turning out the trespasser and to use force for that purpose? It will suffice here to state that it is undoubtedly the right of every person to use force within the limits prescribed by law, in defence of his or another person's property. If, therefore, the use of such force is justifiable under one section, it cannot be held unjustifiable under this or any other section. Further, the fact that such an act may cause breach of peace is no reason for denying him his right. An interesting question arose in the case of the *Salvation Army*, who in defiance of the public order

to desist from marching out in a procession, led a procession in the exercise of their right of way although they knew that they would be attacked by a counter-organisation called 'The Skeleton Army' formed to oppose them. The Salvation Army were prosecuted for rioting but were acquitted on the ground that they were exercising their legal right of way.[25] This view has also been generally followed in India. It should, however, be noticed that the clause does not take away the right of private defence of property which stands legalised and justified in the IPC.

In short, the question under this head, is how far a man is justified in resorting to force for defensive purposes both for the purpose of retaining what he has got, and recovering what he has a right to. It would seem that decided cases recognise the legality of the use of force in the former case. An assembly of five or more persons with the common object of only maintaining possession, would not come within the definition of unlawful assembly given in this section.[26] If only some of the persons have a right of private defence, that entitles not only them to defend the property, but also such other persons as they might gather to help them to protect their rights.[27]

Enforcing the Right of Procession

The Indian constitution does not specifically enumerate the right of public meeting or that of public procession, though these are guaranteed by the Constitutions of some other countries. But the right of procession is a logical corollary from the right of assembly guaranteed by art 19(1)(e) of the Constitution and the individual right of user of a highway because when the right to use a highway is exercised collectively by a number of persons, there is a procession. Even before the framing of the Constitution, it was held that the right to conduct a procession followed the individual liberty of person, and that a person could not be deprived of his right simply because in the course of exercising it, or for the purpose of exercising it, he joined with other people who had also the same right, provided, of course, that the object with which the persons assembled, the manner in which they assembled, or the mode in which they conducted themselves was not illegal. The right to conduct processions is subject to the law of public nuisance and the greater advantage of the public to restrict that right. Persons of whatever religion or sect are entitled to conduct religious processions through the public streets subject only to the above mentioned limitations, namely, that they should not interfere with the ordinary use of such streets by the public and should observe such directions as public authorities may lawfully give to prevent obstruction of thoroughfare and breach of the public peace.[28]

Enforcing a 'Supposed' Right

One thing is, however, clear, no one has the right to vindicate, his 'supposed right' by use of criminal force. Such a right is, in fact, no right at all and such show of criminal force has been held to be sufficient to constitute unlawful assembly.[29] It is mere prevention to a right which does not exist. If people were to set up their own notions of what is right or wrong in vindication of armed force, it will be a plea available to everyone who cared to raise it. Such a plea would be totally subversive of all security and order. Even the assertion of a supposed right, if it is to be asserted by a show of force, is sufficient in itself to constitute an unlawful assembly. Hence, in the case of a grown up girl, it would be an offence for an assembly of men to carry her away by force against her will with the object of restoring her to her husband.

Illegal Compulsion

This clause is too generally worded. It applies to all the rights a man can possess, whether they concern the enjoyment of property or not. All it means, however, is that no one can use criminal force to illegally compel another to do or forbear from doing any act connected or unconnected with property. It is not sufficient to bring a case under this clause that the accused should have merely used criminal force or show of criminal force to take possession of property, unless the use of force was accompanied by some criminal intent. So, where a number of men turned out to remove the pipes laid by the district board to replace a bridge on the ground that they would obstruct the flow of water, it was held that the object of the accused was not unlawful within the meaning of this clause.[30]

DEFINITIONAL AND PENAL ASPECTS

The two terms which run throughout ch VIII, IPC (ss 141-148) are 'unlawful assembly' and 'common object'. Section 149 provides for vicarious liability of those who are proved to have shared the common object of the unlawful assembly. To understand the entire scope of the law, it will be more fruitful to study the general principles underlying the law regarding liabilities of persons who are alleged to be members of an unlawful assembly. Section 149 is extracted below followed by a summary of the essential characteristics of s 141 and s 149, IPC.

Section 149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

On What Constitutes Unlawful Assembly

An unlawful assembly must have a minimum of five persons who are part of it and share the common object. A combined reading of ss 141 and 149 reveals that if the assembly is of less than five persons, it will not be an unlawful assembly within the meaning of s 141 and therefore cannot form the basis of conviction under s 149, IPC. This principle was stated in *Subran @ Subramanian v State of Kerala* .[31] In this case, six named accused were alleged to have formed an unlawful assembly and killed the deceased. While the first accused was convicted under s 302, others were convicted for committing offence under s 326 read with 149, IPC, amongst other offences. The High Court of Kerala, however, acquitted two persons without a finding that there were some other unknown persons also involved in the offence, implying that the two persons were not part of the assembly. Thus, there were only four persons proved to have been part of the assembly. The Supreme Court held that the existence of an unlawful assembly is a necessary postulate for invoking s 149, IPC. Where the existence of such an unlawful assembly is not proved, the conviction with the aid of s 149 cannot be recorded or sustained. The failure of the prosecution to show that the assembly was unlawful must necessarily result in the failure of the charge under s 149, IPC. Thus, the accused were acquitted of offences under s 326 read with s 149, and they were convicted for their individual acts under ss 325 and 326, IPC, respectively. A similar view was expressed by the Supreme Court in *Amar Singh v State of Punjab* ,[32] in which of the seven accused arrayed as accused, the trial court acquitted two, and the high court, on appeal, acquitted one accused. The Supreme Court found that there were only four persons established to have committed the offence. Since the number was less than five, they were acquitted of the offences they were convicted of under s 149, IPC.

An assembly, as stated in *explanation* to s 141, may be lawful at the time of its inception or even sometime thereafter, but may become unlawful subsequently on adoption of one of the common objects. However, previous concert is not required for proving the fact that the assembly later turned into an unlawful one.[33] The time of forming an unlawful intent is not material. Common object can develop at the beginning of the assembly or during the course of incident at the *spot eo instanti*.[34] A lawful assembly in the beginning does not turn into an unlawful one, if, it responds by way of self-defence to an attack on it. This proposition was considered in *Gajanand v State of Uttar Pradesh* ,[35] in which two group of *pandas* (priests) in Benaras had a fight over the share of offerings made by a Nepali pilgrim, when one set of *pandas* were conducting *poojas*. Although there was simmering tension, the fight erupted suddenly. The appellant's party had received numerous injuries, and the evidence revealed that they had retaliated only when attacked. However, there was no evidence to show that the appellant's party which was initially lawful later on turned unlawful.

A variation of this principle was elaborated in *Mariadasan v State of Tamil Nadu* .[36] In a sudden altercation and fight between two parties, the deceased who tried to intervene, was fatally assaulted in the spur of the moment, in the heat of passion. The court held on facts, that no unlawful assembly was formed at any time with the common object of assaulting the deceased. As a result, each accused person was held liable only for their individual act s. The suddenness of quarrel militates against development against common object being entertained by members of the assembly. So, sudden quarrel does not answer s 141 or s 147 or s 149 of the IPC.[37]

A clear finding regarding the common object of the assembly must be given where the court convicts any person or persons of an offence with the aid of s 149, IPC. The evidence discussed must not only show the nature of the common object, but also that the object was unlawful. Since s 149 creates a specific offence

and deals with the punishment of that offence, before recording a conviction under s 149, the essential ingredient of s 141 must be established. What is to be noted is that the emphasis is on common object.[38]

The prosecution must prove that the accused were a part of the unlawful assembly at the time when the assembly became unlawful. This ratio was laid down in *Prabhakar Shankar Sawant v State of Maharashtra* .[39] In this case there was a rivalry between two trade unions. A *morcha* of about 300-400 persons was initially peaceful, but suddenly some of the members started pelting stones. The accused were implicated, even though the first informant in the FIR did not name anyone. The accused were convicted under ss 147, 426/149 and 506, IPC, and sentenced to three months rigorous imprisonment. The Supreme Court, on considering the evidence, held that before the appellants could be convicted of sharing the common object of the assembly, or as being members of the same at a time when the assembly became unlawful, it was incumbent on the prosecution to prove at that stage that the accused were part of the unlawful assembly. Further, before the court is satisfied that a person was a member of an unlawful assembly, it must be clearly shown either from his active participation or otherwise, that he shared the common object of the assembly. 'It is sufficient if it is shown that as a participant of the unlawful assembly he was sharing the common object of the same'. Since in the above-mentioned case the prosecution did not establish this, the appellants were acquitted.

In *Sudhir Samanta v State of West Bengal* ,[40] the Supreme Court had to consider the situation in which there was rivalry between two parties over land in a village. In such a situation, when a large number of villagers were present at the occurrence site, the prosecution had to prove that a person was a member of the unlawful assembly sharing the common object with others. While not every member needs to have committed an overt act, his membership was a *sine qua non* for considering the question of his culpability for acts committed by the unlawful assembly. Using this yardstick, the court acquitted three accused, as there was no evidence at all regarding their membership or role in the unlawful assembly. Once membership of an unlawful assembly is established it is not necessary for the prosecution to establish whether any specific overt act has been assigned or done to the accused. Mere membership of the unlawful assembly is sufficient to hold him vicariously liable.[41]

Section 149 is a substantive offence. In *Nanak Chand v State of Punjab* ,[42] the accused, along with others, was charged under s 148 and s 302 read with s 149, IPC. Although, the trial court held that the charge of rioting was not proved, it convicted the appellant for murder under s 302, IPC, and imposed death sentence. It was argued before the Supreme Court that inasmuch as there was no specific charge under s 302, but only for offence under s 302 read with 149, IPC, the conviction was not maintainable. The Supreme Court held that this conviction was wrong and quashed it allowing the appeal of the accused. The court remarked:

> Under this section a person, who is a member of an unlawful assembly is made guilty of the offence committed by another member of the same assembly, in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. Therefore, when the accused are acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed.[43]

Recently, in *State of Haryana v Shakuntla* ,[44] the Supreme Court, reiterating that s 149 is a substantive offences, stressed that whenever a court convicts any person or persons of any offence with the aid of s 149, the evidence relied upon by it must disclose not only the nature of the common object but also that the object was unlawful. It must show that the incriminating act was done to accomplish the common object of the unlawful assembly. It also must be shown that he or they knew or were aware of the likelihood of a particular offence being committed in prosecution of common object.

What is the Common Object of Unlawful Assembly?

The emphasis of the offence of unlawful assembly is the common object of the members of the assembly being unlawful. Thus, in *Bhudeo Mandal v State of Bihar* ,[45] the Supreme Court held that before convicting any person with the aid of s 149, IPC, the evidence must clearly establish not only the common object, but also show that the common object was unlawful. In the absence of evidence that there was either an unlawful object or the accused has shared it, conviction under s 149 is not sustainable.[46]

In *Allauddin Mian v State of Bihar* ,[47] the Supreme Court considered the case of the six accused persons forming an unlawful assembly with the common object of killing the father of the deceased girls (victims), and since they could not achieve this, two of the accused killed the young daughters of the person the accused originally wanted to kill. The court sought to examine whether all members shared the same object. The court said:

> What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object, every member of the assembly will become liable for the same. Therefore, any offence committed by a member of the unlawful assembly in prosecution of any of the five objects mentioned in section 141, will render his companions constituting the unlawful assembly liable for that offence with the aid of section 149.[48]

It was clarified that since s 149 fastened vicarious responsibility on persons, it ought to be strictly construed. Even if acts incidental to the common object are committed to accomplish the common object, it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

Common object has to be essentially inferred from the facts and circumstances of each case, the nature and number of injuries inflicted, manner of executing the common object and so on.[49] Acts and conduct of the accused also operate as guiding factors.[50]

Unlawful object can be developed on the spot, and it could be that initially the persons gathered together for a lawful object. In *Sukha v State of Rajasthan* ,[51] the court found that initially fearing marauders, the accused and others rushed to the spot. Some of the persons were armed and their rushing could be considered to be for a lawful purpose. But when that object is exceeded, and the persons begin to beat up the suspects, the act of beating becomes unlawful, for private persons are no more entitled to beat and ill-treat thieves than the police, especially at a time when there is no more than suspicion against them.

Acts in Prosecution of the Common Object: Tests for Inferring Common Object

In *Muthu Naicken v State of Tamil Nadu* ,[52] the Supreme Court evolved what it called the workable test of finding out the role of each accused. In that case, there was a melee involving large number of assailants and witnesses in a village where everyone knew each other. In such a situation, it was inevitable that many witnesses would be partisan in character. However, the entire evidence could not be discarded on this score. Similarly, the other tendency would be to involve as many people as possible by merely naming them as having been seen in the melee. Therefore, the evidence has to be examined with utmost care and caution. In the instant case, the high court convicted eight persons for offence under ss 302/34, IPC, and the rest under ss 326/34, IPC. This clearly revealed that the high court did not accept the prosecution case that the common object of the unlawful assembly was to cause the murder. In such a situation, the court ought to have analysed the evidence so that participation by overt act is established as against each accused.

The principle elucidated in *Masalti v State of Uttar Pradesh* ,[53] is that the court should carefully sift the evidence and decide which part of it is true and which is not, in cases involving many accused as part of the unlawful assembly and evidence of witnesses does not assign specific part or role to the accused.

It is not necessary that any specific act be attributed to each one of the accused persons. It was held that it is sufficient if the evidence established that all the members of the unlawful assembly shared the common object of the unlawful assembly.[54]

In *Fatte v State of Uttar Pradesh* ,[55] the Supreme Court declared that lack of overt act being ascribed to anyone of the accused may not by itself be used to disprove the charge under s 149, IPC. But the question of whether the members shared the common object is something which has to be examined on the facts and circumstances of the case.

In *Sarwan Singh v State of Punjab* ,[56] the court considered the issue of apportionment of liability. The prosecution case was that the death was caused due to inflicting injuries sufficient in the ordinary course to cause death. When death had resulted, the question was whether the injuries were cumulatively sufficient to cause death. However, more primary was to ascertain if the common object was to cause death or whether the members knew that it was likely that an offence under s 302 would be committed in prosecution of the com-

mon object. In the instant case, the nature of injuries caused made it clear that the object was to cause bodily injury as is likely to cause death.

Essential Elements of Membership of Unlawful Assembly

The Supreme Court emphasised that the test for finding out membership of unlawful assembly was whether the accused was one of the persons constituting unlawful assembly and shared the common object along with other co-accused. Each individual need not be shown to have committed any specific act . This came to be evolved in *Masalti and Ors v State of Uttar Pradesh* ,[57] where there was a faction-fight between two families. The accused went to the house of the deceased with a group of 35 persons, with firearms and other lethal weapons with the avowed intention of killing all the male members of the rival family, and ended murdering five persons. It was contended for some of the accused that only those persons who had actually shot the deceased with the gun, should be convicted of the offence of murder and others in the unlawful assembly, who had no such arms, should not be held guilty of the offence of murder. Reliance was placed on an earlier decision of the Supreme Court in *Baladin v State of Uttar Pradesh* ,[58] where it was observed by Sinha J, that mere presence in an assembly does not make a person member of an unlawful assembly, unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or had intentionally joined the unlawful assembly. Mere presence of a person in an unlawful assembly does not make him liable unless there was a common object and he was act uated by that common object and that object is one of those enumerated in s 141.[59] In the earlier case of *Baladin*, the members of the family of appellants and other residents of the village had assembled together. Some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. However, in the *Masalti* case, it was held that what has to be proved against a person, who is alleged to be a member of an unlawful assembly, is that he was one of the persons constituting the assembly and that he shared along with other members of the assembly the common object as defined in s 141, IPC. Section 142 provides that whoever, being aware of facts which render any assembly unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by s 141, IPC. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. In the case of *Masalti*, the court held that since they all formed members of the unlawful assembly, the common object of which was to exterminate the male members of the family of Gayadin, they were all equally guilty of murder under ss 302/149, IPC. The basis of liability under s 149 is vicarious, and it is not necessary that the offence have actually been committed by every member of the unlawful assembly. Overt act on the part of each is unnecessary. To constitute unlawful assembly, thus, no overt act by all the participants towards the commission of the crime is necessary.[60] It is enough if they share common object. Once it is proved that a person comes within the ambit of s 141, he cannot take the defence that he did nothing with his own hands in committing the offence and thereby he should be absolved from liability.[61] It cannot be laid down as a general proposition of law that unless the commission of an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly is unlawful and is likely to commit any of the acts that fall within the purview of s 141 of the Code.[62]It is trite law that a person, who is a member of an unlawful assembly even if he does not commit any overt act but shares the common object of such an unlawful assembly, is liable for the consequences of the same.[63] For convicting a person under s 149, it is necessary for the prosecution to prove that the person was a member of the unlawful assembly at the time when the offence was committed.[64]

In *Musa Khan & Ors v State of Maharashtra* ,[65] the Supreme Court held that a mere innocent presence in an assembly of a person does not make him a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that he shared the common object of the assembly. A court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities, is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful as-

sembly at some stage but at all the crucial stages, and shared the common objects of the assembly at all these stages. It is not uncommon that an unruly crowd on the rampage may contain some miscreants who may go beyond the common object and commit ad hoc crimes graver than the mob had as its objective. The facts of the case were that the restaurant owned by some of the appellants was boycotted by students of the neighbouring engineering college who started patronising a rival establishment. Some more incidents led to further enmity. Consequent upon yet another incident between them, the appellants formed a mob numbering 25 people and raided four different places in succession including the rival restaurant and the engineering college hostel, causing wanton act s of vandalism. They also indulged in spontaneous acts of robbery. Having regard to the background against which the events took place, all the four incidents were parts of the same transaction, but they were separate incidents in which different members of the mob had participated. In these circumstances, therefore, without there being any direct evidence about the act ual participation of the appellants in all the incidents, it could not be inferred as a matter of law, that once the appellants were members of the mob at the place of the first incident, they must be deemed to have participated in all the other three incidents. In these circumstances, therefore, the accused who were not present or who did not share the common object of the unlawful assembly at other stages, cannot be convicted for the activities of the assembly at those stages.

The question of whether a person happens to be innocently present at the place where the members of the unlawful assembly had gathered together to prosecute their common object or was a member therein who shared the common object of the unlawful assembly, is a question of fact to be left to the courts determining fact.[66]

In *Muthu Naicken v State of Tamil Nadu,* [67] the effect of a stray assault by the spectators of an unlawful assembly was considered. The court observed that in rural society, when something unusual occurs, more so when local society is faction ridden and a fight occurs amongst factions, a good number of people appear at the scene not with a view to participate in the occurrence, but as curious spectators. In such an event, mere presence should not be taken as proof of being member of the unlawful assembly. Vicarious liability attaches itself to a person who is proved to have been a member of the unlawful assembly sharing in the common object and either participates in the commission of the event by overt act or knows that the offence which was committed was likely to be committed by any member of the assembly in prosecution of the common object of the unlawful assembly, and becomes or continues to be a member of the unlawful assembly. Once it is established that he was a member of the unlawful assembly as outlined above, then it is not required to show that he committed any overt act. In the instant case, a large crowd of people had gathered, all of whom were not shown to be sharing the common object of the unlawful assembly. Thus, a stray assault by any one of the accused or any particular witness could not be said to be an assault in prosecution of the common object of the assembly, so that the remaining accused could be imputed the knowledge that such an offence was likely to be committed in prosecution of the common object of the unlawful assembly.

In the case of a concerted attack on victims by members of the unlawful assembly, the failure to prove the presence of the named accused does not by itself affect the criminality of those who are established to have been part of the unlawful assembly. In *Ramu Gope v State of Bihar* ,[68]more than 30 persons formed an unlawful assembly, the common object of which was to rescue cattle detained by the villagers and to kill those who resisted. They went to the village, assaulted the villagers and severely beat them causing the death of one Budhia among the villagers. The prosecution had named one Harihar Gope as the person who had act ually inflicted injuries which resulted in the death of Budhia, but Harihar Gope was acquitted on appeal by the high court on the ground that he was absent on the occasion. In appeal before the Supreme Court, the rest of the appellants contended that in the light of the acquittal of Harihar Gope, their conviction for the offence under s 302 read with s 149, IPC, could not be sustained. But the Supreme Court rejected that contention and held that where a member of an unlawful assembly is named as an offender, who committed an offence for which the members of the unlawful assembly are liable under s 149, IPC, and the evidence at the trial was insufficient to establish that a particular act could be attributed to that person, he may still be convicted of the offence if it is proved that he was a member of the unlawful assembly and that the act was done by some member of the assembly in prosecution of the common object or which the members knew was likely to be committed in prosecution of that object. Anyhow, failure to prove the presence of the named offender among the members of the unlawful assembly will not absolve the rest of the members of the unlawful assembly.

Where a member of an unlawful assembly ceases to be a member halfway through the incident, then such person cannot be fastened with the guilt of the entire offence through the provisions of s 149. Thus, in *Badruddin R Karpude v State of Maharashtra* ,[69] the appellant was part of the assembly only until the deceased was dragged out of the house. Thereafter, he ceased to be part of the assembly. Subsequently, the other members of the assembly carried away the deceased to the *chowk* and killed him. The court held that in view of his non-participation beyond the stage of dragging out the deceased from the house, he could not be convicted for murder using s 149, IPC.

On the question of vicarious liability of a member leaving the assembly before the commission of the offence, the Supreme Court held that it cannot be fastened on a person for things done by members of the unlawful assembly, after he had left the house. This aspect arose in *Nawab Ali v State of Uttar Pradesh* ,[70] where the appellant was one amongst seven persons who surrounded the deceased, giving him *lathi* blows. The appellant thereafter lifted the deceased and took him inside the house, locking the door along with other six accused. When the police got the door opened, they found the dead body and only six accused. The court considered the possibility that the deceased was strangulated after the accused-appellant slipped out of the house. Since the law is that an accused must be shown to be part of the unlawful assembly at the time when the offence is committed, the fact that the accused had left the place midway indicates that he cannot be held vicariously liable for the acts when he was not part of the unlawful assembly.

Pronouncement of the Supreme Court in *Bhimrao v State of Maharashtra* ,[71] also reveals similar judicial approach. In this case all the accused, along with some others, formed an unlawful assembly with the common object of committing the murder of one Prabhakar. With this objective, all members of the unlawful assembly went to the house of Prabhakar. Some of the members of the assembly entered the house and assaulted Prabhakar causing him grievous injuries consequent to which he died six days later. It was case of the prosecution that while Prabhakar was being assaulted inside the house the appellants stood outside the house but did not take part in the assault of the accused. Nevertheless, the trial court held all the accused, including the appellants, guilty of the offence punishable under s 302 read with s 149 of the Code. On appeal, the high court re-appreciated the evidence and came to the conclusion that: (i) the accused did form an unlawful assembly with the common object to assault Prabhakar and proceeded towards the house; (ii) while some of the accused entered the house, the appellants stayed outside the house; (iii) the group that entered the house caused grievous injuries which were something more than the original object of the unlawful assembly, and (iv) the common object of the persons who stayed outside was not the same as that of those who entered the house. Based on these conclusions, the high court held the group that entered the house guilty of an offence punishable under s 304 Part II and the group that remained outside the house was held guilty of offence punishable under s 326 read with s 149, IPC. On further appeal by the appellants (challenging their conviction under s 326 read with s 149), the Supreme Court justified the high court's verdict on the ground that the common object of the persons who changed it after they entered the house cannot be attributed to the appellants who remained outside the house.

However, if a member of an unlawful assembly becomes helpless due to injury or his inability to walk away or is held up by others, he continues to be member of the unlawful assembly if he shares the common object of the assembly subsequent to his being made helpless. He can, however, withdraw himself from the assembly and thereby disavow the common object and the subsequent act s done by other members of the assembly by expressions or gestures clearly indicating that he is averse to taking any further part in the incident.[72]

Test When There is a Group or Communal Clash

In *Aher Bhagu Jetha v State of Gujarat* ,[73] the court had to consider the case of rioting, armed with deadly weapons, which was alleged to be communal in nature. The facts were that there was prior tension between the Hindus and Muslims over the taking out of *tazia* procession during Moharrum between the Ahir (Hindu) community and the Samas, a Muslim sect. A dispute arose when two Samas men were sitting in their locality outside their houses, which was objected by some Ahir men on the ground that the Ahir women folk used the route to fetch water. An altercation erupted resulting in the attack and stone throwing by both communities. In the night, the dead body of one Lalamamad was found with cut injuries in the neck. On the question of the duty of the court to evaluate evidence, the Supreme Court observed:

> It is not uncommon in cases of a communal nature to find witnesses coming forward to depose falsely about an attack by a person who is believed to be guilty... A court of justice has to sift and analyze the evidence very carefully so as to determine whether the case against an accused person is established beyond reasonable doubt. This is particularly necessary in a case with a communal background in which partisan witnesses may depose falsely out of a mistaken or misplaced sense of a group loyalty.[74]

A similar caution was highlighted by the Supreme Court in cases involving communal or group clash in the case of *Baldeo Singh v State of Bihar* .[75] The court said that as happens in group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. The courts therefore had to exercise caution, and, if after close scrutiny of the evidence, a reasonable doubt arose with regard to participation of a particular person or persons alleged to be part of the assembly, then the benefit of doubt has to be given to the accused persons.

In *Sukhdeo v State of Maharashtra* ,[76] there was an attack by about 40 armed members of the Wanjari community on the members of the Budha community (a Dalit or Harijan community). There was prior tension between the communities, as the Wanjaris believed that the later community was involved in committing thefts and dacoities in nearby villages, thereby earning a bad name for the village. In the attack, four Buddhas died, and as many as six persons had sustained serious injuries. The Supreme Court held that the evidence of eye witnesses, though all belonging to the victim community, could not be disbelieved on that ground alone. Evidence of eyewitnesses was proved by medical evidence. The trial court and the high court had carefully scrutinised the evidence comprehensively. Finally, there was recovery of incriminating articles regarding the commission of the offence of rioting leading to death. Therefore, the Supreme Court stated that there was no ground to interfere with the conviction of the accused.

Constructive Liability When Free Fight Occurs

In sudden and free fight, which erupts without any prior concert or plan, the principle of constructive liability cannot be imposed and each individual will be liable only for the acts committed by him and not vicariously for the act s of others.[77]

(1) *Determination of common object: Summary***--**(i) Determination may be made from the number and nature of injuries on the body of the victim;[78](ii) the nature of weapons used;[79](iii) the manner and sequence of attack;[80](iv) before convicting, the court must give clear finding regarding the nature of common object and that the object was unlawful;[81](iv) exact sequence of events important in deriving or refuting inference of common object.[82]

(2) *Common knowledge of offence likely to be committed***--**Section 149 operates when the accused had knowledge that some offences are likely to be committed. Thus, in *KC Mathew v State of Travancore & Cochin* ,[83] the Supreme Court held that knowledge of offence would relate not only to offences actually committed, but also to offences likely to be committed. Similarly, liability can be gauged by the type of weapons used.[84]Section 149 consists of two parts. The first contemplates an offence committed by a member of an unlawful assembly in prosecution of the common object. The expression 'in prosecution of common object' is equivalent to 'in order to attain the common object'. In order that the offence may fall within the first part of the section, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. The second part embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, if members of the assembly knew that the act is likely to be committed.[85] The word 'knew' used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. If such knowledge cannot be reasonably attributed to others of the unlawful assembly then their liability for the offence committed in prosecution of common object does not arise.[86]

Common Object and Common Intention: Distinctions and Differences[87]

To better appreciate the distinction between 'common object' (s 149) and 'common intention' (s 34), the text of the two sections is reproduced below for comparison.

Section 34. Acts done by several persons in furtherance of common intention.-- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Section 149. Every member of unlawful assembly guilty of offence committed in prosecution of the common object.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Now, the specific distinctions between ss 34 and 149 may be restated thus.

(1) Section 149 requires an assembly of five persons, whereas s 34 does not require such a fixed number.
(2) The 'common object' must be one specified in s 141, whereas under s 34, the 'common intention' may be any intention
(3) The offence act ually committed is required by s 149 to be one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. It need not be a criminal act in act ual furtherance of the common object which under s 34, it has to be.
(4) Section 34 requires some act, however small, to be done, is sufficient as its essence lies in simultaneous consensus of the minds of persons participating in the criminal act ion to bring about a particular result, whereas under s 149, mere membership of the assembly is sufficient.[88]
(5) Section 34 enunciates a mere rule of evidence or a principle of liability, but creates no distinct offence, while s 149, though a declaratory provision, creates a specific offence.[89]

Section 149 is not intended to subject a member of an assembly to punishment for every offence which is committed by any one of its members during the time they are engaged in the prosecution of the common object. Assuming that the accused was a member of an unlawful assembly, three other conditions must be fulfilled before he can be held responsible.

(1) The offence must have been committed in prosecution of the common object;
(2) The offence must be such as the members knew to be likely; and
(3) The accused must have been a member of the assembly at the time the offence was committed.

The distinction between the 'common object' and 'common intention' is that in 'common object', unlike in 'common intention', there is no need to have prior concert and meeting of minds of the parties before committing an offence.[90] An unlawful object can develop after the assembly gathered before the commission of the crime at the spot itself. Mere sharing of common object between five or more than five persons is enough to impose constructive liability on all of them.[91] It is, however, incorrect to claim that the prior formation of an unlawful assembly with a common object is a must. It is also equally incorrect to claim that prior formation of an unlawful assembly is a condition precedent before roping an accused within the ambit of s 149.[92] The apex court, articulating the distinction between s 34 and s 149, observed:

> It is well settled by a catena of decisions that section 34 as well as section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combination of persons who become punishable as sharers in an offence. Thus, they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes act ion in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Though there is substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. Thus, if several persons numbering five or more do an act and intend to do it, both sections 34 and section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of section 34 for section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of section 149 is, therefore, no bar in convicting the appellants under section 302 read with section 34, if the evidence discloses commission of an offence in furtherance of the common intention of them all.[93]

Effect of Omission to Charge Accused for Substantive Offence When Charge Using Section 149 Fails

This aspect of the matter was discussed by the Supreme Court in *Nanak Chand v State of Punjab* ,[94] which clearly explained the distinction between ss 149 and 34, IPC. In that case, the accused along with others was charged under ss 148, 302 read with s 149, IPC. One Sadhu Ram was killed on 5 November 1953, and it was alleged by the prosecution that his death was due to the assault by the appellant and his associates. The charge of rioting was not proved and the accused and his companions were acquitted of the specific charge under s 302/149, IPC. But the accused was convicted under s 302 alone and sentenced to death. In his appeal before the Supreme Court, it was successfully argued that inasmuch as there was no specific charge of murder along under s 302, IPC, but only of s 302 read with s 149, the conviction under s 302 is not maintainable in law. According to s 233 (s 218 of the present) of the CrPC, for every distinct offence, there should be a separate charge. In the light of this section, there ought to have been a separate charge for murder alone before the trial court and not for murder in consequence of being a member of an unlawful assembly under s 149.

Since s 149 by itself creates a specific offence, and when an accused who was charged under that section is acquitted, it is not open to the trial court to alter ss 302/149, into one of s 302 (murder). The accused was not charged of the offence of murder as such originally, and he was sought to be punished as being a member of unlawful assembly which caused the death of an individual. There was no evidence that the accused act ually caused the death of the deceased by inflicting the injuries found on the body of the deceased caused by a blunt iron weapon called takwa. The accused and his associates were acquitted of the charge under ss 302/149, IPC, but the accused alone was convicted under s 302, IPC, although, there was no specific charge under the section against him. The Supreme Court held that this conviction was wrong and quashed it allowing the appeal of the accused. Justice Imam has explained the distinction between ss 34 and 149, thus:

> There is a clear distinction between the provisions of sections 34 and 149, IPC , and the two sections are not to be confused. The principle element in sections 34 , IPC , is the common intention to commit a crime. In furtherance of the common intention, several acts may be done by several persons resulting in the commission of that crime. In such a situation, section 34 provides that each one of them would be liable, for that crime in the same manner as if all the act s resulting in that crime had been done by him alone. There is no question of common intention in section 149 , IPC . An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although, there was no common intention between that person and other members of the unlawful assembly to commit that offence, provided the conditions laid down in the section are fulfilled. Thus, if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence.[95]

The Supreme Court set aside the conviction of the appellant under s 302, IPC, on the ground that when the charge of rioting and being members of unlawful assembly was not proved, no person can be convicted for an offence which that person had himself not committed.

In a subsequent decision of Supreme Court, *Suraj Pal v State of Uttar Pradesh* ,[96] the same view as regards s 149, as creating a specific offence by itself, was adopted. The liability of a person charged under s 302 read with s 149 and charged under s 302, IPC, alone was thus pointed out:

> The liability of a person in respect of the latter is only for act s directly committed by him, while in respect of the former, the liability is for acts which may have been done by any one of the other members of the unlawful assembly, provided that it was in the prosecution of the common object of the assembly or was such as the members knew to be likely to be so committed.

A charge under s 149, IPC, puts the person on notice only of two alleged facts, namely: (1) that the offence was committed by one, or other of the members of the unlawful assembly of which he is one, and (2) that the offence was committed in prosecution of the common object or is such that was known to be

likely to be so committed. Thus, the absence of specific charge under ss 307 and 302, IPC, was held to be a serious lacuna materially causing prejudice to the accused. On this reasoning, the apex court acquitted the appellant of offences under ss 307 and 302, IPC.

However, in *Nallabothu Venkaiah v State of Andhra Pradesh* ,[97] the Supreme Court was urged to deliberate upon two questions, *namely*, (i) whether an accused could be convicted under s 302, IPC, (*simpliciter*) without aid of s 149, IPC, in the absence of substantive charge under s 302, and (ii) whether the accused could be convicted under selfsame evidence on the basis of which other accused were acquitted? The facts, in brief, that led to these questions were: Nallabothu Venkaiah, the appellant, along with other fifteen persons, was charged under s 302 read with s 149 of the IPC and was put to trial. The trial court convicted seven accused along with the appellant under s 302 read with 149. But the Andhra Pradesh High Court, on appeal, after re-appreciation of the evidence, acquitted all the accused and convicted the appellant alone under s 302, IPC, *(simpliciter)* by attributing him the overt act s that, in ordinary course of nature, were sufficient to cause death of the deceased.

The apex court, after a thorough analysis of its earlier judicial pronouncements, articulated the following three broad propositions of law:

(a) the conviction under s 302 *simpliciter*without aid of s 149 is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence;
(b) wrongful acquittal recorded by the high court, even if it stood, that circumstance would not impede the conviction of the appellant under s 302 read with s 149 IPC, and
(c) charge under s 302 with the aid of s 149 could be converted into one under s 302 read with s 34, if the criminal act done by several persons less than five in number in furtherance of common intention, is proved.[1]

Absence of Separate Charge Only Irregularity Which is Curable

The matter of irregularity in charge again came up for consideration before a full bench of five judges in the case of *Willie (William) Staney v State of Madhya Pradesh* .[2] The accused in this case, who was 22 years old, was in love with the sister of the deceased, who did not like his intimacy. On the day of occurrence, there was a quarrel between the deceased and the accused, and the accused was asked to go away from the house. Shortly afterwards, the accused returned with his younger brother and called the sister to come out. Instead of the sister, the deceased brother came out. There was heated exchange of words. The accused slapped the deceased on the cheek. The accused then snatched a hockey stick from his younger brother and gave one blow on his head with the hockey stick with the result that his skull was fractured. The deceased died in the hospital 10 days later. In the opinion of the doctor, the injury was such as was likely to cause death. The accused along with his co-accused brother was charged for murder under s 302 read with s 34, IPC. The co-accused was acquitted of the charge, but the appellant was held guilty under s 302. It was argued in appeal that in so far as there was no distinct charge under s 302 alone, the conviction is wrong.

The Supreme Court held that the omission to frame a separate charge was only a curable irregularity, which in the absence of prejudice, could not affect the legality of conviction under s 302, IPC. Bose J said thus:

> When all is said and done what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether, the main facts sought to be established against him were explained to him fairly and clearly, whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown, the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one.[3]

However, on the facts of the case, the conviction for murder under s 302 was altered into that for culpable homicide not amounting to murder under s 304, IPC.

Even four decades after the *Willie Stanley* dictum, the apex court reiterated that omission to mention s 149 specifically in the charge is only an irregularity and conviction thereunder, even in the absence of such a charge, does not get affected, if no prejudice is caused to the accused person.[4]

Omission in Charge Regarding Common Object

A comparative analysis of the ingredients of ss 34, 149 and 302, IPC, is found in *Chikkarange Gowda v State of Mysore* .[5] In this case, two brothers, who were found in the house of a concubine, were attacked by a mob of more than hundred persons and were killed in the subsequent fire of the house and tumult. The charges against four of the appellants were that they were members of the aforesaid mob which caused the death of both the brothers. The common object of the unlawful assembly was merely to administer a chastisement to the deceased. The charge did not mention that the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object. The deceased was killed by the fatal injury caused by certain members of the unlawful assembly. The trial court convicted the other members including the two appellants, who had not caused the fatal injury under s 302 read with ss 149 and 34, IPC. The Supreme Court held that none of the members of the unlawful assembly had the intention to kill the deceased nor did any of them know that the deceased was likely to be killed in the prosecution of the common object of chastisement. Thus, as the charge gave no notice to the accused that they had a separate common intention of killing the deceased, different from that of the unlawful assembly, the conviction of the accused, who had not caused any fatal injury, under s 302 read with ss 149 or 34, IPC, was held not sustainable. However, in *Anna Reddy Sambasiva Reddy & Ors v State of Andhra Pradesh* ,[6] the Supreme Court ruled that mere omission of specific charge under s 149, IPC, does not warrant setting aside of conviction thereunder if the charge, without specific mention of s 149, specifies essential ingredients of s 149, IPC.

In *Sawal Das v State of Bihar* ,[7] where the charge was that the appellant, along with his father and stepmother caused the death of his wife by throttling her, and the latter two were acquitted of the offence of murder under ss 302/34, IPC, the Supreme Court held that the charge of murder by the use of s 34, IPC, would not stand as against the son. After the acquittal of the co-accused for murder, charged under s 34, IPC, the individual and not the conjoint liability of the appellant has to be established by the prosecution, before the appellant could be convicted under s 302, IPC, *simpliciter*. Since it was not possible for the court to find conclusively that it was a case of murder by throttling and of nothing else, or that the person who could have throttled or done some other act which act ually killed the deceased, was the appellant and not his co-accused he was to be given benefit of doubt and hence was acquitted.

Test for Common Object-Knowledge

In *Shambhu Nath v State of Bihar* ,[8] the first accused Shambhu Nath Singh had been convicted of the offence under s 302 read with s 149, IPC, and the other accused have been convicted of offences under ss 326 read with s 149, IPC. It was contended on behalf of the appellants other than the first accused, that in the absence of evidence to show that grievous hurt was caused by one of the accused in prosecution of the common object, their conviction for the offence under s 326 read with s 149, IPC, was untenable. But the Supreme Court held that the offence under s 326, IPC, is, in its relation to the offence of murder, a minor offence and the language used in s 149, IPC, does not prevent the court from convicting for that minor offence merely because an aggravated offence is committed. Explaining the scope of s 149, IPC, the court held:

> Section 149 of the is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of the common object of that assembly or for such offences as the members of that unlawful assembly knew to be likely to be committed in prosecution of that object. If an unlawful assembly is formed with the common object of committing an offence and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence, even if one or more but not all committed the offence. Again, if an offence is committed by a member of an unlawful assembly and that offence is one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, every member, who had that knowledge, will be guilty of the offence so committed. But 'members of an unlawful assembly may have a community of object up to a certain point, beyond which they may differ on their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this, the effect of s 149 of the Indian Penal Code may be different on different members of the same unlawful assembly'.[9]

The apex court ruled that the basis of constructive guilt under s 149 is mere membership of an unlawful assembly. If an accused is a member of an unlawful assembly, the common object of which is to commit a certain crime, and such a crime is committed by one or more of the members of that assembly, every person who happens to be a member of that assembly is liable for the commission of the crime being a member of it irrespective of the fact whether he has act ually committed the criminal act or not.[10]

Separate Charge Under Section 147 or 148, Indian Penal Code 1860, not Essential When Charge UnderSection 149 Exists

In *Mahadev Sharma and Ors v State of Bihar* ,[11] the Supreme Court held that when a person is charged and convicted under s 302 read with s 149, IPC, it is not obligatory that a charge under s 147 or s 148 should have been framed, and a conviction under those sections also recorded when the charge is laid for an offence like murder with the aid of s 149. Offences under ss 143 and 147, IPC, must always be present, but the other two charges need not be framed separately unless it is sought to secure a conviction under them. For the application of s 149, there must be an unlawful assembly while s 141 defines an unlawful assembly of five or more persons, s 142 says that a person is considered to be a member of an unlawful assembly when he intentionally joins it knowing its unlawful character. A mere membership of an unlawful assembly is made an offence under s 143. Section 144 , IPC , deals with a person who joins an unlawful assembly with a deadly weapon. Section 145 , IPC , deals with those who continue to remain in an unlawful assembly after it has been ordered to be dispersed. Section 146 , IPC , deals with the offence of rioting which is the aggravated offence of unlawful assembly, when they resort to force or violence in the prosecution of the common object. Section 147 , IPC , prescribes punishment for rioting. Section 148 , IPC , deals with rioting armed with deadly weapons. Section 149 , IPC , enacts that every member of an unlawful assembly is guilty of the offence committed on the prosecution of the common object. Thus, from the scheme of provisions under ch VIII of the IPC, it is apparent that a charge under s 149 necessarily implies existence of ingredients of ss 147 and 148. In this particular case, death was caused in the course of rioting.

A conviction under s 304 for culpable homicide not amounting to murder, by the application of ss 34 and 149, IPC, was set aside by the Supreme Court in *Kanbi Nanji Virji v State of Gujarat* .[12] The court held that in a case where there was a melee at the time of the incident, where two groups indulged in a free fight resulting in injuries to persons of both groups and death of two, and the court comes to the conclusion that the injuries sustained by the persons were in the course of a free fight, then only those persons who are proved to have caused injuries or death can he held guilty for the offence individually committed by them.

A bona fide assertion of right of way through the uncultivated portion of private land by the villagers, when the road is submerged during rainy season, cannot, in the absence of any other evidence, be considered as a common intention to commit a criminal act within the meaning of s 34. From the fact that one villager had a spade in his hand and other two had sticks in their hands, it is not safe to draw the inference that they intended to commit any offence. Even assuming that the common intention of the accused persons was to force their way through the uncultivated portion of private land by using force, if necessary, their conviction under s 304 IPC was held illegal, in the absence of any finding that they intended to cause any injury to any person. The Supreme Court set aside the conviction entered by the Gujarat High Court and acquitted the accused saying that the high court failed to bear in mind the distinction between ss 34 and 149, IPC.

Failure of Charge Under Section 149and Substitution of Charge Under Section 34 , Indian Penal Code 1860

In *Ram Tahal v State of Uttar Pradesh* ,[13] the six accused were charged with offences under s 302 read with s 307 read with s 149 and s 148, IPC, for having formed themselves into an unlawful assembly with the common object of demolishing the thatch of one Ram Badal, and for having committed the murder of two others, the brother and mother-in-law of the said Ram Badal. As three of the accused had been acquitted, the court held that the conviction of the rest of the accused for attempt to murder (s 307) read with s 149 which requires at least five persons to form an unlawful assembly, is unsustainable. The court remarked that before s 149 can be pressed, s 141 prescribing a minimum of five persons, has to be satisfied.

However, the court found them guilty of the said offence under s 34, IPC, premised on common intention. In these cases, the court said that the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted.

In *Krishna Govind Patil v State of Maharashtra* ,[14] it was held that the prearranged plan may develop on the spot during the course of the commission of the offence, but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court convicts a person under ss 302 or 304 read with s 34, IPC, it should come to a definite conclusion that the said person had a prior concert with one or more persons named or unnamed for committing the offence.

In *State of Orissa v Arjun Das Agrawal* ,[15] the Supreme Court has also opined that in cases where the prosecution relies on a charge under s 302 read with s 149, IPC, and if it fails to prove it, a court is competent to convict the accused under s 302 read with 34, IPC, if it is convinced that the criminal act was done by the accused in furtherance of their common intention. The absence of specific charge under s 34 does not cause any prejudice the accused.[16]

The Supreme Court, in *Hamlet @ Sasi v State of Kerala* ,[17] wherein a question of sustainability of liability of the appellants under s 302 read with s 149, IPC, when the prosecution has failed to prove that the unlawful assembly did contain more than five persons entertaining the same common object was raised, ruled that in cases where the prosecution is unable to prove the number of members of the unlawful assembly to be five or more, courts can convict the guilty persons with the aid of s 34 of the Code provided that there is evidence on record to show that such accused shared the common intention to commit the crime. Obviously, to hold a person with the aid of s 34, the prosecution has to prove that the criminal act was done by act ual participation of more than one person and that it was done in furtherance of the common intention of all the engaged at a prior concert. Reiterating the thitherto well-established law, the apex court observed:

> It is true that this Court in any number of cases has held that there can be an unlawful assembly of less than five named accused so long as there is material to come to the conclusion that the prosecution has established that part from these named accused there were also others who were unnamed but who were members of such assembly and shared the common object of that unlawful assembly. ...[I]n the absence of a specific finding that there were other members also in the said unlawful assembly, the invocation of Section 149 will be untenable.[18]

It, therefore, set aside conviction by the high court of the appellants, numbering four, for committing offence punishable under s 302 read with s 149, IPC, and held them guilty of causing grievous hurt by dangerous weapons punishable under s 326 read with s 34 of the IPC.

The apex court, subsequently, also ruled that it is open for a court to take recourse to s 34 even if the said section is not specifically mentioned in the charge and instead s 149 is included, if it comes to a conclusion that accused concerned have shared a common intention with the others.[19]

On Nature of Proof of Common Object in Group or Communal Clashes

In *Kishori v State of Delhi* ,[20] the accused had been sentenced to death for committing offences under ss 148 and 302 read with s 149, IPC. The case related to the mass killing of Sikhs in Delhi following the assassination of Mrs Indira Gandhi, then Prime Minister, by Sikh bodyguards on 31 October 1984. The Supreme Court noted that when an accused person is charged not only under s 302, but also under s 302 read with s 149, IPC, the culpability of such accused resulting in the death of the person will not be less than that of homicide amounting to murder. However, since the accused Kishori was not the leader, while his conviction was confirmed, the death penalty alone was substituted with life imprisonment.

The question of nature of proof came to be considered in *Mahantappa v State of Karnataka* .[21] In this case, the accused were alleged to have formed an unlawful assembly, assaulted the deceased with sword and thereafter threw his dead body into a hut which was set on fire. The evidence of eye witnesses was amply corroborated by the objective findings of the investigating officer about the burnt houses and that of the doctor regarding injuries found on the person of the deceased and PW-1. However, evaluating the role of individual accused, the Supreme Court evolved the following tests:

(1) Conviction could be sustained where more than two eye witnesses establish the presence of a particular accused and also support the allegation of specific role played by each accused;
(2) Considering that a large number of persons were involved in the gruesome incident, it would not be safe to sustain the conviction of the accused, who were identified by only one eye witness;
(3) Where there is no evidence to conclusively say that some accused were present, they were entitled to acquittal. In other words, their presence as onlookers cannot be ruled out.

Effect of Omissions and Embellishments

In *Manoj @ Bhau v State of Maharashtra* ,[22] there were six accused persons who were alleged to have murdered one Raju on account of strained relations between the first three accused and the deceased over an election-related issue. The allegation was that the accused had formed an unlawful assembly and surrounded and assaulted the deceased which resulted in his death. The conviction under ss 147, 148 and 302 read with s 149, IPC, of the trial court was confirmed by the Bombay High Court. However, only three accused persons appealed before the Supreme Court. On examining the evidence, the court found that the evidence as regards the role of A-1 holding *gupti* and stabbing the deceased was corroborated by medical evidence. However, as regards the role of A-2 and A-3, there was not sufficient evidence, and there was no mention of their participation even in the earliest complaint and statement given by the parents of the deceased, who were said to be eye witnesses. The court felt that in view of this nature of the evidence, it would be unsafe to convict A-2 and A-3 by taking recourse to s 149, when their presence and participation itself was in doubt. Hence, A-2 and A-3 were acquitted, while A-1 was convicted for offence under s 302 read with s 34, IPC.

On the issue of the weightage to be given to evidence of persons dubbed as interested witnesses, the Supreme Court in *State of Haryana v Tek Singh* ,[23] considered the case in which the wife of the deceased gave testimony to the murder of her husband by an unlawful assembly of accused numbering nine persons. Her evidence was not believed and the accused had been acquitted by the high court. In this case, the two deceased were sitting in front of their house talking, when they were attacked by the accused. Seeing them, the deceased ran into the house and went into the room, where the wife of the deceased was sitting. The unlawful assembly came into the house, attacked and killed the two deceased. In evaluating such testimony, the Supreme Court said:

> The court while appreciating the evidence ought to have kept in mind and visualised the situation at the time of the occurrence of the incident. The evidence of the witness should be appreciated by keeping ground reality and fact situation in mind. It is also established by law that even with regard to the interested witness, it is the duty of the court to separate truth from falsehood and the chaff from the grain. In view of the close relationship, witnesses naturally would have a tendency to exaggerate or add facts, but while appreciating the evidence, the exaggerated facts are to be ignored unless it affects the substratum of the prosecution story.[24]

The court thus held that when the presence of the accused with weapons was established beyond doubt, they would be liable for the offences.

UNLAWFUL ASSEMBLY: OTHER CONNECTED PROVISIONS

Having exhaustively considered the scope of operation of ss 141 and 149, IPC, we may also consider the connected provisions which are enumerated hereunder.

Being a Member of Unlawful Assembly--Contents and Punishment

Sections 142 and 143 of the IPC, which deal respectively with 'being a member of unlawful assembly' and punishment therefor, run as follows:

Section 142. Being member of unlawful assembly.--Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

Section 143. Punishment.--Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Scope of Section 142

While s 141 defines unlawful assembly, s 142 defines as to who is a member of such assembly and provides for two circumstances: (i) the person is aware of the facts that make such an assembly an unlawful one; (ii) despite this knowledge, however, he intentionally joins the assembly or continues in it. In such circumstances, he is held to be a member of the unlawful assembly. It is clear that he may become a member at any time and in any manner; however, once he has knowledge about the unlawful nature of the assembly and continues to be part of it, he becomes liable for all the acts of the assembly. 'Continuance' in unlawful assembly does not necessarily mean mere physical presence of an accused. Such a presence must accompany with mental element necessary for continuance.[25] Thus, mere presence of a person at the place where unlawful assembly gathered in prosecution of their common object does not make him liable under s 142 unless the prosecution proves that he was one of the persons who 'continued' with the assembly and shared the 'common object' with other members of the assembly. Thus, the condition that he should not be a passive onlooker or spectator, but that he shared the common object of the unlawful assembly, is nevertheless still applicable for offence under this section too.[26] When there is doubt about the presence of an accused or the prosecution has failed to prove his 'continuance' with unlawful assembly, an accused is entitled acquittal.[27]

By virtue of s 143, a member of an unlawful assembly is punished with imprisonment for term up to six months or with fine or with both.

Joining an Unlawful Assembly Armed with Deadly Weapon

Section 144. Joining unlawful assembly armed with deadly weapon.--Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 145. Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.--Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Scope

Section 144 creates an aggravated form of the offence created under s 143, while s 145 provides punishment for joining or continuing with an unlawful assembly that has been commanded to disperse. These offences are premised on the fact that the risk to public tranquility is enhanced by the intention of unlawful assembly of using force evinced by carrying arms or deadly weapons.

The enhanced punishment stipulated under s 144 can be imposed on a member of unlawful assembly if he was: (i) a member of an unlawful assembly, (ii) armed with deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death. However, he cannot be absolved from liability only on the ground that he was not armed with a deadly weapon, if he happened to be a member of the unlawful assembly, which is armed with deadly weapon and determined to commit rioting.[28]

To prove an offence under s 144, the prosecution has to first prove that there was an unlawful assembly of five or more persons, who had a common object which was unlawful, in aim of which they had gathered at which time there was a command to disband and disperse, which they deliberately disobeyed. Here, the element of knowingly continuing to remain part of the assembly despite being commanded to disperse is crucial to proving the offence.[29]

Rendering Aid in Unlawful Assembly

Sections 150, 157 and 158 of the IPC deal with liability of persons who render assistance in various ways in unlawful assembly. Section 150 makes the hiring of persons to join an unlawful assembly punishable, while s

157 makes the hourbouring, receiving or assembling of persons who are likely to be engaged in to an unlawful assembly an offence. Section 158 provides punishment for those who hire themselves out as members of an unlawful assembly or assist such members.

Section 150 intends to bring within the reach of the law those who are originators or instigators of the offences committed by others. It deals with the case of those who are neither abettors of, nor participants in, the offences committed by an unlawful assembly. It brings within its fold the persons who are physically absent in an unlawful assembly but who engage or hire or employ other persons to join or become member of an unlawful assembly. It makes such a person criminally liable at par with that of a member of an unlawful assembly even though he has not been a member of the unlawful assembly. In other words, a person, who engages or hires or employs another to join an unlawful assembly, will be liable for the offences committed by any member of that unlawful assembly in the same manner as if he had been a member of such an unlawful assembly or himself had committed such an offence.[30] It reads as under.

Section 150. Hiring or conniving at hiring, of persons to join unlawful assembly.--Whoever hires or engages, or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of an unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

As mentioned earlier, s 157 provides imprisonment for a term up to six months, with fine or with both, for a person who knowingly harbours, receives or assembles persons hired, engaged or employed, or likely to be hired, engaged or employed to join an unlawful assembly. In order to ensure conviction of a person under s 157, the prosecution is required to prove that: (i) he harboured, received or assembled persons in any house or premises; (ii) such house or premises were in his occupation or charge or under his control; (iii) such persons had been hired, engaged or employed for joining or becoming (or about to join or become) members of an unlawful assembly, and (iv) he was aware of the fact. A plain reading of s 157 reveals these constituting elements. It says:

Section 157. Harbouring persons hired for an unlawful assembly.--Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons, knowing that such persons have been hired, engaged, or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

It also reveals that the section refers to some unlawful assembly that may hold in the future, and not that one which has happened. Therefore, an act of harbouring, receiving or assembling persons who, in the past, had joined or likely to have been members of an unlawful assembly, does not amount to an offence under s 157.[31]

Section 158, which punishes a person who hires himself as a member of an unlawful assembly or assists a member of an unlawful assembly in doing any of the 'objects' enumerated in s 141 of the IPC, states as under:

Section 158. Being hired to take part in an unlawful assembly or riot.--Whoever is engaged, or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

or to go armed.--and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The section is divided in two parts. The first part provides for an imprisonment for a term up to six months, or fine or both, for a person who hires himself or assists in carrying out the unlawful objects; while the second part offers a higher penalty for a person, who, after hiring himself or volunteering in assisting a member of an unlawful assembly, is found armed with a deadly weapon. In such a case, he may be sentenced to an imprisonment for term up to two years, or fine or both.

PART B - RIOTING

Section 146. Rioting.--Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

Section 147. Punishment for rioting.--Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 148. Rioting, armed with deadly weapons.--Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Definition

Section 146 defines the offence of rioting. The prerequisite for applying this provision is that there should have been an unlawful assembly as defined in s 141, IPC, that force or violence was used by the assembly or by any member of the assembly thereof in prosecution of the common object of the assembly, and finally that an offence has been committed. It is to be noted that mere intention to use force is not sufficient and that force or violence must have act ually been used by the assembly or by any of its members. All this presupposes that there was a common object of the assembly, which object was naturally unlawful. Thus, where the common object is not established by the prosecution, the accused would be entitled to be acquitted.[32]

With regard to force or violence used, it has been held in *Lakshmiammal v Samiappa Goundan* ,[33] that while 'force' refers to a narrowed definition under s 350, IPC, and refers mainly to that used against persons, 'violence' is much wider and comprehensive and is used to include violence to property and inanimate objects.

The essence of the offence of rioting lies in the use of force to achieve a common purpose. The essentials of s 146 are the following.

(1) That the accused persons, being five or more in number formed an unlawful assembly;
(2) That they were animated by a common unlawful object;
(3) That force or violence was used by the unlawful assembly or any member thereof;
(4) That such force or violence was used in prosecution of their common (unlawful) object.[34]

Actual force or violence must be used; a mere show of force is not sufficient. All members need not use force. The penal consequences will apply equally to all, if any of them uses force or violence. However, if the common object of an unlawful assembly is not illegal, it is not rioting even if force is used by any member of that assembly.[35] Similarly, use of force by persons in a sudden quarrel does not amount to rioting.[36]

In riot concerning land disputes, the question of private defence generally arises. It should be carefully enquired as to which party was in actual possession of the land in dispute at the time of the riot and not who has a legal claim to it. To enforce a legal claim and consequent possession, remedy lies in the civil court. As far as criminal cases are concerned, the party in act ual possession will have the right of private defence and will not be guilty of rioting; but private defence will be no excuse if the riot is premeditated.

If the previous possession is not peaceful, it is obvious that neither party is in actual possession, and in such a case, both parties may be placed on trial.

Punishment for Committing Riot with Deadly Weapon

Section 148 is an aggravated form of the offence of rioting mentioned in s 146 and punished under s 147 of the IPC. It provides an enhanced punishment for a person who is armed with a deadly weapon while committing rioting. A mere fact that a person was carrying a deadly weapon while committing rioting makes him liable for the enhanced punishment as it converts 'rioting' (under s 146) into an 'aggravated rioting' (under s 148). In an unlawful assembly that used force, if there, along with others, is only one member armed with a

deadly weapon, he alone, and not other unarmed members of the assembly, will be liable under s 148.[37] Rest of the members will be liable under s 147, IPC.[38]Section 148, therefore, cannot be read with the provisions of s 149 of the IPC.[39]

Punishment for Provoking Riot

Section 153. Wantonly giving provocation with intent to cause riot--if rioting be committed--if not committed.--Whoever, malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Section 153 provides punishment for a person who, by doing an illegal act, maliciously or recklessly, 'gives provocation' to another person to commit a riot. It brings within its ambit provocative words or acts that do not amount to instigation or abetment.[40]The words 'by doing an illegal act ' connote that provisions of the section cannot be invoked unless the act done by a person was 'illegal' accompanied with his intent or knowledge that it would provoke others to commit a riot.[41] However, it excludes from its operation a mere chance provocation.[42] To invoke s 153, the provocation given must be likely to cause rioting.

Liability of a Person for Whose Benefit Riot is Committed

Sections 154 - 156 of the deal with constructive liability of a person having interest in the land on which an unlawful assembly is held or a riot is committed and of a person for whose benefit such an assembly or riot is committed.

Section 154 imposes criminal liability on an owner or occupier of land or a person having an interest in land for the failure of his servant or manager to give information to the public authorities or to take adequate legal measures to stop the occurrence of an unlawful assembly or riot upon the land of such an owner or occupier. To be more precise, s 154 imposes liability on an owner or an occupier of the land on which an unlawful assembly or a riot has taken place for the following omissions of his servant or manager: (i) failure to give earliest notice to the public authorities about the unlawful assembly or riot; (ii) intentional failure to give notice of the unlawful assembly or riot which was about to be held or committed; and (iii) abstention from taking appropriate measures to suppress an unlawful assembly or riot. The owner's liability does not depend upon his knowledge of the riot or of the act s and intention of his servant or manager. He is punished for the taking place of an unlawful assembly or riot on his land.

Sections 155 and 156 deal with the liability of persons for whose benefit a riot is committed. The former deals with liability of the owner or an occupier of the land on which an unlawful assembly or a riot, who has derived benefits from such an assembly or riot and he or his agent, knowing or having reasons to believe that such assembly or riot is likely to take place, has failed to use lawful means within his reach to prevent, suppress or disperse it. While the latter section holds an agent or a manager of an occupier or an owner of the land on which a riot has taken place and from which such an owner or occupier has derived benefits responsible for his failure, having reasons to believe that such a riot is likely to take place, to resort to all lawful means within his power to prevent or suppress such a riot.

To invoke s 155 the prosecution needs to prove that: (i) a riot is committed for the benefit or on behalf of land owner or occupier; (ii) such riot took place in respect of the land, of which the accused is either the owner or an occupier; (iii) the accused accepted or derived benefits therefrom; and (iv) he, his agent or manager, having reasons to believe that such a riot was likely to be committed or such an unlawful assembly to be held, has not used lawful means to prevent or oppress or disperse the riot or the unlawful assembly. To constitute an offence under s 156, which imposes personal liability on the managers or agents of such an owner or occupier, it is required to prove that: (i) a riot was committed; (ii) the riot was committed for the benefit of the owner or occupier of the land; (iii) the accused had reasons to believe that a riot was likely to be committed, and (iv) the accused failed to appropriate measures to prevent it.

These three provisions read as under.

Section 154. Owner or occupier of land on which an unlawful assembly is held.-- Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

Section 155. Liability of person for whose benefit riot is committed.--Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land, respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

Section 156. Liability of agent of owner or occupier for whose benefit riot is committed.--Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

Liability of a Person for Obstructing Suppression of Riot

Section 152 stops a person from using force or threatening to use force against a public servant with a view to deterring him from dispersing an unlawful assembly or suppressing a riot or affray. It accordingly holds a person liable to an imprisonment for a term up to three years or with fine or with both, if he resists or attempts to resist a public servant in his endeavour to disperse an unlawful assembly or suppress a riot or affray. It says.

Section 152. Assaulting or obstructing public servant when suppressing riot, etc.--Whoever assaults or threatens to assault, or obstructs or attempts to obstruct, any public servant in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

PART C - BELONGING TO AN ASSEMBLY OF FIVE OR MORE PERSONS WHEN ORDERED TO DISPERSE

Section 151 , IPC, which deals with the offence in question, says:

Section 151. Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.--Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or both.

Explanation.--If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

The 'explanation' to the said section distinguishes s 151 from s 145. An assembly of five or more persons may not be an unlawful assembly, if, the common object be lawful or if unlawful, different from those mentioned in s 141. If, however, such an assembly is likely to disturb the public peace, it may be ordered to disperse according to the provisions of s 129, CrPC. If the members refuse to disperse after receiving a lawful mandate, they are guilty under s 151. Punishment for the offence under s 151 is imprisonment for a term up to six months or fine or both.

A plain reading of s 151 and *explanation* thereof makes it clear that its provisions are inapplicable to cases in which the assembly is unlawful from its inception or becomes so before the command for its dispersal is given.[43] It perceives that joining or continuing with an unlawful assembly after it is being ordered to disperse is a serious offence.[44] The following are the points for proof in order to obtain conviction for the offence in question:

(i) That the assembly consisted of five or more persons;
(ii) That such assembly was likely to cause a disturbance of the public peace;
(iii) That such assembly was commanded to disperse;
(iv) That such command was lawful;
(v) That the accused joined or continued in the assembly after the command; and
(vi) That the accused did so knowingly.

To prove point (ii), the opinion of the police officer that the assembly was likely to disturb the public peace is admissible in evidence under s 45 of the Evidence Act, but is not sufficient for a conviction.

In *Komma Neelkantha Reddy v State of Andhra Pradesh* ,[45] the Supreme Court held that where there were not more than four armed persons, and it was not made out that their object was to commit any offence, the assembly had not become unlawful. Section 151 , IPC , was also held not applicable on the facts of the case, as the group had not been 'commanded to disperse' by the police. In this particular case, two rival parties were throwing stones at each other from the terrace of two houses situated on opposite sides of a road and the accused persons had merely rushed up on the terrace of one house, hearing the call of other persons in that particular terrace. Two others, who were already on the terrace and who had actually shot and caused the death of one, had died after their conviction by the trial court, while appeal was pending before the high court. In the circumstances, the Supreme Court held that there was no reliable evidence to convict the surviving accused appellants of the offences of murder under ss 149 and 151, IPC.

PART D - AFFRAY

Section 159. Affray.--When two or more persons, by fighting in a public place, disturb the public peace, they are said to 'commit an affray'.

Section 160. Punishment for committing affray.--Whoever commits an affray, shall be punished with punishment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

Definition

When two or more persons, by fighting in a public place, disturb the public peace, they are said 'to commit an affray' (s 159). The punishment for committing affray is imprisonment for up to one month or fine up to one hundred rupees or both (s 160).

It means that when two or more persons, by fighting in a public place, disturb the public peace, they are said to commit an affray. The offence of affray, as defined in s 159, IPC, postulates the commission of a definite assault or a breach of the peace. Mere quarrelling or abusing in a public place without exchange of blows is not sufficient to attract the application of s 160, IPC.[46] To constitute affray there must be a fight and it is not fight when one party is aggressive and the other one is passive.[47] Both the parties need to participate in a struggle. Struggle implies that there are two sides each of which is trying to obtain mastery by violence.

From the above, it is clear that the section requires the following three essentials[48]:

(i) Fight between two or more persons;
(ii) fighting in a public place; and
(iii) disturbance of the public peace in consequence thereof.

The points that must be proved for convicting an accused on a charge of affray are:

(i) that the accused and other persons were fighting;
(ii) that such a fight was in public place; and
(iii) that the fight disturbed the public peace.

Distinction Between Affray, Assault and Riot

It is important to note that affray differs from riot and assault. Affray differs from riot in two major aspects. First, affray cannot be committed in a private place, while riot can be committed in a private place. Secondly, affray can be committed by two or more persons and riot by five or more. The difference between affray and assault lies in the fact that in the former both the quarrelling parties are accused of affray, while in assault one of the parties is a prosecutor and the other is accused. The difference between assault, affray and riot may be stated thus.

Table 23.1

Assault	***Affray***	***Riot***
(1) May be committed in any place, public or private.	(1) Must be committed in a public place and cannot be committed in a private place.	(1) May be committed in any one place, public or private.
(2) May be committed by one or more.	(2) Must be committed by two or more (minimum number must be two).	(2) Must be committed by five or more (minimum number must be five).
(3) There may be or may not be common object.	(3) There may be or may not be common object.	(3) There must be common object and it must be one of the five mentioned in s 141.
(4) Is an offence against the person of the individual.	(4) Is an offence against the public peace.	(4) Is an offence against the public peace.
(5) May be sudden and unpremeditated.	(5) May be sudden and unpremeditated.	(5) Is generally premeditated.
(6) Punishment (ordinarily): Imprisonment of either description for three months or fine up to Rs 500 of both (s 352).	(6) Punishment (ordinarily): Imprisonment of either description for one month of fine up to Rs 100 or both (s 160).	(6) Punishment ordinarily): Imprisonment of either description for two years or fine or both (s 147).

PART E - PROMOTING ENMITY BETWEEN CLASSES

Section 153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.--

(1) Whoever--
(a) by words, either spoken, or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or
(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or

(c) organises any exercise, movement, drill or other similar activity intending that the participants in such act ivity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such act ivity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such act ivity, for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

Offence committed in place of worship, etc.--(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

Introduction

Section 153A was originally introduced in the IPC in the year 1898 by the Indian Penal Code (Amendment) Act 1898, with the view of preventing breaches of public tranquility and to prevent various classes from coming into conflict by mutual abuse and recrimination. Following the recommendations of the National Integration Council in 1969, the present section was substituted for the old section.[49] The scope of the sections was further widened with the introduction of sub-cl (c) to sub-s (1) and addition of sub-s (2) to the section. The 'Statement of Objects and Reasons' for the introduction of the section, reveals the background in which the new clauses were added:

> In order effectively to check fissiparous communal and separatist tendencies, whether based on grounds of religion, caste, language or community or any other grounds, it is proposed to amend section 153A of the Indian Penal Code so as to make it a specific offence for anyone to promote or attempt to promote feelings of enmity or hatred between different religious, racial or language groups or castes or communities. The Bill also seeks to make it an offence for anyone to do any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which is likely to disturb public tranquility.

Subsequently in the year 1972, a further addition was made by bringing into the scope of the section any act ivity, such as training in the form of holding regular drills, exercises, movements and other activities in order to train the participants in the use of criminal force or violence, the use of religious places for conduct of such act ivities as will result in promotion of enmity between different groups based on race, place of birth and so on.[50]

Constitutional Validity of Section 153A

After the Constitution of India came into force, the constitutional vires of s 153A came in doubt. In 1951 it was contended before the then East Punjab High Court that it contravened the letter and spirit of art 19(1)(a) of the Constitution that guarantees the freedom of speech and expression and thereby deserved to be declared ultra vires the Constitution. The high court, perceiving that the section, in the light of art 19(2) of the Constitution, imposed unreasonable restrictions on the fundamental right of speech and expression, declared it unconstitutional and struck it down.[51]

However, subsequently the Constitution (First Amendment) Act 1951, inserted the words 'in the interests of...public order' in art 19(2) to widen the scope of restrictions that can be imposed on the fundamental right.

In the light of the amended art 19(2), however, the High Courts of Allahabad and of Bombay upheld the vires of s 153A of the IPC. In *Sheikh Wajih Waddin v State of Uttar Pradesh* ,[52] the Allahabad High Court held that s 153A, IPC, is saved by art 19(2) of the Constitution. Subsequently, the high court, in another case,[53] also ruled that s 153A is not ultra vires because the restriction imposed on freedom of speech and expression by s 153A is reasonable within the meaning of art 19(2) of the Constitution. The Bombay High Court also held

that s 153A is intra vires to the Constitution. The high court ruled that art 19(2) of the Constitution saves s 153A from being ultra vires to the Constitution as it puts a permissible restriction on the freedom of speech and expression. It observed[54]:

> Section 153A on the ground that it violates the guarantee of free speech and expression must be rejected because the section seeks to punish only (a) such act s which have the tendency to promote enmity or hatred between different classes, or (b) such acts which are prejudicial to the maintenance of harmony between different classes and which have the tendency to disturb public tranquility. These act s are clearly calculated to disturb public order and so the limitations imposed by Section 153A are in the interests of public order. Article 19(2) would therefore save Section 153A as being within the scope of permissible legislative restrictions on the fundamental right guaranteed by Article 19(1) (a).[55]

Essential Ingredients of Section 153-A

The essential ingredients of the sections can be enumerated as follows:

(1) Whoever by (a) words, either spoken or written; or (b) by signs; or (c) by visible representations; or (d) otherwise;
(2) Promotes or attempts to promote disharmony or feelings of enmity, hatred or ill-will;
(3) Between different religious, racial, language or regional groups or castes or communities;
(4) On grounds of religion, race, place of birth, residence, language, caste or community or any other ground; or
(5) The act may be prejudicial to the maintenance of harmony between different groups as outlined above, and which disturbs or is likely to disturb public tranquility [s 153A(1)(b)]; or
(6) Organises any exercise, movement, drill or other similar act ivities in order to train for use of force or violence against any of the groups outlined in (iii) above.

Scope of Section 153A

The section is not confined to the promotion of feelings of enmity on grounds of religion only. It takes in promotion of such feelings on other grounds such as race, place of birth, residence, language, caste or community.[56] However, a fair and rational criticism of religious tenets, couched in temperate or restrained language, will not make the criticism fall within the ambit of the section. Thus, in *Lalai Singh v State of Uttar Pradesh* ,[57] it was held that it was perfectly legitimate to criticise Hinduism for the doctrine of untouchability and the discriminatory caste practices followed by it, and the reprehensible treatment meted out to the castes considered lower in the caste hierarchy. However, it is equally important to note that it is not the mere language of the statement, but also the manner in which it is stated, that counts for examination of liability under the provision. Thus, where words spoken are couched in dignified, temperate and mild language which are not such as would hurt the deepest religious convictions of any section of the people, then the act will not fall under the provision.[58] If the language is of a nature calculated to produce or to promote feelings of enmity or hatred the writer is presumed to intend its natural consequences.[59]

In *Babu Rao Patel v State (Delhi Administration)* ,[60] the accused had published an article in a newspaper that militant minorities thrive on communalism and specifically referred to Muslims generally as a 'basically violent community', apart from other aspersions to the Muslim community. The author had also criticised the naming of roads in Delhi after Mogul emperors, who according to the author, were lustful perverts, rapists and murderers. The Supreme Court, after considering all the evidence in the case, held that the article, in the guise of political thesis or historical truth, act ually promoted feelings of enmity, hatred and ill will between the Hindu and Muslim communities. Therefore, the Court held the conviction of the accused by the trial court for offence under s 153A, IPC was held to be proper.

The essential requirements for proving the offence can be set out as below:

(1) It is not necessary to prove that as a result of the objectionable matter, enmity or hatred was in fact caused between the different classes;

(2) It is not necessary to prove or establish intention to promote enmity and so on. It is sufficient, if it is shown that the language of the writing is of a nature calculated to promote feelings of enmity or hatred, for a person must be presumed to intend the natural consequences of his act;

(3) The matter, for falling within the scope of the section, must be read as a whole.[61] One cannot rely on stray or isolated passages for proving the charge, nor can a sentence be taken from different places for the purpose of inferential reasoning;

(4) For judging what are the natural or probable consequences of the writing, it is permissible to take into consideration the class of readers for whom it is primarily meant, as also the state of feelings between the different classes or communities at the relevant time;

(5) If the writing is calculated to promote feelings of enmity or hatred, it is no defence that the writing contains a truthful account of past events or is otherwise supported by good authority. If a writer is disloyal to history, it might be easier to prove that history was distorted in order to achieve a particular end, eg, to promote feelings of enmity or hatred between different classes or communities. But adherence to the strict path of history is not by itself a complete defence to a charge under s 153A. In fact, the greater the impact on the minds of its readers, if the writing is otherwise calculated to produce mischief.[62]

In *Bilal Ahmed Kaloo v State of Andhra Pradesh* ,[63] the accused was said to be a Kashmiri youth belonging to a group called Al Jehad with the ultimate aim of liberating Kashmir from the Indian Union. He was accused of propagating amongst the Muslims, that in Kashmir, Muslims were being subjected to atrocities by the Indian Army personnel. He was charged for offences under ss 124A, 153A, 505(2), IPC, amongst other offences.

On the issue of whether the evidence disclosed offence under s 153A, the Supreme Court held that mens rea was an essential component of the offence, as was held in an earlier judgment of the Supreme Court in *Balwant Singh v State of Punjab* .[64] In this case, the apex court ruled that the intention to cause disorder or incite people to violence is the *sine qua non* of the offence under s 153A, and the prosecution has to prove the existence of mens rea in order to succeed. Mere promotion of disharmony or ill will between different groups of people is an offence under s 153A of the IPC.[65] The court also contrasted the differing contents of offence under ss 505(2) and 153A, IPC, and held that while in the former offence [s 505(2)] the statement held to be offensive, must have been printed or published, for the latter offence under s 153A, it need not necessarily be published. However, the common feature in both the provisions being promotion of feeling of enmity, hatred or ill-will 'between different' religious or racial or castes and communities, it is necessary that at least two such groups or communities are involved. For the operation of s 153A or s 505(2), it must, therefore, be shown that the accused intended to create bitter feelings between members of two communities. 'Mere inciting the feeling of one community or group without any reference to any other community or group' cannot attract either of these two sections.[66]

The offence of promoting enmity between two groups on the ground of religion must be proved by producing act ual utterances or by placing material showing that the act was committed by the accused. Merely vague allegations made in FIR are not sufficient to invoke s 153A of the IPC.[67] It is, as a legal requisite, not necessary that enmity or hatred must result between the incited groups.[68]

The effect of the utterances of the accused intending to promote communal enmity or hatred between different groups must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view.[69]

The offences relating to promoting enmity between classes covered by s 153A(1) (a)-(c) are made punishable by imprisonment for a term up to three years or with fine or with imprisonment and fine. If the offence is committed in a place of worship or in religious ceremonies the offender will be punished with imprisonment for a term up to five years with fine.

Section 153AA, inserted in the Penal Code in 2005,[70] creates an offence of knowingly carrying arms in any procession or organizing or holding mass drill with arms and provides punishment therefor. It runs as under:

Section 153AA. Punishment for knowingly carrying arms in any procession or organizing or holding or taking part in any mass drill or mass training with arms.--Whoever knowingly carries arms in procession or organises or holds or takes part in mass drill or mass training with arms in any public place in contravention of any public notice or order issued or made under section 144A of the Code of Criminal Procedure ,

1973 (2 of 1974) shall be punished with imprisonment for a term which may extend to six months and with fine which may extend to two thousand rupees.

Explanation.--'Arms' means articles of any description designed or adapted as weapons for offence or defence and includes fire arms, sharp edged weapons, lathis, dandas and sticks.

Section 153AA enables the District Magistrate to prohibit mass drill or training with arms in public places. It prescribes punishment with imprisonment up to six months and fine up to two thousand rupees for the contravention of the prohibitory order.

Section 153B. Imputations, assertions prejudicial to national-integration.--

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,--
   (a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or upholds the sovereignty and integrity of India, or
   (b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India, or
   (c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,

   shall be punished with imprisonment which may extend to three years, or with fine or with both.

(2) Whoever commits an offence specified in sub-section (1), in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years, and shall also be liable to fine.

Section 153B was introduced in the IPC only in 1972,[71] in the context of increased communal and caste tensions erupting in different parts of the country, which threatened not just the peaceful relations between and amongst different communities and groups of people, but also the integrity of the country itself.

PROPOSALS FOR REFORM

The Fifth Law Commission has suggested a set of reforms in the chapter. A few prominent among them, with justifications, are outlined here below;[72]

(1) Recognising the ambiguity, discussed above, bridled with s 141, *third*, making an assembly 'unlawful' if its object is 'to commit any mischief or criminal trespass, or other offence', the Law Commission felt that the said clause needs to be simplified to make it to read as: '*Third*.--To commit any offence punishable with imprisonment; or'.
(2) With a view to checking rioting at its earliest stage, it suggested that preparatory act s, like collecting sticks, knives and other weapons of offence, acid bulbs, brickbats etc, by anti-social elements who are bent on committing mischief should (through proposed new s 147A) be made punishable by imprisonment for a term up to one year or with fine or both.[73]
(3) Referring to s 153, the Law Commission opined that the expressions 'malignantly' and 'wantonly' appearing therein, which, in the light of tenor and tone of the provision, 'do not add anything to the other requirements of the section', are unwarranted and therefore need to be deleted.
(4) The word 'intentionally' should be inserted before the word 'promotes' in the existing s 153A for making it clear that mens rea is essential for warranting liability and thereby protecting any honest criticism without malice from mischief of s 153A.

(5) Existing s 505(1)(b) and (c) and 505(2) of the IPC, punishing statements, oral or written, capable of creating or promoting enmity, hatred or ill-will between different classes, should, with modification, be converted into a new section (s 158B).

(6) Perceiving that punishment provided for the offences in ss 154-156 and 160 is lenient, it recommended that the sentences provided in these sections be replaced by 'sentence of six months' imprisonment of either description or fine or both'.

1 Hari Singh Gour, *Penal Law of India*, vol I, 10th edn, Law Publishers, Allahabad, 1987, p 234.

2 *Amar Singh v State of Punjab* AIR 1987 SC 826, (1987) Cr LJ 706(SC) ; *Subran @ Subramaniam v State of Kerala* (1993) 3 SCC 32, (1993) Cr LJ 1387(SC) .

3 *Sunder Singh v State of Punjab* AIR 1962 SC 1211; see also *Sahaji v State of Kerala* (2005) Cr LJ 3121(Ker) .

4 AIR 1963 SC 174, (1963) Cr LJ 100(SC) .

5 See *Dharam Pal v State of Uttar Pradesh* AIR 1975 SC 1917; *Maina Singh v State of Rajasthan* AIR 1976 SC 1084; *Achhey Lal v State of Uttar Pradesh* (1978) Cr LJ 1101(SC), (1978) 3 SCC 526; *Suresh Pal v State of Uttar Pradesh* AIR 1981 SC 1161; *Subran @ Subramaniam v State of Kerala* (1993) 3 SCC 32, (1993) Cr LJ 1387(SC) .

6 [1964] 1 SCR 775, (1964) Cr LJ 673(SC) .

7 *Bharwad Mepa Dana v State of Bombay* AIR 1960 SC 289, (1960) Cr LJ 424(SC) ; *Kartar Singh v State of Punjab* AIR 1961 SC 1787; *Dalip Singh v State of Punjab* [1954] SCR 145; *Mohan Singh v State of Punjab* AIR 1963 SC 174, (1963) Cr LJ 100(SC) ; *Sunder Singh v State of Punjab* AIR 1962 SC 1211.

8 [1964] 1 SCR 775, (1964) Cr LJ 673(SC), para 16.

9 *Sheikh Yusuf v Emperor* AIR 1946 Pat 127.

10 *Maranadu v State by Inspector of Police, Tamil Nadu* (2008) Cr LJ 4562(SC), 2008 (12) SCALE 420.

11 *Shoukat Ali v State* AIR 1954 Pat 194, (1954) Cr LJ 485(Pat) .

12 *CV Devassi v Sughar Singh* AIR 1953 SC 275; *Haramant v State of Karnataka* (1994) Cr LJ 1422(SC) ; *Ram Dular Rai v State of Bihar* AIR 2004 SC 1043, (2004) Cr LJ 635(SC) ; *Shiv Shankar Pandey v State of Bihar* (2002) 7 SCC 229.

13 *Lalji v State of Uttar Pradesh* AIR 1989 SC 754, (1989) Cr LJ 850(SC) ; *Rachamreddi Chenna Reddy v State of Andhra Pradesh* (1999) Cr LJ 1445(SC) ; *Gangadhar Behra v State of Orissa* AIR 2002 SC 3633, (2002) 8 SCC 381, (2003) Cr LJ 41(SC) ; *Bhagwan Singh v State of Madhya Pradesh* (2002) 4 SCC 85; *Ram Dular Rai v State of Bihar* AIR 2004 SC 1043, (2004) Cr LJ 635(SC) ; *Madan Singh v State of Bihar* (2004) 4 SCC 622, (2004) Cr LJ 2862(SC) ; *Dani Singh v State of Bihar* (2004) Cr LJ 3328(SC) ; *Maranadu v State by Inspector of Police, Tamil Nadu* (2008) Cr LJ 4562(SC), 2008 (12) SCALE 420; *Bhanwar Singh v State of Madhya Pradesh* (2008) 16 SCC 657, AIR 2009 SC 768; *Pandurang Chandrakant Mhatre v State of Maharashtra* (2009) 10 SCC 773, JT 2009 (13) SC 242.

14 *Naurangi Mahto v State* (2001) Cr LJ 1525(Jhar) .

15 AIR 1954 SC 657, (1954) Cr LJ 1708(SC) .

16 The first and the last two clauses (ie, except third clause) envisage the use of criminal force or show of criminal force as an essential part of the activity.

17 *Durga Das v State of Punjab* AIR 1970 Punj 271, (1960) Cr LJ 646(P&H) .

18 *Madan Singh v State of Bihar* (2004) 4 SCC 622, (2004) Cr LJ 2862(SC) .

19 *Public Prosecutor v Satya Narayan* AIR 1931 Mad 484.

20 For definition see s 425, IPC.

21 See s 441, IPC.

22 'Offence' is defined in s 40, IPC.

23 *Ghansa Singh v State of Rajasthan* AIR 1958 Raj 226.

24 *Ramendra Chandra Ray v Emperor* AIR 1931 Cal 1303.

25 *Beatty v Gillbanks* [1882] QBD 300.

26 As illustrative cases refer to *Chand Singh v State of Punjab* AIR 1965 Punj 90; Re *Bangaraju*AIR 1942 Mad 58.

27 See *State of Bihar v Mathu Pandey* AIR 1970 SC 27, (1970) Cr LJ 5(SC), [1970] 1 SCR 358; *State of Assam v Dwarik* (1978) Cr LJ (NOC) 40(Gau) ; *Vajrapu Sambhayya Naidu v State of Andhra Pradesh* AIR 2003 SC 3706, (2004) 10 SCC 152, (2003) Cr LJ 4433(SC) .

28 Generally see, Re *P Abdul Sattar*(1961) Cr LJ 291(Mys) ; *Vaghari Kala Bhikha v State of Gujarat* (1985) Cr LJ 237(Guj) ; *Kutubuddin Hasansab Mahat v State* (1977) Cr LJ (NOC) 155(Kant) .

29 *Fatnya Lal Khan v Emperor* AIR 1942 Lah 89.

30 *Mohd Hasnain v Rex* AIR 1949 All 351.

31 (1993) 3 SCC 32, (1993) Cr LJ 1387(SC) ; see also *Ramashish Yadav v State of Bihar* AIR 1999 SC 3830, (1999) 8 SCC 555, (2000) Cr LJ 12(SC), in which it was held that the accused party did not constitute an unlawful assembly in the beginning. Later too, though they did attack the party of the deceased persons, they lacked any of the specified objects spelt out in s 141. Hence, the conviction of the accused using s 149 was held not permissible.

32 AIR 1987 SC 826, (1987) Cr LJ 706(SC), Also see, *Bhudeo Mandal v State of Bihar* AIR 1981 SC 1219.

33 *Moti Das v State of Bihar* AIR 1954 SC 657, (1954) Cr LJ 1708(SC) ; *Ediga Jagamadha Gowd v State of Andhra Pradesh* (2004) Cr LJ 4052(AP) .

34 *Gangadhar Behra v State of Orissa* AIR 2002 SC 3633, (2002) 8 SCC 381, (2003) Cr LJ 41(SC) ; *Amzad Ali alias Amzad Khan v State of Assam* AIR 2003 SC 3587, (2003) 6 SCC 270, (2003) Cr LJ 3545(SC) ; *Dani Singh v State of Bihar* (2004) Cr LJ 3328(SC) ; *Maranadu v State by Inspector of Po- lice, Tamil Nadu* (2008) Cr LJ 4562(SC), 2008 (12) SCALE 420; *Dharnidhar v State of Uttar Pradesh* (2010) 7 SCC 759, JT 2010 (7) SC 411.

35 AIR 1954 SC 695, (1954) Cr LJ 1746(SC) .

36 AIR 1980 SC 573, (1980) Cr LJ 412(SC) .

37 *State of Uttar Pradesh v Jodha Singh* AIR 1989 SC 1822, (1989) Cr LJ 2113(SC) .

38 *Bhudeo Mandal v State of Bihar* AIR 1981 SC 1219.

39 AIR 1979 SC 1265, (1979) Cr LJ 856(SC) .

40 AIR 1997 SC 4263, (1998) Cr LJ 495(SC), (1998) 1 SCC 581..

41 *State of Uttar Pradesh v Kishanpal* (2008) 16 SCC 73, 2008 (11) SCALE 233; *Amerika Rai v State of Bihar* (2011) 4 SCC 677, AIR 2011 SC 1379; *Kuldip Yadav v State of Bihar* AIR 2011 SC 1737, (2011) 5 SCC 324, (2011) Cr LJ 2640(SC) .

42 AIR 1955 SC 274, (1955) Cr LJ 721(SC) .

43 Ibid, para 7.

44 (2012) 4 SCALE 526, AIR 2012 SC 2133. See, para 40.

45 AIR 1981 SC 1219.

46 *Ramashish Yadav v State of Bihar* AIR 1999 SC 3830, (1999) 8 SCC 555, (2000) Cr LJ 12(SC) .

47 AIR 1989 SC 1456, (1989) Cr LJ 1466(SC) .

48 Ibid, para 8.

49 *Lalji v State of Uttar Pradesh* AIR 1989 SC 754, (1989) Cr LJ 850(SC) ; *Madru Singh v State of Madhya Pradesh* AIR 1997 SC 3527; *Rachamreddi Chenna Reddy v State of Andhra Pradesh* (1999) Cr LJ 1445(SC) ; *Gangadhar Behra v State of Orissa* AIR 2002 SC 3633, (2002) 8 SCC 381, (2003) Cr LJ 41(SC) ; *Ram Dular Rai v State of Bihar* AIR 2004 SC 1043, (2004) Cr LJ 635(SC) .

50 *Akbar Sheikh v State of West Bengal* (2009) 7 SCC 415, 2009 (6) SCALE 45.

51 AIR 1956 SC 513, (1956) Cr LJ 923(SC) .

52 (1978) 4 SCC 385, (1978) Cr LJ 1713(SC) .

53 AIR 1965 SC 202, (1965) Cr LJ 226(SC) .

54 *Bhe Ram v State of Haryana* AIR 1980 SC 957, (1980) 1 SCC 201, (1980) Cr LJ 735(SC) ; *Sheo Prasad Bhor v State of Assam* (2007) 3 SCC 120, AIR 2007 SC 918; *State of Uttar Pradesh v Kishanpal* (2008) 16 SCC 73; *Akbar Sheikh v State of West Bengal* (2009) 7 SCC 415, 2009 (6) SCALE 45.

55 AIR 1979 SC 1504, (1980) Cr LJ 829(SC) .

56 AIR 1978 SC 1525, (1978) Cr LJ 1598(SC) .

57 AIR 1965 SC 202, (1965) Cr LJ 226(SC) .

58 AIR 1956 SC 181, (1956) Cr LJ 345(SC) .

59 *Maranadu v State by Inspector of Police, Tamil Nadu* (2008) Cr LJ 4562(SC), 2008 (12) SCALE 420; *KM Ravi v State of Karnataka* (2009) 16 SCC 337.

60 *Balwant Singh v State* (1972) Cr LJ 645(SC) ; *Sita Ram v State of Bihar* (1976) Cr LJ 800(SC) ; *Bhe Ram v State of Haryana* AIR 1980 SC 957, (1980) 1 SCC 201, (1980) Cr LJ 735(SC) ; *Kaki Ramesh v State of Andhra Pradesh* (1994) 4 SCC 397; *Ranbir Yadav v State of Bihar* AIR 1995 SC 1219.

61 *Ganga Singh v State of Uttar Pradesh* (2000) Cr LJ 232(All) ; *Jaswant Singh v State of Haryana & Ors* AIR 2000 SC 1833, (2000) 4 SCC 484.

62 *Madan Singh v State of Bihar* (2004) 4 SCC 622, (2004) Cr LJ 2862(SC) ; *Chandra v State of Uttar Pradesh* (2004) 5 SCC 141, (2004) Cr LJ 2536(SC) ; *Dani Singh v State of Bihar* (2004) Cr LJ 3328(SC) ; *Ram Dular Rai v State of Bihar* AIR 2004 SC 1043, (2004) Cr LJ 635(SC) ; *Bikau Pandey v State of Bihar* AIR 2004 SC 997, (2003) 12 SCC 616; *Akbar Sheikh v State of West Bengal* (2009) 7 SCC 415, 2009 (6) SCALE 45.

63 *Yunis @ Kariya v State of Madhya Pradesh* (2003) 1 SCC 425; *Jay Shree v State of Uttar Pradesh* (2005) 9 SCC 788; *Mangal Singh v State* (2005) Cr LJ 3755(SC) .

64 *Munna Chanda v State of Assam* (2006) 3 SCC 752, (2006) Cr LJ 1632(SC) ..

65 AIR 1976 SC 2566, (1977) 1 SCC 733.

66 *Gokul v State of Rajasthan* AIR 1972 SC 209, (1972) Cr LJ 42(SC) .

67 AIR 1978 SC 1647, (1978) Cr LJ 1713(SC) .

68 AIR 1969 SC 689.

69 (1981) Cr LJ 729 (SC).

70 (1974) 4 SCC 600, (1974) Cr LJ 921(SC) .

71 (2003) 3 SCC 37.

72 *Rex v Sadla* AIR 1950 All 418.

73 AIR 1974 SC 292.

74 Ibid, para 8.

75 AIR 1972 SC 464, (1972) Cr LJ 262(SC) .

76 AIR 1997 SC 1849, (1997) 10 SCC 102.

77 This view has been held in a host of cases; see *Puran Singh v State of Rajasthan* AIR 1976 SC 912, (1976) Cr LJ 674(SC) ; *Kanbi Nanji Virji v State of Gujarat* AIR 1970 SC 219, (1970) Cr LJ 363(SC) ; *Munir Khan v State of Uttar Pradesh* AIR 1971 SC 335, (1971) Cr LJ 288(SC) ; *State of Uttar Pradesh v Jodha Singh* AIR 1989 SC 1822, (1989) Cr LJ 2113(SC) ; *Chinu Patel v State of Orissa* (1990) Cr LJ 248(Ori) ; *State of Haryana v Chandvir* AIR 1996 SC 3344; *Ananta Kathad Pawar v State of Maharashtra* (1997) 11 SCC 564; *Pundalik Mahadu Bhane v State of Maharashtra* (1997) 11 SCC 567, 1997 (5) SCALE 488; *Kanwarlal v State of Madhya Pradesh* AIR 2002 SC 3690, (2002) 7 SCC 152, (2003) Cr LJ 62(SC) .

78 *Gokul v State of Rajasthan* AIR 1972 SC 209, (1972) Cr LJ 42(SC) .

79 *Madru Singh v State of Madhya Pradesh* AIR 1997 SC 3527, (1997) Cr LJ 4398(SC) .

80 *Rachamreddi Chenna Reddy v State of Andhra Pradesh* (1999) Cr LJ 1445(SC) .

81 *Bhudeo Mandal v State of Bihar* AIR 1981 SC 1219.

82 *Bharwad Bhikaji Nata v State of Gujarat* AIR 1977 SC 1768, (1977) Cr LJ 1160(SC) .

83 AIR 1956 SC 241, (1956) Cr LJ 444(SC) .

84 *Bhajan Singh v State of Uttar Pradesh* AIR 1974 SC 1564, (1974) Cr LJ 1029(SC) .

85 *Gangadhar Behra v State of Orissa* AIR 2002 SC 3633, (2002) 8 SCC 381, (2003) Cr LJ 41(SC) ; *Rajendra Shantaram Todankar v State of Maharashtra* (2003) 2 SCC 257, AIR 2003 SC 1110, (2003) Cr LJ 1277(SC) ; *Dani Singh v State of Bihar* (2004) Cr LJ 3328(SC) ; *Ram Dular Rai v State of Bihar* AIR 2004 SC 1043, (2004) Cr LJ 635(SC) ; *Bhargavan v State of Kerala* AIR 2004 SC 1058, (2004) 12 SCC 414, (2004) Cr LJ 646(SC) ; *Maranadu v State by Inspector of Police, Tamil Nadu* (2008) Cr LJ 4562(SC), 2008 (12) SCALE 420; *Bhupendra Singh v State of Uttar Pradesh* AIR 2009 SC 3265, (2009) 12 SCC 447.

86 *Gajanand v State of Uttar Pradesh* AIR 1954 SC 695, (1954) Cr LJ 174(SC) ; *Santosh v State of Madhya Pradesh* AIR 1975 SC 654, (1975) Cr LJ 602(SC) ; *Ram Anjore v State of Uttar Pradesh* AIR 1975 SC 185, (1975) Cr LJ 249(SC) ; *State of Karnataka v Chikkahottappa @ Varade Gowda* AIR 2008 SC 2692, (2008) 15 SCC 299, (2008) Cr LJ 3495(SC) ; *Shivjee Singh v State of Bihar* (2008) 11 SCC 631, 2008 (10) SCALE 530; *Akbar Sheikh v State of West Bengal* (2009) 7 SCC 415, 2009 (6) SCALE 45; *Gunnana Pentayya @ Pentadu v State of Andhra Pradesh* (2009) 16 SCC 59, 2008 (11) SCALE 557.

87 See also, 'Common Intention *versus* Common Object: A Comparative Analysis' in ch 18: Joint Liability, above.

88 *Dani Singh v State of Bihar* (2004) Cr LJ 3328(SC) ; *Shivjee Singh v State of Bihar* (2008) 11 SCC 631.

89 *Rajesh G ovind Jagesha v State of Maharashtra* (1999) 8 SCC 428.

90 *Munna Chanda v State of Assam* (2006) 3 SCC 752, (2006) Cr LJ 1632(SC) ; *Raj Nath v State of Uttar Pradesh* (2009) 4 SCC 334, AIR 2009 SC 1422; *Ramchandran v State of Kerala* (2011) 9 SCC 257, AIR 2011 SC 3581, (2011) Cr LJ 4845(SC) .

91 *Madan Singh v State of Bihar,* (2004) 4 SCC 622, (2004) Cr LJ 2862(SC) ; *Chandra v State of Uttar Pradesh,* (2004) 5 SCC 141, (2004) Cr LJ 2536(SC) ; *Dani Singh v State of Bihar* (2004) Cr LJ 3328(SC) ; *Rabindra Mahto v State of Jharkhand* (2006) 3 SCJ 324; *Bhupendra Singh v State of Uttar Pradesh* AIR 2009 SC 3265, (2009) 12 SCC 447; .

92 *Amzad Ali alias Amzad Khan v State of Assam* (2003) 6 SCC 270, (2003) Cr LJ 3545(SC) .

93 *Chittarmal Moti v State of Rajasthan* AIR 2003 SC 796, (2003) 2 SCC 266, (2003) Cr LJ 889(SC), para 14.

94 AIR 1955 SC 274, (1955) Cr LJ 721(SC) .

95 Ibid, para 9.

96 AIR 1955 SC 419.

97 AIR 2002 SC 2945, (2002) 7 SCC 117, (2002) Cr LJ 4081(SC) .

1 Ibid, para 24.

2 AIR 1956 SC 116, (1956) Cr LJ 291.

3 Ibid, para 51.

4 *Ram Kishan v State of Rajasthan* (1997) 7 SCC 518.

5 AIR 1956 SC 731.

6 AIR 2009 SC 2661, (2009) 12 SCC 546.

7 (1974) 5 SCC 193.

8 AIR 1960 SC 725.

9 Ibid, para 6. Similar judicial perception of s 149 and of liability thereunder is also reflected in: *Madan Singh v State of Bihar* (2004) 4 SCC 622, (2004) Cr LJ 2862(SC) ; *Triloki Nath v State of Uttar Pradesh* (2005) 9 SCALE 76; *Bishna @ Bhiswadeb Mahato & Ors v State of West Bengal* (2005) 9 JT 290, (2005) 9 SCALE 204.

10 *Rabindra Mahto v State ofjharkhand* (2006) 3 SCJ 324; *State of Rajasthan v Nathu* (2003) 5 SCC 537.

11 AIR 1966 SC 302.

12 AIR 1970 SC 219.

13 AIR 1972 SC 254, (1972) 1 SCC 136.

14 AIR 1963 SC 1413, (1963) Cr LJ 351(SC) .

15 AIR 1999 SC 3229, (1999) 8 SCC 154, (1999) Cr LJ 4078(SC) .

16 *Shiv Shankar Pandey v State of Bihar* (2002) 7 SCC 229.

17 AIR 2003 SC 3682, (2003) 10 SCC 108, (2003) Cr LJ 4898(SC) .

18 Ibid, para 13.

19 *Jivan Lal v State of Madhya Pradesh* (1997) 9 SCC 119; *Shiv Shankar Pandey v State of Bihar* (2002) 7 SCC 229.

20 AIR 1999 SC 382.

21 AIR 1999 SC 314.

22 AIR 1999 SC 1620.

23 AIR 1999 SC 1742, (1999) 4 SCC 682, (1999) Cr LJ 2577(SC) .

24 Ibid, para 6.

25 *Hanuman Singh v State of Uttar Pradesh* AIR 1969 All 130, (1969) Cr LJ 359(All) .

26 *Banwari Ram v State of Uttar Pradesh* AIR 1998 SC 674, (1998) Cr LJ 869(SC) .

27 *K Ashokan v State of Kerala* AIR 1998 SC 1974, (1998) Cr LJ 2834(SC) .

28 *Satyadeo Singh v State of Bihar* (1972) Cr LJ 700(Pat) .

29 See *Girdhara Singh v Emperor* AIR 1922 Lah 135; *Jagmohan v State of Orissa* (1977) Cr LJ 1394(Ori) .

30 See *Nayan Ullah v Emperor* AIR 1925 Cal 903; *Vinit @ Baba v State of Maharashtra* (1994) Cr LJ 1791(Bom) .

31 *Radba Raman Saba v Emperor* AIR 1931 Cal 712.

32 *State of Uttar Pradesh v Mahendra Singh* AIR 1975 SC 455; *Prabhakar Shankar Sawant v State of Maharashtra* AIR 1979 SC 1265, (1979) Cr LJ 856(SC) .

33 AIR 1968 Mad 310, (1968) Cr LJ 1084(Mad) .

34 *Hazara Singh v State of Punjab* (1971) 3 SCR 674, (1971) 1 SCC 529.

35 *Miku v State of Uttar Pradesh* AIR 1989 SC 67, (1989) Cr LJ 860(SC) .

36 *Ananta Kathod Pawar v State of Maharashtra* (1997) 11 SCC 564.

37 *Haripada Parui v State of West Bengal* (1988) Cr LJ 3(NOC) Cal .

38 *Barendra v State* (1978) Cr LJ (NOC) 90(Gau) .

39 *Nanda Kishore v State* AIR 1961 Ori 29.

40 *Emperor v Ahmed Hasham* (1932) 35 Bom LR 240.

41 See, *Rahimatalli Mohomedalli*(1919) 22 Bom LR 166; *Abdullah v Emperor* AIR 1919 All 307; *Kori v State of Bihar* AIR 1952 Pat 138; *State of Madhya Pradesh v Indrasingh* AIR 1962 MP 292.

42 *State of Orissa v RC Chowala* AIR 1966 Orissa 192; *Aroon Puri v HL Verma* (1999) Cr LJ 983(Bom) .

43 *Fazul v Emperor* AIR 1947 Sindh 190.

44 *K Mohd Abdullah v Emperor* AIR 1934 Lah 243.

45 AIR 1978 SC 1021, (1978) 2 SCC 473, (1978) Cr LJ 780(SC) .

46 *Sheoraj Singh v State of Uttar Pradesh* (1978) Cr LJ (NOC) 84(All) .

47 *Ram Reddy v Narsi Reddy* AIR 1938 Mad 924; *Ram Kudumban v Crown* AIR 1950 Mad 408; *C Subbarayudh v State of Andhra Pradesh* (1996) Cr LJ 1472(AP) .

48 *Gadadhar Guru v State of Orissa* (1989) Cr LJ 2080(Ori) ; *R Ranganna v State of Andhra Pradesh* (2010) Cr LJ 1275(AP) .

49 Criminal and Election Laws (Amendment) Act 1969, s 2.

50 Criminal Law (Amendment) Act 1972, s 2.

51 *Tara Singh v State* AIR 1951 Punj 27, (1951) 53 Punj LR 22.

52 AIR 1963 All 335.

53 *Khan Gujran Zahidia v State of Uttar Pradesh* (1964) All LJ 545, (1964) All Cr R 501.

54 *Gopal Vinayak Godse v Union of India* AIR 1971 Bom 56, (1971) Cr LJ 324(Bom) .

55 Ibid, para 61.

56 *Babu Rao Patel v State (Delhi Administration)* AIR 1980 SC 763, (1980) Cr LJ 529(SC) .

57 (1971) Cr LJ 1773 (All).

58 *Azizul Haq Kausar Naqvi v State of Uttar Pradesh* AIR 1980 All 149.

59 *Kali Charan Sharma v Emperor* AIR 1927 All 649.

60 AIR 1980 SC 763, (1980) Cr LJ 529(SC) .

61 On this point, also see, *Joseph B D'Souza v State of Maharashtra* (1995) Cr LJ 1316(Bom), where the high court held that the article complained of should be read as a whole.

62 These points are culled from *Gopal Vinayak Godse v Union of India* AIR 1971 Bom 56, (1971) Cr LJ 324(Bom) .

63 AIR 1997 SC 3483, (1997) Cr LJ 4091(SC) .

64 AIR 1995 SC 1785, (1995) 3 SCC 214.

65 *Dr Ramesh Yeshwant Prabhu v Prabhakar Kashinath Kunte & Ors* AIR 1996 SC 1113, (1996) 1 SCC 130; see also, *Mohd Khalid Hussain v State* (2000) Cr LJ 2949(AP) ; *Trustees of Safdar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ 3689(Del) .

66 *Joseph Bain D'Souza v State of Maharashtrea* (1995) Cr LJ 1316 (Bom), (1995) 97 BOMLR 909; *Bilal Ahmad Kaloo v State of Andhra Pradesh* AIR 1997 SC 3483, (1997) 7 SC 431; *Manzar Sayeed Khan v State of Maharashtra* (2007) 5 SCC 1, AIR 2007 SC 2074.

67 *Mohd Khalid Hussain v State* (2000) Cr LJ 2949(AP) .

68 *Gopal Vinayak Godse v Union of India* AIR 1971 Bom 56, (1971) Cr LJ 324(Bom) .

69 *Manzar Sayeed Khan v State of Maharashtra* (2007) 5 SCC 1, AIR 2007 SC 2074; *State of Maharashtra v Sangharaj Damodar Rupawate* (2010) Cr LJ 4290(SC), (2010) 7 SCC 398.

70 The Code of Criminal Procedure (Amendment) Act, 2005, s 44(a).

71 Criminal Law (Amendment) Act 1972, s 2.

72 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, paras 8.18, 8.25, 8.27-8.31.

73 For text see, ibid, para 8.13. Clause 54 of the Indian Penal Code (Amendment) Bill 1978 sought to give legislative effect to the proposed s 147A. But the Bill lapsed. Subsequently in 1997, the Fourteenth Law Commission endorsed the proposed s 147A. See Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, para 12.31.

CHAPTER 24

Offences Relating to Elections

(Indian Penal Code 1860,Sections 171A to 171E)

INTRODUCTION

The chapter 'Of Offences Relating to Elections' (ch IX-A) was added to the IPC by the Indian Elections Offences and Inquiries Act, 1920, soon after the British India Government introduced limited scope of participation for Indians in government elections. It seeks to make punishable bribery, undue influence, personation and other malpractices at elections and to provide punishment therefor.

It is salutary to consider what were the reasons put forward for the introduction of the provisions relating to election offences in 1920. The Select Committee, justifying incorporation of the offences in the IPC, observed:

> We feel there are distinct advantages at the present time when election is to play so important a part in the new public life of India that the public conscience should be markedly drawn to the danger of corrupt practices in relation to the franchise, whether that franchise relates to legislative or other bodies. We feel it is of the greatest importance that the principle of the purity of the franchise should be insisted on in the general criminal law of the country and that it should not be left to local legislatures to deal with the broad principles.[1]

After independence, a much more comprehensive legislation covering the law of elections was introduced in the form of the Representation of People's Act 1951 (RPA). This enactment contains detailed provisions regarding the nature and conduct of elections for the Parliament and state legislatures. In spite of these separate enactments, these general provisions of the IPC are highly necessary, in so far as they apply not only to elections to Parliament, or to the legislatures of states, but to every other kind of election, such as elections to the municipalities, village *panchayats*, district boards and other local authorities. It need not be stated that in a democratic state like India, where institutions based on free franchise are bound to grow, such law and rules applicable to all types of elections are highly essential.

Thus, despite the existence of the RPA, ordinary criminal courts still have jurisdiction to decide cases alleging any of the election related offences defined in ss 171B to 171E, IPC. The IPC and the RPA have to be seen as complementing each other, as several definitions of election offences are provided in the RPA, as for example, the offence of undue influence [s 123(2), RPA], are similar to that in the IPC. Similarly, a conviction under ss 171E and 171F of the IPC amounts a disqualification under the RPA (s 8), which provides additional punishment therefor.

OFFENCES RELATING TO ELECTIONS

The very first provision (s 171A) in the chapter relates to the definition of 'candidate' and 'electoral right'. Thereafter, the chapter details six offences in relation to elections. They are: (1) Bribery and punishment therefor (ss 171B and 171E); (2) Undue influence (ss 171C and 171F); (3) Personation at election (s 171D); (4) Making or publishing false statements (s 171G); (5) Illegal payments (s 171H), and (6) Failure to keep election accounts (s 171-I).

The first three offences, namely, bribery, undue influence, and personation, are considered grave enough to deserve imprisonment for a term up to one year or fine. The other three offences, viz, making false statements about the personal character or conduct of a candidate, illegal payments in connection with an election, and failure to keep election accounts as required by law, are punishable with fine only.

'CANDIDATE' AND 'ELECTORAL RIGHT'--DEFINED

Section 171A. "Candidate", "Electoral right" defined.--For the purposes of this Chapter--

(a) "candidate" means a person who has been nominated as a candidate at any election;
(b) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at any election.

Scope of Section 171A

This section is a definition clause, which qualifies the election related offences described in the sections following thereafter. It defines two key terms, namely 'candidate' (at an election[2]) and 'electoral right'.

In *S Khader v Munuswami* ,[3] the petitioner's election had been declared void on account of the fact that he had spent more than the ceiling amount of Rs 8,000, then prescribed for elections to the state legislature. The petitioner had only disclosed an expense of Rs 7,063, and not disclosed expenses of two amounts of Rs 500 each. It was his contention that he was not a candidate until much later and the disputed amount of Rs 1,000 was incurred by him before he was officially nominated as candidate by the party concerned. Therefore, he was covered by the definition of candidate only after the official nomination and not before, which would entitle him not to show the expense of Rs 1,000 or so. The Supreme Court, however, did not accept this contention and held that the determining factor as to who is a candidate lies in the decision of the candidate himself, not in the act of other persons or bodies adopting him as their candidate. Thus, if he has communicated his intention to the outside world by declaration or conduct, from which it can be inferred that he intends to contest elections, then from that moment onwards, he would be considered to be a candidate.

The term 'electoral rights' means the right of a person to stand or not to stand for elections or withdraw his candidature, as also to vote or refrain from voting.[4]

BRIBERY

Section 171B. Bribery.--

(1) Whoever--
  (i) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or
  (ii) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right;

  commits the offence of bribery:

  Provided that a declaration of public policy or a promise of public act ion shall not be an offence under this section.
(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

Section 171E. Punishment for bribery.--Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Provided that bribery by treating shall be punished with fine only.

Explanation.--"Treating" means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

SCOPE OF THE OFFENCE OF BRIBERY

Section 171B defines bribery as the giving or acceptance of a gratification, either as a motive or as a reward, to any person to induce him to stand or not to stand as a candidate or to withdraw from the contest or to vote or not to vote at an election. The Supreme Court in *Mohan Singh v Bhanwarlal* ,[5] considered the meaning of the term 'gratification' by referring to the explanation to s 123(1)(b) of the RPA, and observed that gratification, even by the above explanation, is not restricted to pecuniary gratifications or gratifications estimable in money, and it includes all forms of entertainment and all forms of employment for reward barring bona fide election expenses. Thus, the term 'gratification' may be taken to mean, 'something valuable which is calculated to satisfy a person's aim, object or desire, whether or not that thing is estimable in terms of money'. The term 'gratification' refers to some gift that gives a material advantage to the recipient.[6]

Two tests were evolved to check out as to what would amount to an act of bribery. The first test was to see whether the gratification was calculated to satisfy a person's aim, object or desire, and secondly, whether the gratification would be of some value, even if the value was not estimable in terms of money. The gratification need not merely be of value to the person offered, but also to anybody else.[7] The gratification need not be offered directly by the candidate himself. Even if an agent, on the instigation of the candidate, offers any such gratification, it will be sufficient to invoke the section.

However, it was held by the Bombay High Court that a statement made by members of a ruling political alliance to the Republican Party of India (RPI) that if it supports the alliance in Parliamentary elections, one of the members of RPI would be made the Deputy Chief Minister of State, did not amount to giving gratification under s 171B of the IPC.[8]

Section 171E stipulates an imprisonment for period up to one year, or fine or both for a person convicted of committing the offence of bribery in the election. The *explanation* of section makes it clear that 'treatment' also amounts to bribery.

UNDUE INFLUENCE

Section 171C. Undue influence at elections.--

(1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever--

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public act ion, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

Section 171F. Punishment for undue influence or personation at an election.-- Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or both.

Scope of the Offence of Undue Influence

Section 171C defines the offence of undue offence at elections while s 171F provides the punishment for the same. The essential ingredient of the offence is that there should be a voluntary interference or attempted interference with the right of a person to enjoy his electoral rights, namely, the right to stand for elections or to withdraw from elections or to vote. The section is much broader however and covers other acts of threat and intimidation also. Sub-s (2) covers: (i) threat to a candidate; or a voter; or any other person in whom a candidate or voter is interested in, with injury of any kind and (ii) act s or attempts to induce a candidate or voter fear of Divine displeasure or spiritual censure.

The gist of the offence of undue influence consists in voluntary interference or attempts at interference with the free exercise of any electoral rights.[9] It covers all threats of injury to a person or property and illegal methods of persuasion, including of Divine displeasure, and any interference with the liberty of a candidate at, or a voter of, any election. Mere influence on a voter in making his choice to one candidate or another does not amount to undue interference or influence.[10]

The issue of whether the act of 'undue influence' will be considered to have been committed only if it has produced some act ual effect, came to be considered in the case of *Ram Dial v Sant Lal* .[11]The Supreme Court clarified that unlike English law, in Indian law, what is material is not the actual effect produced, but the commission of such act s as are calculated to interfere with the free exercise of any electoral right. In that case, the election of the appellant, Ram Dial, had been set aside on the ground that he had persuaded some religious leaders to issue religious edicts or *farmans* orally, forbidding the members of the community to vote for the respondent. The court stated that the religious leaders had the right to exercise their influence in favour of any particular candidate by voting for him and also canvassing voters or others for him. However, where the religious leaders issue directions or *farmans* implying that those who disobey their mandate would incur Divine displeasure or spiritual censure, then the case would be considered as one of 'undue influence' as defined in s 123(2) of the RPA (which corresponds to s 171C, IPC). The Supreme Court refused to interfere with the judgments of the lower courts, holding the election of the appellant void on act of committing offence of undue influence.

In *Baburao Patel v Dr Zakir Hussain* ,[12] the Supreme Court considered the issue of the various act s which may or may not constitute the offence of 'undue influence' under s 171C, IPC and s 123(2) of the RPA, and also considered the issue of whether whips issued by a political party to its members to vote for a particular person would amount to 'undue influence'. The court clarified that though the definition in s 171C was wide, it would not take into its fold canvassing in favour of any candidate at an election. What was contained in sub-s (2) is only illustrative, and cannot cut down the generality of the provision. Thus, the mere exercise of a legal right without intent to interfere with an electoral right would not amount to undue influence. The following acts were held not to amount to undue influence:

(1) Canvassing by ministers to canvass for their party candidate in the presidential elections, would not constitute undue influence. So long as the minister only asks the electors to vote for a particular candidate belonging to his party, and in this regard puts forward before the public, the merits of the candidate, it would not amount to the offence;
(2) Even if this were in the form of a whip it is immaterial, so long as there is no compulsion on the electorate to vote in the manner indicated.
(3) Letters addressed by the Prime Minister, as leader of a political party, to the electors to vote for a candidate of the party, or by the leader of a party to all the members of the party members to cast their first preference votes to the party candidate were also held not to constitute act s of undue influence.

(4) Thus, even when a chief minister canvasses with his own party men to vote in favour of the party candidate, or if ministers are deputed to travel and canvass for the party candidate, these acts would not be covered by the definition.

Another case involving allegations of undue influence arose in *Shiv Kirpal Singh v VV Giri* ,[13]again in the context of the presidential elections. The petitioner and others challenged the election of the respondent, VV Giri as President of India, on several grounds, one of which was that undue influence had been used. One of the act s stated in this regard was the circulation of an anonymous pamphlet in the central hall of Parliament (which was also posted) containing scurrilous attacks of the rival candidate, Sanjeeva Reddy. The pamphlets were alleged to have been prepared by the supporters of VV Giri, and at any rate done with his knowledge and consent. There were three issues, namely: (i) whether the pamphlet could be considered as one coming within the vice of s 171C; (ii) whether the acts could be attributed to the successful candidate; and (iii) whether the result of the election had been materially affected, sufficient to set aside the election result. The court considered at great length, the scope of s 171C as also s 171G, IPC, and held the following to be important considerations of the stages of undue influence.

(1) There can be undue influence at any stage during the elections. This ranges from the time when the elector goes through the mental process of weighing the merits and demerits of the candidates to make his choice and also covers the time when he act ually casts his vote or ballot;
(2) The pamphlet would be one which would be covered both by s 171C, as also s 171G, even if it was anonymous. When it was distributed in Parliament by a MP, then it showed that the person had endorsed the pamphlet;
(3) It is the de gree or gravity of the allegation, which determines whether the allegations would be covered by s 171C or s 171G. If it was aimed at character assassination, then it would be the lesser offence of s 171G; however, if it amounted to interference with the election, then it would be covered by provision of s 171C.

In the facts of the case, however, the burden was on the complainant or petitioners to prove the charge that the successful candidate was involved with or responsible for the pamphlet. They were also required to prove that the elections had been materially affected. However, since both these ingredients were held not to be sufficiently established, the Supreme Court dismissed the petitions challenging the election of VV Giri to the post of President of India.

In *Narbada Prasad v Chhaganlal* ,[14] the Supreme Court upheld the judgment of the High Court setting aside the election of the appellant, Narbada Prasad, on the ground that he had committed offence of undue influence by asking the voters not to vote for the Congress Party, as it had not abolished cow-slaughter in India. In his speech, he had said that voters would be committing the sin of *go-hatya* (sin of cow slaughter), if they voted for the Congress, instead of the Jan Sangh. In consequence, the appellant, who belonged to the Jan Sangh was elected. The Supreme Court held that the exhortation not to vote for the congress, because by doing so they were committing the sin of *go-hatya*, thereby incurring divine displeasure actually amounted to threats. Such threats, it was held, fell within the scope of section defining undue influence, and therefore the setting aside of his election was held proper.

The act alleged as constituting undue influence must be in the nature of a pressure of tyranny on the mind of the candidate or the voter.[15]

Representation by a candidate and his agents that he was *Chalanti Vishnu* (mobile Vishnu-God) and thereby representative of Lord Jagannath and persons not voting for him would be sinning against the God and also be committing sacrilege against *dharma* (religion) and appealing to voters by using symbols of God in his propaganda comes within the ambit of the offence undue influence.[16]

In *Court On Its Own Motion v Union of India & Ors* ,[17] the Punjab and Haryana High Court held a Public Servant, none other than JM Lyngdoh, the then Election Commissioner of India, guilty of committing an offence contrary to s 171C and punishable under s 171F of the IPC.

The Election Commissioner, by telephone, directed Om Parkash Chautala, the then Chief Minister of Haryana, who was campaigning in the Parliamentary election in the Bhiwani Constituency in Haryana and was desiring to cast his vote in the Parliamentary election scheduled on the next day, to return forthwith to the State

Headquarter, and that non-compliance of the direction would invite 'drastic action' from the Election Commission. The Punjab and Haryana High Court, after ascertaining that the direction was without any reasons, held that the Election Commissioner has violated the 'electoral rights' of the Chief Minister. In the light of the fact that the Election Commissioner is a public servant and thereby warranting the requisite prior sanction of the Central Government to prosecute him for the offence and that it cannot direct a competent court to take cognisance of the offence punishable under s 171F as it is a non-cognisable offence, the high court, however, left it open to the person who has made representation to the court or to any other aggrieved person to launch prosecution against the Election Commissioner in accordance with law.

A declaration of public policy or a promise of public act ion, by virtue of s 171C (3) does not amount to undue influence at elections.

The offence of undue influence at elections is punishable by an imprisonment for a term up to one year, fine or both.

PERSONATION AT AN ELECTION

Section 171D. Personation at elections.--Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence of personation at an election:

Provided that nothing in this section shall apply to a person who has been authorised to vote as proxy for an elector under any law for the time being in force in so far as he votes as a proxy for such elector.

Scope of the Offence of Personation

The offence defined here differs from the previous ones in that it covers the offences committed not by the candidate or his agent, but by others also. The essence of the offence of false personation is that the offender pretends to be other than what he really is. It implies false pretence. It covers only issues when there is an attempt at impersonation and does not come into play when the candidate, or his agent, do not claim to be the voters themselves, when they make a cross against any name.[18] The offender must have a corrupt motive or guilty mind. A person, who, in good faith, believes that he has two votes as his name appeared in two lists of voters at two polling stations, therefore, cannot be held guilty under the section.[19] Similarly, a person, who honestly believed that his father, who was seriously ill, could authorize him to cast his vote and did it, cannot be held guilty under this section.[20]However, proof of mens rea or corrupt motive is not required when a person knowing that he is not entitled to vote, goes to a polling station and applies for a ballot paper under a false name. His mens rea or corrupt motive is seemingly implied in his act.[21]

In *Muhammad Din v Emperor* ,[22] in the electoral roll of a municipality, one MD son of FM was recorded as a person entitled to vote. The accused MD, whose father's name was *A* asked for a ballot paper in the name of MD, son of FM, and when questioned, he asserted that his father's name was FM. There was no evidence on the record that the officer, who prepared the electoral roll, intended to put the accused on the register and that MD, son of FM, had no existence at all. It was held that the accused was guilty of the offence of personation. But in the case of one *Mulchand v Emperor* ,[23] where it was not shown that the accused had knowledge that he was not entitled to vote in that name which was there upon the list, the name of another person, which name was the same as his own, it was held that he could not be found guilty of personation.

In the case of one *Malkhan Singh v Emperor* ,[24] the applicant went to an election officer in charge of signature-slips and produced a certain piece of paper bearing a certain number. The name *L* appeared in the electoral roll against that number, and the applicant professed to be *L.* A *patwari* (village officer) pointed out that the applicant was not *L,* but one *M.* After some dispute, the applicant admitted that he was not *L.* It was held that the applicant was not guilty of an attempt to commit the offence of fraudulently applying for a voting paper and thereby personating at an election. The court observed:

> In this case, the obtaining of the signature-slip was an act which by itself, would not have amounted to an application for a voting paper. The applicant was frustrated in the act of obtaining a signature-slip. If he had not been frustrated, all that he would have committed was the obtaining of a signature-slip on false pretences. The completion of this act would not have amounted to a completion of the act of applying for a voting paper.

Section 171F provides for an imprisonment for a term up to one year, fine or both for the offence of personation at an election defined in s 171D.

MAKING OR PUBLISHING DELIBERATE FALSE STATEMENTS

Section 171G. False statement in connection with an election.--Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

Section 171G penalises a person making or publishing a false statement in relation to the personal character or conduct of a candidate. A statement that does not contain a statement of fact relating to the personal character or conduct of a candidate does not amount to an offence under the section.[25] A general statement or a general imputation of misconduct or a statement of fact does not come within the purview of s 171G.[26] An election speech containing mere general expressions also does not warrant s 171G.[27]

To a charge of false statement and thereby to invoke s 171G, it is required to prove that : (i) an election was impeding; (ii) the accused made or published a statement; (iii) the statement related to the personal character or conduct of a candidate; (iv) the statement was made or published with intent to affect the result of the election; and (v) the accused knew that the statement was false or believed to be false or he did not believe it to be true.[28]

The offence of making or publishing a deliberate false statement in connection with an election is punished by fine.

ILLEGAL PAYMENTS

Section 171H. Illegal payments in connection with an election.--Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees:

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

This section makes any unauthorised and unapproved expenditure (by the candidate) illegal at an election. It plausibly intends to secure correct returns of expenditure and to prevent corruption. The punishment provided for such an unauthorised and unapproved expenditure is fine up to five hundred rupees.

FAILURE TO KEEP ELECTION ACCOUNTS

Section 171-I. Failure to keep election accounts.--Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees.

Section 171-I penalises the failure of a candidate to keep accounts of expenses incurred at an election.

PROPOSALS FOR REFORM

The Fifth Law Commission[29] offered the following substantive and structural proposals for reform in the chapter dealing with offences relating to elections. They are:

(1) Recalling the fact that the definition of 'electoral rights' (s 171A) does not expressly refer to the right of a person not to withdraw his candidature in an election and the subsequent changes brought in the corresponding section of the RPA, the Law Commission proposed that the definition of 'electoral right' be modified to incorporate in it the right of a candidate 'to withdraw or not to withdraw' his candidature.

(2) Provisions dealing with definition of the offence of bribery (s 171B) and providing punishment therefor (s 171E) should be clustered together for clear understanding. It, accordingly, suggested that the present s 171E be brought to s 171B as its cl (4) and s 171E be deleted.

(3) Realising the gravity of the offence of bribery, it recommended that punishment for the offence of bribery (except bribery by treating) should be enhanced to imprisonment for a term up to two years or with fine, or with both.

(4) Perceiving that the existing s 171C offers a very wide definition of 'undue influence' capable of taking 'any voluntary interference' within its fold and comparing it with parallel definitional clauses from the British, Canadian and Australian election laws, the Law Commission stressed the need to have a stricter definition of 'undue influence' in the IPC with a comparatively severe punishment. It also suggested that the definition of undue influence, in addition to the two objectionable methods of undue influence mentioned in its two clauses, should expressly make mention of any violent method of interfering with the free exercise of an electoral right.

(5) Section 171D (dealing with the offence of personation at elections) and s 171F (dealing inter alia with punishment for personation at elections) should be brought together. It recommended that the part of s 171F dealing with punishment for personation should be put in s 171D as its cl (2) and the punishment provided therefor be enhanced to imprisonment for term up to two years, with fine or both.

(6) Apprehending that false statements made in connection with elections are not only likely to cause irreparable damage to the candidate concerned but are also likely to falsify the election as a whole, it proposed that existing punishment for making a false statement (of only fine) should be enhanced to imprisonment for a term up to two years, or with fine or with both.

(7) It recommended the deletion of ss 171H and 171-I from the IPC, as they seem to be dead letters of law.

However, none of these proposals for reform has received any response either from the Legislature when it prepared the Indian Penal Code (Amendment) Bill 1978, or from the Fourteenth Law Commission when it in 1997 undertook review of the IPC.[30]

1 Statement of Objects and Reasons, Gazette of India, Pt V, 1920, p 135, s 4.

2 'Election' is defined is defined in 'explanation 3' to s 21 of the IPC, It says: 'the word 'election' denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election'.

3 AIR 1955 SC 775.

4 In *SK Singh v VV Giri* AIR 1970 SC 2097, (1970) 2 SCC 567, it was alleged that Smt Indira Gandhi threatened a few national leaders with serious consequences with the object of unduly influencing these people for changing their decision to nominate Sri N Sanjiva Reddy as their Presidential candidate, it was held by the Supreme Court that such a threat does not constitute any interference with the electoral right as defined in s 171A of the IPC. A false representation made at the time of filing nomination for an election, opined the Rajasthan High Court, amounts to an offence under s 171A of the IPC as it violates the electoral right of the other candidate. See, *Bahadur Nath v State of Rajasthan* AIR 2001 Raj 251.

5 AIR 1964 SC 1366.

6 *S Iqbal Singh v S Gurdas Singh* (1976) 3 SCC 284, AIR 1976 SC 27.

7 *Trilochan Singh v Karnail Singh* AIR 1968 Punj 416, (1968) Cr LJ 1199(P&H) (FB).

8 *Deepak Ganpatrao Salunke v Govt of Maharashtra* (1999) Cr LJ 1224(Bom) .

9 *Baburao Patel v Dr Zakir Hussain* AIR 1968 SC 904.

10 *M Anbalagam v State* (1981) Cr LJ 1179(Mad) .

11 AIR 1959 SC 855 .

12 AIR 1968 SC 904.

13 AIR 1970 SC 2097, (1970) 2 SCC 567.

14 AIR 1969 SC 395.

15 *Charan Lal v Giani Zail Singh* AIR 1984 SC 309, (1984) 1 SCC 390.

16 *Sri Raj Raj Deb v Gangadhar Mahapatra* AIR 1964 Ori 1.

17 (2001) Cr LJ 225 (P&H).

18 *Parthasarathi v Ramachandra Rao* AIR 1956 AP 65; *State of Gujarat v Chandulal Bhikalal* AIR 1965 Guj 83, (1965) Cr LJ 440(Guj) .

19 *Pantam Venkayya v Emperor* AIR 1930 Mad 246.

20 *State v Siddhannath Gangaram* (1956) Cr LJ 1327(MP) .

21 *State of Gujarat v Chandula Bhikalall* AIR 1965 Guj 83, (1965) Cr LJ 440(Guj) ; *State of Orissa v Gokul Barick* AIR 1959 Ori 97.

22 AIR 1929 Lah 52.

23 AIR 1930 Sind 21.

24 AIR 1925 All 226.

25 *Narayanaswamy Naicker v Devaraja Mudaliar* AIR 1936 Mad 316.

26 *Kumara Nanda v Brij Mohan Lal Sharma* AIR 1967 SC 808.

27 *Shanmughan v Thangavelu* AIR 1958 Mad 240.

28 *Mohd Kadir Sheriff v Rahmatullah* AIR 1940 Mad 230. If publication of a false statement of fact also amounts to defamation punishable under s 500, IPC, a candidate is at liberty to proceed under s 500 instead of s 171G. See, *Narayanaswamy Naicker v Devaraja Mudaliar* AIR 1936 Mad 316.

29 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, paras 9A.4, 9A.6, 9A.12-9A.15.

30 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997.

CHAPTER 25

Contempts of the Lawful Authority of Public Servants

(Indian Penal Code 1860,Sections 172 to 190)

INTRODUCTION

Chapter X of the IPC, containing 20 sections, covers the subject of the penal consequences of all disobedience of the lawful authority of public servants. Act ually, this chapter should be seen as the converse of ch IX of the IPC, which deals with offences by, or relating to, public servants. As the lawmakers originally conceived it, this chapter provides for the penal actions liable to be taken against members of the public for disobedience to the lawful orders of all the three main classes of public servants: courts of justice, officers of revenue, and of the police.

While the chapter contains a variety of act s that constitute contempt of the lawful authority of public servants, there are two core principles which have been described as essentials to constitute the contempt. In order that the contempt powers be used against persons disobeying the authority of public servants, it is necessary to show that the order disobeyed is legal and the disobedience was intentional. While additional conditions have been prescribed in different provisions, proving these two conditions are held absolutely essential.

OFFENCES RELATING TO CONTEMPT OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS

The following are the main categories of offences elaborated in the chapter:

(1) Offences relating to avoidance or prevention of summons, notice or orders (ss 172-174).
(2) Offence relating to non-appearance in response to a proclamation made under Section 82 of the CrPC (s 174A).
(3) Offences relating to production of documents or furnishing information (ss 175-177).
(4) Offences relating to statements on oath (ss 178-181).
(5) False information causing wrongful use of power by public servant causing injury (s 182).
(6) Offences relating to sale of property effected through legal process (ss 183-186).
(7) Offences relating to disobeying or non-enforcing order of public servant (ss 187-190).

An important aspect of the offences provided in this chapter needs to be highlighted. Most of the sections contain two portions: the first portion describes the main offence, and the second clause covers aggravated forms of the same offence and provides for more stringent punishment. Since, more or less, the offences are arranged subject-wise in a chronological manner, we shall study each section individually.

Offences Relating to Avoidance or Prevention of Summons, etc

Section 172. Absconding to avoid service of summons or other proceeding.-- Whoever absconds in order to avoid being served with a summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document or an electronic record in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Scope of Section 172

The section makes punishable the wilful avoidance of receiving summons, notice or order issued by a person legally competent to issue it. The avoidance may be by abscondence or other means. The following are the main ingredients of the offence that need to be proved:

(1) That the summons, notice or order has been issued;
(2) That the summons, notice or order has been issued by a public servant;
(3) That the public servant was legally competent to issue it;

(4) That the summons, notice or order has been issued to be served on the accused. In other words, the accused must be shown to have known or have reasons to believe that it had been issued;
(5) That the accused has absconded to avoid it being served;

The second clause which deals with the aggravated form of the offence requires two further conditions to be established:

(1) That the process required the attendance of the accused personally or by his agent or required the production of a document or an electronic record[1] by him;
(2) Such attendance or production must be for the purpose of appearing in a Court of Justice.

It is interesting to note that the section contemplates only evasion of a service of summons, notice or order. Therefore, a person who absconds in apprehension that process will be issued against him does not come within the purview of s 172. It also does not cover evasion of a warrant of arrest,[2] as it is not an order served on an accused but merely an order to the police to arrest him. Further, only evasion of the summons is made an offence and not non-appearance in response to receipt of summons or notice.[3]

Absconding to avoid service of summons, notice or order is the essence of the offence under s 172. A person is said to be 'absconding' when he hides in his place of residence or remains away from it.[4] A person who has gone abroad long before issue of warrant cannot be said to have absconded or concealed himself. No proclamation and attachment against him under s 82 of the CrPC can be issued.[5]

A relevant question that arises is as to the nature of the order of summons or notice. Sections 62 - 69 Code of Civil Procedure 1908 (CPC), prescribe the mode of service of summons or for summoning witnesses in civil cases. The order of summons or notice should be addressed to the person concerned and must be legally of the type which takes effect from the date of service of summons to the accused. Thus, to be enforceable, the order must not relate to a person generally, but specifically be directed to the person specifically named in it. The orders whose evasion is made punishable under the CPC are, for example, a prohibitory order or one of temporary injunction,[6] or an attachment of property.[7] It should be noted that generally, as a rule, all orders passed in civil proceedings affecting the rights of a party to a suit or proceeding are required to be served on the party likely to be affected by the order sought for.[8] Similarly, in proceedings under the CrPC, an order for removal of nuisance requires to be served on the person against whom it is sought to be passed,[9] or in a dispute over immovable property, the party against whom an order is sought to be passed against has to be served intimation to make the order binding on the person.[10] In all such cases, an evasion would be punishable as an offence.

Section 173. Preventing service of summons or other proceeding, or preventing publication thereof.--Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order, proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order;

or intentionally prevents the lawful affixing to any place of any such summons, notice or order;

or intentionally removes any such summons, notice or order from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document or an electronic record in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Scope of Section 173

Even a bare reading of the provision makes it clear that the accused is liable only when it is shown that he actively resisted and had the intention to prevent serving of summons. Three essential prerequisites need to be established are: (i) intention; (ii) prevention; and (iii) lawful authority of public servant.

Prevention may be by a direct act or by evasion or concealment. It needs to be noted that what the section contemplates is intentional prevention of serving summons, or affixing to any place the summons, or intentional removal of summons or intentional prevention of making proclamations as provided for in law. The aggravated form of the offence covers the event when the intentional prevention of serving summons is in relation to a summons to attend a court of justice, in which case the punishment is for six months.

What is to be noted here is that the prevention of serving summons etc may be by active or evasive methods. However, the refusal of the accused to receive summons from court issued either under the CrPC or the CPC, cannot be punished under this provision, as under both the Codes, the refusal to accept summons itself amounts to service and it cannot be considered to be prevention of service of summons.[11]

Section 174. Non-attendance in obedience to an order from public servant.-- Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order, or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both,

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations

(a) *A*, being legally bound to appear before the High Court at Calcutta, in obedience to a subpoena issuing from that Court, intentionally omits to appear. *A* has committed the offence defined in this section.

(b) *A*, being legally bound to appear before the District Judge, as a witness, in obedience to a summons issued by that District Judge, intentionally omits to appear. *A* has committed the offence in this section.

Scope of Section 174

For the section to be operational, the summons or order must be legally valid, issued by a person competent to do so, and most importantly, must fulfill all the requirements of law. Thus, the summons or order should clearly indicate the person addressed and give full and complete details of the place, time and date when he is required to present himself before the named authority or court. Thus, the presence of the accused must be compulsory and not merely optional. Finally, the absence of the accused to present himself must be intentional.

If the summons or order is not complete in all aspects as required by law, as for example, not containing signature of the authority issuing it or not containing the seal of the office, then the omission was held fatal to the prosecution case regarding allegation of an offence under this section. Similarly, when the summons only mentioned the day and not the time and the place when the accused was required to be present, it was held that the summons was not legally enforceable, and hence non-conviction could be ordered under this section.[12]

The important supposition in the section is that the accused must have been legally bound to appear before the authority concerned which issued the summons or order. Thus, disobeying summons under s 160, CrPC,[13]or one issued under s 147 of the Land Revenue Act,[14] are not considered to be offences under this section.

Further, the omission on part of the accused to appear in response to a summons must be wilful. Therefore, non-attendance due to illness of the accused[15] or some unanticipated disability on his part does not amount to 'intentional' disobedience.

Offences Relating to Non-appearance in Response to a Proclamation

Section 174A. Non-appearance in response to a proclamation under section 82 of Act 2 of 1974.--Whoever fails to appear at the specified place and the specified time as required by a proclamation published under sub-section (1) of Section 82 of the Code of Criminal Procedure , 1973 shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine

Scope of Section 174A

Section 174A was inserted in the Penal Codeby the Code of Criminal Procedure (Amendment) Act , 2005 (25 of 2005) to give effect to s 82(4) inserted in the CrPC by it. The newly inserted provision of the CrPC provides for the declaration of a person accused of the offence punishable under 302, 304, 364, 367, 382, 392, 393-400, 402, 436, 449, 459 or 460 of the IPC as proclaimed offender, if he fails to appear (at the specified place and time required by the proclamation) in spite of the proclamation published under s 82, CrPC. S 174A prescribes punishment for such a proclaimed offender. It provides for imprisonment for term up to three years or fine or both if the declaration was made under s 82(1), CrPC, the term of imprisonment extends to seven years (with fine) if the declaration was made under s 82(4), CrPC.

Offences Relating to Production of Documents

Section 175. Omission to produce document or electronic record to public servant by person legally bound to produce it.--Whoever, being legally bound to produce or deliver up any document or electronic record to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the document or electronic record is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustration

A, being legally bound to produce a document before a District Court, intentionally omits to produce the same. *A* has committed the offence defined in this section.

Scope of Section 175

To punish a person under this section, it must be established that the accused was legally bound to produce or deliver the document or electronic record he was required to produce or deliver. However, it should be noted that every citizen enjoys constitutional protection against self-incrimination and thus, no person undergoing a trial can be convicted for refusal to produce a document or evidence, which would implicate himself, although this section may make such refusal punishable.[16] Article 20(3) of the Constitution, guaranteeing the right against testimonial compulsion, is not only confined to the oral evidence of the person facing a criminal trial but also extended to the compulsory production of documents that are likely to be used as evidence against him.[17] An accused, therefore, cannot be compelled to produce any documents that contravenes art 20(3) of the Constitution.[18]

Section 176. Omission to give notice or information to public servant by person legally bound to give it.--Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the notice or information required to be given is required by an order passed under sub-section (1) of section 565 of the Code of Criminal Procedure , 1898 (5 of 1898),[19] with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Scope of Section 176

The law of most countries imposes a legal obligation on all persons to report to the authorities vital information especially as regards the commission of a crime or an offence which has the effect of causing injury and harm to others. However, the failure to comply with the obligation to assist public servants becomes punishable under this section, only if two conditions are established:

(1) There must have been a public duty cast on the accused concerned;
(2) There must have been intentional non-performance of the duty cast.[20]

To make the non-performance of the duty punishable, however, the effect must be such as to have led to some injury because of the non-disclosure or withholding of the information, when the public servant has not already received the information. For once, the public servant has been intimated a particular information, it is not thereafter an offence to claim that the accused ought to have intimated the officer concerned. On receipt of information, the section has no application thereafter on account of non-disclosure.[21]

The information whose non-disclosure is made punishable should be such that it is not vague, floating gossip, but should be information of a definite nature, having credible origin and as such is of the type which gives rise to a real apprehension of the commission of an offence.

Again, a crucial element in the offence is that there should be intentional omission to deliver the information. Thus, in *Dr Sathyasheel Nandlal Naik v State of Maharashtra* ,[22] the high court held that if there is omission and the omission cannot be explained properly, then it is intentional and is as such punishable.

Section 177. Furnishing false information.--Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) *A*, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. *A* is guilty of the offence defined in this section.
(b) *A*, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of *Z*, a wealthy merchant residing in a neighbouring place, and being bound under clause 5, section VII, Regulation III, 1821, of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest police-station, wilfuly misinforms the police-officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here *A* is guilty of the offence defined in the latter part of this section.

Explanation.--In section 176 and in this section the word 'offence' includes any act committed at any place out of India, which, if committed in India, would be punishable under any of the following sections, namely,

302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449 450, 457, 458, 459 and 460; and the word 'offender' includes any person who is alleged to have been guilty of any such act.

Ingredients of the Offence Under Section 177

It can be seen that whereas the previous s 176 punishes omission to give information, the present section makes punishable, deliberately giving false information with the knowledge that it is false. The essential ingredients therefore are as follows:

(1) The accused must be legally bound to furnish the information;
(2) The information must be furnished to a public servant;
(3) That in pursuance of such requirement, the accused did furnish certain information;
(4) The information so furnished was act ually false;
(5) The accused must have furnished the information knowing well that it was actually false or had reason to believe that it was false;[23]
(6) With regard to the operation of cl 2, aggravated form of the offence, the information must have been in connection with the commission of an offence.

Police officers are duty bound to immediately record all information and consequently register complaints with regard to commission of cognisable or non-cognisable offences, under ss 154 and 155, CrPC. Such records must necessarily be correct and accurate. This is both for the purpose of enquiry as also for the purpose of intimating senior officers like the superintendent of police or the district magistrate. So, where a police officer suppressed the report of a cognisable offence as a non-cognisable offence, to save himself the trouble of investigation, he was held to have committed an offence under this section.[24] Similarly, a sub-inspector of police who recorded the occurrence of a serious riot as a petty assault was also held to have been guilty of committing offence under s 177.[25] HS Gaur has succinctly expressed that false information may be as much be conveyed by *suggestio falsi* as by *suppressio veri*.[26]

Offences Relating to Statements on Oath

Section 178. Refusing oath or affirmation when duly required by public servant to make it.--Whoever refuses to bind himself by an oath or affirmation to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Section 179. Refusing to answer public servant authorised to question.--Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Scope of Section 179

While s 178 makes it an offence to take an oath or make an affirmation, s 179 makes it an offence to refuse to answer the public servant or act ually refers to a refusal to give evidence. Thus, a person may bind himself by an oath to state the truth, but may even after that refuse to state the truth or speak at all, which is the subject matter of the present section. However, there are certain exemptions in law, which curtail the scope of the section. Thus, the accused persons' liability to state the truth is qualified by the provisions of ss 121-132 of the Indian Evidence Act 1872, relating to exemptions available to witnesses. Within the scope of the exemptions so provided, the refusal to answer questions may not fall within the purview of s 179. Similarly, witnesses examined by the police are privileged from having to answer questions which may have the tendency to implicate themselves or expose them to a criminal charge or forfeiture or penalty under s 161(2), CrPC.

The element of mens rea is most crucial for securing a conviction under this provision. Thus, where there is no wilful refusal, but only unwitting omission or innocent warding off of giving information, then the accused is

entitled to benefit of doubt. To be otherwise, would be to constrain him in such a way that he loses the valuable constitutional guarantee against self-incrimination.[27]

Section 180. Refusing to sign statement.--Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Scope of Section 180

This section was enacted at a time when all witnesses were required to sign the statements recorded by the police officer. However, under s 162 of the present CrPC, witnesses are not required to sign the statements made by them. However, where a complaint is made in writing about an offence and which is received under s 154, CrPC, then the complaint should bear the signature of the first informant or the complainant. Similarly, statements or confessions given by persons or accused under s 164, CrPC, to judicial magistrates (popularly called judicial confessions), are required to be signed by the persons making it on all the pages bearing their statements or confessions.

Thus, in the absence of any statutory obligation an accused, who refuses to sign a statement, commits no offence under the section.

Section 181. False statement on oath or affirmation of public servant or person authorised to administer an oath or affirmation.--Whoever, being legally bound by an oath or affirmation to state the truth on any subject to any public servant or other person authorised by law to administer such oath or affirmation, makes, to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 181 punishes making a false statement on oath or affirmation to a public servant. To rope an accused in s 181, the prosecution needs to prove that the accused: (i) took the oath or made the affirmation; (ii) was legally bound to do so and to state the truth to a public servant; and (iii) made a statement which was false or he knew or had reasons to believe that the statement was false or he did not believe that the statement was true. However, s 181 is inapplicable when the public servant administers the oath in a case wholly beyond his jurisdiction.

Comparison between Sections 181 and 191, Indian Penal Code 1860

It is interesting to note that provisions of s 181 are almost identical to that of s 191 of the Code, which is made punishable under s 193, IPC.

However, there is one difference between the two. When a false statement is made to a public servant, the offender is punishable under s 181 with imprisonment not exceeding three years, but when the false statement amounts to false evidence (as defined under s 191), he is punishable (under s 193 of the IPC) with imprisonment for a term up to seven years. Section 193, thus, prescribes punishment that is much more stringent and is meant to cover a more serious crime. However, one can observe that s 193 can be considered to have application in instances when false statements have been made in judicial proceedings. Act ually, a view has taken that s 181 is applicable to perjury committed in proceedings other than judicial proceedings.[28]

False Information Causing Wrongful use of Power by Public Servant Causing Injury

Section 182. False information, with intent to cause public servant to use his lawful power to the injury of another person.--Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant--

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations

(a) *A* informs a Magistrate that *Z,* a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss *Z*. *A* has committed the offence defined in this section.

(b) *A* falsely informs a public servant that *Z* has contraband salt in a secret place knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of *Z*'s premises, attended with annoyance to *Z*. *A* has committed the offence defined in this section.

(c) *A* falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. *A* has committed an offence under this section.

Scope of Section 182

This section relates to giving information, which the informer knows or believes to be false, to a public servant with intent to make him to use his lawful power to cause injury or annoyance to other person. Its object, thus, is to ensure that a public servant should not be given false or misleading information and thereby to make him to do what he ought not to do or to omit what he ought to do.[29]

The essential ingredients of the offence can be described as follows:

(1) giving of false information;
(2) to a public servant;
(3) which information is known by the informant to be false;
(4) given with the intention to influence the public servant to act otherwise than he would have act ed;
(5) which may have the effect of causing injury or annoyance to any person.[30]

In order to convict an accused under s 182, it is necessary for a court to ensure that all these ingredients constituting the offence are proved.[31]

In *Daulat Ram v State of Punjab* ,[32] the Supreme Court held that the offence is complete the moment a person moves the public servant for action. However, it is not in all cases of false or incorrect statement that prosecution needs to be launched. A prosecution needs to be initiated only in cases of larger interest of justice.[33]

It should be noted that what the section contemplates is the positive act of giving of false information and not the withholding of information.[34] Thus, the guilt of the accused lies in the intention entertained or knowledge, and a man's knowledge or intention must be judged from his acts and surrounding circumstances.[35] Actual injury to a third person need not be necessary for a conviction under the section, as the offence is made out with the positive act of the accused giving false information with the requisite intention. However, a person who makes a false statement in his petition cannot be held guilty under this section simply because his claims are not substantiated.[36] Similarly, an expression of suspicion against some persons in a complaint of theft to the police does not amount to the giving of false information under the section.[37] Mere criticism of the administration for its lapses or the police for its inaction and for faulty steps in the investigation also does not constitute any offences under s 182.[38] However, a person initiating mala fide criminal proceedings initiated against a person holding high office with a view to wreak vengeance and spite him due to private and personal grudge may be prosecuted under s 182, IPC.[39]

Section 182 and Section 211 , Indian Penal Code 1860, compared

A comparison, in brief, between s 182 and s 211 of the IPC, dealing respectively with giving false information and instituting false charges, deserves our attention. Section 182, as mentioned earlier, deals with the case of false information given to a public servant with the intent to cause injury to another. While s 211 deals with the offence of making a false charge of an offence with the intent to cause injury. Section 211 provides that it shall be an offence, if a person, with intent to cause injury to any person, either institutes any criminal proceeding against him or falsely charges him with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge. There is a basic difference between the offences created under these two sections. The offence under s 182 is complete when a person has moved a public servant for action.[40] While the offence under s 211 is complete, the moment a person puts or attempts to put a criminal court in motion against another.[41] False information (under s 182), unlike false allegation (under s 211), may not necessarily lead to a particular allegation or charge against a specified and definite person. The offence created under s 211 is a more serious offence than that one punishable under s 182. The offences created under these two sections being distinct, persons charged under s 182 cannot be charged under s 211 in the alternative.[42]

Offences Relating to Sale of Property Effected through Legal Process

Section 183. Resistance to the taking of property by the lawful authority of a public servant.--Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Scope of Section 183

The section makes punishable the offering of resistance to the seizure of property by the lawful authority of a public servant as it forms an overt act of defiance to his authority. As regards to what constitutes resistance, it has been held that it refers to obstruction and implies something more than mere verbal opposition to the seizure, but involves the threat or the imminent threat of use of force against the seizure.[43]

The essential ingredients to prove the offence are as follows:

(1) The accused must have offered resistance to the taking of any property;
(2) The property was being seized under the authority of a public servant;
(3) Such authority must be shown to be lawful;
(4) At the time when the accused resisted the seizure, he must be shown to have known or had reason to believe that the public servant had the authority to the taking of the property.

Thus, the public servant seeking to take the property under cover of a warrant must have the warrant with him at that time, or else the effecting of the taking of the property will not be lawful.[44] Similarly, a warrant for attachment of property which is not signed by the judge or does not bear the seal of the court concerned, is not a legal warrant.[45] Resistance or obstruction of such unlawful warrants is not an offence.[46] An objection to the police seizing property does amount to 'resistance' under the section.[47]

Section 184. Obstructing sale of property offered for sale by authority of public servant.--Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Section 185. Illegal purchase or bid for property offered for sale by authority of public servant.--Whoever, at any sale of property held by the lawful authority of a public servant, as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Section 186. Obstructing public servant in discharge of public functions.-- Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Scope of Section 186

The section makes a general provision for the obstruction of a public servant in the discharge of their public functions. In the case of judicial officers, any obstruction will amount to a contempt of court and is as such summarily punishable under s 345, CrPC, and the offences may be any of the offences under ss 175, 178, 179, 180 or 228 of the IPC. What is to be noted is that the obstruction must be caused during the discharge of public functions and not in other times.

The term 'voluntarily' in the section indicates that the offence must be of some overt act of obstruction as distinguished from mere passive conduct.[48]

The word 'obstruction' denotes some overt act in the nature of violence or show of violence.[49] To prove obstruction, it is not necessary that there should be actual criminal force. It is sufficient if there is show of force or threat or any act preventing the execution of any act by a public servant.[50] A mere verbal objection to discharge of public function by a public servant, therefore, does not amount to obstruction of the public servant and the person cannot be held guilty under the section.[51] Similarly, where the accused had made aggressive or menacing act ions while uttering threats such as to give rise to a real threat of use of force, preventing the public servant from discharging his public functions, then the offence is held to have been made out.[52]

Offences Relating to Disobeying or Non-enforcing Order of Public Servant

Section 187. Omission to assist public servant when bound by law to give assistance.--Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both;

and if such assistance be demanded to him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Section 187 provides for the punishment for intentional omission on part of a person, who is bound by law, to render assistance to a public servant in: (i) the execution of his public duty, and (ii) executing any process lawfully issued by a court of justice, (iii) preventing the commission of an offence, and (iv) suppressing a riot or affray, or apprehending a person who has charged with or guilty of an offence or who has escaped from custody.

Section 188. Disobedience to order duly promulgated by public servant.--Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction;

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.--It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.

Illustration

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. *A* knowingly disobeys the order, and thereby causes danger of riot. *A* has committed the offence defined in this section.

Scope of Section 188

The section prescribes the punishment for disobedience of the lawful orders of a public servant, especially when the disobedience results in any of the consequences outlined in the second and third clauses of the section to the person lawfully employed. However, in *Bharat Raut v State* ,[53] it was held that mere disobedience of an order of a public servant is not punishable and that the disobedience must lead to the consequences narrated in the section. Conviction under s 188 cannot be sustained if the alleged disobedience does not cause or is not tended to cause obstruction, annoyance or injury or risk of obstruction, annoyance or injury to any person lawfully employed there.[54] It also needs to be further clarified that the orders must be made by public servants in public interest and cannot pertain to orders made by such officers in civil proceedings between two parties.[55]

Thus, the annoyance, injury or obstruction caused by disobedience cannot be with reference to orders passed by civil or revenue courts in judicial proceedings. Any breach of the orders can be adequately dealt with under the provisions of the CPC itself.

On the other hand, when orders under s 144, CrPC, have been passed, any disobedience of the same will result in the commission of an offence under s 188, IPC. Similarly, in *Ram Samujh v State* ,[56] the Allahabad High Court held that s 188 includes within its ambit orders passed under s 144 as also s 145, CrPC.

In all cases involving the section, it is essential to prove that the accused had knowledge of the orders passed, for which violation, he was being prosecuted. The question of knowledge is generally a matter of inference from the evidence brought on record.[57]

Thus, when one examines s 188, the following essential aspects command attention:

(1) There must be an order promulgated by a public servant;
(2) The public servant must be lawfully empowered to promulgate such order;
(3) The accused must have disobeyed such order;
(4) Such disobedience must have caused or tend to have caused: (a) obstruction, injury annoyance or risk to any person lawfully employed; or (b) danger to human life, health or safety; or (c) riot or affray.

It has been held that no conviction under s 188 can be made unless the likely consequences of the breach of the order are proved positively.[58] In *Ratlam Municipality v Uardichand* ,[59] the Supreme Court held a municipal council through its officers liable under s 188, IPC for disobeying and non-compliance with an order passed by a magistrate under s 133, CrPC, to close certain pits and to repair the drains.

Section 189. Threat of injury to public servant.--Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 190. Threat of injury to induce person to refrain from applying for protection to public servant.--Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Sections 189 and 190 punish criminal threats affecting public servants. The former is involved when threat is directed against the public servant himself, while the latter is aimed the person who seeks his protection.

PROPOSALS FOR REFORM

The Fifth Law Commission has offered a couple of major and minor proposals for reform. Most of the proposals suggest enhanced punishment for the offences relating to contempts of the lawful authority of public servants. and deletion of some of the explanations of the existing sections. It proposed no changes in ss 181, 183, 189 and, 190. The recommended reforms are[60]:

(1) Second paragraph of s 172, which refers to the production of a 'document' (and an electronic record) in a Court of Justice, should be amended to bring within its purview also the production of 'any other thing'.
(2) The punishment of 'one month, or with fine which may extend to five hundred rupees, or with both' stipulated in the first paragraph of s 172 should be substituted by 'three months, or with fine, or with both', and that of 'six months, or with fine which may extend to one thousand rupees, or with both', provided in its second paragraph, should be replaced by 'one year, or with fine, or with both'.
(3) The proposed enhanced punishment in s 172 should be also carried out in ss 173-175, and the illustrations of ss 174 and 175 should be deleted, as they do not clarify any doubtful point.
(4) The maximum punishment under the first paragraph of s 176 should be of three months' imprisonment and unlimited fine; and under the second and third paragraphs, it should be of one year's imprisonment and unlimited fine.
(5) The sections enumerated in explanation of s 177 should be deleted as the duty to give information in respect of their commission arises from relevant provisions of the CrPC, which enumerate or otherwise specify the existing enumerated offences.
(6) The two illustrations of s 177 should be deleted, as they 'do not appear to be of any real help'.
(7) The punishment provided for the offence under the first paragraph of s 177 should be slightly increased by omitting the words 'which may extend to one thousand rupees' appearing after the word 'fine'.
(8) The limit of one thousand rupees for the fine stipulated under s 178 and s 179 should be removed by omitting the words 'which may extend to one thousand rupees'.
(9) The punishment provided for in s 180 should be enhanced to 'simple imprisonment for a term which may extend to six months, or with fine, or with both'.
(10) The punishment provided in s 182 should be enhanced from imprisonment for a term up to 'six months' to for a term up to 'one year'.
(11) The provisions of s 184, dealing with intentional obstruction to sale of property offered for sale by a public servant, should not be merely confined to 'intentional obstruction' requiring proof of mens rea but also be extended to 'known obstruction', requiring mere knowledge or its likelihood on part of the accused. It, accordingly, suggested that the word 'intentionally' prefixing the word 'obstructs' be replaced by the word 'voluntarily'.
(12) The sentence of imprisonment for a term up to one month stipulated under s 184 should be deleted and the quantum of fine be increased from five hundred to one thousand.
(13) The maximum punishment provided in s 186, ie, 'three months imprisonment, or fine up to five hundred rupees, or both' should be increased to 'six months, or with fine, or with both'.
(14) The punishment provision in the first paragraph of s 187 should be amended to make it to read as 'punished with fine which may extend to one thousand rupees'. Further, the words 'which may extend to five hundred' be omitted from the punitive clause appearing in the second paragraph of s 187.
(15) No major substantive proposals for reforms in s 188 are offered by the Law Commission. It merely recommended: (i) in the punishment provision (in para 3 of the section), the limit of one thousand rupees for the fine should be removed by omitting the words 'which may extend to one thousand rupees'; (ii) the *Explanation* should be shortened and should be made precise by deleting the word 'contemplate', which is imprecise and not in accord with the usual terminology, from the first sentence, and the second sentence, which is unnecessarily expository and slightly misleading, should be made precise, to make the explanation to read 'it is not necessary that the offender should intend to produce harm, or know that his disobedience is likely to

produce harm'; and (iii) the illustration should be deleted as it does not elucidate any doubtful point.

However, none of these proposals for reform of the Law Commission found place in the Indian Penal Code (Amendment) Bill 1978.

1 The term 'electronic record' is defined in s 29A, IPC.

2 *Sheo Jangal Prasad v Emperor* AIR 1928 All 232; *Mumtaz v Chhutwa* AIR 1940 All 386.

3 *State of Uttar Pradesh v Hem Narain Singh* AIR 1953 All 200, (1953) Cr LJ 555(All) .

4 *KTMS Abdul Kader v Union of India* (1977) Cr LJ 1708(Mad) ; *DB Deshmukh v State of Maharashtra* AIR 1970 Bom 438; see also, *Bhaskaran v State of Kerala* (1985) Cr LJ 1711(Ker) .

5 *Gundappa v State of Karnataka* (1977) Cr LJ (NOC) 187(Kant) .

6 Order XXXIX, CPC.

7 Ibid, Order XXXVIII.

8 S 91, CPC.

9 S 134, CrPC.

10 S 145, CrPC.

11 *Banwari Lal v Jhunka* AIR 1926 All 229.

12 *Latormal v Emperor* AIR 1948 All 137; *Hukum Singh v Emperor* AIR 1926 All 474.

13 *Manicka Reddy v State* AIR 1968 Mad 225, (1968) Cr LJ 760(Mad) .

14 *Emperor v Bhirgha Singh* AIR 1927 All 122; *Emperor v Himachal Singh* AIR 1930 All 265.

15 *Bohra Birbal v Emperor* AIR 1922 All 82.

16 *Ishwar Chandra v Ghoshal* (1908) 12 Cal WN 1016. Though this ruling is in the pre-independence period and before the Constitution was passed, its ratio still seems to be of relevance in view of art 21.

17 *Babu Ram v State of Uttar Pradesh* (1961) Cr LJ 55(All) ; *Balkishan v State of Maharashtra* AIR 1981 SC 379, (1980) 4 SCC 600.

18 *Ram Rakha v Sat Pant* (1973) Cr LJ 93(Ori) .

19 Now s 356, CrPC of 1973.

20 *Shridhar v State* AIR 1954 HP 67.

21 *Jothi Bai v State* (1989) LW 308(Mad)(Cri) .

22 (1996) Cr LJ 1463 (Bom).

23 *Jagan Nath v Rex* AIR 1950 Ajmer 19.

24 *Mohammad Ismail*(1893) ILR 20 All 151.

25 *Syed Futteh Mohammad* 21 WR 30 (Cri), cited from Hari Singh Gour, *Penal Law of India*, vol 2, 11th edn, Law Publishers, Allahabad, 1998, p 1636.

26 Ibid.

27 *Nandini Satpathy v PL Dani* AIR 1978 SC 1025, (1978) Cr LJ 968(SC), (1978) 2 SCC 424.

28 Hari Singh Gour, *Penal Law of India*, vol 2, 11th edn, Law Publishers, Allahabad, 1998, p 1646.

29 *State of Maharashtra v Limbaji Mhaske* (1976) Mah LJ 475; *State of Rajasthan v Roppa* AIR 1966 Raj 101.

30 *Baleshwar Singh v District Magistrate and Collector, Benaras* AIR 1959 All 71.

31 *Subash Chandra v State of Uttar Pradesh* (2000) 9 SCC 356.

32 AIR 1962 SC 1206, (1962) Cr LJ 286(SC) .

33 *Santokh Singh v Izahar Hussain* AIR 1973 SC 2190, (1973) Cr LJ 1176(SC) .

34 *Sher Mohamad v Emperor* AIR 1940 Lah 15.

35 *Shiv Kumar Prasad v State of Bihar* (1984) Cr LJ 1417(Pat) .

36 *Amir Ali v Dukhan Momin* AIR 1928 Pat 574.

37 *Ananga Mohan Dutta v Emperor* AIR 1919 Cal 501.

38 *Shiv Kumar Prasad Singh v State of Bihar* (1984) Cr LJ 1417(Pat) .

39 *State of Haryana v Bhajan Lal* AIR 1992 SC 604, (1992) Cr LJ 527(SC) .

40 *Daulat Ram v State of Punjab* AIR 1962 SC 1206, (1962) Cr LJ 286(SC) .

41 See *Local Govt v Guji* AIR 1935 Nag 69, wherein the lady, who wanted investigation and sought punishment of an SI of Police who allegedly raped her, was held guilty under s 211 when the police officer was not found guilty of committing rape on her.

42 *State of Punjab v Brijlal Palta* AIR 1969 SC 355, (1969) Cr LJ 645(SC) .

43 Re *Rangaswami Govdan*AIR 1944 Mad 45.

44 *Emperor v Ganeshilal* (1904) Cr LJ 896(All) .

45 *Karamatullah v Emperor* AIR 1920 All 51.

46 *Mohini Mohan Banerji v Emperor* AIR 1916 Pat 272, (1917) 18 Cr LJ 39(Pat) .

47 Re *Rangaswami Goundan*AIR 1944 Mad 45.

48 *Jaswant Singh v Emperor* AIR 1925 Lah 139, (1924) 25 Cr LJ 721(Lah) .

49 *Phudki v State* AIR 1955 All 104.

50 *State v Babulal Gauri Shankar Misar* AIR 1957 Bom 10(DB) ; but see, *Janaki Prasad v State of Bihar* (1975) Cr LJ 575(Pat) .

51 *AH Choung v Emperor* AIR 1932 Rang 21.

52 *Basudev v State* (1984) 2 Crimes 599.

53 AIR 1953 Pat 376, (1953) Cr LJ 1787(Pat) ; see also Re *V Subramaniam*AIR 1970 Mad 333; *Habibur v Jagadish* (1982) Cr LJ 1652(Cal) . The view is reiterated in *Mahto v State of Bihar* (1992) 1 Crimes 449.

54 *Ambalan v S Jagannatha* AIR 1959 Mad 89; *Ram Manohar Lohia v State of Uttar Pradesh* AIR 1963 All 100.

55 *Bishan Datt v Emperor* AIR 1948 All 50; *VVRV Anjaneyalu v State* (1997) 4 Crimes 467(AP) .

56 AIR 1967 All 579.

57 Re *Sundara Mudaliar*AIR 1937 Mad 535, (1938) Cr LJ 620(Mad) ; Re *Madan Kishore*AIR 1940 Pat 446.

58 *State v Tugla* AIR 1955 All 423, (1955) Cr LJ 1111(All) .

59 AIR 1980 SC 1622, (1980) Cr LJ 1075(SC) .

60 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, paras 10.2-10.18 & 10.21-10.23.

CHAPTER 26

False Evidence and Offences Against Public Justice

(Indian Penal Code 1860,Sections 191 to 229A)

INTRODUCTION

Chapter XI of the IPC deals with the offences relating to false evidence and offences against public justice. In relation to proceedings in any court, the offences enumerated are : giving false evidence or fabricating false evidence (ss 191 to 193); giving or fabricating false evidence with intent to procure conviction (ss 194 & 195); threatening any person to give false evidence (s 195A); using evidence known to be false (s 196); using as true a certificate known to be false (s 198); making a false statement in a declaration which is by law receivable as evidence (s 199); using as true any declaration receivable as evidence, knowing it to be false (s 200); causing disappearance of evidence of offence, or giving false information to screen offender (s 201); intentional omission to give information of offence by person bound to inform (s 202); giving false information in respect of an offence (s 203); destruction of document or electronic record to prevent its production as evidence (s 204); false personation (s 205); fraudulent removal/ concealment of property (s 206); fraudulent claim to property (s 207); fraudulently suffering or obtaining decree for sum not due (ss 208 & 210); dishonestly making a false claim in Court (s 209); intentional insult or interruption to public servant sitting in judicial proceedings (s 228), and failure to appear in court in violation of bail or bond (s 229A).

These offences can be categorised into two groups:

(A) Giving or fabricating false evidence (ss 191-200). This may be further sub-divided as follows:
- (1) Giving false evidence (s 191); fabricating false evidence (s 192).
- (2) Punishment for giving false evidence and fabricating false evidence (s 193).
- (3) Aggravated forms of giving false evidence and fabricating false evidence (ss 194-195A).
- (4) Offences punishable in the same way as giving or fabricating false evidence (ss 196-200).

(B) Offences against public justice (ss 201-229A). This may be further sub-divided as follows:
- (1) Causing disappearance of evidence, such as intentional omission to give information, giving false information and destruction of documentary evidence (ss 201-204).
- (2) False personation (ss 205 and 229).
- (3) Abuse of process of Court of Justice (ss 206-210).
- (4) False charge of an offence (s 211).
- (5) Screening and harbouring offenders (ss 201, 212- 216, 216A).
- (6) Offences against justice by public servants (ss 217-223 and 225A).
- (7) Resisting the law (ss 224-225 and 225B).
- (8) Violation of conditions of remission (s 227).
- (9) Contempt of court (s 228).
- (10) Failure of a person released on bail or bond to appear in court (s 229A).

PART A - FALSE EVIDENCE

Section 191. Giving false evidence.--Whoever, being legally bound by an oath or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any

statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.--A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.--A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

Illustrations

(a) *A*, in support of a just claim which *B* has against *Z* for one thousand rupees, falsely swears on a trial that he heard *Z* admit the justice of *B*'s claim. A has given false evidence.
(b) *A*, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of *Z*, when he does not believe it to be the handwriting of *Z*. Here *A* states that which he knows to be false, and therefore, gives false evidence.
(c) *A*, knowing the general character of *Z's* handwriting, states that he believes a certain signature to be the handwriting of *Z*; *A* in good faith believing it to be so. Here *A's* statement is merely as to his belief, and therefore, although the signature may not be the handwriting of *Z*, *A* has not given false evidence.
(d) *A*, being bound by an oath to state the truth, states that he knows that *Z* was at a particular place on a particular day, not knowing anything upon the subject. *A* gives false evidence whether *Z* was at that place on the day named or not.
(e) *A*, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. *A* has given false evidence.

GIVING FALSE EVIDENCE OR PERJURY

The offence intended to be covered under this section is the offence of perjury in English law. According to English statutory law (the Perjury Act 1911), as stated in *Halsbury's Laws of England:*[1]

> A person is by statute guilty of the crime of perjury if, lawfully sworn as a witness or as an interpreter in a judicial proceeding; he lawfully makes a statement material in that proceeding which he knows to be false or does not believe to be true.

There should at least be two witnesses to convict a person of the offence of perjury under English law.

The offence as defined in s 191, IPC, comprises of the following five elements:

(1) A false statement, made by a person, who is;
(2) Bound by an oath; or
(3) By an express provision of law; or
(4) A declaration which a person is bound by law to make on any subject; and
(5) Which statement or declaration is false and which he either knows or believes to be false or does not believe to be true.

The three essential prerequisite conditions are:

(1) A legal obligation to state the truth;
(2) The making of a false statement or declaration; and
(3) Belief in its falsity.

Differences vis--vis the English Law of Perjury

Compared to the English law of perjury, the Indian law is less rigid in the following respects:

(1) In order to sustain a prosecution under s 191, it is enough, if the accused had given a false statement contrary to the oath or an express provision of law to state the truth or bound by law to make a declaration, whereas under English law prosecution for perjury is permitted only when there is an express violation of an oath. In India, oath is merely one of the forms by which a party may be bound to speak the truth.

(2) In English law, the false statement must have been made in judicial proceeding ie, before courts. In s 191, it is not so strictly limited. Under s 191, if a person is legally bound by oath or by express provision of law to state the truth and acts contra, he will be liable for prosecution. In the IPC, the distinction is relevant only in determining the degree of punishment to be imposed.

(3) Again, as stated before, in English law, perjury must be proved by two witnesses or by one witness with other corroborative material evidence. Under the IPC, no specific number of witnesses is required to sustain the guilt.

(4) Finally, in English law, the matter sworn to must be material to the case in which it is given. According to the IPC, materiality is not insisted on, although, it would undoubtedly be taken into consideration by the court when awarding punishment.

Legally Bound by Oath or Law to Say the Truth

Section 191is applicable only when a statement is made by a person bound by an oath or by an express provision of law to state the truth, or who is bound by law to make a declaration upon any subject. In other words, it means that he is under a legal obligation to speak the truth in view of the oath administered to him or because of the express provision of law, which binds him to speak the truth. The Oaths Act 1969, empowers all courts and all persons having, by law or consent of parties, authority to receive evidence and commanding officers of military stations to administer oaths and affirmations. The oath or affirmation is to the effect that the witness 'will speak the truth, the whole truth and nothing but truth.' The main purpose of administering of oath is to render persons who give false evidence liable to prosecution and further to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth.[2] The oath itself must be administered by a person of competent authority. But, what is important is the competency of the authority before which the statement is made to administer the same. If the competent authority either intentionally or inadvertently fails to administer the oath to the person concerned, it does not make the person making the statement less obligated to speak the truth. The purpose of administering the oath to a witness is to bring home the solemnity of the occasion and to impress upon him the duty of speaking the truth.[3]The duty to state the truth is laid down in s 8 of the Oaths Act 1969. Whenever, in a court of law, a person binds himself on oath to state the truth, he is bound to state the truth.[4] Any omission or irregularity in the administration of oath cannot invalidate any proceeding or render inadmissible any evidence whatsoever. Thus, even if the competent authority fails to administer the oath altogether or commits an irregularity in the administration of the oath, it does not affect the liability of the person to speak the truth. If a person deposes falsely before such competent authority, he is liable for prosecution for giving false evidence under this section. However, if the court concerned had no authority in the first place to administer an oath to a witness, this section has no application. Proceedings against the witness for giving false evidence will not stand.[5] Further, the proceedings must be sanctioned by law. If the proceeding itself is one without jurisdiction and not authorised or sanctioned by law, then any false statement made therein is not an offence.[6]

The words 'legally bound by an oath' contemplate a witness. No advocate is legally bound by an oath or by an express provision of law to state the truth. A lawyer, therefore, cannot be held guilty for either giving false evidence (under s 193) or using evidence known to be false (under s 196).[7]

When a person is bound by an express provision of law to state the truth, he is not required to take an oath to state the truth. He, therefore, cannot be charged with giving false evidence.[8]

False Statement to be Intentionally Made

In order to constitute an offence under this section, three criteria have to be established: (i) that the statement was false; (ii) the person making the statement knew or believed it to be false or did not believe it to be true, and (iii) that such a statement was made intentionally.

The *illustrations* to the section succinctly explain these ingredients.

Thus, the question of intention to make a false statement is the crux of the offence and goes to very root of the matter. If the prosecution fails to prove that the accused made the false statement intentionally, then the accused will be entitled to an acquittal. So, in order to sustain a conviction under this section, it is vital that the prosecution establish all the three criteria mentioned above.

In *Chandra Pal Singh v Maharaj Singh* ,[9] a landlord having unsuccessfully challenged in the civil court the allotment of a vacated portion of a premises to a tenant who was in possession of the adjacent premises, filed a criminal case against him under s 193, IPC. The complainant merely stated that certain statements made in the affidavit by the accused were false. No specific averment was singled out for the purpose of substantiating the complaint. His main ground in filing the complaint and substantiating the same is the fact that the rent control court did not accept some of the statements made by the accused. For instance, the accused had stated in his affidavit that he was in possession of one room in a particular premise, which was not accepted by the court. The Supreme Court held that there was no foundation for a charge in the first place. It observed that:

> Acceptance or rejection of evidence by itself is not a sufficient yardstick to dub the one rejected as false. Falsity can be alleged when truth stands out glaringly and to the knowledge of the person who is making the false statement. Day in and day out, in courts averments made by one set of witnesses are accepted and the counter-averments are rejected. If in all such cases, complaints under s 199, IPC, are to be filed not only they will open up floodgates of litigation but it would unquestionably be an abuse of the process of the Court.[10]

Similarly, in *KTMS Mohd v Union of India* ,[11] the Supreme Court held:

> The mere fact that a deponent has made contradictory statements at two different stages in a judicial proceeding is not by itself always sufficient to justify a prosecution for perjury under s 193, IPC, but it must be established that the deponent has intentionally given a false statement in any stage of the 'judicial proceeding' or fabricated false evidence for the purpose of being used in any stage of the judicial proceedings.[12]

It is necessary for holding a person liable for perjury that he should make the statement on oath regarding the facts on which his statement was based and then deny those facts on oath on a subsequent occasion. So earlier as well as subsequent statements must be on oath and are opposed to each other.[13] In order to expose a person to the liability of a prosecution of making false statement there must be a false statement of fact and not a mere pleading made on the basis of facts which are themselves not false.[14]He, however, is not expected to make a reasonable inquiry regarding veracity of the statement. He cannot be convicted for perjury for having act ed rashly or for having failed to make reasonable inquiry about the fact allegedly to be true.[15]

False Statement Made by Accused

It is no doubt true that s 191 opens with the words 'whoever...,' meaning thereby that every person who makes a false statement on oath is liable to be prosecuted. However, the position of an accused stands on a different footing. Article 20(3) of the Constitution of India provides that 'no person accused of any offence shall be compelled to be a witness against himself'. In view of this constitutional guarantee, which is part of the Fundamental Rights guaranteed to every citizen, a person accused of any offence cannot be compelled to make any statement on oath. As per s 313, CrPC, a court is given the power to examine an accused in a trial or enquiry. However, the section stipulates that no oath shall be administered to the accused when he is examined, and further the section provides that the accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them.

Pleadings and Affidavits

Section 191contemplates statements made under oath or under express provisions of law. Plaints, written statements and other pleadings in suits are instances of such statements made under express provision of law. The Code of Civil Procedure 1908, under which these pleadings are filed, casts a legal duty on persons

filing plaints etc to speak the truth. In every plaint that is filed, a person is under a legal obligation to verify the facts stated in the plaint and pleadings. If a person falsely verifies a plaint, he will be liable under this section.

Similarly, affidavits sworn to by witnesses in proceedings before court are also sworn statements, where the witness is under an obligation to state the truth. An affidavit is a declaration made under an oath. An affidavit is evidence within the meaning of s 191 of the IPC and a person swearing to a false affidavit is guilty of perjury punishable under s 193 of the IPC.[16] A person swearing to a false affidavit, therefore, can be held guilty of perjury.[17] Even a false statement made in an affidavit filed as true 'to the best of knowledge and belief' of a person amounts to giving false evidence.[18]

However, a person does not commit perjury, if he, in his voluntarily made affidavit, makes assertions not from his personal knowledge but from what he had told and where there is nothing to show the assertions are not correct.[19] He also does not commit perjury if his affidavit does not disclose which paragraph was true to his knowledge and which paragraph was true to information.[20] An affidavit filed *suo motu* in a court by a person cannot be termed as evidence. He, therefore, cannot be prosecuted for perjury for false statements made therein.[21] But if an affidavit, filed on direction of court by a person in support of his writ petition, contains certain statements known to him to be false, believed them to be false, or did not believe them to be true, amount to giving false evidence and thereby he can be guilty of perjury.[22] A person, who tries to file either any false affidavit, forged document or makes false statement on oath, has a tendency to interfere with the administration of justice or the due course of judicial proceedings. Such a conduct has the tendency to shake the confidence of the public in the judicial institution. It, therefore, would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to file false affidavits by giving false statements or fabricating false evidence in a court of law.[23] However, if he has some plausible explanations to offer for discrepancies and omissions in documents and pleadings, it cannot be said that he interfered with the administration of justice.[24] But he is precluded from resiling through subsequent affidavits, the statements made by him as a prosecution witness. He commits perjury for filing such an affidavit.[25]

However, contradictory aversions made by a public prosecutor or a counsel at different stages of proceedings and shift in his stand do not amount to either fabricating evidence or making a false statement.[26]

Prosecution Only if Expedient in the Interest of Justice

Before prosecutions are launched under any of the provisions in ch XI, it may be useful to bear in mind that the chapter deals with offences against public justice. The Supreme Court in *KTMS Mohd v Union of India* ,[27] has held that before initiating proceedings under this chapter, great caution should be exercised. The mere fact that the deponent had made two contradictory statements is not sufficient; it should be established that it was made intentionally. Further, what is important is that a prosecution for perjury should be launched only in the expedient interest of justice. Thus, not every incorrect or false statement makes it incumbent upon the court to order prosecution. It has to exercise its judicial discretion in ordering prosecution only in larger interest of the administration of justice[28] and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Frequent ordering prosecution for perjury without due care and caution and on inconclusive and doubtful material defeats its very purpose.[29]

Nevertheless, courts are to remind themselves that the inclusion of offence of giving false evidence in the chapter is premised on the recognition of decline of moral values and erosion of sanctity of oath. A general impression is, unfortunately, created that most of the witnesses coming to the courts despite taking oath make false statements to suit the interests of the parties calling them. It becomes imperative to take effective and stern actions against those who mislead a court by making irresponsible, frivolous or vexatious statements inspired by extraneous considerations or revengeful for maintaining purity of court proceedings. The evil of perjury, if unchecked, will pollute and wreck the justice dispensation system. The mere existence of the penal provisions to deal with perjury would be a cruel joke with the society unless the courts stop to take an evasive recourse despite proof of the commission of the offence. If the system is to survive, effective act ion is the need of the time.[30] If witnesses are giving false evidence before court and if it is proved satisfactorily, the court should take serious action against them without allowing them to go with certain explanations or reasons for lying on oath.[31]

FABRICATING FALSE EVIDENCE

Section 192. Fabricating false evidence.--Whoever causes any circumstance to exist or makes any false entry in any book or record, or electronic record or makes any document or electronic record containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said 'to fabricate false evidence'.

Illustrations

(a) *A,* puts jewels into a box belonging to *Z*, with the intention that they may be found in that box, and that this circumstance may cause *Z* to be convicted of theft. *A* has fabricated false evidence.

(b) *A* makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. *A* has fabricated false evidence.

(c) *A*, with intention of causing *Z* to be convicted of a criminal conspiracy, writes a letter in imitation of *Z's* handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the police are likely to search. *A* has fabricated false evidence.

Introduction

The offence of fabricating false evidence under s 192 involves three elements: (i) the causing of (a) any circumstance to exist; or (b) making any false entry; or (c) of any document containing a false statement; (ii) with intention that it may appear in evidence in (a) a judicial proceeding; or (b) in a proceeding taken by law before a public servant; or (c) an arbitrator, and (iii) in order to cause any person whose duty it is in such proceedings to form an opinion upon the evidence, to arrive at an erroneous opinion on any point material to the result of such proceeding.[32]

Sometimes, ss 191 and 192 may overlap. For instance, the swearing to of a false affidavit would be an offence under both ss 191 and 192. An affidavit is a sworn statement made under oath before the competent authority and hence, the provisions of s 191 are attracted and it would amount to giving false evidence. At the same time, swearing to a false affidavit would also amount to making a document containing false statement, which statement is used as evidence in a judicial proceeding thereby constituting an offence under s 192 as well.

It may be pertinent to point out that the offence of fabrication may arise by not only an act of commission, ie, by making false entry in any book or record, etc, but can also take place if a material omission is made in an entry or a statement.

In *Afzal v State of Haryana* ,[33] the railway police were in search of one Rahim Khan for offences of fraud and forgery of the railway receipts, cheating and misappropriation. Since the said Rahim Khan was eluding the authorities, the investigating team took away two minor boys, one of whom was Rahim Khan's son and kept them in wrongful confinement at different places. The inspector of the railway police allegedly stated only if Rahim Khan surrendered, would the minor boys be released. A habeas corpus petition was filed in the Supreme Court under art 32 of the Constitution. The superintendent of police and the sub-inspector were asked to file counter-affidavits in the matter. Both of them filed counter-affidavits denying the allegation that the minor children were in their custody. It also transpired that the superintendent of police, who was not available at Delhi on the relevant date, instructed his subordinate officer to forge his signature in the counter-affidavit. The District Judge, Faridabad, was directed to ascertain the facts in respect of the illegal confinement of the two minor boys. The Director of Central Bureau of Investigation (CBI) was entrusted with the task of verifying the signatures in the counter-affidavit, if necessary, with the assistance of handwriting experts. On enquiry, it was found that the superintendent of police and the inspector had falsely stated in their counter-affidavit that the minor children were not under illegal confinement. It was also found that the signature of the superintendent of police was forged under his instructions. The Supreme Court took very serious note of the conduct of the police officials. It observed that the tendency to file false affidavits or fabricated documents, or forgery of documents and placing them as part of record of the court cannot be lightly brushed aside and they are matters of grave and serious concern. The Supreme Court convicted both the superintendent of police and the

sub-inspector under ss 192 and 193, IPC. The Superintendent of Police was sentenced to one year rigorous imprisonment and the sub-inspector, to six months rigorous imprisonment.

Intention that Fabricated Evidence May Appear as Evidence in a Judicial Proceeding

In order to attract the provisions of this section, it is not sufficient to make a false document. The mere making of false document will not amount to fabrication. At the time of making the false document, it is essential that the person making it should have the intention that the false document so made should appear in evidence in a judicial proceeding or in any proceeding taken by law. Unless this intention is proved, an offence under this section cannot be established. The offence becomes complete as soon as the fabrication is complete; it is immaterial that the judicial proceeding has not been commenced.

In order to establish the intention of using the false document in a proceeding, proximity to a judicial proceeding pending or the likelihood that judicial proceeding is going to be initiated, is a test by which intention to use the false document in a proceeding can be established. Even a reasonable prospect of using the document fabricated as evidence, is sufficient to substantiate the offence under this section.

Fabricated Evidence to be Material to the Result of the Proceeding

In order to constitute an offence under this section, first, a person should fabricate the evidence. Secondly, such fabricated evidence should be used as evidence in a judicial proceeding or in a proceeding taken by law before a public servant. Thirdly, the evidence thus fabricated, should be of such nature that the person who is presiding over judicial or other proceedings is made to entertain an erroneous opinion touching any point material to the result of such proceeding based on such fabricated evidence. If it merely causes the formation of an erroneous opinion on a point, which is immaterial to the result of the proceeding, this section will not apply.[34]

DISTINCTION BETWEEN GIVING FALSE EVIDENCE AND FABRICATING FALSE EVIDENCE

(1) In both, it is the intentional giving of false evidence or intentional fabrication that is made punishable (s 193, IPC). Mens rea is the essence of both the offences. But in the case of giving false evidence, only general intention is sufficient, whereas in fabrication, particular intention is essential.

(2) Section 192 differs from s 191 in that the fabrication must be on a point material to the proceeding, whereas in giving false statements, it need not be made on a material point. The offence is complete when a false statement is made, though it may not have been in relation to a material point. In such cases, law demands that whatever a person states shall be true. In case of fabrication, which is usually done in secret, behind court, law will not interfere unless the doing causes injury to another being on a matter material. In fact, but for the safeguards provided for in s 192, IPC, a person charged under that section may incur the penalty, though his act may have caused no injury to any person.

(3) The effect of false evidence under s 192 must be such as to lead the court or officer concerned to form an erroneous opinion touching any material object, but the effect on the officer is immaterial to fix liability under s 191, IPC.

(4) Under s 191, false evidence is given by a person who is bound by an oath, whereas no such condition is found in s 192.

(5) Under s 191, there must be a proceeding, judicial or non-judicial, pending or in existence at the time when the offence is committed. Under s 192, it is enough that there is a reasonable prospect of such a proceeding, having regard to the circumstances of the case and that the evidence fabricated is intended to be used in such a proceeding.

PUNISHMENT FOR FALSE EVIDENCE

Section 193. Punishment for false evidence.--Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial

proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.--A trial before a Court-martial is a judicial proceeding.

Explanation 2.--An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration

A, in an enquiry before a Magistrate for the purpose of ascertaining whether *Z* ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, *A* has given false evidence.

Explanation 3.--An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, *A* has given false evidence.

Introduction

Section 193 provides that whoever intentionally gives false evidence in any stage of a judicial proceeding or fabricates false evidence for the purpose of being used in any stage of the judicial proceeding, shall be punished by simple or rigorous imprisonment for a term up to seven years. If the giving or fabricating of false evidence in any other case, ie, any case other than judicial proceedings, the punishment prescribed is imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

A reading of s 193 shows that the punishment in respect of giving or fabricating false evidence in judicial proceedings is considered much more serious in character and hence, a higher punishment of up to seven years imprisonment has been provided for by the legislature. The legislature has distinguished similar offence of giving or fabricating false evidence in proceedings other than judicial proceedings, and has imposed a lesser punishment of three years imprisonment.

It has been noticed earlier in the chapter, that in respect of filing of complaints for giving or fabricating false evidence in judicial proceedings, a special procedure has been prescribed under s 195(1)(b), CrPC. As per this section, a complaint under s 193 for giving or fabricating false evidence in a judicial proceeding can be entertained, only if forwarded by the court concerned. This is because in view of the higher sentence provided for offences committed in the course of judicial proceedings, the legislature thought it fit that adequate procedural safeguard should also be given to the accused. Since, in respect of giving false evidence or fabrication of evidence in proceedings other than judicial proceedings, a lesser sentence has been prescribed as safeguard, provided under s 195.[35]

Judicial Proceeding

The term 'judicial proceeding' is not defined in IPC. However, there is a definition of the said expression under s 2(i) of the CrPC, which states that a judicial proceeding includes any proceeding in the course of which evidence is, or may be legally taken on oath. Though, the word 'judicial proceeding' is not defined in IPC, there are three explanations to s 193. Explanation 1 provides that a trial before a court-martial is a judicial proceeding; explanation 2 lays down that an investigation directed by law, preliminary to a proceeding before a court of justice, is a stage of a judicial proceeding, though that investigation may not take place before a court of justice. Under explanation 3, an investigation directed by a court of justice according to law and conducted under the authority of justice is a stage of a judicial proceeding, though that investigation may not take place before a court of justice. This explanation covers enquiries before officers deputed by courts of

justice to ascertain, for instance, on the spot, the boundaries of land. Thus, the three explanations of s 193 include within the expression 'judicial proceeding' certain proceedings, which on a strict construction of the said expression, may not have been included under it.

The question whether a particular proceeding before particular authorities would amount to a judicial proceeding or not under s 193, has engaged courts in several cases. In *Lalji Haridas v State of Maharashtra* ,[36]the question before the Supreme court was whether the proceeding before an income tax officer would amount to judicial proceeding or not. In this case, the accused and the complainant were long time business partners. In the income tax assessment proceedings of the complainant, the accused gave evidence on oath before the income tax officer, stating that he did not have a son nor did he carry on any business in the place of the complainant. According to the complainant, these statements were made by the accused deliberately to mislead the income tax officer and to avoid the incidence of income tax on himself. As a result of the false statements made by the accused, the complainant was heavily taxed by the income tax authorities. The complainant filed a criminal complaint against the accused under s 193, IPC. These proceedings were challenged by the accused stating that since no complaint was forwarded by the court concerned under s 195(1)(b), CrPC, the complaint itself was not maintainable. The complainant contended that the proceeding before the income tax authorities was not a judicial proceeding and hence s 195(1)(b), CrPC, was not applicable. When the matter came up before the Supreme Court, the court held that s 37(4) of the Income-tax Act 1961, specifically provided that any proceeding before an income tax authority shall be deemed to be a judicial proceeding within the meaning of s 193, IPC, and hence s 195, CrPC, would apply.[37]

In *State of Maharashtra v SK Bannu* ,[38]in the bail proceedings, the affidavit purported to be sworn by the surety, turned out to be false. The question which arose before the Supreme Court was whether proceedings in a bail application were judicial proceedings or not. The Supreme Court held that while deciding the question of bail, the magistrate cannot but be regarded as a court act ing judicially, notwithstanding the fact that the offence of the accused is still under investigation by the police or has progressed to the stage of an enquiry or trial by the magistrate. The court explained that an order of bail passed by the magistrate decided the rights of the state and the accused, and is made by the magistrate after the application of his mind. Therefore, the discharge of his judicial duties constitutes it an act of a court. It was held that orders of magistrates, such as orders of bail, discharge or orders taking cognisance of an offence, are parts of an integral act as a whole. They cannot be viewed in isolation and given a character different from the entire judicial process of which they are intended to form a part.[39]

In *Iqbal Singh Narang v Veeran Narang* ,[40] the Supreme Court held that proceedings before a Rent Controller, a statutory authority having quasi-judicial powers, are not judicial proceedings for the purpose of s 193 of the IPC, as it is not a 'court' within the meaning of s 195(1) of the CrPC, Hence, any statement made to the official in such proceedings cannot be the basis for initiating proceedings under s 193 of the IPC.

Intention

As in the previous two sections (ss 191 and 192), intention to give false evidence is an important ingredient of s 193 as well. False evidence is said to be given intentionally, if, the person making the statement is aware or has knowledge that it is false and has deliberately used such evidence in a judicial proceeding with the intention of deceiving the court. However, mere discrepancies or contradictions in evidence due to confusion of mind or failure of memory cannot be regarded as false evidence given intentionally.[41]

AGGRAVATED FORMS OF THE OFFENCE OF GIVING OR FABRICATING FALSE EVIDENCE

Section 194. Giving or fabricating false evidence with intent to procure conviction of capital offence.--Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law for the time being in force in India shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

if innocent person be thereby convicted and executed.--and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

Section 195. Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment.--Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by the law for the time being in force in India is not capital, but punishable with imprisonment for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Illustration

A gives false evidence before a Court of Justice, intending thereby to cause *Z* to be convicted of a dacoity. The punishment of dacoity is imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. *A*, therefore, is liable to imprisonment for life or imprisonment, with or without fine.

Section 195A. Threatening any person to give false evidence.--Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both;

and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced

Introduction

Sections 194 and 195, IPC, deal with aggravated forms of giving or fabricating false evidence. Aggravated forms refer to cases wherein the accused are charged with very serious offences such as murder, culpable homicide not amounting to murder, rape, dacoity, where the punishment awarded to the accused is either death sentence or imprisonment for life.[42] The following example will explain the section:

A is charged under ss 121 or 132 or 194 or 302 or 303 or 307(2) or 396, IPC, where the prescribed punishment is up to death sentence. *B* gives or fabricates false evidence against *A*, with the intention of obtaining the conviction of *A*. In such a case, *B* is punishable with imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years. If, as a consequence of false or fabricated evidence given by *B*, *A* though being innocent, gets convicted and is executed, then *B* is liable to be punished with death or life imprisonment or rigorous imprisonment for a term which may extend to 10 years.

Similarly, if *A* is charged with offences which are punishable with imprisonment for life or imprisonment for a term of seven years or upwards, and *B* gives or fabricates false evidence with the intention of obtaining the conviction of *A*, then *B* is liable for the same punishment as *A* would have got on his conviction.

In *Santokh Singh v Izhar Hussain* ,[43] the accused Santokh Singh had given false evidence against Izhar Hussain by falsely identifying him in an identification parade. The Supreme Court held that the statement on oath falsely supporting the prosecution case amounts to an offence under ss 193 and 195, IPC. However, a person who, having reasons to believe that his recovery was impossible, in his dying declaration, implicates another for murder but survives, cannot be made responsible under s 194 of the IPC.[44]

Sections 193 to 195 of the IPC, thus, are aimed at the offence of procuring conviction of an innocent person by false evidence.[45]

Section 195A was inserted in the Penal Codeby the Criminal Law (Amendment) Act, 2005 (2 of 2006) to desist interested parties to criminal proceedings from obtaining favorable statements from witnesses by putting them or persons in whom they are interested in fear of injury to their person, property or reputation.

OFFENCES PUNISHABLE IN THE SAME WAY AS GIVING OR FABRICATING FALSE EVIDENCE

Using False Evidence

Section 196. Using evidence known to be false.--Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the manner as if he gave or fabricated false evidence.

Introduction

Section 196 makes the use of false evidence as, if it is true or genuine, punishable. The wording of the section is very broad and it states 'whoever' corruptly uses false evidence as true, is punishable. The term 'whoever' includes even an accused person using false evidence for the purpose of his defence.[46] A person conducting a case on behalf of a party can also be guilty of an offence under this section.[47]

Meaning of 'Corruptly'

It is interesting to note that the section uses the word 'corruptly' instead of 'dishonestly' or 'fraudulently'. The word 'corruptly' is defined nowhere in the IPC. In *Dr S Dutt v State of Uttar Pradesh* ,[48] a doctor was called in to depose as an expert. The doctor claimed to hold a diploma from the Imperial college of Science and Technology, London, in the specialised subject of criminology. In the trial during course of his examination, the court asked him to produce his certificates, which he did. The certificates were found to be false. He was sought to be prosecuted for offences of using as genuine a forged document under ss 465 and 471, IPC. The Supreme Court held that s 471 used the word 'fraudulently' and 'dishonestly'. The question arose whether the conduct of the doctor in producing a forged certificate on the direction of the court could be termed either 'dishonestly' or 'fraudulently'.

The word 'dishonestly' is defined by s 24, IPC. A person who does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly. Now, the conduct of the doctor neither caused any wrongful gain or wrongful loss to another. So, he could not be said to have act ed 'dishonestly'. The word 'fraudulently' is defined by s 25, IPC. A person is said to do a thing 'fraudulently' if he does that thing with intent to defraud, but not otherwise. Defraud has been interpreted by courts as inducing a person to act against his own interests. In the instant case, the doctor did not produce the forged certificate voluntarily, but only on being directed by the court, and hence, it could not be said that he act ed so as to 'defraud' anyone, though he did practice deception.

The court held that while the conduct of the doctor in producing a forged certificate under orders of the court would not amount to either 'dishonest' or 'fraudulent' act, it would be 'corrupt' as used in s 196, IPC. The word 'corrupt' does not necessarily include an element of bribe taking. It is used in a much larger sense as denoting conduct, which is morally unsound or debased. The Supreme Court held that the word 'corrupt' is a word of wider import than the words 'fraudulently' or 'dishonestly'. It included conduct which was neither fraudulent nor dishonest, if, it was otherwise blameworthy or improper. Section 196 , IPC , casts its net wider in the interest of purity of administration of justice. An offence under s 196, IPC, is considered a much more serious offence than that of use of forged document. It was finally held that the conduct of the doctor in producing a false certificate with the intention that the court should form an erroneous opinion about him and his testimony, was a 'corrupt' conduct and covered by s 196, IPC.

False Certificate

Section 197. Issuing or signing false certificate.--Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Introduction

Section 197 makes the issuing or signing of false certificates an offence. The essential ingredients of the offence under this section are: (i) the certificate issued or signed must be one which is 'required by law' to be given or must be one which is admissible in evidence; (ii) the certificate should be false in any material point, and (iii) the person issuing or signing the certificate should know that it is false.

Medical certificates issued by medical practitioners or character certificates are not certificates required by law to be given and hence, are not covered by this section.[49]

A principal of a college issued a certificate in respect of a student, so as to enable him to participate in a sports meet. Since, the principal was not required by any law to issue such a certificate, he cannot be said to have committed an offence under this section, even if the certificate was false.[50]

The words 'required by law' do not mean somebody authorised to issue certificates. It means that there must be a statutory requirement for issuing the certificate. An authorisation by Government Resolution to issue or sign some certificate does not come within the phrase 'required by law' occurring in s 197.[51] The issuance of a false certificate is punishable in the same manner as giving false evidence under s 191, IPC.

Admissible in Evidence

The section states that the false certificate issued or signed should be admissible in evidence. The words 'admissible in evidence' means the certificate must be 'admissible in evidence' as such, without further evidence of proof of the certificate.[52] If a certificate has to be further proved by any witness, then the certificate is not admissible in evidence in law.

Using of False Certificate

Section 198. Using as true a certificate known to be false.--Whoever corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Introduction

Section 198 makes punishable the use of false certificate as if it is a genuine one. In this section also, the word used is 'corruptly' and has the same meaning as used in s 196. The words 'any such certificate' used in the section means the certificate that has been falsely issued or signed as mentioned in s 197. Hence, the false certificate used must satisfy the condition under s 197, namely, the false certificate used must be one, which is required by law or it should be admissible in evidence. However, the Rajasthan High Court held the accused guilty under s 198 who used a false certificate issued by head of the institution for obtaining an appointment in government service even though the headmaster was not authorised to issue certificate and the same was admissible as legal evidence of facts mentioned therein.[53]

False Declaration

Section 199. False statement made in declaration which is by law receivable as evidence.--Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

Introduction

Section 199 makes the making of false declaration, which is legally receivable in law as evidence of the fact so declared, an offence. The essential ingredients of the offence are: (i) the document making the declaration should be one, which will be admissible in evidence as per law, as proof of the fact declared in the document; (ii) the declaration so made must be false; (iii) the person making the declaration must be aware or have knowledge that the statement made in the declaration is false, and (iv) the false statement in the declaration must be in respect of a material point for which the declaration is made.[54]

The 'declaration' contemplated under this section is not necessarily statements, which a person is legally bound by an oath or an express provision of law as required under s 191, IPC. The statements or declarations made under s 199 are voluntarily made by the person concerned. However, the statements should be capable of being used as evidence and which the court is bound to receive as evidence.[55] A false affidavit appended to an application for seeking admission to a medical course against the reserved quota[56] or a false statement in an application for obtaining a certified copy,[57] it was held, do not come under the section as neither the affidavit nor the application could be received as evidence.

Affidavits made on oath administered by proper officer, declarations and certificates under the Special Marriage Act 1954,are examples of declarations bound or authorised by law to be received as evidence.[58]

In *Deputy General Manager, Inter-State Bus Terminal v Sudarshan Kumari* ,[59] the respondent, Ms Sudarshan Kumari, had filed a false affidavit before the Supreme Court, which was not arised by a notary public. On enquiry, it was found that no such notary public existed. The Supreme Court convicted Ms Sudarshan Kumari for producing false certificates and false affidavits under s 199, IPC, and sentenced her to rigorous imprisonment for a period of six months and also directed her to pay a fine of Rs 1,000 and in default to undergo a further sentence of six weeks.

In *Jyotish Chandra Choudhary v State of Bihar* ,[60] the accused, a businessman, filed a suit for infringement of his trademark, registered under the Trade Marks Act 1940. In the suit, he had to implead his three minor children, who were also business partners, as parties. Since the accused had a large family and could not recall the date of birth of all his sons, he sought information from the school where his sons were studying and on the basis of such information, swore to an affidavit and filed it. It so happened that the date of birth of one of the minor sons was wrong and the trial court was of the opinion that it was not a bona fide mistake and sought to prosecute him under s 199. The Supreme Court held that as far as the suit which was over infringement of trade mark, the age of the minor son of the accused was not material to the outcome of the suit. Before a person can be punished under s 199, it has to be proved, inter alia, that the false statement is 'touching any point material to the object for which the declaration is made'. Since in the present case, the date of birth of the minor son did not touch any material point, it was held that s 199 was not attracted.

Use of False Declaration

Section 200. Using as true such declaration knowing it to be false.--Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.--A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

Introduction

As per this section, if anybody makes use of false declaration as if it were true, then an offence is committed. The word 'such declaration' used in s 200 refers to declarations as contemplated in the previous s 199. The explanation to the section states that even though certain declarations which are ordinarily receivable in evidence become inadmissible because of some failure to complete all the formalities, they would still be covered by ss 199 and 200.

As in the earlier sections, even in this section, it is important that the person who corruptly uses or attempts to use a false declaration must be aware that such declaration is false in any material point.

As in ss 196 and 198, this section is attracted only if the declaration is used or attempted to be used corruptly. In the *Jotish Chandra* case,[61] discussed above, the Supreme Court held that the declaration of age of the minor son in the trademarks suit was only given after due verification from the school authorities and hence, the accused could not be said to have used it corruptly.

If all the above-mentioned conditions are satisfied, then a person committing an offence under this section will be punished in the same manner as if he gave false evidence.

PART B - OFFENCES AGAINST PUBLIC JUSTICE

CAUSING DISAPPEARANCE OF EVIDENCE

Section 201. Causing disappearance of evidence of offence, or giving false information to screen offender.--Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from

legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false;

if a capital offence.--shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life.--and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with less than ten years' imprisonment.--and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Illustration

A, knowing that *B* has murdered *Z*, assists *B* to hide the body with the intention of screening *B* from punishment. *A* is liable to imprisonment of either description for seven years, and also to fine.

Introduction

The section deals with two aspects. One is causing disappearance of evidence and the second is giving false information about the offence. The essential ingredients[62] of the section are: (i) there must be an offence which has been committed; (ii) a person should cause the disappearance of any evidence of the crime committed; (iii) it should be done with the intention of screening or saving the culprit from punishment; or (iv) a person must give false information about the offence; (v) he must be aware or have knowledge that the information given by him is false, and (vi) it must be done with the intention of screening the offender or the culprit.

The two indispensable ingredients for all the three tiers in s 201 are: (i) the accused should have had the knowledge that an offence has been committed or at least that he should have had reasons to believe it; and, (ii) he should then have caused disappearance of evidence of commission of that offence. And the prosecution cannot escape from establishing these two basic ingredients for conviction of the accused under the section.[63]

Punishment has been prescribed depending on the seriousness or graveness of crime, in respect of which evidence has been caused to disappear or in respect of which false information has been given. The graver the offence, the more severe is the punishment. If the offence from which the offender is shielded is one which is punishable with death, then a maximum sentence of seven years and fine is prescribed. If the offence screened is one punishable with life imprisonment, then the sentence prescribed is imprisonment up to a maximum of three years and fine. If the offence shielded is one in which the punishment prescribed is less than ten years, then the sentence prescribed is one-fourth part of the longest term of the imprisonment provided for the offence, or with fine or with both.

Commission of an Offence

One of the primary requirements of s 201 is proof of the actual commission of offence. This is because, unless an offence has been committed in the first place, the question of causing disappearance of evidence of crime or shielding the criminal does not arise.

One of the earliest cases on this point is *Palvinder Kaur v State of Punjab* .[64] In this case, the version of the prosecution was that the appellant had administered potassium cyanide to her husband and killed him. She, along with another, with whom she had illegitimate liaison, had together put the body of the deceased in a trunk, took the trunk in a jeep and threw it into a well. She was charged for committing murder (s 302) and for causing disappearance of evidence (s 201). More than a month after the alleged murder, because of the obnoxious smell coming from the well, the matter was reported to the village authorities and the trunk was taken out. A post-mortem was conducted. The opinion in the post-mortem report stated that there was no sign of potassium cyanide poisoning. The defence story was that the deceased took to photography as a

hobby, and sometimes even developed the prints at home for which he bought some liquid for working on the photos. On the day of occurrence, he had by mistake consumed that liquid thinking it to be medicine that was stored. The appellant, who already had strained relationship with her in-laws, was too scared to inform them. So, she, with the help of another, put the body in a trunk and threw it in the well. The trial court convicted her under s 302. No verdict was passed on s 201, IPC. The high court on appeal, set aside her conviction and convicted under s 201. On appeal, the Supreme Court held that the statement of the wife showed that there was no commission of any offence, as the death was accidental. It held that the statement of Palvinder Kaur could not be taken to be as an admission of guilt and the trial court was wrong in convicting her on the basis of her statement. In the absence of any other evidence, the court held that a person could not be convicted on mere suspicion, howsoever strong the suspicions were. It observed:

> In order to establish the charge under s 201, Indian Penal Code, it is essential to prove that an offence has been committed mere suspicion that it has been committed is not sufficient that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offences knowing or having reason to believe the same to be false.[65]

Mere suspicion is not enough sufficient to hold accused guilty under s 201. There must be some cogent evidence on record to suggest that the accused has caused the evidence to disappear in order to screen another known or unknown. He must have the knowledge that or have reason to believe that an offence has been committed.[66]

In *Hargovandas Devrajbhai Patel v State of Gujarat* ,[67] the accused were police officers who were alleged to have severely beaten up a person and caused disappearance of evidence by causing disappearance of the body. Later, a decomposed body was discovered in the jungle. However, the prosecution could not establish that the body recovered was that of the person, who was alleged to have been killed. In fact, there was no evidence to even show in respect of what crime the deceased person was arrested in the first place. On the other hand, the accused stated that the person arrested on the stated day was another person and he was alive. In view of the lack of evidence to support prosecution case of even homicide, the charge under s 201 was also not made out. The accused were acquitted.

In *Suleman Rahiman Mulani v State of Maharashtra* ,[68] the accused who was driving a jeep, struck the deceased, as a result of which he sustained serious injuries. The accused put the injured person in the jeep for medical treatment, but he died on the way. Thereafter, the accused cremated the body. The accused was charged under ss 304A and 201 IPC. As per s 304A, there must be a direct nexus between the death of a person and rash and negligent act of the accused that caused the death of the deceased. In the instant case, there was absolutely no evidence that the accused had driven in a rash and negligent manner. In the absence of such evidence, no offence under s 304A was made out. When no offence under s 304A was committed, then there was no question of causing disappearance of evidence by cremating the body and committing an offence under s 201, IPC. The accused was acquitted of both the charges.

In *KB Rajguru v State of Maharashtra* ,[69] wherein the mother of a newly born was found burying it with the help of others, the Bombay High Court acquitted her of charges under s 302 and s 201, IPC, as there was no proof on record to suggest that she caused the infant's death.

However, it needs to stress that the offence under s 201, though it cannot be separated from the substance of the main offence, is of independent nature. It is a substantive offence. A person can, therefore, be held guilty under s 201 even though nobody is convicted for the main offence. Conviction under s 201 is possible despite acquittal from the main offence, provided the essential ingredients of s 201 are established.[70]

Apart from commission of the offence, it must also be established that the person charged under s 201, IPC, had also knowledge of the commission of offence or had information sufficient to lead him to believe that the offence had been committed.[71]

In *Shamim Rahmani v State of Uttar Pradesh* ,[72] the accused, a college going student, had an illicit relationship with the deceased, a doctor. The deceased was a licentious man, already married with three children. Angered by this, the accused shot him dead with a pistol. The elder brother of the accused, who stayed separately, gave a police statement that another younger brother informed him that a strange thing had hap-

pened at home; that their sister had shot the deceased and he had fallen and was bleeding. The prosecution case was that the brother of Shamim knew that the offence of murder had been committed by his sister, but gave this statement to screen her. The Supreme Court held that Shamim's elder brother's knowledge was based on the information given by his younger brother and he probably was not aware whether the deceased had succumbed to his injuries. In view of this, no offence under s 201 was said to have been made out. Shamim's elder brother was acquitted of the charge under s 201, IPC.

In *Nathu v State of Uttar Pradesh* ,[73] one Sivya Ram was alleged to have beaten his wife, as a result of which she died. The accused were alleged to have carried the body of the deceased to the cremation ground for the purpose of cremation. There was absolutely no evidence to show that the accused were present at the time when the deceased wife was being beaten or at least that she did not die a natural death. They were merely residents of the same village. In the absence of any evidence to show that the accused had any knowledge or reason to believe that any offence was committed, the offence of causing disappearance of evidence does not arise. The accused were acquitted of the charges under s 201, IPC.

In *Sukhram v State of Maharashtra* ,[74] the Supreme Court held the father not guilty of sheltering his son, who killed his wife, as he had no knowledge that his son had caused the death of his wife at home.

The word 'offence' as used in this section, does not mean that the accused should have knowledge of the precise character of the crime committed or should know the particular section of the IPC, under which the offence falls. It is sufficient if there is knowledge that a crime has been committed.[75]

'Whoever'

The section uses the language 'whoever'. The question that arose was whether the term 'whoever' included the person who is guilty of committing the offence, of which evidence has been caused to disappear. Or whether, it was applicable to persons apart from the person accused of the main offence.

In *Kalawati v State of Himachal Pradesh* ,[76] the accused Kalawati, was the wife of the deceased. She had been ill-treated by the deceased. She was alleged to have killed her husband with the help of another person Ranjith Singh, with whom she had an extra-marital relationship. The deceased husband was murdered as they were all asleep on the terrace of their house. The wife Kalawati, who was present, made a statement that some unknown dacoits had invaded her house, killed her husband and robbed her of her jewels. Kalawati was charged of conspiring with doing away with her husband and also with the charge of giving false statement with the intention of screening Ranjit Singh. She was acquitted of the charge of murder. It was contended before the Supreme Court that having been acquitted of the charge of murder, she could not be acquitted for the offence under s 201, IPC. The Supreme Court rejected the contention stating:

> Section 201 is not restricted to the case of a person who screens the actual offender, it can be applied even to a person guilty of the main offence, though as a matter of practice, a court will not convict a person both of the main offence and under s 201.[77]

In *VL Tresa v State of Kerala* ,[78] the Supreme Court, when encountered with the same issue, relied upon the *Kalawati* dictum to uphold conviction of the appellant under s 201, even though she was acquitted of the charge of murdering her husband.

If facts of the case at hand, supported by convincing evidence, exhibit that the accused has committed the main offence and has also taken steps to make the evidence thereof to disappear; he can be safely convicted for both the offences.[79] He cannot be convicted under s 201, if the main offence is not proved against him. Mere suspicion or impossibility to definitely say that he has committed the main offence, however, does not drive him outside the orbit of s 201.[80]

Causes any Evidence to Disappear

As stated earlier, one of the essential ingredients of the offence under s 201 is the causing of the disappearance of evidence of the crime.

In *State of Uttar Pradesh v Mahendra Singh* ,[81] there was a dispute over the right to take water from a tube well. An armed group of over 20 persons went to the deceased's field and opened fire, killing five people.

Thereafter, the accused's gang decapitated the five dead bodies and severed their limbs. They got petrol from a jeep, sprinkled it over some wood, set fire to the wood and threw the five dead bodies into the fire. The severed heads were carried away as souvenirs. The accused were all convicted for murder and for causing the destruction of evidence establishing the murders.

In *Ram Dahin Singh v State of Uttar Pradesh* ,[82] the deceased was last seen in the company of the accused. The body of the deceased was buried in the field of the accused. It was held an offence under s 201, IPC, was made out.

In *Baldev Singh v State of Punjab* ,[83] the accused dug a pit in the bed of river and buried the dead body of the deceased. An offence under s 201, IPC was held to be made out.

In *Dhura v State of Rajasthan* ,[84] the deceased was the wife of the accused Dhura, whose brother was engaged to the deceased's sister. Due to some reason, the engagement was broken off, and the accused and his brother believed that it was done at the instance of the deceased. Near about the day on which the deceased met her death, the deceased and her husband were invited to attend the marriage of the deceased's first cousin. When there was no response, a person was sent to the house of the deceased to invite them again. At that time, the person who came to extend the invitation was told that the deceased had died a natural death as a result of diarrhea and other connected ailments and had already been cremated. There was no evidence that any doctor was called to treat the deceased. None of the villagers were also aware of it. Further, the conduct of the accused in not informing the parents of the deceased of her death and the surreptitious cremation of the body in the absence of family members, revealed commission of offence under s 201, IPC.[85]

In *Balai Chandra Biswas v State of West Bengal* ,[86] the accused was a doctor by profession. He was asked to give a death certificate in respect of a woman. He certified that he found her dead and could not state what the cause of her death was. It was later found that the woman was strangulated by her husband and he was convicted for the offence of murder. According to the prosecution, in the course of conducting a search of the doctor's house, he came across a second death certificate, certifying that she had been suffering from schizophrenia with nutrition deficiency and died due to respiratory failure. The case of the prosecution was that the second death certificate was used to facilitate cremation of the body of the young wife, with a view to cause disappearance of evidence with regard to her murder. The Supreme Court held that there was no evidence to show that the accused doctor had given the second death certificate to anybody or whether anybody had even seen it prior to the certificate being seized by the police during the search. There was also no evidence to show that it was used to facilitate cremation of the body. On the other hand, the first death certificate had in a way paved way for further investigation, since the doctor certified that he did not know the cause of death. Under the circumstances, it was held that no offence under s 201, IPC was made out.

However, mere knowledge that somebody had caused disappearance of evidence by disposing a body is not an offence under s 201, IPC.[87] Mere removal of corpse too is not enough;[88] it must be further proved that removal was made with the intention of screening the offender from legal penalty.[89]

Offence to be Committed with Intention of Screening Offender

For an offence under this section, the causing of disappearance of evidence in respect of a crime must be with the intention of screening the offender from legal punishment.[90]

In *Hanuman v State of Rajasthan* ,[91] there was a dispute between two families over property. The settlement talks were well in progress, when the deceased died under mysterious circumstances, but there was no evidence as to how he died. The charge against the accused was that they had taken part in giving bath to the dead body and went ahead and cremated the body. There was no evidence that a murder had taken place, and if so, who were the culprits who committed the offence of murder. For sustaining a charge under s 201, IPC, it has to be proved that the accused had cremated the body 'with the intention of screening the offender form legal punishment'. Since no such finding was recorded, the Supreme Court held no charge under s 201, IPC, was made out.[92]

In the subsequent judicial proceedings the Supreme Court has reiterated that the essence of s 201 is the disappearance of evidence with the intent to screen the offender from legal punishment. The primary and

sole object of the accused is to screen the offender. In the absence of such intention accused cannot be held guilty under s 201, IPC.[93]

Giving False Information

Giving false information as to the commission of offence is also a constituent element of an offence under this section.

In *Kodali Purnachandra Rao v Public Prosecutor, Andhra Pradesh* ,[94] the first accused (A-1) was an arrack contractor and the second accused (A-2) was a sub-inspector of police. In this case, the accused had abducted, raped and murdered two young college girl students and thrown their bodies into the sea. Within a couple of hours, one of the bodies was washed ashore. When information of the body being washed ashore reached the second accused, who was the sub-inspector, he decided to go to the spot and enquire about it. The first accused who was present in the police station, also supported the idea that the second accused should personally investigate. Many of the villagers had gathered around the body of the girl by then. There was a mark on the forehead of the corpse from which blood was oozing out. There was a reddish abrasion on the thigh and blood marks on the underwear of the dead body. A-2 did not hold any inquest nor did he prepare any record. He directed the local villagers to bury the dead body. He obtained signatures on blank papers from some witnesses. Meanwhile, the Karnam had come. A-2 chided the Karnam for coming late and told him that he had completed all the works and had got the body buried. When the Karnam asked him why he did not send the body for post mortem, he replied that the body was that of a prostitute, who had committed suicide, despite the fact that A-2 was aware of the identity of the college girl. Despite the injuries on the body, A-2 falsely noted that there were no injuries on the dead body. He also falsely noted that the stomach was bloated due to drinking of water. He also fabricated a false statement of a person who was found to be non-existent, that he came to the village with two prostitutes promising them opportunities in film, and they had an argument after which both the prostitutes left him. He identified the body as that of one of the prostitutes. The second body was found floating by some fishermen about three miles from the shore. A wrist watch, a ring and an ear ring was removed from the dead body, but the body was allowed to drift away. The articles were handed over to the police, which helped to identify the other girl.

The Supreme Court held that A-2 being a public servant charged with the preparation of official record relating to the investigation of the cause of death of both the girls, had framed the record in such a manner as to save the real offenders from punishment. He prepared false and forged record with the fraudulent and dishonest intention of misleading his superiors. A-1 had facilitated and intentionally aided A-2 in the preparation of the false and forged record.

The accused were acquitted of the charges of abduction, rape and murder, but were convicted for offences under ss 201, 318 and 468, IPC.

In *Roshan Lal v State of Punjab* ,[95] the Supreme Court has explained the true scope of s 201, IPC. Roshan Lal, a sub-inspector of police, with a police party (which included two other appellants, one of whom was an assistant sub-inspector and the other a police constable), arrested a man called Raja Ram on a public street on the suspicion that he was an opium smuggler. They took him to his house and when no contraband opium was found there, the appellant Roshan Lal got very angry and hit him on the head with his baton, which injured his eye. After this beating, Raja Ram was taken to the police station by the police party and kept confined in a room for the night and there he was beaten by Roshan, assisted by some policemen. It was however not found that the other two appellants had taken any part in administering this beating to Raja Ram. In respect of the first injury, he was convicted under s 330, IPC, (voluntarily causing hurt to extract confession or to compel restoration of property). In respect of the second beating, he was convicted by the high court under s 330 read with s 34, IPC, and also under s 348 (wrongful confinement). Next morning, Raja Ram was found dead in the room in a pool of blood. The three appellants thereafter carried his dead body to a jungle, burnt it up and collected the bones and ground them with a pestle and mortar and threw the remnants in a canal. In respect of the disposal of the body, and thereby destroying the evidence of the offence committed upon Raja Ram, the appellants were convicted under s 201 of the IPC. Each of the appellants was sentenced to rigorous imprisonment for three years.

In appeal, the Supreme Court reduced the sentence under s 201 to one year and nine months for the following reasons. Where an accused causes the evidence of two offences under ss 330 and 348, IPC, committed

by the same act to disappear, he commits by the same act, two separate offences under s 201. But two separate punishments need not be passed. In such circumstances, the appropriate sentence under s 201 for causing the evidence of the offence under s 330 to disappear should be passed, and no separate sentence need be passed under s 201 for causing the evidence of s 348 to disappear. The maximum sentence for the offence under s 330 is imprisonment for seven years and under the fourth paragraph to s 201, the accused are liable to be sentenced to a maximum of one-fourth of seven years imprisonment.

The court remarked that s 201 is somewhat clumsily drafted, for the expression 'knowing or having reason to believe', in the first paragraph and the expression 'knows or believes' in the second paragraph are used in the same sense. For instance, take the case of an accused who has 'reason to believe' that an offence has been committed. If the other conditions of the first paragraph are satisfied, he is guilty of an offence under s 201. If it be supposed that the word 'believes' was used in a sense different from the expression 'having reason to believe', it would be necessary for the purpose of inflicting punishment upon the accused to prove that he 'believes' in addition to 'having reason to believe'. The legislature cannot be imputed with such an intention that an accused who is found guilty of the offence under the first paragraph would escape punishment under the succeeding paragraph, unless some additional fact or state of mind is proved.

The first paragraph of s 201 lays down the essential ingredients of the offence under s 201. It must be proved first, that an offence has been committed. Secondly, the accused must know or have reason to believe that the offence has been committed. Thirdly, the accused must either cause any evidence of the commission of that offence to disappear, or give any information respecting the offence which he knows or believes to be false. Fourthly, the accused must have act ed with the intention of screening the offender from legal punishment.

By the second, third and fourth paragraphs, the measure of the punishment is made to depend on the gravity of the offence. The word 'offence' wherever used in the first, second, third and fourth paragraphs means some real offence, which in fact has been committed. The punishment depends upon the gravity of the offence which was committed. If an accused seeing blood marks on the ground as a result of an offence punishable under s 323 (for causing hurt), erases the blood marks with the intention of screening the offender, whom he erroneously believes to have committed the offence of murder, he could be convicted only on the footing that an offence under s 323 was committed, and that he acted with the intention of screening such an offender believing that such an offence was committed and he may be punished accordingly under the fourth paragraph with imprisonment extending to three months. However, he could not be convicted on the basis of his having screened a murder or merely because he wrongly imagined that an offence of murder has been committed. The erroneous belief of delusion of the accused would not furnish the measure of punishment, and he would not be punishable under the second paragraph with imprisonment extending to seven years. It is difficult to impute such an intention to the legislature and to hold that the minor offence of screening an offender under s 201 is punishable more severely than the main offence committed by the main offender.

In this case, the appellants had been charged under s 304 for the offence of culpable homicide (of Raja Ram) not amounting to murder, but were acquitted of that charge and convicted only under ss 330 and 348. The longest term of imprisonment for an offence is only seven years and hence one-fourth of that period, one year and nine months, was awarded as punishment.

Omission to Give Information

Section 202. Intentional omission to give information of offence by person bound to inform.--Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Introduction

As a responsible citizen, it is the duty of every person to give information about the commission of an offence to the authorities concerned as to facilitate investigation and prosecution of criminals. Provisions of this section are not intended to be punitive in themselves, but are intended to facilitate the gathering of information about crimes committed, so that the authorities concerned can take necessary steps for timely investigation of the offences.

Sections 39 and 40, CrPC, require a person aware of the commission of any offence, or of any intention of any person to commit any offence specified in the section to inform forthwith the nearest magistrate or police officer about such commission or intention. If a person does not give the information, he must be able to establish that he had a reasonable excuse for failing to give the information.

Section 202 makes the failure to give information of the commission of an offence punishable with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

In a prosecution under s 302, it is necessary for the prosecution to prove that the accused: (i) had knowledge or reason to believe that some offence had been committed, (ii) had intentionally omitted to give information respecting that offence, and (iii) was legally bound to give that information.

'Whoever'

The term 'whoever' appearing in the opening part of s 202, unlike in the previous section, refers to a person other than the offender. It has no application to the person, who is alleged to have committed the principal offence. This is so, because there is no law which casts a duty on a criminal to give information which would incriminate himself. On the contrary, any coercive measure employed against accused to incriminate himself goes against the fundamental right against self-incrimination guaranteed in art 20(3) of the Constitution. So, while the main offender might be liable of causing the disappearance of evidence in respect of the offence committed by him, he is under no legal obligation to give information about the commission of the crime to the authorities.

Knowledge or Reasonable Belief of Commission of Offence

In order to sustain a conviction under this section, it is essential to first establish that a crime has been committed and the accused was aware or at least had reasonable belief that an offence which he is under a legal obligation to report, has been committed. The prosecution therefore has to first establish that the main offence has been committed. Thereafter, the prosecution has to produce further proof that the accused had knowledge or reason to believe that such an offence had been committed.

In *Harishchandra Singh Sajjan Singh Rathod v State of Gujarat* ,[96] six police officials who were the accused therein had allegedly taken the deceased to the police station for the purpose of interrogation. At the police station, they had inflicted a number of injuries on the person of the deceased by means of fists, kicks and sticks, knowing that the bodily injuries inflicted by them were likely to cause death of the deceased. When the deceased complained of severe pain, he was admitted in the hospital. But, his condition deteriorated. A dying declaration was recorded from him in which he stated that he was beaten by the police. The deceased ultimately succumbed to his injuries. The accused were charged for offences of causing grievous hurt to extort confession under s 331 and for culpable homicide not amounting to murder under s 304(II) as well as for an offence under s 202, IPC. Due to several infirmities in the evidence, it was held that offences under ss 331 and 304(II) had not been established. In view of this, the Supreme Court held that the conviction under s 202 was also not sustainable, because it is necessary for the prosecution to establish the main offence before making the person liable under s 202, IPC. Further, the Supreme Court observed that the persons in this case having been accused of the main offence under ss 331 and 304(II), IPC, could not be said to be under legal obligation to give information about the commission of the offence.

Intentional Omission to Give Information

The section contemplates that the omission to give information about the commission of the crime by a person should be done intentionally. If the omission to give information is bona fide and not wilful, then no offence under this section is made out. Thus, intention is an essential ingredient of an offence under this section.

In *Bhagwan Swarup v State of Rajasthan* ,[97] the first accused (A-1) was the son of the second accused (A-2). A-1 was married to the deceased. A-2, father-in-law of the deceased, was a retired government servant and a practising lawyer. The relations between A-1 and his wife were strained. One day, the deceased was found dead in her room. At that time, A-2, the father-in-law was not present in the house. Though, A-1 and A-2 had been charged with committing the murder of the deceased, there was no material to show that the death was homicidal. However, it was very clear that it was not a natural death. Under these circumstances, the mo-

ment A-1, the husband of the deceased came to know about the death of the deceased, he was under an obligation to inform the same to the police. However, A-1 misled everybody by stating that the deceased, was still alive. It was the brother of the deceased who ultimately went to the police station and gave a report. It was thus held that A-1 intentionally omitted to give the information in respect of the death of the deceased, which he was legally bound to give and he was sentenced to six months rigorous imprisonment.

Legal Obligation to Give Information

The person accused of committing of an offence under s 202 must be duty bound under law to give the information.[98]

Giving False Information About an Offence

Section 203. Giving false information respecting an offence committed.-- Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.--In sections 201 and 202 and in this section the word "offence", includes any act committed at any place out of India, which, if committed in India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

Introduction

Section 203 , IPC, punishes any person who is aware of the commission of the crime and gives false information in respect of that crime with imprisonment, which may extend for a period of two years or with fine or with both. In order to secure conviction under this section, the prosecution needs to establish that: (i) an offence has been committed; (ii) the accused knew or had reason to believe that such offence had been committed; (iii) he gave the information with respect to that offence; (iv) the information so given was false, and (v) when he gave such information he knew or believed it to be false.[99]

Sections 201, 202 and 203 are related, but different. They deal with various aspects of offences dealing with conduct of persons after the commission of the main offence. Section 201 deals with causing disappearance of evidence of an offence or giving false information with the intention of screening the offender; s 202 deals with omission to give information in respect of commission of an offence; s 203 deals with giving of false information in respect of commission of an offence. Under s 201, the giving of false information in respect of an offence should be with the intention to screen the offender. But, under s 203, IPC, it is sufficient if the prosecution establishes that the accused had given false information in respect of an offence. It need not establish that such false information was given with the intention of screening the offender. Thus, a person who merely gives false information commits an offence under both ss 202 and 203.

Section 204. Destruction of document or electronic record to prevent its production as evidence.--Whoever secrets or destroys any document or electronic record which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such document or electronic record with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Introduction

So far, we have dealt about giving of false information, fabricating documents, causing disappearance of evidence, failure to give information in respect of a crime and giving false information in respect of a crime. Section 204 deals with secreting or destruction of documents either by completely destroying it, or by blotting out, erasing or defacing certain portions of the document or the entire document with the intention that it be prevented from being produced or being used as evidence in any court or before any public servant. Such destruction may have been carried out either prior to it being summoned to be produced in court or after the

person was lawfully required to produce the document in court. A person may secret a document when its existence is unknown to other persons or is known to others. It may be secreted with the purpose of preventing its knowledge to others.

This offence is punishable with simple or rigorous imprisonment for a term up to two years or with fine or with both.

IMPERSONATION

Section 205. False personation for purpose of act or proceeding in suit or prosecution.--Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 229. Personation of a juror or assessor.--Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Introduction

These two sections make impersonation an offence. Impersonation means pretending to be another person. For instance, if *A* pretends to be *B*, then it means that *A* is impersonating *B*.

However, the impersonation should have been done in a civil or criminal proceeding. For the purpose of conviction under this section, it is not necessary that the impersonation should be done fraudulently or dishonestly. Even, if the impersonation is done with the consent of the person impersonated, it will nevertheless be an offence under this section.

There is a difference of opinion between the Calcutta High Court and the Madras High Court as to the question whether impersonation of a non-existent person is an offence under this section. For instance, *A* pretends to be *B*. But there is no such person as *B* in existence. According to the Calcutta High Court,[1] even impersonation of a fictitious person is an offence under this section. However, the Madras High Court[2] has held that the impersonation should be of a known person and not of an imaginary person.

If such impersonation is of a juror or an assessor, then it is an offence under s 229, IPC. However, s 229 is of no relevance as jury trial or assessors is no more in vogue in India.

There are altogether six sections in the IPC dealing with false personation. They are as follows:

(1) Personation of a sailor, soldier or airman (s 140);
(2) Personation of a public servant (s 170);
(3) Wearing a garb or carrying a token used by a public servant (s 171);
(4) Personation of a voter at an election (s 171);
(5) Personation for the purpose of an act or proceeding in a suit of prosecution (s 205);
(6) Personation of a juror or assessor (s 229).

ABUSE OF PROCESS OF COURT OF JUSTICE

Sections 206 - 210 of the deal with cases of abuse of process of court of justice, either by the plaintiff or by the defendant.

Section 206. Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution.--Whoever fraudulently removes, conceals, transfers or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution

of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Introduction

This section makes punishable fraudulent removal, transfer or delivery of any property with the intention of defeating the outcome of any proceedings of execution or forfeiture orders that may be passed by a court of justice or other competent authority. The section uses the word 'fraudulently' which is defined in s 25, IPC. The word 'fraudulently' connotes an intention to deceive and to cause injury to another person. Thus, it is essential that an intention to defraud should be present in order to commit an offence under this section. Further, there must also be an intention to prevent the property or interest therein from being taken as forfeiture of, in satisfaction of a fine or in execution of a decree or order of a civil court. This particular intention is necessary for the applicability of this section.

In order to take cognisance of an offence under this section, it is essential that the court in which the offence is alleged to have been committed, should forward a complaint in this regard as per s 195, CrPC.

Section 207. Fraudulent claim to property to prevent its seizure as forfeited or in execution.--Whoever fraudulently accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practices any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Introduction

This section deals with making fraudulent claims to a property knowing fully well that the person making the claim has no rightful claim to such property. Such claim should be made with the intention to prevent the property from being taken as forfeiture, or in satisfaction of a fine or in execution of a decree under a sentence of a court. An offence under this section is punishable with imprisonment of either description for a term, which may extend to two years or with fine or with both.

Section 208. Fraudulently suffering decree for sum not due.--Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due or for a larger sum that is due to such person or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration

A institutes a suit against *Z*. *Z*, knowing that *A* is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount at the suit of *B*, who has no just claim against him, in order that *B*, either on his own account or for the benefit of *Z*, may share in the proceeds of any sale of *Z's* property which may be made under *A's* decree. *Z* has committed an offence under this section.

Introduction

Section 208 contemplates a situation, wherein a person fraudulently suffers a decree for a sum that is not due. Though, the section does not state as to what is the intention or purpose with which the person concerned should suffer the decree, the word 'fraudulently' would throw some light on it. The word 'fraudulently' denotes that it should be done with the intention to deceive or to cause injury to another person. The illustration to the section is self-explanatory.

Section 209. Dishonestly making false claim in Court.--Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall

be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Introduction

Section 209 relates to false and fraudulent claims in a court of justice. The person making the claim should do so fraudulently or dishonestly and with an intention to injure or annoy any person. The person making the claim should know that the claim made is false. It is not sufficient for the prosecution to merely establish that the accused had reasonable belief that it is false. It should go a step forward and prove decisively that the accused knew fully well that the claim made by him was false. A mere dismissal of a suit on merits will not amount to a false claim, unless there is a clear, finding by the court that the claim was false and was instituted with the intention to injure the defendant.

For a court to take cognisance of an offence under this section, it is essential that the court in whose proceedings the offence has been committed should forward a complaint in this regard under s 195, CrPC.

Section 210. Fraudulently obtaining decree for sum not due.--Whoever fraudulently obtains a decree or order against any person for a sum not due or for a larger sum than is due or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Introduction

This section punishes a plaintiff for obtaining a decree for sum not due, whereas s 208 punishes a defendant for fraudulently suffering a decree for a sum not due. This section will apply only if the prosecution is able to establish a fraudulent or a criminal intention on the part of the plaintiff and not a bona fide mistake. Like in earlier sections, a prosecution for an offence under this section requires a complaint to be made by the court, in which or in relation to any proceeding in which such proceeding is alleged to be committed.

FALSE CHARGE OF AN OFFENCE

Section 211. False charge of offence made with intent to injury.--Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, imprisonment for life or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Introduction

This section makes falsely charging or accusing a person of an offence punishable. This section is akin to malicious prosecution.[3]

This provision deals with two distinct offences: (1) actually instituting or causing to be instituted false criminal proceeding against a person,[4] and (2) leveling a false charge against a person. The former assumes the latter, but the latter offence may be committed even if no criminal proceedings follow. To constitute an offence under this section, it must be established that the accused: (i) instituted or caused to be instituted a criminal proceeding against a person; (ii) falsely charged a person with having committed an offence; (iii) did so with intent to cause injury to such person, and (iv) did so knowing that there was no just or lawful ground for such proceeding or charge.[5]

The punishment provided for in the section is linked to the nature of the false charge and the consequential proceedings. The mere making of a false charge is made punishable by simple or rigorous imprisonment for a term up to two years, with fine or with both. But if criminal proceedings are act ually instituted on the basis

of the false charge of an offence punishable with death, imprisonment for life, or imprisonment for seven or more years, the punishment extends to simple or rigorous imprisonment for a term up to seven years and fine. The enhanced punishment can be imposed on the prosecutrix only when: (i) proceedings on the false charge are instituted, and (ii) the false charge relates to an offence punishable with death, life imprisonment, or imprisonment for seven years or upwards.[6]

The opening words of the section are 'whoever'. This means that this section applies not only to a private individual, but also to a police officer, who brings a false charge of an offence with intent to injure another person. The intention to injure is an essential ingredient of offence under this section.

The words 'criminal proceedings' means a step taken in a criminal court as per the CrPC, for the purpose of preventing a crime or for prosecuting a person for the commission of crime.[7]An application under the Contempt of Courts Act 1971 can also be regarded as the institution of a criminal proceeding.[8] If a person falsely sets the criminal law in motion by making a false complaint to the police of a cognisable offence, it amounts to instituting criminal proceedings within the meaning of this section.[9]The word 'proceedings' is used in the section in the ordinary sense of a prescribed mode of act ion for prosecuting a right or redressing a wrong. it is not used in the technical sense of a proceeding taken in a court of law.[10] A criminal prosecution can be instituted by:

(i) a complaint as defined under s 2(d), CrPC;
(ii) moving the court by a petition under the provisions of the CrPC, which may not amount to a complaint as so defined (eg a petition under s 107, CrPC);
(iii) a police report to the court;
(iv) making a false charge of a cognisable offence to the police.

However, merely giving false evidence as a prosecution witness against an accused in a court does not amount to institution of criminal proceedings. Such a false statement on oath supporting the prosecution amounts to an offence under s 193 and s 195 and not under s 211.[11] Further, the false charge must refer to the original or initial accusation putting or seeking to put in motion the machinery of criminal investigation and not then seeking to prove the false charge framed in that trial. The false charge must be made not to any person, but to a person who is empowered to investigate the charge and get the offender punished.

The false charge need not necessarily be an offence under IPC, but can also be under a special or local law.[12]

The false charge given should be with the intention to cause injury to a particular person.[13] Thus, giving a complaint to the police about theft of property by a person without naming or indicating any particular person as being the offender, will not amount to an offence under this section, even if the complaint made is a false one.[14]

For an offence to be instituted under this section, complaint of the court in which the proceedings have been initiated is essential, as per s 195, CrPC.[15] No private party is entitled to file a complaint.[16]

The ingredients of this section and that of s 182 are similar. Both the sections deal with institution of false charges with intention to cause injury. A mala fide criminal proceeding initiated against a person holding a high office with a view to wreak vengeance and spite him due to private and personal grudge comes within s 182, s 211 or s 511 of the IPC.[17]

Section 211 is so closely analogous to s 182, that many have expressed the view that these two sections are redundant. The Calcutta, Madras and Patna High Courts have held that there is no radical difference between the two sections and if at all they differ, it is only in degree. The expressions used in the respective sections are as follows.

Table 26.1

Section 182	Section 211
Whoever gives to any public servant any information, which he knows or believes to be false, etc.	Whoever with intent to cause injury to any person institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence knowing that there is no just or lawful ground for such proceeding or charge against that person, etc.
	Differences
False information is given.	Criminal proceeding is instituted or false charge is held.
Intention of the accused to cause a public servant to use his lawful power to the injury or annoyance of any person against whom false information is given.	Intention of the accused to cause injury to person subject to the criminal proceeding or the false charge.
Information may be given on any matter.	Institution of a criminal proceeding must be for an offence or the false charge must be of an offence.
The section, contemplates giving false information.	Here, it is setting in motion the criminal law without any just or lawful grounds.
The offence is complete even if the public servant does not take any step towards criminal prosecution.	The offence is complete only when the criminal proceeding is actually instituted or commenced.
Proof of malice and want of reasonable and probable cause is not necessary.	Proof of want of just and lawful grounds for instituting criminal proceeding or for giving false charge is necessary.
Offence under s 182 is triable, even by a second class magistrate.	Offence under s 211 is not triable by a magistrate below the rank of a first class magistrate.

SCREENING AND HARBOURING OFFENDERS

Sections 201, 212-216A deal with offences of screening and harbouring offenders.

Section 212. Harbouring offender.--Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment;

if a capital offence.--shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.--and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

"Offence" in this section includes any act committed at any place out of India, which, if committed in India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in India.

Exception.--This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration

A, knowing that *B* has committed dacoity, knowingly conceals *B* in order to screen him from legal punishment. Here, as *B* is liable to imprisonment for life, *A* is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

Introduction

As seen earlier, s 201 deals with causing disappearance of evidence and giving false information to screen the offender while s 212 deals with harbouring of offenders.

An offence under this section presupposes that some other offence has been committed by another person whom the accused harbours or conceals with the intention of screening the other person from legal punishment. The word 'harbour' includes supplying a person with shelter, food, drink, money, clothes, arms, ammunitions or means of conveyance or assisting a person in any way to evade apprehension. Mere knowledge of the whereabouts of the offender does not amount to harbouring him, unless the alleged harbourer is guilty of supplying the person with food, shelter, etc.[18] The harbouring of the person must be done with the intention of screening the person from legal punishment. If, however, the person concerned gives food or medical aid to a person on humanitarian considerations and he has no intention of screening the offender from legal punishment, no offence of harbouring within the meaning of this section can be said to have been committed.

No prosecution can be launched under this section until the main offender is convicted of the offence he has alleged to have been committed. This is because, if, the person accused of the main offence is acquitted, then he can no longer said to be an offender and harbouring him cannot be said to be an offence. Thus, it is only logical if a person has to be prosecuted under this section, it can only be done after the person harboured is found guilty of the main offence.[19]

Section 212 is attracted only when it is established that the person had harboured or concealed a person whom he knew or reasonably believed to be an offender. Hence, it is necessary for the prosecution to prove that: (i) the offence in question was committed; (ii) the accused has harboured or concealed the person known or reasonably believed to be an offender; and (iii) such harbouring or concealing was done with the intention of screening the offender from legal punishment.[20] S 212 does not apply to harbouring of persons, not being criminals, who merely abscond to avoid or delay a judicial investigation.[21]

The exception to the section provides that this provision shall not extend to any case in which the harbouring or the concealment is done by the husband or wife of the offender.[22] No other relationship other than wife or husband of the offender gets benefit of the exception.

Section 213. Taking gift, etc., to screen an offender from punishment.--Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

if a capital offence.--shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.--and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not exceeding to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Introduction

This section makes the receiving of gifts or gratification in consideration for concealing an offence or screening an offender from legal punishment, an offence. Before a person can be convicted under this section, it is essential that there must be commission of the main offence and the same should also be proved.[23]

The word 'consideration' in this section is wide enough to cover any past gift or favour and also the case of something to be done in future. It may be either a promise to conceal an offence or screen the person from legal punishment or it may be a past consideration, the person having been already concealed the offence or screened the person from legal punishment.[24]

Section 214. Offering gift or restoration of property in consideration of screening offender.--Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or restores or causes the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment;

if a capital offence.--shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.--and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.--The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.

Introduction

This section is complementary to s 213. While s 213 makes the taking of gifts, gratification, etc, to screen an offender from punishment an offence, s 214 makes the offerings of gifts or gratification to any person in consideration for screening an offender, an offence. The intention of the legislature under these two sections is to generally discourage malpractices such as concealment of offences or screening offenders where offences have already been committed.[25]

In both these sections, the quantum of punishment depends upon the gravity and seriousness of the offence, which is being concealed and screened. Under both ss 213 and 214, if the offence concealed is one which is punishable with death, then the punishment may extend to seven years imprisonment of either description and shall also be liable to fine. If the offence screened or concealed is punishable with life imprisonment or imprisonment which may extend to 10 years, then the punishment under ss 213 and 214 is imprisonment of either description, which may extend to three years or with fine or with both. In other cases, the punishment is for a term up to a maximum of one-fourth of the longest term of imprisonment prescribed for the offence.

The exception to s 214 states that this section will not apply to offences which may be lawfully compounded.

Section 215. Taking gift to help to recover stolen property, etc.--Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Introduction

Section 215 is designed to impose criminal liability on the person who, being in league with the thief, receives some gratification for helping the owner of stolen property to recover it, without at the same time using means in his power to see that the thief is apprehended and convicted. Its main aim is to desist a person from making profit out of the crime while screening the offender from justice. A person, who has received gratification, can avoid liability by showing that he used all means in his power to cause apprehension of the offender. It is for him to prove that he is entitled to the benefit of this exception.[26] The essential ingredients of this section are: (i) a person should have been deprived of any movable property by the commission of an offence; (ii) the accused should agree or consent to recover the said property to the owner; (iii) the accused should take gratification for the purpose of such recovery, and (iv) he should have failed to use all means in his power to cause the original offender to be apprehended and convicted of the offence.[27]

Section 216. Harbouring offender who has escaped from custody or whose apprehension has been ordered.--Whenever any person convicted of or charged with an offence, being in lawful custody for that offence, escapes from such custody;

or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say,--

if a capital offence.--if the offence for which the person was in custody or is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.--if the offence is punishable with imprisonment for life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine;

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

'Offence' in this section includes also any act or omission of which a person is alleged to have been guilty out of India, which, if he had been guilty of it in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in India.

Exception.--This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

Introduction

Section 216 makes the harbouring of the offender, who has been either convicted or charged with an offence and who has escaped from lawful custody, an offence.[28] Under this section, it is not essential that the person harboured, ie, the person accused of the main offence, should be found guilty and convicted for the same. It is enough, if, at the time of harbouring, the harboured person was charged with an offence and he had escaped from lawful custody or there was an order issued for his apprehension for the commission of an offence. The person harbouring or concealing the offender should do so with the intention of preventing him from being arrested.

Even under this section, if the harbouring is done by the wife or the husband of the person to be apprehended, no offence is committed.

Section 216 has certain resemblance with s 212. But they do have different requisites and subject to different penal consequences. S 212 deals with the offence of harbouring an offender who having committed an offence absconds, while s 216 deals with harbouring an offender who has escaped from lawful custody after being actually convicted or charged with the offence, or whose apprehension has been ordered. The latter, compared with s 212, provides for heavier punishment.

Section 216A. Penalty for harbouring robbers or dacoits.--Whoever, knowing or having reason to believe that any persons are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.--For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without India.

Exception.--This provision does not extend to the case in which the harbour is by the husband or wife of the offender.

Introduction

Section 216A provides for enhanced punishment for harbouring robbers or dacoits or persons intended to commit robbery or dacoity. The essential ingredients of this section are: (i) the person in question should be about to commit robbery or dacoity or had recently committed robbery or dacoity; (ii) that the accused knew or had 'reason to believe' this; (iii) that the accused harboured all or any of such persons, and (iv) that the accused did so with the intention of facilitating the commission of such robbery or dacoity or of screening them or any of them from punishment.

Wife or husband of the harboured robber or dacoit or person about to commit robbery or dacoity is exempted from liability for harbouring him or her.

OFFENCES AGAINST JUSTICE BY PUBLIC SERVANTS

Sections 217-223 and 225A deal with offences against justice by public servants.

Section 217. Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.--Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Introduction

This section makes certain dereliction of duty by public servants, which is done with intent to save or screen persons from punishment or enable the offender to get a lesser punishment than that to which he is liable, or helps save any property from forfeiture or charge, an offence punishable with simple or rigorous imprisonment for a term up to two years or with fine or with both. A public servant becomes liable under this section even though the intention which he had of saving a person legal punishment was premised on his mistaken belief as to that person's liability to punishment.[29] The offence of dereliction of duty can be committed only by the public servant during the discharge of his official duty.[30]

To prosecute a public servant under this section, sanction under s 197, CrPC, is required.

Section 218. Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture.--Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which

he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Introduction

If a public servant is responsible for the preparing or writing of any records and he knowingly fabricates or falsifies such public document with the intent to cause or knowing that it is likely to cause public injury or loss for the purpose of saving a person from legal punishment or saving any property from forfeiture or charge to which it is liable by law. If the intention of fabrication is not to save any person from legal punishment or save forfeiture of any property, then this section will not apply. His intention to cause injury by fabricating or falsifying record is the key element of the offence. Mere making incorrect entry in a record sans the requisite intent (specified in the section), therefore, does not warrant s 218, IPC31 It is, as a legal requirement, not necessary that the incorrect document should be used by the writer or submitted to another person. The offence become complete the moment the false record is made with the intention contemplated under s 218. It is not necessary for the completion of the offence under this section that fabricated record should be used in a judicial proceedings.[31] A public servant commits the offence under this section even if the person whom he intended to save was none other than himself.[32] A public servant, who has made a false entry in record with a view to save accused from legal punishment that might be inflicted upon him, cannot avoid liability under this section even though the accused (for whose benefit the record was fabricated) is subsequently acquitted of the offence.[33]

An offence under this section is punishable with simple or rigorous imprisonment for a term up to three years or with fine or with both.

Section 219. Public servant in judicial proceeding corruptly making report, etc., contrary to law.--Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Introduction

This section contemplates the pendency of judicial proceedings, in which proceeding a public servant corruptly or maliciously makes any false report, order etc which is contrary to law.

An offence under this section is punishable with simple or rigorous imprisonment for a term which may extend to seven years or with fine or with both.

Section 220. Commitment for trial or confinement by person having authority who knows that he is acting contrary to law.--Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is act ing contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Introduction

If a public servant corruptly or maliciously commits a person to trial or keeps him in confinement knowing that he is acting contrary to law, it is an offence under this section,[34] punishable with simple or rigorous imprisonment which may extend to seven years or with fine or with both.

Section 221. Intentional omission to apprehend on the part of public servant bound to apprehend.--Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say--

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death; or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for life, or imprisonment for a term which may extend to ten years; or

with imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years.

Introduction

If a public servant who is legally bound to apprehend or arrest a person, intentionally fails to do so, or allows the person who has been arrested to escape or helps such person to escape, or helps him attempt to escape from confinement, then it is an offence under this section.[35] If the person he fails to arrest or helps escape is accused of an offence punishable with death, then the public servant concerned will be punishable with imprisonment of either description for a term which may extend to seven years with or without fine; if the offender is accused of an offence which is punishable for life imprisonment or imprisonment for a term which may extend to ten years, then the public servant is punishable with imprisonment of either description for a term which may extend to three years with or without fine; if the offender was charged with an offence punishable with imprisonment for less than ten years, then the public servant is punishable with imprisonment of either description for a term which may extend to two years with or without fine.

Section 222. Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed.--Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person under sentence of a Court of Justice for any offence or lawfully committed to custody, intentionally omits to apprehend such person, or intentionally suffers such person to escape or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say:--

with imprisonment for life or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death; or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to imprisonment for life or imprisonment for a term of ten years or upwards; or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years or if the person was lawfully committed to custody.

Section 223. Escape from confinement or custody negligently suffered by public servant.--Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody, negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years or with fine, or with both.

Introduction

Sections 222 and 223 deal with failure on the part of a public servant to keep in confinement, a person charged with an offence or convicted of an offence. Under s 222, the omission to apprehend a person charged or convicted of an offence is also included. Section 222 will apply if the omission to apprehend or failure to keep in confinement a person charged with an offence, or convicted of an offence, is done intentionally by a public servant. If the person confined is allowed to escape because of the negligence on the part

of the public servant then s 223 will apply. The punishment under s 222 is far graver than the one provided under s 223.

Section 225A. Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise, provided for.--Whoever, being a public servant legally bound as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222 or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished--

(a) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and
(b) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Introduction

Section 225A has been enacted to provide for failure on the part of a public servant to apprehend a person, he is legally bound to, or failure on the part of a public servant to keep in confinement a person who has been arrested in all other situations which are not provided for in ss 221-223 or in any other law for the time being in force.

RESISTING THE LAW

Section 224. Resistance or obstruction by a person to his lawful apprehension.-- Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.--The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.

Section 225. Resistance or obstruction to lawful apprehension of another person.--Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with imprisonment for life or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

or, if the person to be apprehended, or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is liable under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to imprisonment for life, or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with imprisonment with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Section 225B. Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.--Whoever, in any case not provided for in section 224 or section 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful appre-

hension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Introduction

Sections 224, 225 and 225B deal with cases of resisting the law. Under s 224, if a person intentionally resists or illegally obstructs his own arrest for an offence with which he is charged or convicted, or escapes or attempts to escape from any lawful custody, then an offence under this section is committed.[36] On the other hand, if a person obstructs the lawful arrest of another person by a public servant or helps him to escape or helps in the attempt of the person confined to escape, then offence under s 225 is committed. A proof of intentional resistance or obstruction to lawful apprehension of another person is necessary for ensuring conviction under s 225.[37]Section 225B provides for situations not covered under ss 224 and 225.

Under all these provisions, the arrest must be legal and the custody contemplated under the section must be a lawful custody. Only then the provisions of this section will be attracted. The resistance or obstruction caused must be intentional.

VIOLATION OF CONDITIONS OF REMISSION

Section 227. Violation of condition of remission of punishment.--Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

Introduction

Remission is the shortening of convict's prison sentence on account of his good behaviour. Such remission is sometimes granted on certain conditions. Remission of sentences by appropriate Government is regulated by s 432 of the CrPC. S 227, IPC, thus, deals with the conditional remission of sentences.

If a person who has come out on conditional remission violates any of such conditions, then it amounts to an offence under this section. Such person shall be punished with the punishment to which he was originally sentenced. In other words, the remission given is withdrawn and the person will be required to serve the full sentence.

CONTEMPT OF COURT CONSTITUTING OFFENCES

Section 228. Intentional insult or interruption to public servant sitting in judicial proceeding.--Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Introduction

Section 228makes an intentional insult to a judge or interruption of court proceedings. The offence under s 228 is not punishable as contempt of court. But the definition of criminal contempt in s 2(c) of the Contempt of Courts Act, 1971 is wide enough and is not limited to the offering of intentional insult to the judge or interruption of the judicial proceedings.[38] The essential ingredients of the offence under s 228 are: (i) intention to insult a public servant or to interrupt judicial proceeding; (ii) insult or interruption to a public servant, and (iii) the public servant insulted or interrupted must be sitting in any stage of a judicial proceeding.[39] Insult or interruption to a public servant sitting in a judicial proceeding must be intentional. Any innocent insult or insult or interruption of trivial nature does not amount to an offence under s 228.[40] The question whether an insult offered to a public servant is intentional or not, however, depends upon the facts and circumstances of the case at hand and it is neither necessary nor advisable to lay down any hard and fast rule. Acts such as rude or vulgar behaviour, obstinacy, perverseness, prevarication, refusal to answer any lawful question, refusal to

leave the court when asked to do so, breach of the peace or any willful disturbance, hurling of shoes at the presiding officer, uttering filthy abuses or making contemptuous statements, and like, amount to intentional insult or interruption. The fact that the court feels insulted is no reason for holding that any insult is intended. Courts, in fact, should not be unduly sensitive about their dignity.[41]

Object of Contempt Proceedings

The offence dealt with by this section is a contempt of court, which is also made an offence punishable under the IPC. The object of the proceedings is to deter persons from heaping indignities on a public servant, who is discharging judicial functions. However; it is not to afford protection to judges personally from imputations to which they may be exposed as individuals; it is intended to be a protection to the public whose interests will be very much affected if, by the act or conduct of any party, the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it is weakened.

In *Brahma Prakash Sharma v State of Uttar Pradesh* ,[42] the Bar Association of Muzaffarnagar within the state of Uttar Pradesh had received numerous complaints from their members and the litigant public in respect of the conduct of two judicial officers. At a meeting held by the Association, it resolved that 'It is now our considered opinion that the two officers are thoroughly incompetent in law, do not inspire in their judicial works, are given to stating the wrong facts when passing orders and are overbearing and discourteous to the litigant public and the lawyers alike.' Apart from this general defect pointed out, other individual defects of the two individual officers were set out separately. Copies of the resolution were marked to the Chief Secretary, Commissioner and the District Magistrate for suitable action.

This representation of the Bar Association was brought to the notice of the Allahabad High court and contempt notices were issued. The Allahabad High Court held the Bar Association members guilty of contempt, but accepted their unqualified apology. The Supreme Court, when called upon to decide whether the act ion of the Bar Association in passing of the resolution would amount to contempt or not, pointed out:

> It seems that there are two primary considerations which would weigh with court when it is called upon to exercise the summary powers in cases of contempt committed by scandalising the court itself. In the first place, the reflection of the conduct or character of a judge in reference to the discharge of his judicial duties would not be contempt, if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created. The path of criticism ... is a public way. ... In the second place when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court.[43]

The Supreme Court then went ahead and considered each portion of the resolutions passed by the Bar Association, to decide whether it amounted to contempt. In respect of one judicial officer, the allegations were that he does not record the evidence in cases tried by him properly, that in all criminal matters transferred to his court, where the accused were already on bail, he does not give them time to furnish fresh sureties, with the result that they were sent to jail, and lastly, that he was not accommodating to lawyers at all. So far as the other officer was concerned, one serious allegation made was, that he followed the highly illegal procedure of hearing two cases at one and the same time, and while he recorded the evidence in one case himself, he allowed the court reader to record the evidence in the other. It was also said that he was short-tempered and frequently threatened lawyers with proceedings for contempt. Some of these complaints were not at all serious and no judge, unless he was hypersensitive, would at all feel aggrieved by them. It was undoubtedly a grave charge that the judicial officer heard two cases simultaneously and allowed the court reader to do the work for him. If true, it was a patent illegality and was precisely a matter which should be brought to the notice of the district magistrate, who was the administrative head of these officers.

As regards the first part of the resolution, the allegations were made in general terms that these officers did not state the facts correctly; when they passed orders and that they were discourteous to the litigant public. These did not, by any means, amount to scandalising the court. Such complaints were frequently heard in respect of many subordinate courts and if the appellants had a genuine grievance, it could not be said that in ventilating their grievances, they exceeded the limits of fair criticism.

The Supreme Court held that it was only in respect of the two sentences, which stated that these officers were thoroughly incompetent in law and their judicial works did not inspire confidence, were defamatory. But, even these two sentences could not constitute contempt of court in view of the fact that the resolutions were marked confidentially to the superior officers and no publicity was given. It was held that the act did not have any injurious effect on the minds of the public or of the judiciary itself and hence did not interfere with the administration of justice. The Supreme Court set aside the order of the high court and observed that the high court should have dropped proceedings against them.

Procedure for Contempt under Section 228

Under s 345, CrPC, it is provided that when an offence of contempt under ss 175, 178, 179, 180 and 228, IPC, is committed in the view or in the presence of any civil, criminal or review court, the court can detain the offender and at any time before the rising of the court on the same day, take cognisance of the offence. The court after giving an opportunity to the accused to show cause as to why he should not be punished, can sentence the offender to a fine not exceeding Rs 200, and in default of payment of fine to simple imprisonment for a term which may extend to one month unless such fine is paid earlier. The section further provides that the court shall record the facts constituting the offence, statements, if any, made by the offender and record the findings and the sentence as well. If the offence is under s 228, the record shall show the nature and stage of the judicial proceeding in which the court interrupted or insulted was sitting and the nature of the interruption or insult.

In the event of the court coming to an opinion that the case should not be dealt with under s 345, CrPC, because the offence deserves a higher punishment or for any other reason, then the same may be forwarded to the magistrate having jurisdiction under s 346, CrPC.

Contempt of Courts Act, 1971 and Section 228 , Indian Penal Code 1860

Apart from the provisions under the IPC, the Contempt of Courts Act, 1971 sets out elaborately the powers of contempt of courts vested in the judiciary. Section 10, Contempt of Courts Act, 1971 provides that no high court shall take cognisance of a contempt alleged to have been committed in respect of a court subordinate to it, where such contempt is an offence punishable under the IPC.

By virtue of s 10, Contempt of Courts Act, 1971, if an act constitutes an offence under ss 228, 175, 178, 179 and 180, IPC, the jurisdiction of the high courts to initiate proceedings under this Act is taken away. This section is analogous to s 3(2), Contempt of Courts Act, 1971 and s 2(3), Contempt of Courts Act 1926. In*State of Madhya Pradesh v Reva Shankar* ,[44]the accused had caused aspersions against the magistrate in an application filed in the court. He stated that the magistrate was not impartial, wanted to favour the other party and that he had a hand in a conspiracy hatched by the other parties. This application was forwarded by the magistrate to the Madhya Bharat High Court and the high court initiated contempt proceedings against him. Thereafter, a division Bench of the high court held that in view of the provisions in the Contempt of Courts Act which oust the jurisdiction of high court, where a contempt is an offence punishable under the IPC, theact complained of by the magistrate amounted to an offence under s 228 and hence, the high court had no jurisdiction to take contempt proceedings. On appeal, the Supreme Court held that the actof the accused showed prima facie that it was much more than a mere insult to the magistrate and it had an effect of scandalising the court in such a way as to created distrust in the popular mind and impair the confidence of people in courts. They observed that under s 228, an intentional insult to a magistrate is an offence. But, when the act complained of amounts to more than a mere personal insult to the magistrate, then the jurisdiction of the high courts to initiate contempt proceedings under the Contempt of Courts Act is not taken away. Further, factually it was not clear as to whether the application filed by the accused was before the bench clerk or office or whether they were filed before the magistrate when he was sitting in judicial proceedings. If he was not doing any judicial work at the time the insulting application was filed, the third essential ingredient mentioned in s 228, viz, that the public servant insulted or interrupted must be sitting in any stage of a judicial proceeding, was not satisfied and hence s 228 was not attracted. Moreover, on this ground also, the high court could have initiated action under the Contempt of Courts Act . The matter was remanded back to the high court for decision on merits.

In respect of the construction of s 10, Contempt of Courts Act, 1971, which oust the jurisdiction of high court in respect of a subordinate court, where such contempt is an offence punishable under the IPC, the question

arose as to whether an act which may not be an offence of contempt under the IPC, but which would otherwise be an offence under IPC, will also oust the jurisdiction of the high court or not.

In *Bathma Ramakrishna Reddy v State of Andhra Pradesh* ,[45] the publisher and the managing editor of a Telugu weekly called *Praja Rajyam*wrote a derogatory piece about a sub-magistrate. He stated that the sub-magistrate concerned had either taken bribes or had put the litigants to undue harassment. A contempt notice was issued to him. It was contended that the act of publishing done by the accused would amount to an offence of defamation under s 499, IPC, and hence, the high court could not take cognisance of the same. Rejecting this contention, the Supreme Court held that the high court's jurisdiction was ousted in cases of contempt, which have already been provided for in the IPC. In respect of act s, which merely amount to offences of other description in the IPC, will not take away the jurisdiction of the high court. This would be clear from the language of the section which uses the word 'where such contempt is an offence' and does not say 'where the act alleged to constitute such contempt is an offence'. In this case, the conviction of the accused for contempt of court was upheld by the Supreme Court.

FAILURE BY PERSON RELEASED ON BAIL TO APPEAR IN COURT

Section 229A. Failure by person released on bail or bond to appear in Court.-- Whoever, having been charged with an offence and released on bail or on bond without sureties, fails without sufficient cause (the burden of proving which shall lie upon him), to appear in Court in accordance with the terms of the bail or bond, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Explanation.--The punishment under this section is-

(a) in addition to the punishment to which the offender would be liable on a conviction for the offence with which he has been charged; and
(b) without prejudice to the power of the Court to order forfeiture of the bond.

Introduction

Section 229A is inserted in the IPC by the Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005). It puts obligation on the person released on bail or bond to, in accordance with the terms of bail or bond, appear and surrender to custody. Failure on his part to do so attracts the penal sanction provided thereunder. He may be punished by simple or rigorous imprisonment for a term up to one year or with fine or both for his failure to appear or surrender. He, however, can avoid the punishment when he had some sufficient cause, to be proved by him, for not appearing in the court.

PROCEDURE FOR PROSECUTION FOR CERTAIN OFFENCES

The CrPC provides for certain procedure and safeguards before prosecution under some of the sections falling under the chapter on false evidence and offences against public justice of the IPC.

A two-tier procedure of inquiry and complaint is contemplated under the CrPC, before any prosecution under ss 193-196, 199-200, 205-211, and 228 can be launched.

First, as per s 195(1)(b)(i) & (iii) of the CrPC, a court can take cognizance of a case for offences committed under any of these sections, only upon a complaint in writing by the court. Relevant part of s 195 of the CrPC runs as under:

> 195. *Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.--*
>
> (1) No court shall take cognizance--
>
> ...

(b)

(i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, Sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

...

(ii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court or by such officer of the Court as that Court may authorize in writing in this behalf, or of some other Court to which that Court is subordinate.

S 195, thus, mandates a complaint in writing to the court for taking cognizance of the offences enumerated in Clauses (b)(i) and (b)(ii) thereof. The court, which has a jurisdiction to give the complaint, is the court in which the alleged offence is said to have been committed.

Second, before making such a complaint, the Court concerned is called upon to conduct a preliminary inquiry under s 340, CrPC, after recording a finding to the effect that it is expedient in the interest of justice to make a complaint in writing in respect of the offence committed in its court. Section 340 of the CrPC says:

340. *Procedure in cases mentioned in Section 195--*

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court ... such Court may, after such preliminary inquiry, if any, as it thinks necessary,--
(a) record a finding to that effect;
(b) make a complaint thereof in writing;
(c) send it to a Magistrate of the first class having jurisdiction;
(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary to do, send the accused in custody to such Magistrate; and
(e) bind any person to appear and give evidence before such Magistrate. ...

From the language of s 340, it is clear that court is not obliged to make a preliminary inquiry or a compliant but if it decides to do so it must form an opinion that it is expedient in the interests of justice that inquiry should be made into any offence referred to in s 195(1)(b), CrPC.[46]

Section 195A , CrPC, inserted in it by Act 5 of 2009, deals with the procedure for prosecuting a person who has threatened a witness to give false evidence. It authorizes the witness himself or any other person to file complaint for initiating the prosecution against the person who has threatened for giving false evidence.

PROPOSALS FOR REFORM

Realizing that the chapter dealing with false evidence and offences against public justice is comprehensive, the Fifth Law Commission has merely offered a few suggestions for removing some 'working difficulties'. A few prominent among them are outlined here below[47]:

(1) Referring to s 194, the Law Commission it proposed that: (i) the second part of s 194, which punishes only the person who gave 'false evidence' in consequence of which an innocent per-

son is convicted and executed, should be also be extended to a person who 'fabricated' false evidence; (ii) the sentence of 'imprisonment for life' stipulated, as an alternative to 'rigorous imprisonment for a term which may extend to ten years', in the first part of s 194, should be omitted and the maximum sentence provided for the offence be 'rigorous imprisonment for fourteen years', and (iii) the punishment, as a consequence of the proposed deletion of 'imprisonment for life' from the first part of s 194, provided for in the second part of s 194 should be 'death or imprisonment for life'.

(2) With a view to desisting unscrupulous persons from using a false medical certificate to gain advantage in the course of litigation, it suggested that issuing a false medical certificate as well as using it in judicial proceedings should be specifically made punishable under the IPC. It accordingly recommended that two new sections (ss 198A and 198B), dealing respectively with the issuing or signing false medical certificates and the using the same as true one, should be inserted in the IPC.

(3) Recalling that there is no specific provision in the IPC against the removal of legally attached movable property, it recommended that any unauthorized removal of, or interference with, the lawfully attached movable property should also be made punishable. With this view, it recommended that a new section (s 207A) should be added to the Penal Code .

(4) It recommended redrafting of s 216A, which deals with punishment for the persons who harbour robbers, dacoits or persons who are about to commit or have recently committed robbery or dacoity, to give effect to its suggestions: (i) the part of s 216A referring to harbouring robbers and dacoits, being unnecessary, should be done away with, as harbouring an offender is already taken care of by s 212 of the IPC; (ii) such a penal provision should be extended to the offences of kidnapping and abduction.

(5) Section 229, dealing with personation of a juror or assessor, should be deleted from the IPC as the jury system is no more operative in India.

(6) Three new provisions (ss 229A to 229C) should be added to the chapter to penalise three illegal acts: (i) interference with witnesses, (ii) jumping bail, and (iii) vexatious search without reasonable grounds, to make administration of criminal justice more effective.

The Indian Penal Code (Amendment) Bill 1978 incorporated almost all these proposals for reform.

The Fourteenth Law Commission declined to endorse the proposals of issuing and using of false medical certificate on the ground that these act s can be brought within the ambit of s 197, IPC. It endorsed the proposals for addition of ss 229A to 229C in the IPC.[48]

But none of the proposals incorporated in the 1978 Bill could not get converted in law as the Bill, though passed by the *Rajya Sabha*, lapsed due to the dissolution of the *Lok Sabha* in 1978.

However, the Code of Criminal Procedure (Amendment)Act, 2005 (2 of 2006), has inserted s 195A and s 229A was inserted by Act 25 of 2005 in the Penal Code . S 195A criminalizes any threat given to a witness (or a person in whom he person is interested) for getting false evidence. S 229A provides punishment for a person released on bail or bond if he fails, without sufficient cause, to appear in Court in accordance with the terms of the bail or bond.

1 Third edn, vol 10, p 623.

2 *State of Rajasthan v Darshan Singh @ Darshan Lal* (2012) Cr LJ 2908(SC), AIR 2012 SC 1973.

3 *RameshwarKalyan Singh v State of Rajasthan* AIR 1952 SC 54, 1952 Cr LJ 547.

4 *Ranjit Pal v State of Pepsu* AIR 1959 SC 843, (1959) Cr LJ 1124(SC) .

5 *Abdul Majid v Krishna Lal Nag* (1893) ILR 20 Cal 724.

6 *U MistirWallang v KaEphraben* AIR 1954 Assam 259, (1954) Cr LJ 1838(Assam) (DB) .

7 *Syed Alley EbaRizvi v State* (1971) Cr LJ 359(All), AIR 1971 All 107.

8 *Hari Charan Singh v Queen-Empress* (1900) ILR 27 Cal 455.

9 AIR 1982 SC 1238, (1982) Cr LJ 1731(SC), (1982) 1 SCC 466.

10 Ibid, para 14.

11 AIR 1992 SC 1831, (1992) Cr LJ 2781(SC), (1992) 3 SCC 178.

12 Ibid, para 36.

13 *Ismail Khan v State* (1992) Cr LJ 3566(Kant) .

14 *SR Ramaraj v Special Court, Bombay* AIR 2003 SC 3039, (2003) 7 SCC 175, (2003) Cr LJ 3863(SC) .

15 *Emperor v Muhammud Ishaq* (1914) ILR 36 All 362.

16 *Baban Singh v Jagdish Sing* AIR 1967 SC 68.

17 Re *Suo Motu Proceedings against R Karuppan, Advocate*AIR 2001 SC 2204, (2001) 5 SCC 289, (2001) Cr LJ 2611(SC) .

18 *Ranjit Singh v State of Pepsu* AIR 1959 SC 843, (1959) Cr LJ 1124(SC) .

19 *Dinanath v Nek Ram* AIR 1923 All 175.

20 *Jyotindra Mohan Roy v State of Gujarat* (1967) Cr LJ 359(Guj) .

21 *Delhi Lotteries v Rajesh Agrawal* AIR 1998 Del 1332.

22 Re *Suo Motu Proceedings against R Karuppan, Advocate*AIR 2001 SC 2204, (2001) 5 SCC 289, (2001) Cr LJ 2611(SC) .

23 *Advocate General v Chidambara* (2004) Cr LJ 493(Kant) ; see also, *Mohan Singh v Amar Singh* AIR 1999 SC 482, (1998) 6 SCC 686.

24 *Puneet Anand v Lt Governor, Govt of NCT Delhi* (2004) 110 DLT 444.

25 *State of Madhya Pradesh v Badri Yadav* (2006) 9 SCC 549.

26 *N Natarajan v BK Subba Rao* AIR 2003 SC 541, (2003) 2 SCC 76, (2003) Cr LJ 820(SC) .

27 AIR 1992 SC 1831, (1992) Cr LJ 2781(SC), (1992) 3 SCC 178.

28 *MS Ahlawat v State of Haryana* AIR 2000 SC 168, (2000) Cr LJ 388(SC) .

29 *Santokh Singh v Izhar Hussain* AIR 1973 SC 2190, (1973) Cr LJ 1176(SC) .

30 Re *Suo Motu Proceedings against R Karuppan, Advocate*AIR 2001 SC 2204, (2001) 5 SCC 289, (2001) Cr LJ 2611(SC) . See also *Arun Kumar Agarwal v Radha Arun* (2001) Cr LJ 3560(SC) ; *Dhananjay Sharma v State of Haryana* AIR 1995 SC 1795.

31 *Mishrilal v State of Madhya Pradesh* (2005) 10 SCC 701, JT 2005 (5) SC 559.

32 *Babu Lal v State of Uttar Pradesh* AIR 1964 SC 725, (1964) Cr LJ 555(SC) .

33 AIR 1996 SC 2326; see, however, *MS Ahlawat v State of Haryana* AIR 2000 SC 168, (2000) Cr LJ 388(SC), and *Randhir Singh v State of Haryana* (2000) Cr LJ 755(SC), in which the Supreme Court held that the conviction by the Supreme Court under s 193, IPC, and for contempt of Supreme Court under art 129 of the Constitution, was liable to be set aside, as the Court had not complied with the procedure required under s 155 read with s 340, CrPC. Moreover, it pointed out that the Supreme Court does not have any original jurisdiction in relation to offences under s 193, IPC.

34 *Mangal Sing v State* AIR 1956 Pat 154, (1956) Cr LJ 646(Pat) .

35 *LaljiHaridas v State of Maharashtra* AIR 1964 SC 1154.

36 *LaljiHaridas v State of Maharashtra* AIR 1964 SC 1154.

37 No longer good law in respect of applicability of s 195, CrPC, in view of introduction of s 195(3) in the CrPC. See, *Baliram W Hiray v Justice B Lentin* AIR 1988 SC 2267 .

38 AIR 1981 SC 22, (1980) Cr LJ 1280(SC) .

39 See also *Kamalapati Trivedi v State of West Bengal* AIR 1979 SC 777.

40 AIR 2012 SC 466, (2012) 2 SCC 60.

41 AIR 1918 Cal 106, (1919) Cr LJ 230(Cal) .

42 *Suresh Chandra Sharma v State of Madhya Pradesh* AIR 2009 SC 3169, (2009) Cr LJ 4288(SC), (2011) 11 SCC 173.

43 AIR 1973 SC 2190, (1973) Cr LJ 1176(SC) .

44 *Banti Pande v Emperor* AIR 1930 Pat 550.

45 *Budhan Singh v State of Bihar* (2006) 4 SCC 740.

46 *Emperor v Rama Nana Hagavne* AIR 1922 Bom 99, (1923) Cr LJ 23(Bom) (DB) .

47 (1882) ILR 4 All 293.

48 AIR 1966 SC 523, (1966) Cr LJ 459(SC) .

49 *Prafulla Kumar v Emperor* AIR 1943 Cal 40, (1944) Cr LJ 292(Cal) .

50 (1982) All LJ 1231.

51 *Hasankhan Kolekhan v State of Gujarat* (1972) Guj LR 444.

52 Re *Shaik Nimatullah*(1982) 2 Cal HN 170.

53 *Prem Lal v State of Rajasthan* (1998) Cr LJ 1430(Raj) ; see also, *Tulsidas Jivabhai Changani v State of Gujarat* (2001) 1 SCC 719.

54 These ingredients of the offence are to be established at the trial and not at the stage when cognisance is taken. See, *MS Jaggi v Registrar, High Court of Orissa* (1983) Cr LJ 1527(Ori), 54 (1982) CLT 601. It is for the prosecution to prove that the statement of the accused was false, and not for the accused to prove that it was true; see *Baddu Khan v Emperor* AIR 1928 All 182.

55 *Baban Singh v Jagdish Singh* AIR 1967 SC 68; *Yellappa v Kamalavva* (1995) Cr LJ 2303(Kant) .

56 *Anil Kapoor v Finance-cum-Health Secretary, Chandigarh Administration* (1974) Cri LJ 862(P&H)

57 *Yellappa v Kamalavva* (1995) Cr LJ 2303(Kant), 1995 (4) Kar LJ 730.

58 *State of Maharashtra v Pandya Mangubhai* AIR 1956 Bom 439(DB), (1956) Cr LJ 861(Bom) .

59 AIR 1997 SC 1902, (1997) Cr LJ 1931(SC) .

60 AIR 1969 SC 7, (1969) Cr LJ 257(SC) .

61 AIR 1969 SC 7, (1969) Cr LJ 257(SC) .

62 See *Roshanlal v State of Punjab* AIR 1965 SC 1413; *VL Tresa v State of Kerala* AIR 2001 SC 953, (2001) 3 SCC 549, (2001) Cr LJ 1171(SC) ; *Budhan Singh v State of Bihar* (2006) 4 SCC 740; *Sukhram v State of Maharashtra* (2007) 7 SCC 502, AIR 2007 SC 3050.

63 *Ram Saran Mahto v State of Bihar* AIR 1999 SC 3435, (1999) 9 SCC 486, (1999) Cr LJ 4311(SC) .

64 AIR 1952 SC 354, (1953) Cr LJ 154(SC) .

65 Ibid, para 15. Also followed and reiterated in *Wattan Singh v State of Punjab* AIR 2004 SC 1607, (2004) 3 SCC 700, and quoted with approval in *Budhan Singh v State of Bihar* (2006) 4 SCC 740.

66 *VL Tresa v State of Kerala* AIR 2001 SC 953, (2001) 3 SCC 549, (2001) Cr LJ 1171(SC) .

67 AIR 1998 SC 370, (1998) Cr LJ 662(SC) .

68 AIR 1968 SC 829, (1968) Cr LJ 1013(SC) .

69 (1993) Cr LJ 3410 (Bom).

70 See *Suresh v State of Karnataka* (2002) Cr LJ 3273(Kant) ; *State of Karnataka v Madesha* (2007) 7 SCC 35, AIR 2007 SC 2917; *Sukhram v State of Maharashtra* (2007) 7 SCC 502, AIR 2007 SC 3050.

71 *Hanuman v State of Rajasthan* AIR 1994 SC 1307, 1994 Cr LJ 2092(SC) ; *Arbind Singh v State of Bihar* AIR 1994 SC 1068, (1994) Cr LJ 1227(SC) ; *Vijaya v State of Maharashtra* (2003) 8 SCC 296, AIR 2003 SC 3787.

72 AIR 1975 SC 1883, (1975) Cr LJ 1654(SC) .

73 AIR 1979 SC 1245, (1979) Cr LJ 1066(SC) .

74 (2007) 7 SCC 502, AIR 2007 SC 3050.

75 Re *Kuttayan alias Nambi Thevar*AIR 1960 Mad 9, (1960) Cr LJ 85(Mad) (DB) .

76 AIR 1953 SC 131, (1953) Cr LJ 668(SC) .

77 Ibid, para 24.

78 AIR 2001 SC 953, (2001) 3 SCC 549, (2001) Cr LJ 1171(SC) .

79 *Deepak v State of Maharashtra* (1995) Cr LJ 2219(Bom), 1995 (4) Bom CR 386.

80 *Public Prosecutor v Venkatamma* (1932) ILR 56 Mad 63.

81 AIR 1975 SC 455, (1975) Cr LJ 425(SC) .

82 AIR 1971 SC 2013, (1971) Cr LJ 145(SC) .

83 AIR 1979 SC 1280, (1979) Cr LJ 871(SC) .

84 AIR 1995 SC 1963, (1995) Cr LJ 3619(SC) .

85 See also *Mahesh Mahto v State of Bihar* AIR 1997 SC 3567, (1997) Cr LJ 4402(SC) ; *Suryamani Dei v State of Orissa* AIR 1979 SC 1534, (1979) Cr LJ 959(SC) ; *Mulakh Raj v Satish Kumar* AIR 1992 SC 1175, (1992) Cr LJ 1529(SC) ; *Dhanna Chaudhary v State of Bihar* AIR 1985 SC 1688, (1985) Cr LJ 1864(SC) .

86 AIR 1994 SC 914, (1994) Cr LJ 1035(SC) .

87 *Raghav Prapanna Tripathy v State of Uttar Pradesh* AIR 1963 SC 74, (1963) Cr LJ 70(SC) .

88 *BhagbanKirsani v State of Orissa* (1985) Cr LJ 868(Ori) ; *Batapa Pada Seth v State of Orissa* (1987) Cr LJ 1976(Ori) .

89 *State of Orissa v Trinath Das* (1982) Cr LJ 942(Ori) .

90 See *Arbind Singh v State of Bihar* AIR 1994 SC 1068; *Mahesh Mahto v State of Bihar* AIR 1997 SC 3567, (1997) Cr LJ 4402(SC) .

91 AIR 1994 SC 1307, (1994) Cr LJ 2092(SC) .

92 See also *Col Mohan Singh v State of Rajasthan* AIR 1980 SC 1560, (1980) Cr LJ 1098(SC) ; *Bhupendra Singh v State of Uttar Pradesh* AIR 1991 SC 1083, (1991) Cr LJ 1337(SC) .

93 *VL Tresa v State of Kerala* AIR 2001 SC 953, (2001) 3 SCC 549, (2001) Cr LJ 1171(SC) ; *Vijaya @ Baby v State of Maharashtra* (2003) 8 SCC 296, AIR 2003 SC 3787; *State of Karnataka v Madesha* (2007) 7 SCC 35, AIR 2007 SC 2917.

94 AIR 1975 SC 1925, (1975) Cr LJ 1671(SC) .

95 AIR 1965 SC 1413.

96 AIR 1979 SC 1232, (1979) Cr LJ 1025(SC), (1979) 4 SCC 502.

97 AIR 1991 SC 2062, (1991) 4 SCC 514, (1991) Cr LJ 3023(SC) .

98 *KK Patnayak v State of Madhya Pradesh* (1999) Cr LJ 1129(MP) .

99 *Bhagguram v State of Madhya Pradesh* (1982) Cr LJ 106(MP) .

1 *Bitto Kahar*(1862) 1 Ind Jour OS 128(Cal) .

2 *Kadar Ravuttam*(1868) 4 Mad HCR 18; but see *State of Uttar Pradesh v Inder Sen* AIR 1961 All 62.

3 *RP Kapoor v Pratap Singh Kairon* AIR 1966 All 66; *Basamma v Peerappa* AIR 1982 Kant 9.

4 See *AN Gupta v State of Rajasthan* (1999) Cr LJ 4932(Raj) ; *Jitendra v State of Uttar Pradesh* (2000) Cr LJ 3087(All) .

5 *Haridass v State of West Bengal* AIR 1964 SC 1773, [1964] 7 SCR 237; *Santokh Singh v Izhar Hussein* AIR 1973 SC 2190, (1973) Cr LJ 1176(SC), (1973) 2 SCC 406.

6 *Queen-Empress v Bisheskar* (1893) ILR 16 All 124;.*Emperor v Karsan Jeasang* (1941) 43 Bom LR 858.

7 *Teja Singh v Kishan Singh* AIR 1949 Lah 28, (1950) Cr LJ 244(Lah) (FB) .

8 Ibid.

9 *Queen-Empress v Jijibhai* (1889) ILR 22 Bom 596; *Queen-Empress v Karim Buksh* (1888) ILR 17 Cal 574.

10 *Alberi v State of Kerala,* AIR 1966 Ker 11.

11 *Santokh Singh v Izhar Hussein* AIR 1973 SC 2190, (1973) Cr LJ 1176(SC), (1973) 2 SCC 406.

12 Ibid.

13 *JinilalMandal v Chanderdeo Prasad* AIR 1941 Pat 419.

14 *Ram RenuChattoraj v Emperor* AIR 1941 Cal 288, (1942) Cr LJ 624(Cal) .

15 *KamalapathiTrivedi v State of West Bengal* AIR 1979 SC 777, (1979) Cr LJ 679(SC) .

16 *Subhash Ram CandraDurga v Deepak Annasaheb* (2000) Cr LJ 4774(Bom) .

17 *State of Haryana v Bhajan Lal* (1992) Supp (1) SCC 335, AIR 1992 SC 604.

18 *Jagdish Chandra Maity v Emperor* AIR 1935 Cal 550.

19 *Kuriacose Chacko v State of Travancore-Cochin* AIR 1951 Tr&Coch 90, (1952) Cr LJ 470(Tr&Coch) .

20 *Niranjan Ojha v State of Orissa* (1992) Cr LJ 1863(Ori) ; *Sanjiv Kumar v State of Himachal Pradesh* AIR 1999 SC 782, (1999) 2 SCC 288;*State of Tamil Nadu v T Suthenthiraraja* AIR 1999 SC 2640; *State v Siddarth Vashisth @ Manu Sharma* (2001) Cr LJ 2404(Del), 90 (2001) DLT 548.

21 *Mir Faiz Ali v State of Maharashtra* (1992) Cr LJ 1034(Bom), 1992 (1) Bom CR 226.

22 The exception is based on the principle of preserving domestic peace and conjugal confidence between the spouses. See *MCV Verghese v TJ Poonan&Ors* AIR 1970 SC 1876, (1970) Cr LJ 1651(SC) .

23 For different judicial view on the point see *Hemchandra Mukherjee v Emperor* AIR 1925 Cal 85; *Waris Ali v Mohd Azimullah Khan* AIR 1918 Nag 181; *Emperor v Biharilal Kalacharan* AIR 1949 Bom 405; *Mir Faizali Shaheen v State of Maharashtra* (1992) Cr LJ 1034(Bom) .

24 *Emperor v Biharilal Kalacharan* AIR 1949 Bom 405.

25 *Mohd. Aslam v State of Madhya Pradesh* AIR 1981 SC 1735, 1981 Cr LJ 1285.

26 *Deo Suchit Rai v Emperor* AIR 1947 All 225.

27 *State v Karan Singh Gujar* AIR 1953 MP 191.

28 *Ajab v State of Maharashtra* AIR 1989 SC 827, (1989) Cr LJ 954(SC) ; *Anadharaj v State of Tamil Nadu* (2000) 9 SCC 45, JT 2000 (3) SC 368.

29 *Queen-Empress v Amiruddeen* (1878) ILR 3 Cal 412.

30 *Sunil v State of Maharashtra* 2006 (6) Mh LJ 690.

31 *Raghubansh Lal v State of Uttar Pradesh* AIR 1957 SC 486.

32 *Aamla Prasad Singh v Hari Nath Singh* AIR 1968 SC 19.

33 *Queen-Empress v Nand Aishore* (1897) ILR 19 All 305; *Sarju Singh v State of Uttar Pradesh* (1978) Cr LJ (NOC) 286(All) .

34 *Maulud Ahmad v State of Uttar Pradesh* (1964) Cr LJ 71(SC) .

35 *Suryamoorthy v Govindaswamy* AIR 1989 SC 1410, (1989) Cr LJ 1451(SC) .

36 See *Rampal v State of Uttar Pradesh* AIR 1979 SC 1184, (1979) Cr LJ 711(SC) .

37 *Prithivi Nath Pandey v State of Uttar Pradesh* (1994) Cr LJ 3623(All) .

38 *Malhu Yadav v State of Bihar* (2002) 5 SCC 724, AIR 2002 SC 2137.

39 *Daroga Singh v BK Pandey* (2004) 5 SCC 26, AIR 2004 SC 2579, (2004) Cr LJ 2084(SC) .

40 *State of Madhya Pradesh v Revashankar* AIR 1959 SC 102, (1959) Cr LJ 251(SC) .

41 *Kiran N Makasari v State of Maharashtra* (1998) Cr LJ 1939(Bom) .

42 *S Narayan Murthy v State of Mysore* (1974) Cr LJ 211(Mys) .

43 AIR 1954 SC 10, (1954) Cr LJ 238(SC) .

44 Ibid, paras 15 and 16.

45 AIR 1959 SC 102.

46 AIR 1952 SC 149.

47 *BK Gupta v Damodar H Bajaj* (2001) 9 SCC 742, JT 2001 (4) SC 422; *Pritish v State of Maharashtra* (2002) 1 SCC 253, AIR 2002 SC 236; *Iqbal Singh Marwah v Meenakshi Marwah* (2005) 4 SCC 370, AIR 2005 SC 2119.

48 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.37-12.39.

CHAPTER 27

Offences Affecting Public Health, Safety, Convenience, Decency and Morals

(Indian Penal Code 1860,Sections 268 to 294A)

INTRODUCTION

Chapter XIV of the IPC deals with public nuisance. It is undoubtedly an offence affecting the public health, safety, convenience, decency and morals.

PUBLIC AND PRIVATE NUISANCE

Nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. The term is not capable of precise definition.

Nuisance is of two kinds: (i) public nuisance, and (ii) private nuisance. Public or common nuisance which affects the public, and is annoyance to all citizens, is treated as a public wrong. Private nuisance, on the oth-

er hand, hurts or causes annoyance to some individuals as distinguished from the public at large. It interferes comfort of another or of the lands, tenements or hereditaments of another. Since the latter affects only particular individuals, it is treated as a private wrong and it does not form the subject matter of public prosecution. Where, however, besides being injurious to a private person it is also detrimental to the public, it is treated as public nuisance and is then punishable by public prosecution.

Section 268. Public nuisance.--A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

This chapter dealing with the subject of public nuisance; is intended to protect three classes of persons: (1) the public; (2) the neighbours as distinct from the public; and (3) persons possessing a public right.

Analysis of Public Nuisance

Section 268 defines a doer of a public nuisance as one who: (i) does any act or is guilty of an illegal omission, (ii) which causes (a) any common injury, or (b) danger or (c) annoyance to (iii) the public or to the people in general, who dwell or occupy property in the vicinity; or (iv) causes injury, obstruction, danger or annoyance to persons who may have any occasion to use any public right. Public nuisance is an act of doing something that tends to the annoyance of the whole community in general or neglecting to do anything that the common good requires.[1] It is an act or omission affecting the public at large, or some considerable portion of them, and interferes with rights the members of the community might otherwise enjoy.

Public nuisance is based on the principle embodied in the maxim of civil law *sic utere tuo ut rem publicum non laedas*, which means 'enjoy your property in such a way as not to injure the rights of the public'.

Meaning of 'Public'

The term 'public' is defined in s 12, IPC. The word 'public' includes any class of the public or any community. Thus, a class or community residing in a particular locality may come within the term 'public'.[2]

In popular parlance, the word 'public' means the general body of humankind or of a nation, state or community. But as defined in the IPC, it includes any class of the public even so small, but still large enough to form a 'class' and which excludes the possibility of a mere individual. So again, the term 'community' is used here interchangeably with 'public', and as a community may consist of a sect, race or body of men united on any given principle. A class or community inhabiting a particular locality may come within the term 'public'.[3]

Act or Illegal Omission

The words 'illegal omission' in this section must be construed in the light of the definitions of words 'acts', 'act' and 'illegal' given in ss 32, 33 and 43, IPC, respectively. Every omission will not constitute an offence under this section. Unless the omission which causes the nuisance as an illegal omission in the above sense, there will be no public nuisance.

Public Nuisance Causing Some Advantage or Convenience

In the second paragraph of the section, it is stated that a common nuisance cannot be excused on the ground that it causes some convenience or advantage. This means that it is no defence to a charge of committing a common nuisance that the act in question was done to prevent or mitigate some harm to the accused's interest or to protect his own lands and crops.[4]

In this context, it may be useful to refer to s 81, IPC, coming under the chapter on 'General Exceptions'. Under s 81, an act done in good faith to prevent other harm is a defence available, which will not make any person criminally liable. However, in view of the specific provision in s 268 that this cannot be an excuse, recourse to s 81 may not be available to a person who is charged under this section.[5]

Common Injury, Danger or Annoyance to the Public

To constitute an offence under this section, there must be an injury, danger or annoyance. It must be caused to the public or the people in general, who live or occupy property in the vicinity. The injury, etc, may be one which is act ually caused to the public or the people in general living in the vicinity. It can also be caused to anyone who may have the occasion to use a public right.[6] However, it is not necessary that the annoyance should injuriously affect every member of the public within its range.[7]

However, the actual causing of the injury, danger or annoyance is not necessary to constitute an offence under this section. It is sufficient if the act or illegal omission is of such a nature that it must necessarily cause injury, danger or annoyance or obstruction to anyone, who may have the occasion to use a public right, such as persons entitled to use a highway or a navigable river.[8]

Trade

Even a lawful trade may sometimes become a nuisance, if it interferes with the comfort and peace of the neighbours or if it becomes a health hazard. But whether it would become a nuisance as prescribed under the section, depends on the facts and circumstances of the case.

In *Ram Autar v State of Uttar Pradesh* ,[9] the appellants were carrying on trade of auctioning vegetables. These vegetables were brought in carts, which were parked on the public road outside the building where the auctioning took place. It was alleged that the carts which brought in the vegetables were obstructing the road. It was also alleged that the trade was injurious to the health and physical comfort of the community. The appellants were asked to stop the auctioning under s 133, CrPC. The Supreme Court, however, held that the appellants who were auctioning the vegetables inside their private house did not cause any obstruction on the road. If persons who participated in the auction obstructed the road, the appellants who carried on the auction could not be said to cause the obstruction. The Supreme Court held that merely because some noise is caused during the auction and people preferring perfect peace might not like it, cannot be said to be injurious to the physical comfort or health of the community. The court observed that in the conduct of trades of this nature, there is bound to be some noise in the trading localities, which may produce some discomfort, but trade is also at the same time for the good of the community. So, some amount of noise has to be borne in at least that part of the town where such trade is ordinarily carried on.

In *Gobind Singh v Shanti Sarup* ,[10] a baker had constructed an oven and a chimney where he baked his products. Smoke emitted by the chimney was very high and a very strong wind could carry the flames over a distance and cause a conflagration. It was held to be was injurious to the health of the people.

The negligent blasting of stones in a quarry, so as to endanger the safety of persons living in the vicinity, is a public indictable nuisance. So, the erection of buildings and making fires that send forth noxious, offensive and stinking smoke and making great quantities of noxious, offensive and stinking liquors near the common highway and near the dwelling houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive smells was held to be a common nuisance. So also allowing a building near a highway, which is ruinous and dangerous to the public, is a common nuisance.[11]

In Re *Muttumira*,[12] the setting up of an image during Moharram in the village *wasti* and near a Hindu temple was held not to constitute a public nuisance under this section. Chief Justice Turner, referring to the section, said thus:

> It was obvious from the language of the Act that it was not intended to apply to act s and omissions calculated to offend the sentiments of a class. In this country, it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The erection of a place of worship in a particular spot is likely to offend the sentiments of the adherents of other creeds residing in the neighbourhood; but the Penal Code does not regard such an act as a public nuisance. The scope of the provision we are considering is to protect the public or the people in general, as distinguished from the members of a sect from injury, danger or annoyance in the neighborhood of places where they dwell or occupy property, or when they have occasion to use a public right.

Slaughter Houses

Slaughtering of cattle cannot be deemed to be a public nuisance, unless the act is done in places and in a manner where it might prove to be a public nuisance.

In *Byramaji Edalji's* case,[13]certain Jains complained against the accused's act of cutting meat on the verandah of his house in sight of the complainants who were neighbours of the accused. The exposure of the meat although revolting to the feelings of the Jains, was held to be not sufficient to constitute a nuisance. But suppose, if in such a case, the slaughter had been made in public, so that the groans and blood of the slaughtered beasts were heard and seen by passersby, would it not cause annoyance to the public at large, whether Hindu, Mohammedan or Christian? In such a case, the act of the accused would clearly amount to a public nuisance.[14] So the mere sale of meat or fish near or on a public road cannot be deemed a nuisance,[15]though the fact that such exposure is offensive to the religious susceptibilities, may be a matter of executive act ion. The act of annoyance, which this section contemplates, is not the kind of annoyance which the religious ideas of a class of people may suffer on account of an otherwise innocent act of another section of the public as the playing of music by Hindus at the time of worship.[16]

Disposal of the Dead

Cremation and burial of dead bodies are the ordinary recognised methods of the disposal of dead bodies and as such there is nothing illegal in burning the body or in burying it, unless the cremation or burying is done in such a manner as it may amount to a public nuisance. It has accordingly been held in *Saminatha Pillay's* case[17] followed in *Muhammad Mahiddin v Municipal Commissioner* ,[18] that when persons entitled to use a particular spot, dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incidental to such an act, as it is generally performed in this country, they cannot be convicted of public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to. To hold that an act so properly done, not only in the exercise of a right, of which the people of this country are normally so tenacious, but also in the discharge of a serious duty, amounts, as the prosecution contends, to an offence, would be highly unreasonable and unjust.

Passive Smoking

In *K Ramakrishnan v State of Kerala* ,[19] it was argued that smoking of tobacco in any form in public places makes the non-smokers 'passive smokers' and thereby causes 'public nuisance' as defined under s 268 of the IPC. The Kerala High Court, therefore, was urged to declare smoking of tobacco not only illegal as it causes public nuisance but also unconstitutional. The high court held that tobacco smoking in public places in the form of cigarettes, cigars, or *beedis* falls within the mischief of the penal provisions relating to 'public nuisance'. Relying upon the right to life guaranteed under art 21 of the Constitution, the high court declared that public smoking of tobacco is unconstitutional.

DISEASES DANGEROUS TO LIFE

Section 269. Negligent act likely to spread infection of disease dangerous to life.--Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Section 270. Malignant act likely to spread infection of disease dangerous to life.--Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Introduction

Section 269 is aimed at preventing people from doing, unlawfully or negligently, any act, knowingly or having reasons to believe, that is likely to spread infection or disease dangerous to life of another. The punishment

provided for the offence is simple or rigorous imprisonment for a term up to six months, or with fine, or with both.

S 270, worded in the phraseology identical to s 269, deals with an aggravated form of the offence dealt under s 269. It uses the word 'malignantly', referring to mens rea of the offence. The term implies that the doer, while spreading infection or disease dangerous to life, was act uated by malice. It denotes a deliberate intention on the part of the accused. The punishment provided thereunder, compared to that under s 269, is harsher. It prescribes imprisonment of either description for a term up to two years, or fine or both.

In *X v Hospital Z* ,[20] the appellant's blood was to be transfused to another. Therefore, a sample of his blood was taken for testing and was found to be HIV+. The hospital authorities disclosed this to one *A*, to whom the appellant was engaged to be married. On account of this disclosure, the marriage was called off. He was also severely criticised and ostracised by the community. The appellant contended that the hospital had violated medical ethics by disclosing what they were required to keep secret. The appellant also contended that his right to privacy was violated and therefore claimed compensation. In this context, the Supreme Court held that in view of the fact that the appellant was found to be HIV+, its disclosure would not be violative either of the rule of confidentiality or right of privacy as *A*, whom the appellant was to marry, would have otherwise been infected by the deadly disease if the marriage had taken place and consummated. The court held that where there is a clash of two fundamental rights as in the present case, namely, the appellant's right to privacy as part of right to life, and *A's* right to lead a healthy life, which is her fundamental right under art 21, the right which would advance public morality or public interest would alone be enforced through the process of court. While full sympathy should be given to the person suffering from the dreadful disease AIDS, sex with such person or the possibility of thereof has to be avoided as otherwise they would infect and communicate the disease to others. The court cannot assist such a person to achieve such object. Therefore, if a person suffering from HIV Aids, knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences under ss 269 & 270, IPC.

Subsequently, in *Mr. X v Hospital Z* ,[21] the petitioner called upon Supreme Court to decide as to whether a person suffering from HIV+ contracting marriage with a willing partner after disclosing the factum of disease to that partner committed the offence contrary to ss 269 and 270, IPC. The petitioner wanted to seek clarification from the court that there is no bar for the marriage, if the healthy spouse consents to marry in spite of being made aware of the fact the other spouse is suffering from the said disease. Placing its reliance on the facts of the case and its observations in the earlier pronouncement that it was open for the hospital or the doctors concerned to reveal the patient's information to the girl intended to marry, and she had the right to know about the HIV+, the Supreme Court felt it unnecessary to declare in general terms as to whether such persons in the event of their marriage would commit an offence under ss 269 and 270, IPC. But in the light of facts of the instant case, it held that if an HIV+ person contracts marriage with a willing partner, it would not constitute the offence under s 269 and 270, IPC.

QUARANTINE RULE

Section 271. Disobedience to quarantine rule.--Whoever knowingly disobeys any rule made and promulgated by the Government for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

NOXIOUS FOOD OR DRINK

Section 272. Adulteration of food or drink intended for sale.--Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

Section 273. Sale of noxious food or drink.--Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Introduction

Section 272 punishes adulteration of food or drink rendering it noxious with intent to sell it as food or drink. In order to ensure conviction under this section, the prosecution needs to prove that (i) the article involved was food or drink meant to be consumed by live persons, (ii) the accused adulterated it, (iii) such adulteration rendered it noxious as food or drink, and (iv) the accused at the time of such adulteration intended to sell such article as food or drink, or knew it to be likely that such article would be sold as food or drink.[22]

Section 273 makes the sale of noxious food or drink an offence. Mere adulteration is not an offence under this section. The adulteration should be of such a nature as to make the food or drink noxious.[23] Further, it should also be established that that such noxious food or drink was intended to be sold either by the accused himself or somebody else. What is made punishable under this section is sale of noxious articles as food or drink and not the mere sale of noxious article. The expression 'noxious as food' means unwholesomeness as a food or injurious to health. It does not mean repugnant to one's feelings. Therefore, mixing of food mixing of pig's fat with ghee and selling the mixture does not render the article as 'noxious as food' though it may be noxious to the religious feelings of some sections of the public'.[24]

> Mixing water with milk is no offence under this section, because the mixture is not noxious or injurious as food or drink.[25] Similarly, the selling of wheat containing a large admixture of extraneous matter, such as dirt, wood, charcoal was held to constitute no offence.[26] But if found that it is mixed with rodents hair and their excreta, and plenty of foreign starch, it would obviously be 'noxious as food'.[27] Article of food or drink, intended to be sold, may become noxious by the lapse of time or by not taking proper precaution or not adding preservatives or like.[28] Adulteration Of Drugs And Sale Thereof

Section 274. Adulteration of drugs.--Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medical purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Section 275. Sale of adulterated drugs.--Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Introduction

Sections 274 and 275 deal with adulteration of drugs and sale thereof. Under these sections, it must not only be proved that the drug is adulterated, but it should be in such a manner as to reduce the efficacy of the drug, alter its effect, or make it noxious. Section 275 prohibits the sale of an adulterated drug as well as its issue from any dispensary.

SALE OF A DIFFERENT DRUG

Section 276. Sale of drug as a different drug or preparation.--Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a

different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

OFFENCES REGARDING NATURAL RESOURCES

Section 277. Fouling water of public spring or reservoir.--Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Introduction

The water of public spring or reservoir belongs to every member of the community, and if a person voluntarily fouls it, he comes within the ambit of s 277 as it renders it less fit for the purpose for which it is ordinarily used. Fouling water of a private well is not punishable under the section.[29] The words 'corrupts or fouls' mean some act which physically defiles or fouls water. Bathing in a tank fouls the drinking water.[30] However, fouling of the water of a river running in a continuous stream does not amount to an offence under s 277, as it is not covered by the words 'public spring'.[31] Nevertheless, it may be punishable under s 290 if it causes common injury or danger to the public.[32]

Section 278. Making atmosphere noxious to health.--Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

Introduction

In *K Ramakrishnan v State of Kerala* ,[33] the Kerala High Court held that smoking of tobacco in any form in a public place vitiates the atmosphere and makes it noxious to health of persons who happen to be there. Smoking in a public place, therefore, contravenes s 278 of the IPC.

RASH DRIVING

Section 279. Rash driving or riding on a public way.--Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Introduction

In negligence, undoubtedly there is no intention or desire for a particular consequence. The event happens without any premeditation on the part of the doer. There is invariably an overhasty act done without due deliberation and caution. It produces a result which the offender never expected and over which he may feel sorry later. But he is punished, not for the effect produced, which he could not have expected, but for the manner of doing the act which was fraught with danger.

The words 'rash or negligent' though very close, are nevertheless distinguishable. In cases of negligence, the wrongdoer breaks a positive duty and he does not advert to the act which is his duty to do. In rashness, the party does an act which he is bound to forbear and he breaks a negative duty. Here, he adverts to the act, but not to the consequences of the act which he does. A person furiously driving a car into a crowd knows the nature of the act, but he has not properly adverted to the consequence of his act. There is an over-confidence in him which makes him believe that no untoward incident would happen.

The difference between culpable rashness and culpable negligence is this: Culpable rashness is act ing with the consciousness that mischievous and illegal consequences may follow, but with the hope they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The im-

putability arises despite the consciousness. Culpable negligence is act ing without the consciousness that illegal and mischievous result will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection.

The distinction between the two has thus been pointed out by Lord Esher MR, in *Le Neve v Gould* .[34]

> The question of liability for negligence cannot arise at all until it has been established that the man, who has been negligent, owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be a negligent as he pleases toward the whole world if he owes no duty to them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.
>
> For instance, if a man is driving along a road, it is his duty not to do that, which may injure another person whom he meets on the road or his horse or his carriage. In the same way, it is the duty of a man not to do that, which will injure the house of another to which he is near. If a man is driving on Salisbury Plain and no other person is near him, he is at liberty to drive as fast or recklessly as he pleases. But if he sees another carriage coming to him, immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So, too, if a man is driving along a street in a town, a similar duty-not to drive carelessly - arises out of contiguity or neighborhood.

There are 14 sections in the IPC that deal with the different offences resulting from criminal rashness or negligence.[35]

Section 279 deals with rashness and negligent driving of a vehicle or riding on a public way in a rash and negligent manner, as to endanger human life or likely to cause hurt or injury to any person. In order to constitute an offence punishable under s 279, IPC, it must be established that:

(1) the accused was driving the vehicle on a public way;
(2) such driving was done in a rash and negligent manner to endanger human life or likely to cause hurt or injury to another person.

The criminality lies in running the risk of doing such an act with recklessness or indifferences as to the consequences.[36] Rash and negligence must be criminal rashness or criminal negligence. It must be more than mere carelessness or error of judgment. For conviction under the section it must be proved that the accused was driving the vehicle on public road in a manner that endangered human life or was likely to cause hurt or injury to any other person.[37]

In *Prafulla Kumar Rout v State* ,[38] the accused was a driver of a bus. He came at a high speed and ran over a school going minor girl, resulting in her death. According to him, the deceased had suddenly run towards the vehicle and since it was an unexpected act, it could not be construed as a rash or negligent act of him. The Orissa High Court held that the accident occurred in front of the school, and it is expected for a driver to be cautious and slow down the vehicle when nearby an educational institution. The accused was held guilty under this section.

In *Duli Chand v Delhi Administration* ,[39] when the driver of a bus, who, although was driving at a moderate speed, failed to look to his right before turning at a cross-road and consequently ran over a cyclist, it was held that the driver was guilty of negligence.

In *State of Karnataka v Santanam* ,[40] the Karnataka High Court held a military personnel, who after consuming liquor drove a military track in zigzag manner and dashed against moped rider causing his death and caused two other accidents on the road, guilty of rash and negligent driving. Similarly, the Rajasthan High Court, under this section, held the driver of a city bus guilty who drove the bus in a wavering manner and at a high speed and thereby killed a cyclist.[41]

However, mere error in judgment does not amount to a rash and negligent act.[42]

Where the charge against the accused is not of negligent driving, but of rash driving, all that is to be determined is whether the accused was driving at a reckless speed and, if so, whether the speed was such as to

endanger human life or to be likely to cause hurt or injury to any other person. Rash driving, even where the road happens to be unoccupied or not used by any pedestrian or vehicle, is still an offence.[43]

To drive on the wrong side of the road is not always rash and negligent.[44] In the case of an accused, the law or usage of the road is not the criterion. The test is whether the accident could have been avoided by the accused if he had exercised that care and diligence, which ordinarily cautious persons would have done.[45]

It would be a negligent act to carry on a bicycle any second person, irrespective of his age, build or weight, who is liable to change his position, or fall off, if this is done on a public way where there is other traffic.[46]

If an accused person did not drive or ride rashly or negligently, he cannot be held liable for death caused by misadventure. On the other hand, if his driving was rash, furious or negligent, he would be liable, though no one may have been hurt, if the manner of driving or riding was such as to make the causing of hurt or injury likely, or if it put lives of men in jeopardy.[47] Driving at an excessive speed on a public road may be a prima facie evidence of rash driving in determining whether the person is rash or negligent in driving.[48]

RASH NAVIGATION

Section 280. Rash navigation of vessel.--Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

EXHIBITION OF FALSE LIGHT, MARK OR BUOY, ETC

Section 281. Exhibition of false light, mark or buoy.--Whoever exhibits any false light, mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

UNSAFE CONVEYANCE IN WATER

Section 282. Conveying person by water for hire in unsafe or overloaded vessel.--Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded, as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Introduction

In *VR Bhate v State of Maharashtra* ,[49] a passenger vessel was carrying persons in excess of the permissible limit. The overloading did not cause danger to the passengers during the whole year. Even on the day the launch capsized, it was not due to the fact of overloading. The launch had reached the port and it was tied to the jetty. At that time, there was a sudden onrush of persons waiting at the jetty on to the deck and the passengers on the launch who wanted to get down had also assembled on the deck. Because of this shifting of weight on one side, the launch tilted towards the jetty and water flowed into the launch. The passengers on the launch were frightened and they moved to the other side. The weight then suddenly shifted to the other side. The launch tilted and as a result the ropes gave away and the launch capsized. The Supreme Court held that the capsizing of the launch was not because of any negligence of the owners. The launch capsized by reason of the stampede that followed the sudden rash of persons. So, it was held that a conviction under s 282 could not be sustained.

OBSTRUCTION IN PUBLIC WAY

Section 283. Danger or obstruction in public way or line of navigation.--Whoever by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred rupees.

POISONOUS SUBSTANCE

Section 284. Negligent conduct with respect to poisonous substance.--Whoever does, with any poisonous substance, any act in a manner so rash or negligent to endanger human life, or to be likely to cause hurt or injury to any person,

or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMBUSTIBLE MATTER

Section 285. Negligent conduct with respect to fire or combustible matter.-- Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Introduction

In *Kurban Hussein Mohamedalli Rangawalla v State of Maharashtra* ,[50] the accused was the owner of a factory manufacturing paints and varnish. He had licence to manufacture only by a cold process. He converted the factory from the cold process of manufacturing to heat process. For that purpose, he installed four burners. Resin was heated in the burners and lime was added. Then, turpentine was poured into the mixture. The mixture started frothing and overflowed out of the barrel and because of the heat, varnish and turpentine which were stored at a short distance caught fire. The fire spread rapidly due to the presence of combustible material in the premises, resulting in the death of seven workers and burn injuries of seven others. The accused was convicted under s 285, IPC.

EXPLOSIVE SUBSTANCE

Section 286. Negligent conduct with respect to explosive substance.--Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

MACHINERY

Section 287. Negligent conduct with respect to machinery.--Whoever does, with any machinery, any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both.

PULLING DOWN BUILDINGS

Section 288. Negligent conduct with respect to pulling down or repairing buildings.--Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ANIMALS

Section 289. Negligent conduct with respect to animal.--Whoever knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

ALL OTHER NUISANCES

Section 290. Punishment for public nuisance in cases not otherwise provided for.--Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

Introduction

Section 290 provides for the punishment of any public nuisance which does not fall under any other sections of the IPC, relating to public nuisances. It deals, in short, with all the residuary miscellaneous public nuisances. The fact that the act of the accused is an offence under some special or local Act is no bar to his prosecution under the IPC.

In *Sukumaran Nair v State* ,[51] where the accused was charged of the offence of public nuisance under ss 268 and 290, IPC, for having interrupted a public meeting by putting questions to the speaker or denying the statements of the speaker, he was held not guilty. The offence alleged was that at a public meeting when one Purushottam Pillai was addressing the meeting, the accused came near the platform and said two or three lines meaning 'this is not correct'. The court said that in the absence of any allegation that the accused by contradicting the speaker and by saying that what the speaker stated was not correct has caused any common injury, danger or annoyance to the public, the prosecution will not stand. It is not understandable, how, by merely interrupting a meeting, without any other overt act ion, it would amount to an offence under s 290, IPC. The court also said that such cases would fall under s 95, IPC, as mere trivial cases which courts should not take cognisance of.

CONTINUANCE OF NUISANCE

Section 291. Continuance of nuisance after injunction to discontinue.--Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction

not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

PUBLIC MORALS AND DECENCY

Section 292. Sale, etc., of obscene books, etc.--

(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever--

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

Exception.--This section does not extend to--

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure--

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, painting, representation or figure is in the interest of science, literature, art or learning or other object of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation, sculptured, engraved, painted or otherwise represented on or in--

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958, (24 of 1958), or

(ii) any temple, or any car used for the conveyance of idols, or kept or used for any religious purpose.

Introduction

Sections 292 and 293 were added in accordance with the resolution passed by the International Convention for the Suppression and Circulation of, and Traffic in, Obscene Publications, signed at Geneva on 12 September 1923.

Sections 292 and 293 were subsequently amended by the Indian Penal Code (Amendment) Act 1969. With a view to making the then existing law more definite and clear, cl 1 of s 292 explains the connotation of the expression 'obscenity'. Clause 2 of the section deals with the offence of sale, distribution, public exhibition, import or export, possession etc, of obscene material. It provides for not only enhanced punishment for matters relating to publication of obscene matters or objects but also makes it compulsory for the court to award it. However, certain publications and sculptured or engraved representations or figures are exempted. A book, pamphlet, paper, writing, drawing, painting, figure, or representation, which*per se* appears to be obscene, is exempted, if its publication is justified: (i) in the interest of science, literature, art, learning or other objects of general concern, or (ii) is kept or used *bona fide* for the religious purpose. A sculptured, engraved, painted representation is exempted if it appears on an ancient monument, temple or car used for the conveyance of idols, or kept or used for religious purpose.

Constitutional Validity

In *Ranjit D Udeshi v State of Maharashtra* ,[52] the constitutional validity of s 292 was challenged on the ground that it was violative of the right to freedom of speech and expression guaranteed under art 19 of the Constitution. The Supreme Court held that:

> ...[I]t can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292 of the Penal Codemanifestly embodies such a restriction because the law against obscenity...seeks no more than to promote public decency and morality. ...When there is propagation of ideas, opinions and informations of public interest or profit the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical test would certainly be considered to be obscene. Section 292, Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Article 19.[53]

Thus, it was held that s 292 was constitutional and it does not offend art 19(2) of the Constitution.

Obscene - Meaning

Section 292(1) consists of two parts. One part refers to a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object which is lascivious or appeals to the prurient interest, and the next part mentions that, if the above referred materials comprises of two or more distinct items, the effect of any one of its items, is, if taken as a whole, tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

There must be two things proved under s 292, namely, that: (i) the matter is obscene; and (ii) the accused has sold, distributed, imported, printed or exhibited it, or attempted or offered to do so.

However, the word 'obscene' is not defined in the IPC. Framers of the Code, plausibly realising that 'obscenity' depends upon the standards of morals of the contemporary society, were desisted from confining it in precise terms. The idea relating to immorality and indecency may change from time to time, and place to place. In the absence of definition of obscenity in the IPC, the task of defining it, thus, has been done by courts. The apex court has also evolved a test of obscenity.

The word 'obscene', in common parlance, denotes the thing that is offensive to modesty or decency, lewd, filthy and repulsive. The meaning of 'obscene', according to the *Oxford New English Dictionary* is, 'offensive to modesty or decency, expressing or suggesting unchaste and lustful ideas, impure, indecent and lewd'. The term gives emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. However, it would be wrong to perceive nudity and sex as essentially obscene, indecent or immoral. Sex and obscenity are not always synonymous.[54] Even a picture of a woman in the nude is not per se obscene. It becomes obscene only when it excites impure thoughts in the mind of ordinary persons of normal temperament. Surrounding circumstances, in which such expressions or pictures are made, therefore, become relevant.[55] While deciding whether a nude picture is obscene or not, one has to consider to a great ex-

tent the pose, the posture, the suggestive element in the picture and the person or persons in whose hands it is likely to fall.[56] Looked as a whole, the nude or semi-nude photograph of a woman should tend to deprave and corrupt the mind and excite lustful sexual passion.[57] When there is nothing in it to offend the ordinary decent person, it cannot be said to be obscene.[58] Unless a nude or semi-nude picture of a woman is an incentive to sensuality or impure or excite the thoughts in the mind of an ordinary person of a normal temperament, the picture cannot be regarded as obscene within the meaning of s 292. A nude picture, having hardly anything aesthetic or artistic look or literary content, published with the sole purpose of attracting readers who have a prurient mind becomes obscene.[59]A nude or semi-nude picture has to be viewed in the background in which it is shown and the message it has to convey to the public and the world at large. A picture of a nude white-skinned man (Boris Becker, a renowned German tennis player) standing close to his dark-skinned nude fiance (Barabara Feltus, an act ress), and the man covering breast of his fiance with his hands, followed by an article conveying message to people against practice of apartheid or racism and that love triumphs over hatred, therefore, cannot be obscene.[60] However, where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked.[61] Similarly, a vulgar writing is not necessarily obscene. It differs from obscenity. A book or other literature on sexology that intends to give advice to married people cannot be held obscene even though it refers to sex and carries sexual pictures.[62]

In *Samaresh Bose v Amal Mitra* ,[63] the Supreme Court, holding a novel intended to expose the evils prevailing in society with emphasis on sex and using slang and unconventional language is not obscene, observed:

> A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader the novel, whereas obscenity the tendency to deprave and corrupt those whose minds are open to such immoral observe... A novel...which...intends to expose the evils and ills prevailing in the society in various spheres cannot be said to be obscene merely because slang and unconventional language has been used in the book, in which there has been emphasis on sex and description of female bodies and there are narrations of feelings, thoughts and actions in vulgar language. Some portions of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and descriptions given may not appear to be in proper taste. In some, there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference, but certainly not sufficient to bring home to the adolescents any suggestion which is depraving or lascivious. The author has written this novel for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought in contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and 'will have to read books which are purely religious'.[64]

In *Promilla Kapur v Yesh Pal Bhasin* ,[65] the Delhi High Court, in a tone similar to that of the Supreme Court, ruled that a book on call-girls in India written by a sociologist narrating, *inter alia*, description of encounters of some of the young girls in the profession with unscrupulous males and of their first experience with sex, cannot be termed as obscene as it dealt with the ways and means of running the profession and the methods of encountering them.

Mere reference to sex cannot also be considered obscene in the legal sense without examining the context of the reference. A personal opinion, in the context of survey conducted by a news magazine 'India Today' on sexual habits of people in big cities, of a celebrity that pre-marital sex, in the context of live-in relationships, should be accepted by the society and the latter should come out of the thinking that at the time of marriage the girl should be with virginity, was held by the Supreme Court not obscene within the meaning of s 292. It reasoned that such published communication, in the long run, prompts a dialogue within society wherein people can choose to either defend or question the existing social mores.[66]

However, it turns to be obscene when it intends only to exploit the base instinct in human nature and to rouse immoral sex.[67]

Test of Obscenity

The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. The standards of contemporary society in India are also fast changing. So, in judging whether a particular book or article is obscene, one has to see whether a class, not an isolated case, into whose hands the book, article or story falls, suffer in their moral outlook or become depraved by reading it or

might have impure and lecherous thoughts aroused in their minds. The Supreme Court, tracing the origin of s 292 of the Penal Code in the British statute criminalising obscenity by Lord Campbell in 1857, quoted with approval the following test of obscenity laid down in *R v Hicklin* [68] by Cockburn CJ. It reads:

> ...[T]he test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall... It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.[69]

He also stated that a publication must be regarded as obscene, if it is 'calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come'.

The 'test of obscenity' laid down by Cockburn, CJ, according to the apex court, 'has been uniformly applied in India'. However, admitting the difficulty in evolving a true test of obscenity, the Supreme Court observed:

> The laying down of the true test is not rendered any easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross. ...The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not.[70]

The test of obscenity, in ultimate analysis, is whether the tendency of the matter in question is to deprave and corrupt those whose minds are open to immoral influence and into whose hands a publication of that sort may fall.[71] If it is quite certain that the matter would suggest to the minds of the young of either sex or of persons of more advanced years, thoughts of a most impure and libidinous character, the impugned matter is obscene.[72]

Further, it is the duty of the court to take an overall view of the entire work to determine whether a particular work is obscene or not.

In deciding if a book is obscene, the judge may have to take into account the intention of the author. In *Martin Secker and Warburg*,[73] the judge told the jury: 'You will have to consider whether the author was pursuing an honest purpose and an honest thread of thoughts or whether that was all just a bit of camouflage.'

In judging the question of obscenity the Judge in the first place is expected to place himself in the position of the author and from the view point of the author he should try to understand what the author seeks to convey and what the author conveys has any literary and artistic value and thereafter the judge needs to place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have on the minds of the readers.[74] A judge then should apply his judicial mind dispassionately to decide whether the book in question is obscene or not by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. He, however, with a view to eliminating his subjective or personal opinions hidden in his sub-conscious mind to influence his objective assessment, may rely upon the evidence on record and opinions of authors of repute.[75]

The question whether a particular work is obscene or not, is not a matter of oral evidence of a writer and a critic. The offending novel and the portions, which are subject of the charge of obscenity, must be judged by the court in the light of s 292, IPC, and provisions of the Constitution.[76] Obscenity in a story book must be judged by the court itself having regard to the oral testimony.[77]

In *Raj Kapoor v Laxman* ,[78] it was held by the Supreme Court that the prosecution of the producers and act ors of the film *Satyam Shivam Sundaram*under s 292, IPC, was unsustainable, as it had been duly certified as worthy of exhibition under s 5A of the Cinematograph Act 1952. The certificate was held justifiable under s 79, IPC.[79]

In *Director General, Doordarshan v Anand Patwardhan* [80] the Supreme Court found nothing obscene in a documentary film showcasing a real picture of crime and violence against women and members of various

religious groups perpetrated by politically motivated leaders for political, social and personal gains. It held that the view taken by the Director General of *Doordarshan* that the film was not suitable for telecast on Television was erroneous as the film portrayed certain evils in the Indian society and it did not seek to cater to the prurient interests in any person.

Punishment

Under s 292(2) the sale, distribution or public exhibition of obscene books, pamphlets etc. is made punishable. Import, export, possession of obscene material for the purpose of sale, distribution, etc, is also made punishable. Mere possession of obscene material sans the purpose of sale or distribution, however, does not come under the penal provision. A high court, therefore, allowed the persons who were found viewing obscene films on television with the help of VCR to go with no punishment.[81] A mere possession of obscene material meant for satisfying his fugitive passion for sex does make a person liable. But a person becomes liable under the section if he has some mercenary interest in possessing obscene material. A high court, hence, held a person liable under this section who kept bleu film cassette for the purpose of its sale, hire or circulation.[82]

Section 292(2) provides for simple or rigorous imprisonment for a term up to two years and a fine of up to two thousand rupees on first conviction. The term of imprisonment may extend to five years and the amount of fine to five thousand rupees on the second and subsequent convictions.

The section does not, however, make knowledge of obscenity an ingredient of the offence, unlike many other sections which open with the words 'whoever knowingly or negligently...etc.' If knowledge were made a part of the guilty act and if the prosecution were required to prove it, it would place an almost impenetrable defence in the hands of the offenders. To escape liability, it is open to the accused to prove his lack of knowledge. Otherwise, the court will presume that he is guilty unless he can establish that the sale was without his knowledge or consent.[83] However, the absence of knowledge of obscenity may be taken as a mitigating factor. But the prosecution is required to prove that the accused has actually sold or kept for sale the offending article.

In *Uttam Singh v Delhi Administration* ,[84] the accused was found selling a packet of playing cards portraying on the reverse luridly obscene naked pictures of men and women in pornographic sexual postures. When his shop was raided, two more similar packets were recovered from him. The accused was sentenced by the trial court to six months' rigorous imprisonment and ordered to pay a fine of five hundred rupees and in default, to undergo rigorous imprisonment for another three months. The sentence was also confirmed by the high court. The Supreme Court, rejecting the appeal, refused to show any leniency in the punishment on the ground that the objectionable articles were likely to have corrupting influence on younger generation.

In *Avnish Bajaj v State* ,[85] the Delhi High Court ruled that listing of an explicit obscene video-clip for sale on web inviting potential buyers to purchase it comes within the purview of s 292(2)(a) and 292(2)(d),

Section 293. Sale, etc., of obscene objects to young person.--Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees.

Introduction

Section 293 provides for enhanced punishment when an obscene object is sold, distributed, exhibited or circulated to young persons below the age of 20 years. The punishment provided for committing any of the act s provided in the section is simple or rigorous imprisonment for a term up to three years with a fine of up to two thousand rupees on the first conviction. In the event of second or subsequent conviction, the term of imprisonment may be extended up to seven years and the amount of fine may be increased up to five thousand rupees.

Section 294. Obscene acts and songs.--Whoever, to the annoyance of others--

(a) does any obscene act in any public place, or
(b) sings, recites or utters any obscene songs, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Introduction

Section 294 intends to promote public decency and morality. It encompasses the offence called in common parlance 'eve teasing'. In order to secure a conviction under s 294 the prosecution has to prove two particulars, namely: (i) the accused has done an obscene act in any public place or has sung, recited or uttered any obscene songs or words in or near any public place; and (ii) has so caused annoyance to others. If the act complained of is not obscene, or is not done in any public place, or the song recited or uttered is not obscene, or is not sung, received or uttered in or near any public place, or that it causes no annoyance to others, the offence is, obviously, not committed.[86] Uttering words in a private place, therefore, does not constitute an offence under s 294.[87]

In *Deepa v SI of Police* ,[88] the Kerala High Court was called upon to adjudge the question as to whether cabaret dance performed in a posh hotel attracts s 294 of the IPC. The obscene acts alleged against the cabaret dancers were that they exposed their private parts and danced to the annoyance of the audience gesturing in such a way, along with the music as to arouse lust. The other participants and mangers of the hotel were charge-sheeted for abetting the offence. The court framed three issues for judicial deliberation. They were: (i) whether the scene of occurrences (posh hotels) are 'public place'; (ii) whether the act s alleged to have been performed are 'obscene' acts; and (iii) whether these act s were capable of causing annoyance to others.

The high court held that an enclosed area in a posh hotel where cabaret dance is performed cannot be said to be a private place, merely by the reason that entry is restricted to persons purchasing highly priced tickets and the costly drinks and food served. Hotels and restaurants are places to which public in general have access irrespective caste, creed, nationality, sex, age or income. It also ruled that the acts alleged against the artists amount to obscenity, as they are capable of depraving and corrupting those whose minds are open to such immoral influences. Conceptions of morality and decency in India, it opined, have not undergone that much of change to treat performances in nudity as obscene only when it goes to the extent of appealing to the carnal side of human nature. Keeping in view the object of s 294, the high court refused to accept the contention that persons who willingly come to witness cabaret dance with the full knowledge of what is going to happen and even if annoyance is caused, they have no right to complain. It held that persons attending a cabaret show in a hotel or a restaurant can complain that annoyance was caused by the obscenity of the performance. Sections 87 and 88 of the IPC are not a bar to such a complaint merely because the persons attended the cabaret show with full knowledge of what was going to be performed. There is no question of crime being obviated by consent, as s 294 is concerned with the annoyance on the basis of obscenity at public places which is likely to corrupt those whose minds are open to immoral influences and the consequent damage to public order, decency and morality. Ignoring the provisions s 294, an obscene performance can be organised with impunity before an exclusively willing crowd even in public places.

However, the Bombay High Court, in *State of Maharashtra v Miss Joyce* ,[89] in situations similar to the *Deepa* case, ruled that an enclosed area in a posh hotel where cabaret dance is conducted limiting entry to persons who purchase the tickets is not a 'public place'. It also held that a person of common prudence with average common sense, who is reasonably presumed to know or ought to know that in a cabaret dance he will be exposed to sexual and erotic gestures accompanied with music by women and who can avoid the consequential mental harm of annoyance or psychological shocks by not buying tickets of such obscene cabaret dance, cannot, by virtue of provisions of ss 87 and 88 of the IPC, have any right to later on complain that he was aggrieved and annoyed by the cabaret dance. Section 294, therefore, cannot come into play the person witnessing obscenity is not actually 'annoyed' by the obscene act s.

In *Sadhna v State* ,[90] the Delhi High Court also ruled that an adult customer who goes to a hotel where cabaret show is run looks forward to be entertained by obscenity and cannot complain of annoyance to which, he is deemed to have consented. In *Narendra H Khurana v Commissioner of Police* ,[91]a two-judge Bench of the Bombay High Court, however, has ruled that an enclosed area in a posh hotel where cabaret dance is

performed cannot be said to be a private place merely by reason that entry is restricted to persons purchasing the highly priced tickets and costly food and drinks are served. However, it endorsed the earlier dictum of the high court that cabaret dances, where indecent and obscene act*per se* is involved, cannot attract provisions of s 294 unless and until such an obscene act has act ually 'annoyed' any of the persons who 'witnessed' such show.

In the absence of any specific law dealing with eve-teasing and taking note of the fact that provisions of the Protection of Women from Sexual Harassment at Workplace Act are not adequate to curb eve-teasing, the Supreme Court in *Deputy Inspector General of Police v S Samuthiram* [92] has issued the following directions:

(1) All the State Governments and Union Territories are directed to depute plain-clothed female police officers in the precincts of bus-stands and stops, railway stations, metro stations, cinema theaters, shopping malls, parks, beaches, public service vehicles, places of worship etc. so as to monitor and supervise incidents of eve-teasing.
(2) There will be a further direction to the State Governments and Union Territories to install CCTV in strategic positions which itself would be deterrent and if detected, the offender could be caught.
(3) Persons in-charge of the educational institutions, places of worship, cinema theaters, railway stations, bus-stands have to take steps as they deem fit to prevent eve-teasing, within their precincts and on a complaint being made, they must pass on the information to the nearest police station or the Women's Help Centre.
(4) Where any incident of eve-teasing is committed in a public service vehicle either by the passengers or the persons in charge of the vehicle, the crew of such vehicle shall, on a complaint made by the aggrieved person, take such vehicle to the nearest police station and give information to the police. Failure to do so should lead to cancellation of the permit to ply.
(5) State Governments and Union Territories are directed to establish Women's Helpline in various cities and towns, so as to curb eve-teasing within three months.
(6) Suitable boards cautioning such act of eve-teasing be exhibited in all public places including precincts of educational institutions, bus-stands, railway stations, cinema theaters, parks, beaches, public service vehicle, places of worship etc.
(7) Responsibility is also on the passers-by and on noticing such incident, they should also report the same to the nearest police station or to Women's Helpline to save the victims from such crimes.
(8) The State Governments and Union Territories of India would take adequate and effective measures by issuing suitable instructions to the concerned authorities including the District Collectors and the District Superintendent of Police so as to take effective and proper measures to curb such incidents of eve-teasing.[93]

LOTTERY

Section 294A. Keeping lottery office.--Whoever keeps any office or place for the purpose of drawing any lottery not being a State lottery or a lottery authorised by the State Government, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear from doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees.

Introduction

The law disapproves of lottery and gambling, for they both promote the circulation of money by chance. The reason behind is obviously the dominant importance given to chance, as well as the encouragement given to the temptation to squander money. They are moreover opposed to honest labour and industry, upon which the happiness of society and individuals depends. In both lottery and gambling, there is chance, but gam-

bling means the playing of a game at which participants are present, while in lottery, such participants need not be present. In gambling, there may be a display of certain skill, as in throwing the dice or the like.

This section intends only to suppress lotteries unauthorised by the government and it does this by the two fold method of: (1) punishing the keeping of offices or places for drawing them; and (2) by punishing the publication of any advertisement relating to them.

A lottery is a game of chance,[94] in which either the event of gain or loss of the absolute right to the prize or prizes by the persons concerned, is made wholly dependant upon the drawing or casting of lots. It is the staking of money depending upon a contingency or an uncertain event, which is to be rendered certain by drawing of a lot or by chance. The fact that it involves a certain degree of skill, does not make it any the less a lottery, if the obtaining of a prize is determined more by chance than by skill.

However, in cases where persons enter into an agreement of payment of subscriptions by one which in turn is settled by casting lots, it will not be considered as lottery. Where, for instance, 20 persons agreed to subscribe Rs 200 each, by monthly installments of Rs 10, on a condition that each in his turn by lot should take the whole of the subscriptions for a month, the agreement was held not to be a lottery.[95] Being unattended with risk, speculation and uncertainty which make lotteries void, such a transaction has been held to constitute a good contract, unaffected by the provisions of this section.

PROPOSALS FOR REFORM

The Fifth Law Commission has offered a set of substantive, formal and penal proposals for reform. A few significant are mentioned below:[96]

(1) Section 268, defining 'public nuisance', and s 290, prescribing punishment for causing public nuisance, other than that dealt with under the Penal Code, should be merged together for better clarity.

(2) Section 269 and s 270 should be merged and revised with the recommended enhanced punishment.

(3) The word 'malignantly' should be deleted from s 270 as it has some 'condemnatory overtone' and to maintain the hitherto distinction between 'negligent acts' and 'intentional act s' for prescribing comparatively severe punishment for 'intentional acts'.

(4) Fouling of the water of 'public well' should be specifically mentioned in s 277 and the word 'corrupt' should be deleted therefrom as it has archaic taint and is redundant.

(5) Taking clue from provisions of s 282 and noting the absence in the IPC of a provision parallel thereto, it recommended insertion of a new section (s 279A) in the chapter to deal with 'taking on the road an unsafe vehicle' and thereby 'endangering' life of the passengers.

(6) Highlighting the difficulty in articulating a definite test of 'obscenity' from different judicial pronouncements and s 292(1), IPC, and the practical difficulties in ascertaining, with precision, the key-terms like 'lascivious', 'appeals to the prurient interest', 'tend to deprave or corrupt', and proving the 'exception' based on 'the interest of art or science or literature or learning', the Law Commission recommended that an explicit provision allowing opinions of experts as to scientific literary, artistic, academic or other merits of the publication of books, etc., should be made (either by adding a new sub-section to the existing s 292 of the IPC or by rewording s 45 of the Evidence Act).

(7) Recalling serious consequences of callous and negligent act s or omissions causing 'common injury', 'danger or annoyance', etc., and the existing maximum punishment of imprisonment for a term up to six months provided for most of the instances of 'public nuisance', the Law Commission suggested that punishment for these offences should be enhanced. It also recommended that the existing punishment (of imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both) stipulated under ss 272 to 276 should be increased to three years' imprisonment or fine or both. In the similar spirit, it proposed that punishment provided in ss 277-280, 282-284, 290 and 294 should be enhanced. However, it suggested that the existing punishment of 'imprisonment of

either description for a term which may extend to three months, or with fine or with both' provided under s 294 should be scaled down to 'fine not exceeding one thousand rupees'.

The proposals for insertion of ss 279A and the proposed revision of s 292 found place in the Indian Penal Code (Amendment) Bill 1978 and received endorsement from the Fourteenth Law Commission.[97] In addition, the 1978 Amendment Bill also sought to add two new provisions (ss 292A and 294B) in the IPC. The proposed s 292A, with a view to desisting irresponsible way of printing newspapers, periodicals or other exhibits meant for public view motivated with blackmailing, sought to criminalize the printing of grossly indecent or scurrilous matter or matter intended for blackmailing. It was supplemented with two *explanations*. The first *explanation* intended to keep printing done in good faith outside the purview of the penal provision. While the second *explanation* offered some guidelines of general nature to be taken into account by the courts while determining complicity for printing indecent matter. The proposed s 294B dealt with the punishment for distribution and sale of lottery tickets of a state without authorization of the state government.

However, these proposals could not take the form of law as the Amendment Bill lapsed due to the dissolution of the *Lok Sabha* in 1978.

1 *Khachrulal Bhagirath Agarwal v State of Maharashtra* (2005) 9 SCC 36, 2004 Cr LJ 4634.

2 *Harnandan Lal v Rampalak Mahato* AIR 1939 Pat 460.

3 Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 174.

4 *Bharosa Patak v Emperor* (1912) Cr LJ 183(All) .

5 *Joy Krushna Mohanty v Emperor* AIR 1940 Pat 577.

6 *Santhosh v State of Kerala* (1985) Cr LJ 757(Ker) .

7 *S Venkatramaiah v State of Karnataka* (1989) Cr LJ 789(Kant), 1989 (1) Kar LJ 197.

8 AIR 1916 Mad 847.

9 AIR 1962 SC 1794.

10 AIR 1979 SC 143.

11 Hari Singh Gour, *Penal Law of India*, vol 1, 11th edn, Law Publishers, Allahabad, 1998, p 1936.

12 (1884) ILR 7 Mad 590.

13 (1887) 12 ILR Bom 437.

14 Re *Zaki-Uddin*(1887) ILR 10 All 44.

15 Re *Paung Tha Ri*(1860) PLTR 94.

16 *Janaki Prasad v Karamat Husain* AIR 1931 All 674.

17 19 M 464.

18 25 M 118.

19 AIR 1999 Ker 385.

20 AIR 1999 SC 495, (1998) 8 SCC 296.

21 AIR 2003 SC 664, (2003) 1 SCC 500.

22 *Joseph Kurian v State of Kerala* (1994) 6 SCC 535, (1995) Cr LJ 502(SC) ; *Kailash Chand Gupta v State* (2005) Cr LJ 2846(Del) ; *Pepsico India Holdings, Pvt Ltd v State of Uttar Pradesh* (2011) 2 Crimes 250(Del) .

23 *State v Vikas Mahajan* (2003) Cr LJ 2237(J&K) .

24 *Ram Dayal v King Emperor* AIR 1924 All 214.

25 *Dbawa v Emperor* AIR 1926 Lah 49.

26 *Narumal v Emperor* (1904) 6 Bom LR 520.

27 *State v Vikas Mabajan* (2003) Cr LJ 2237(J&K), 2003 (3) JKJ 268.

28 *Dilipsinb Ramsinb Bbatia v State of Mabarasbtra* (2010) Cr LJ 2014(Bom), 2010 (112) Bom LR 1249.

29 *Ramkewal Singh v State of Bihar* AIR 1954 Pat 309.

30 Re *Muthian*(1898) 1 Weir 229.

31 Re *Vitti Chokan*(1881) ILR 4 Mad 229.

32 *Emperor v Nana Rama* (1904) 6 Bom LR 52.

33 AIR 1999 Ker 385.

34 [1898] 1 QB 491.

35 See, ss 279, 280, 283-289, 304A, 336-338.

36 *Pyarejan v State of Mysore* (1972) Cr LJ 404(Mys) .

37 *Braham Das v State of Himachal Pradesh* (2009) 7 SCC 353, AIR 2009 SC 3181.

38 (1995) Cr LJ 1277 (Ori).

39 AIR 1975 SC 1960.

40 (1998) Cr LJ 3045 (Kant).

41 *Dwarka Das v State of Rajasthan* (1997) Cr LJ 4601(Raj) .

42 *Badri Prasad Tiwari v State* (1994) Cr LJ 389(Guj) .

43 Re *Abdul Latif*AIR 1944 Lah 163.

44 *Babu Santi* 25 BLR 358.

45 Re *Emperor v Hamnarain Sukhailal* AIR 1932 Nag 65.

46 *King v Basdeo* AIR 1940 Rang 176.

47 *Sivarama Pillai v State* AIR 1953 Tr&Coch 173.

48 *State of Himachal Pradesh v Amar Nath* (2002) Cr LJ 495(HP) .

49 (1970) 3 SCC 13.

50 AIR 1965 SC 1616.

51 (1961) 1 KLR 205.

52 AIR 1965 SC 881, (1965) Cr LJ 8(SC) .

53 Ibid, paras 8-9.

54 *KA Abbas v Union of India* AIR 1971 SC 481.

55 *Sreen Saksena v Emperor* AIR 1940 Cal 290.

56 *Zafar Ahmad Khan v State* AIR 1963 All 105, (1963) Cr LJ 273(All) ; *State v Thakur Prasad* AIR 1959 All 49, 1959 Cri LJ 9(All) .

57 *Aveek Sarkar v State of West Bengal* (2014) 4 SCC 257, (2014) 2 SCALE 16.

58 *Sreeram Saksena v Emperor* AIR 1940 Cal 290.

59 *Vinay Mohan Sharma v Delhi Administration* (2008) Cr LJ 1672(Del), 146 (2008) DLT 14.

60 *Aveek Sarkar v State of West Bengal* (2014) 4 SCC 257, (2014) 2 SCALE 16.

61 *Neelam Mahajan Singh v Commissioner of Police* (1996) Cr LJ 2725(Cal) .

62 *Emperor v Harnam Das* AIR 1947 Lah 383.

63 AIR 1986 SC 967, (1986) Cr LJ 24(SC) .

64 Ibid, para 34.

65 (1989) Cr LJ 1241 (Del).

66 *S Khushboo v Kanniamal* AIR 2010 SC 3196, (2010) 5 SCC 600, (2010) Cr LJ 2828(SC) .

67 *Sukanta Haldar v State of West Bengal* AIR 1952 Cal 214.

68 [1868] 3 QB 360.

69 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, (1965) Cr LJ 8(SC), para 14.

70 Ibid, para 16.

71 However, recently the Supreme Court has doubted the 'Hicklin Test' as a correct test for determining 'obscenity' and argued that 'contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons' is the correct test. 'Community standard test' rather than 'Hicklin Test' to determine obscenity, it asserts, sounds more correct. See *Aveek Sarkar v State of West Bengal* (2014) 4 SCC 257, (2014) 2 SCALE 16, para 24.

72 See *Chandrakant Kalyandas Kakodkar v State of Maharashtra* AIR 1970 SC 1390, (1969) 2 SCC 687; *State of Uttar Pradesh v Kunjilal* AIR 1970 All 614; *Samaresh Bose v Amal Mitra* AIR 1986 SC 967, (1986) Cr LJ 24(SC) ; *PK Somesnath v State of Kerala* (1990) Cr LJ 542(Ker) ; *Neelam Mahajan Singh v Commr of Police* (1996) Cr LJ 2725(Del) .

73 [1954] 2 All ER 683.

74 *Chandrakant Kalyandas Kakodkar v State of Maharashtra* AIR 1970 SC 1390, (1969) 2 SCC 687.

75 *Samaresh Bose v Amal Mitra* AIR 1986 SC 967, (1986) Cr LJ 24(SC) .

76 Ibid.

77 *Chandrakant Kalyandas Kakodkar v State of Maharashtra* AIR 1970 SC 1390, (1969) 2 SCC 687.

78 AIR 1980 SC 605; but see, *Raj Kapoor v State* AIR 1980 SC 258, (1980) Cr LJ 202(SC) .

79 See also *Bobby International v Om Pal Singh* AIR 1996 SC 1846, wherein it was held that scenes of rape and nudity do not amount to obscenity as they were in consonance with theme of the movie (*Bandit Queen*) and were intended not to arouse prurient or lascivious thoughts but revulsion against perpetrators and pity for victim.

80 (2006) 8 SCC 433, AIR 2006 SC 3346.

81 *Jagdish Chavla v State of Rajasthan* (1999) Cr LJ 2562(Raj) ; *Sri Deepankar Chowdari v State of Karnataka* (2008) Cr LJ 3408(Kant), 2008 (4) KCCR 2720.

82 *Abdul Rasheed v State of Kerala* (2008) Cr LJ 3480(Ker), 2008 (2) KLJ 367.

83 *Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881, (1965) Cr LJ 8(SC) .

84 AIR 1974 SC 1230, (1974) Cr LJ 923(SC) (1974) 4 SCC 590.

85 (2008) 150 DLT 769, 2008 (105) DRJ 721.

86 *Pawan Kumar v State of Haryana* AIR 1996 SC 3300, (1996) 4 SCC 17; *Amulya @ Kalia Behra v State of Orissa* (2011) I Crimes 678.

87 *Saraswati v State of Tamil Nadu* (2002) Cr LJ 1420(Mad) .

88 (1986) Cr LJ 1120 (Ker).

89 (1973) ILR Bom 1299.

90 (1981) 19 DLT 210, (1982) ILR Delhi 339.

91 (2004) Cr LJ 3393 (Bom).

92 AIR 2013 SC 14, (2013) 1 SCC 598.

93 Ibid., para 32.

94 *Suresh Kumar v State* (1978) All LJ 976.

95 *Kamakshi v Appavu* IMI and CR 441-450.

96 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, paras 14.1-14.6 & 14.9, 14.13-14.15.

97 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.43, 12.44, and 12.46.

CHAPTER 28

Coins and Government Stamps

(Indian Penal Code 1860,Sections 230 to 263A)

INTRODUCTION

Chapter XII of the IPC deals with offences relating to coins and government stamps. Sections 230-254 deal with coins and ss 255-263A with government stamps. When paper currency was introduced, ss 489A-489E were added in order to deal with similar offences in relation to currency notes by the Currency-Notes Forgery Act 1899. Before the addition of these sections, offences in relation to currency could be punished only under s 467 or s 471 dealing with forgery or use of valuable securities. In short, the counterfeiting of currency-notes is dealt with under ch XVIII, IPC, which covers all offences relating to property, including offences relating to currency notes and banknotes.

PART A - COINS

The IPC draws a distinction between 'coins' and 'Indian coins'. More deterrent punishments are prescribed for offences relating to Indian coins than in relation to other coins. The words 'coin' and 'Indian coin' are defined in s 230, IPC.

Section 230. 'Coin' defined.--Coin is metal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.

Indian coin.--Indian coin is metal stamped and issued by the authority of the Government of India in order to be used as money; and metal which has been so stamped and issued shall continue to be Indian coin for the purposes of this Chapter, notwithstanding that it may have ceased to be used as money.

Illustrations

(a) Cowries are not coin.

(b) Lumps of unstamped copper, though used as money, are not coin.
(c) Medals are not coin, inasmuch as they are not intended to be used as money.
(d) The coin denominated as the Company's rupee is Indian coin.
(e) The 'Farrukhabad rupee' which was formerly used as money under the authority of the Government of India is Indian coin although it is no longer so used.

The following are the chief characteristics of a 'coin' as defined in IPC:

(1) Coin must be made of a metal;
(2) It must be used as money;
(3) It must be stamped;
(4) It must have been issued by some state or sovereign power. Thus, coins struck in Sri Lanka, China, Russia, France or Germany are all coins.
(5) The issuing of such coin must have been for the purpose of being used as money. It must be current, i.e., used for the time being as money. Thus, old and obsolete coins now out of circulation are not coins.

The offences relating to coins can be divided into three classes. They are:

(1) Counterfeiting;
(2) Criminal act s of mint employees;
(3) Alteration of coin.

COUNTERFEITING

Section 231. Counterfeiting coin.--Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.--A person commits this offence who intending to practice deception, or knowing it to be likely that deception will thereby be practiced, causes a genuine coin to appear like a different coin.

Section 232. Counterfeiting Indian coin.--Whoever counterfeits, or knowingly performs any part of the process of counterfeiting Indian coin, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Introduction

The term 'counterfeiting' is used here as defined in s 28, where it is said that 'a person is said to counterfeit who causes one thing to resemble another thing, intending by means of that resemblance to practice deception or knowing it to be likely that deception will thereby be practised'.

It is not essential to counterfeiting that the imitation should be exact. If a person causes a genuine coin to appear like a different coin, he is guilty under the section. It is sufficient if the resemblance of the counterfeit coin to the genuine one is so close that it is capable of being circulated as such.[1]

Dishonesty and fraud are not the essential pre-requisites of counterfeiting; intention to practice deception or knowledge that deception is likely to be practised, are alone sufficient.

Coin means a current coin. Thus, a coin of the time of Emperor Akbar or a gold *mohur* of the reign of Shahjahan cannot be deemed to be a coin, inasmuch as it is not in use.[2] But the section itself has recognised two exceptions, namely, the company's rupee and the Farrukhabad rupee.

The gist of the offence is intention to practise deceptions, which is inferred from closeness of imitation as explained in s 28. In a case where the accused placed counterfeited coins in the house of another, in order to involve him in a criminal case, but not with the intention to defraud the government or for self gain, it was held that he could not be convicted under s 231, though he may be guilty under s 211 or under s 195 of the IPC for fabricating false evidence.[3]

Making or Selling Counterfeiting Coin

Section 233. Making or selling instrument for counterfeiting coin.--Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 234. Making or selling instrument for counterfeiting Indian coin.-- Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting Indian coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Possession of Instrument or Material for Counterfeiting Coin

Section 235. Possession of instrument or material for the purpose of using the same for counterfeiting coin.--Whoever is in possession of any instrument or material, for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if Indian coin.--and if the coin to be counterfeited is Indian coin, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Introduction

These sections make mere acts of preparation for committing offences of coining punishable.

In the case of prosecution against a goldsmith and his son for having found buried counterfeit coins underneath the verandah of their house, the Patna High Court acquitted them on the following grounds. The lower court had convicted the father on the finding that prima facie, the shop was in his possession. There was, however, evidence that the son ordinarily worked in the shop, while the father looked after cultivation. Hence, the high court held that the adverse presumption as against the father has been satisfactorily rebutted. As regards the son who used the shop, he too was acquitted, as the verandah being open, other persons had equal access to it.[4]

The mere fact that a wife knows that certain implements and materials are in the possession of her husband and the place where they were kept, will not make her liable. The same rule is applicable to other relations of a husband who may be residing in the same house. It is the possession of any instrument or material for the purpose of counterfeiting that is made punishable under the section and not the knowledge that someone else is in such possession.[5]

The word 'possession' connotes the intention to exercise power or control over the object possessed and therefore it necessarily implies that the possessor has been conscious of the possibility of exercising that power or control. It implies conscious retention of an object.[6] Therefore, mere possession of instruments and material capable of counterfeiting coins does not amount to an offence unless it is proved by the prosecution that the accused intended to use them for counterfeiting of coins.[7]

Section 236. Abetting in India the counterfeiting out of India of coin.--Whoever, being within India, abets the counterfeiting of coin out of India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within India.

Section 236 punishes a person in India, whether an Indian or a foreigner, who supplies instruments or materials for the purpose of counterfeiting of coins, or renders assistance in any other way.

Import or Export of Counterfeit Coin

Section 237. Import or export of counterfeit coin.--Whoever imports into India, or exports therefrom, any counterfeit coin, knowingly or having reason to believe that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 238. Import or export of counterfeits of the Indian coin.--Whoever imports into India, or exports therefrom, any counterfeit coin, which he knows or has reason to believe to be a counterfeit of Indian coin, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Sections 237 and 238 deal with the offence of an import or export of any coin known by the importer, or which he has reason to believe, to be counterfeit. Essential ingredients of these provisions are similar except that when the counterfeit coin imported and exported is one of Indian coin, s 238 is attracted with enhanced punishment. When the counterfeit coin is of any other coin, s 237 is warranted.

Delivery of Counterfeit Coin

Section 239. Delivery of coin, possessed with knowledge that it is counterfeit.-- Whoever, having any counterfeit coin, which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Section 240. Delivery of Indian coin, possessed with knowledge that it is counterfeit.--Whoever, having any counterfeit coin, which is a counterfeit of Indian coin, and which, at the time when he became possessed of it, he knew to be a counterfeit of Indian coin, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 241. Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.--Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Illustration

A, a coiner, delivers counterfeit Company's rupees to his accomplice *B*, for the purpose of uttering them. *B* sells the rupees to *C*, another utterer, who buys them knowing them to be counterfeit. *C* pays away the rupees for goods to *D*, who receives them, not knowing them to be counterfeit. *D*, after receiving the rupees, discovers that they are counterfeit and pays them as if they were good. Here *D* is punishable only under this section, but *B* and *C* are punishable under section 239 or 240, as the case may be.

Section 242. Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof.--Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 243. Possession of Indian coin by person who knew it to be counterfeit when he became possessed thereof.--Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, which is a counterfeit of Indian coin, having known at the time when he became possessed of it that it was522

counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Introduction

Sections 239-243 create three classes of offences, namely, (i) delivery to another of coin possessed with the knowledge that it is counterfeit (ss 239 and 240); (ii) deliver to another of coin as genuine, which when first possessed, the deliverer did not know to be counterfeit (s 241); and (iii) possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof (ss 242 and 243).

Section 239 deals with the offence of delivery of counterfeit coin possessed with knowledge that it is counterfeit and punishes the wrongdoer with imprisonment for a term up to five years. While s 240, which deals with an aggravated form of the offence created under s 239, comes into play when the offence relates with delivery of Indian coin. Section 241 punishes a casual possessor of base coin. Sections 242 and 243, on the other hand, make mere possession of a counterfeit coin and Indian coin by a person who knew it to be counterfeit when he became possessed of it and keeps it fraudulently or with intent to defraud an offence respectively.

Possession must be with intent to defraud, and only possession of the coin which the person in possession knew to be counterfeit at the time he became possessed of it is not criminal. A person may get possession of a counterfeit coin without knowledge that it is counterfeit. He may, then discover its true nature. Still, he may keep it with the idea of passing it on to another at a suitable opportunity. His possession of it is not criminal, because he had no knowledge of its spuriousness at the time he came into possession of it.[8] Again, if a person knowingly purchases a spurious coin for collection, his possession is not criminal for he had no intention to defraud anybody.

CRIMINAL ACTS OF MINT EMPLOYEES

Sections 244 and 245 are directed towards punishing employees at a mint who pilfer bullion used at the mint for coinage of money and unlawfully remove any coining instruments or tools from a mint respectively. These sections, which are self-explanatory, read as under.

Section 244. Person employed in mint causing coin to be of different weight or composition from that fixed by law.--Whoever, being employed in any mint lawfully established in India, does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 245. Unlawfully taking coining instrument from mint.--Whoever, without lawful authority; takes out of any mint, lawfully established in India, any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

ALTERATION OF COINS

Sections 246-254 deal with different offences relating to alteration of coins.

Section 246. Fraudulently or dishonestly diminishing weight or altering composition of coin.--Whoever fraudulently or dishonestly performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.--A person who scoops out part of the coin and puts anything else into the cavity alters the composition of that coin.

Section 247. Fraudulently or dishonestly diminishing weight or altering composition of Indian coin.--Whoever fraudulently or dishonestly performs on any Indian coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 248. Altering appearance of coin with intent that it shall pass as coin of different description.--Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 249. Altering appearance of Indian coin with intent that it shall pass as coin of different description.--Whoever performs on any Indian coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 250. Delivery of coin, possessed with knowledge that it is altered.-- Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Section 251. Delivery of Indian coin, possessed with knowledge that it is altered.--Whoever, having coin in his possession with respect to which the offence defined in section 247 or section 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 252. Possession of coin by person who knew it to be altered when he became possessed thereof.--Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the section 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 253. Possession of Indian coin by person who knew it to be altered when he became possessed thereof.--Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 247 or 249 has been committed, having known at the time of becoming possessed thereof, that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Section 254. Delivery of coin as genuine which, when first possessed, the deliverer did not know to be altered.--Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

PART B - GOVERNMENT STAMPS

Sections 255-263-A deal with offences relating to Government stamps. These stamps are impressions upon paper, parchment, or any material used for writing and are sold for the purpose of revenue.

Section 255. Counterfeiting Government stamp.--Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

Section 256. Having possession of instrument or material for counterfeiting Government stamp.--Whoever has in his possession any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 257. Making or selling instrument for counterfeiting Government stamp.--Whoever makes or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose

of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 258. Sale of counterfeit Government stamp.--Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 259. Having possession of counterfeit Government stamp.--Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 260. Using as genuine a Government stamp known to be counterfeit.-- Whoever uses as genuine any stamp, knowing it to be counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Section 261. Effacing, writing from substance bearing Government stamp, or removing from document a stamp used for it, with intent to cause loss to Government.--Whoever, fraudulently or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 262. Using Government stamp known to have been before used.-- Whoever, fraudulently or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 263. Erasure of mark denoting that stamp has been used.--Whoever, fraudulently or with intent to cause loss to Government, erases or removes from a stamp issued by the Government for the purpose of revenue, any mark, put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession or sells or disposes of any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 263A. Prohibition of fictitious stamps.--

(1) Whoever--
  (a) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or
  (b) has in his possession, without lawful excuse, any fictitious stamp, or
  (c) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and, if seized, shall be forfeited.

(3) In this section 'fictitious stamp' means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage, or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263, both inclusive, the word 'Government', when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or

persons authorized by law to administer executive Government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.

PART C - PROPOSALS FOR REFORM

The Fifth Law Commission was not happy with the structural framework of the chapter. It recommended amalgamation, rearrangement and redrafting of most of the sections of the chapter.[9]

(1) It recommended that ss 489A to 489E, dealing with forging or counterfeiting of currency-notes and bank-notes and clustered under chapter XVIII of the Penal Code should be transferred to the present chapter XII, dealing with offences relating to coin and government stamps, as they rightly belong to the latter, and should be placed at the beginning of the current chapter. The caption of the instant chapter, to suit the proposed changes, should be altered to 'Of Offences Relating to Currency-notes, Coins and Government Stamps'.

(2) It recommended that ss 231 and 232; 233-235; 237 and 238; 239, 240 and 241; 242 and 243; 256 and 257, and 258-260 should be combined.

(3) It recommended that ss 236 and ss 246-254; *illustrations* to s 230, and *explanation* of s 255 should be deleted.

(4) It suggested redrafting and renumbering of ss 255-263, and revision and replacement of ss 231-254 by ss 236-242, and of s 263A by the renumbered ss 250 and 251.

(5) It suggested that the punishment of life imprisonment stipulated under s 255 should be replaced by rigorous imprisonment for ten years.

(6) Anticipating the use of automatic vending machines for selling various articles and even services or for collecting fares and tolls are likely to come into vogue in the near future, realizing that such machines are usually operated by inserting the requisite coin, or other valuable token, and recalling the experience of other countries that these machines, rather their owners, are cheated by dishonest persons inserting 'slugs' instead of coins, the Law Commission suggested that such a harmful and dishonest conduct should be made punishable under the IPC. It, accordingly, recommended that a new section (s 243) should be inserted in the present chapter for dealing with the use of 'slug' in lieu of the requisite coin or a valuable token.

The Indian Penal Code (Amendment) Bill 1978, sought to give effect to these recommended proposals. It also sought to replace the existing s 263A by ss 263A, 263B and 263C. These sections, dealing with offences relating to fictitious postage stamps and preparations to commit the offences, intended to have a wider net for combating the large-scale use of fictitious stamps.

Both the proposals for reform received endorsement of the Fourteenth Law Commission.[10] However, none of these proposals could acquire the status of law as the Amendment Bill lapsed.

1 *State of Uttar Pradesh v HM Ismail* AIR 1960 SC 669.

2 Re *Bapu Yadav*(1874) 11 Bom HCR 172.

3 *Velayyudhan Pillai v Emperor* AIR 1937 Mad 711.

4 *Amrit Sonar v Emperor* AIR 1919 Pat 220.

5 *Zamir Hussain v Crown* AIR 1950 Lah 97; see also *Lachminiya Thakurani v Emperor* AIR 1933 Pat 272.

6 *King Emperor v Hari Maniram Sonar* (1904) Cr LJ 960.

7 *Khadim Hussain v Emperor* AIR 1925 Lah 22; see also Re *Morsan*AIR 1938 Mad 393; *Mohd Baksh v Emperor* AIR 1935 Lah 39; *N Venkata Krishna Rao*(1978) Cr LJ 641(SC) .

8 *Kashi Prasad v State of Uttar Pradesh* AIR 1950 All 732.

9 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, paras 12.3-12.8; 12.12.15-12.21; 12.26-12.33.

10 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.40 & 12.41.

CHAPTER 29

Offences Relating to Weights and Measures

(Indian Penal Code 1860,Sections 264 to 267)

Section 264. Fraudulent use of false instrument for weighing.--Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 265. Fraudulent use of false weight or measure.--Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 266. Being in possession of false weight or measure.--Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 267. Making or selling false weight or measure.--Whoever makes, sells or disposes of any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Chapter XIII, IPC, deals with the above offences. They are not defined with reference to any standard weight or measure. False weight or measure here means that which is not current or in use at the place. Again, mere possession of false weights or measures is no offence. Their use with fraudulent intention alone will make the person, who uses them, liable.

Now, we have the Legal Metrology Act, 2009 (1 of 2010), which, inter alia, has adopted a uniform system of weights and measures, based on the metric system. This Act, repealing the Standards of Weights and Measures Act, 1976, lays down the standards of weights and measures, according to which a metre is the primary unit of length and a kilogram is the primary unit of mass. It deals with different offences relating to false or fraudulent use of weights and measures and provides punishments therefore.

PROPOSALS FOR REFORM

Chapter XIII of the IPC, as mentioned earlier, deals with four major offences relating to weights and measures. These are: (i) fraudulent use of a false weighing instrument; (ii) fraudulent use of a false weight or a false measure of length or capacity; (iii) possessing such instrument, weight or measure; and (iv) making or selling such instrument, weight or measure. The maximum punishment provided for these offences is imprisonment for a term up to one year. It is a matter of experience that unscrupulous traders frequently commit these offences with impunity. The Fifth Law Commission, recalling the incidence of these offences and their social implications and the hardships resulting therefrom, proposed deterrent punishment for these of-

fences. It suggested that the existing maximum punishment of one year's imprisonment be increased to two years' imprisonment.[1]

Clause 112 of the Indian Penal Code (Amendment) Bill 1978 sought to give effect to the Law Commission's proposal for enhanced punishment for the offences created under ch XIII of the IPC.

The Fourteenth Law Commission, after drawing a comparative sketch of the legislative framework of ch XIII of the IPC and of the corresponding penal provisions of the then prevailing Standards of Weights and Measures Act 1976, and of the nature of criminal liability thereunder, and recalling that a complaint for violation of the provisions of the latter statute can be filed only by the director or an authorised authority, recommended retention of the ch XIII with the proposed enhanced punishment.[2]

Against the backdrop of these proposals of reform, it is, however, important to note that the recently enacted the Legal Metrology Act, 2009, which came into force on April 1, 2011, deals with all the offences included in the IPC and provides for punishment, pecuniary as well as custodial, much more severe than that is provided therefor in thePenal Code . The punishment provided for these offences under the Act, invariably, is a fine of up to twenty thousand rupees or imprisonment for a term up to three years.[3]Further, the Act explicitly excludes the application of appropriate provisions of the IPC to the acts that constitute an offence thereunder and the Penal Code .[4]A legal consequence of the provision is that the punishment provided for such offences in the IPC will be inapplicable. The offender will be subjected to the severe punishment provided under the Legal Metrology Act and not the milder one provided under thePenal Code .

1 Law Commission of India, 'Forty-Second Report: The Indian Penal Code', Government of India, 1971, paras 13.1 and 13.3.

2 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, para 12.42.

3 See, ch V, the Legal Metrology Act, 2009.

4 S 51, the Legal Metrology Act, 2009.

[redacted]: Criminal Law,12th Edition/[redacted] Criminal Law 2014/CHAPTER 30 Offences Relating to Religion

CHAPTER 30

Offences Relating to Religion

(Indian Penal Code 1860,Sections 295 to 298)

INTRODUCTION

Chapter XV of the IPC, which deals with offences relating to religion, is framed on the principle that every person has full freedom to follow his own religion and that no one is justified to insult religion or religious feelings of another.[1]It makes any deliberate act s perpetrated by persons of one religious persuasion for the insult or annoyance of persons of another persuasion punishable.[2]

This chapter of the IPC seems to be in tune with the constitutional ethos of India. India being a secular state, the Indian Constitution accords equal protection to all religions. Article 25 of the Constitution guarantees the right to freedom of religion. All persons are equally entitled to freedom of conscience and the right to propagate, practice and profess the religion of their choice. However, the freedom of religion is not an unlimited one. It is subject to public order, morality and health.

However, at the same time, the state has to ensure that religious beliefs of individuals do not become a matter of hostilities, controversies and violence among people. Chapter XV of the IPC ostensibly helps the state in maintaining religious harmony in the country.

The chapter contains five sections--ss 295, 295A, 296, 297 and 298. The offences under this chapter can be broadly classified into the following three divisions:

(1) Defilement of places of worship or objects of veneration (ss 295 and 297);
(2) Outraging or wounding the religious feelings of persons (ss 295A and 298);
(3) Disturbing religious assemblies (s 296).

DEFILEMENT OF PLACES OF WORSHIP

Section 295. Injuring or defiling place of worship with intent to insult the religion of any class.--Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 297. Trespassing on burial places, etc.--Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby,

commits any trespass in any place of worship or on any place of sepulchre, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Ingredients

Section 295 makes destruction, damage or defilement of a place of worship or an object held sacred, with intent to insult the religion, by a class of persons, punishable. It compels people to respect the religious susceptibilities of persons of different religious persuasion or creeds.[3] While s 297 extends the principle of s 295 to places which are treated as sacred. It punishes a person who, with intent to insult religion of another or hurt religious feelings of a person, commits trespass in any place of worship or of sepulture, or any place of burial or a place set apart for the performance of burial rites, or offers and dignity to human corpse or disturbs funeral rites.[4]

The essential ingredients of the sections are: (i) intention or knowledge; (ii) destruction, damage or defilement of: (a) a place of worship; (b) a place of veneration; or (iii) an object held sacred; (iv) Trespass into: (a) a place of worship, (b) a place of sepulture, or (c) a place set for performing funeral rites or a depository of remains of the dead, or trespass with intent to: (a) indignity to human corpse, or (b) disturb funeral rites.

Intention or Knowledge

The essence of the offence under s 295 is the intention of insulting the religious feelings of any person or class of persons by destroying, damaging or defiling a place or worship or an object held sacred by any class of persons. Mere defilement of a place of worship is not an offence under this section without the requisite mens rea.

However, the question whether there was intention to insult is a question of fact, which can be judged depending on the facts and circumstances of each case. The intention of the person concerned can be gathered by the act itself, or by words uttered or gestures, or any other circumstances that might have accompanied the act . In one case,[5] certain Hindus were charged under this section for dismantling a mosque. It appeared that the mosque, which was a very small building, was in charge of no one in particular and had fall-

en into ruin. The accused, whose house adjoined the mosque, removed some building material with the help of some Muslims. The object or the intention with which the materials were removed was not established and hence, it was held that the conviction under s 295 was not warranted because the intention of the accused to insult any religious group was not established. The court saw no reason to believe that the accused in so acting intended to insult the religious feeling of Muslim residents of the village.

In another case,[6] the accused Hindu had inserted the rafters of his roof for convenience into the walls of a mosque. It was held that although the act of the accused damaged the mosque, it was not the intention of the accused to insult any particular religion and hence he was acquitted. In the case of Re *Ratna Mudali*,[7] a Hindu had sexual intercourse with a woman within an enclosure surrounding the tomb of a Mohomedan Fakir, which was held in veneration by some of the Muslims. The act was done in secret and at night. Hence, the court held that having regard to the secrecy and time, s 295 would not be applicable. However, s 297 makes trespass into any place of worship an offence and hence, the accused was convicted under s 297, IPC.

Thus, from the above-mentioned case law, mere defilement of a place of worship is not punishable under s 295. The destruction, damage or defilement should be done with intention to insult the religious feelings of any class of persons or with the knowledge that a class of persons is likely to consider the defilement as an insult to their religion. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention of outraging the religious feelings of that class do not come within the purview of s 295.[8]

Destruction, Damage or Defilement

Generally, the words destroy or damage would mean physically or materially affecting the property concerned. It should also be understood in the physical sense of making a particular object or place unclean, dirty or foul. The word 'defilement' would not mean just physical destruction, but also include situations wherein the place of worship or the object of worship would be rendered ritually or ceremonially impure. The presence of a person belonging to lower caste (untouchable) in a Hindu temple, open to only persons of higher castes was held not defilement within the meaning of s 295, IPC.[9]

Place or Object to be Sacred

Another essential ingredient of these offences is that the destruction or damage should be a place of worship or a sacred place. Whether a particular place or object is a sacred one, is a question of fact. Generally, temples, churches, mosques, synagogues, *kyaungs* (place of worship for Buddhists) are all places of worship and hence sacred places. The use of a hut on an agricultural land as a public mosque, without the permission of the owner of the property and conducting prayers there, does not make the hut a place of worship or a sacred place. In *Joseph v State of Kerala* ,[10] a shed was used as a place of worship by the people. The accused got delivery of the shed through the order of the court. After taking possession, he pulled down the shed and took away the pictures of Hindu gods which were kept in the shed for the purpose of worship. He was charged under s 295. It was held by the Kerala High Court that the accused having got possession of the property through an order of the court, was under the bona fide impression that he had the right to use the property in any manner he liked. He did not want the shed to be used as a prayer hall and therefore pulled it down. In these circumstances, the high court held that the place, which was used as a prayer hall, was a property over which others did not have any right and hence, the accused neither knew nor had any intention that it would hurt the religious feelings of others.

In *S Veerabhadran Chettiar v EV Ramasami Naicker* ,[11] the accused was the leader of Dravidar Kazhagam. The complainant filed a petition against him that the accused was out to vilify a certain section of the Hindu community and did propaganda by holding meetings and writing articles. He held a meeting at the Town Hall *maidan* and broke an idol of God Ganesa. Before breaking the idol, he gave a speech and expressly stated that he intended to insult the religious feelings of the Hindu community. The complainant stated that the act of the accused amounted to offences under ss 295 and 295A, IPC. The trial court dismissed the complaint stating that the mud figure of Ganesa cannot be held to be a sacred object held in veneration. Even a Ganesa idol, if it is abandoned by the people, is unworthy of worship and hence loses its sanctity; and hence the act would not amount to an offence under s 295, IPC. When the matter was taken up to the high court, it held that the words 'object held sacred' will mean only the idols inside the temple and when they are taken in procession on festive occasions. There are several dolls in shops which are the images of deities. These

dolls, which are found in shops, have to be distinguished from the objects held sacred, which can only be when they are duly installed in a temple and from which they are subsequently taken out in procession on festive occasions. What was broken by the accused was nothing more than a doll and hence, no offence was made out. The Supreme Court, which decided the appeal, observed that the high court had given a much too restricted meaning to the words in the section. The Supreme Court observed that by holding that only an idol which is consecrated will come within the meaning of 'object held sacred', the high court placed limitations which were not warranted on a plain reading of the section. The court held that idols were only illustrative of sacred objects. Sacred books like the Bible, Quran or the Granth Sahib are all clearly within the ambit of sacred objects. Any object, however, trivial or destitute of real value in itself, if regarded as sacred by any class of persons, would come within the meaning of the penal section. It is not absolutely necessary that the object held sacred should have been act ually worshipped. An object may be held sacred by a class of persons without being worshiped by them. The courts below, the apex court observed, were rather cynical in so lightly brushing aside the religious susceptibilities of that class of persons to which the complainant belongs. Courts, it cautioned, have to be very circumspect in such matters and should pay due regard to the feelings and religious emotions of persons with different beliefs, irrespective of the consideration whether or not they share that belief or whether they are rational or otherwise, in the opinion of the court.

Trespass into Place of Worship or Place of Sepulture

Section 297 , IPC, makes trespass in any place of worship or on any place of sepulture i.e. burial place, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, an offence. 'Trespass' need not necessarily be a 'criminal trespass' for the purpose of s 297.[12]'Trespass' implies any violent or injurious act committed with the intention of wounding feelings or insulting the religion of any person.[13] It is used in the section to indicate an unjustifiable intrusion upon property in possession of another.[14] In *Queen-Empress v Subhan* ,[15] the respondents, who entered upon a burial place and ploughed up the graves, were held guilty under s 297, IPC, notwithstanding that their entry on the land was by the consent of the owner thereof. Such trespass must be with the intention of wounding the religious feelings of any person. In *Re Ratna Mudali's case*,[16] when a Hindu had sexual intercourse with a woman within an enclosure surrounding the tomb of a Mahomedan Fakir held in veneration by some people, he was convicted for trespassing into a place of sepulture under s 297, IPC, and thereby insulting religion of others. A sexual intercourse by Muslim with a woman of the same faith in a dilapidated mosque was also held guilty under s 297, IPC.[17]

Indignity to Human Corpse and Disturbing Funeral Rites

One of the act s which is an offence under s 297 is causing indignity to a human corpse or disturbing the performance of funeral rites. The word 'disturbance' means some active interference in or hindrance to performance of the funeral ceremonies. In *Basir-ul-Huq v State of West Bengal* ,[18] the mother of one Dhirendranath Bera died. He, along with some people, took the dead body to the cremation grounds. In the meantime, the accused had given a complaint in the police station stating that Dhirendranath had throttled his mother and killed her. When the funeral pyre was in flames, the accused, accompanied by the sub-inspector of police, arrived at the cremation ground. The accused pointed out the dead body and told the sub-inspector that if the body was brought down from the pyre, marks of injury would be found on the body. At this suggestion, the fire was extinguished and the dead body was taken down from the pyre in spite of the protest. On an examination of the dead body, it was found that there were no marks of injury on it. Dhirendranath filed a complaint against the accused under s 297 stating that the accused, because of prior enmity, out of a mala fide intention to harm his reputation and to wound his religious feelings, had trespassed on the cremation ground and caused the dead body to be taken out. The accused was convicted and sentenced to three months rigorous imprisonment.

However, in *Sudarshan Kumar v Gangacharan Dubey* ,[19] the accused police officers, who shot dead a criminal in encounter and after post-mortem took the dead body to the deceased's father who refused to take the body. However, in the meantime a large crowd gathered to see the dead body and in order to avoid law and order problem, roped the body to tower for a few minutes to show the public the results of a life to crime, the Madhya Pradesh High Court held the police officers not guilty of showing any indignity to the dead body.

OUTRAGING OR WOUNDING RELIGIOUS FEELINGS

Section 295A. Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.--Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Section 298. Uttering words, etc., with deliberate intent to wound religious feelings of any person.--Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Introduction

Both these sections (ss 295A and 298) of the IPC deal with acts which are done deliberately with an intent to outrage, wound or insult the religious feelings of persons. Section 295A deals with 'deliberate and malicious' act s intended to outrage the religious feelings or insult the religious beliefs or religion of a class of citizens, while s 298 makes 'deliberate' acts of verbal or visible representation intending to wound religious feelings of another punishable.

Section 295A and s 298 use different phrases. The former speaks of 'deliberate and malicious intention' of 'outraging' religious feelings of a 'class of citizens of India'. The latter makes any utterances or gestures done with 'deliberate intention' of 'wounding' religious feelings of a 'person', punishable. The word 'outraging' is a much a stronger word than 'wounding'. Further, the offence under s 295A is more serious than the offence made punishable under s 298. The punishment provided for 'outraging' the religious feelings (under s 295A) is simple or rigorous imprisonment for a term up to three years, while the term imprisonment provided for 'wounding' religious feelings (under s 298) is up to one year.

S 295A does not punish every act of insult to religion. It punishes only deliberate and malicious acts that insult religion or religious beliefs of a class of citizens. Malice is the negation of bona fides. It denotes wicked, perverse and incorrigible disposition. It means and implies an intention to do an act which is wrongful to the detriment of another. Where a person willfully does an act injurious to another without lawful excuse, it can be said that he has done it maliciously.[20] This means that where any unwitting or careless remark is made, which might have the effect of insulting the religious feelings of persons, but which is done without any deliberate or malicious intention to outrage the religious feelings of any class, then s 295A will not apply. Malice is a state of mind and very often it is not capable of direct and tangible proof. In most cases, it has to be inferred from the circumstances having due regard to the setting, background and connected facts.[21] Malice can also be gathered from the language and behavior of the accused. Malice, however, can be presumed on part of an individual if he has done an injurious act without any lawful and just excuse.[22]

A deliberate malicious act, purportedly outraging the religious feelings, may be verbal, written or a visual representation. An attack on even incredible belief may be capable of causing hurt to feelings.[23] Every criticism or attack on a religious belief, however, does not outrage the religious feelings. A rational criticism of religious tenets of the Hindu religion couched in restrained language for its inculcation of the doctrine of untouchability and for the sanction which it has given to reprehensible treatment meted out to the lower caste, has been considered legitimate. It was held that such a criticism of religious tenets does not amount to an offence under s 295A.[24] A person, who was accused of having injured the feeling of others by printing and pasting of photographs of Hindu God and Goddess on firecrackers, was not held guilty under s 295A on the ground that such a practice was being followed since last many years without any objection.[25]

Section 298 deals with deliberate intentional wounding of religious feelings of another by words, gestures or exhibitions. For convicting a person under s 298, the prosecution must establish affirmatively that he did the act in question with deliberate intention of wounding religious feelings of a section of the public. Mere knowledge of the likelihood that the feelings of other persons might be hurt by his act is not sufficient for holding him guilty under s 298.[26] It, unlike s 295A, does not take into its ambit any written articles purportedly

written to wound religious feelings of others.[27] Nevertheless, it is significant to note here the legislative intent of s 298. It allows fair latitude to religious discussion but at the same time prevents the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. No person is justified in wounding with deliberate intention the religious feelings of his neighbours by words, gestures or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by a person, not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, therefore, does not fall under s 298.[28]

Constitutional Validity of Section 295A

In *Ramji Lal Modi v State of Uttar Pradesh* ,[29] the constitutional validity of s 295A was challenged on the ground that it was violative of the fundamental right to freedom of speech and expression guaranteed in art 19(2) of the Constitution. Upholding the constitutional validity of s 295A, the Constitution Bench of the Supreme Court ruled that s 295A is enacted in the interest of the public order, and it penalises not any and every insult to religion but only the deliberate and malicious outraging religious feelings of a class of persons. It excludes from its purview insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of a class of persons. It punishes only aggravated form of insult to religion that have tendency to disrupt the public order and the section of class of persons. Such a penalisation, the court held, falls within cl (2) of art 19 as being a law imposing a reasonable restriction on the exercise of the right to freedom of speech and expression guaranteed under art 19(1)(a) of the Constitution. Forfeiture of Offending Material

Section 95 , CrPC, gives power to the State Government to forfeit, by notification, any newspaper, book or document (including any painting, drawing, photograph, or any other visible representation), which, in its opinion, is punishable, inter alia, under s 295A of the IPC. The notification declaring such forfeiture has to state the grounds of its opinion. The grounds must be specific. They must have reference to the impact of the matter contained in the offending publication. It is not enough to merely reproduce the language of s 295A without specifying as to how or in what manner there has been contravention of the section. Notification of a government mentioning no grounds for its opinion or exhibiting non-application of its mind is of no legal value and deserves to be nullified.[30]

Thereupon, any police officer may seize copies of such forfeited newspaper, book, or document wherever found in India. The effect of confirmed forfeiture under s 95, Cr PC, is to shut out its publication and distribution for all time.[31]

By virtue of s 96 of the CrPC, the author or publisher can challenge the Notification. The burden of proof lies on the applicant to prove that the forfeited publication did not constitute offence under s 295A, IPC.

Such orders of forfeiture being an infringement of fundamental rights, have to be strictly interpreted and if they fail to provide the grounds on which such forfeiture orders are made, they are liable to be quashed.[32] The offending publication has to be viewed as a whole. The authors view has to be gathered from a broader perspective and in the context of its language and central theme for finding his deliberate and malicious intention to outrage religious feelings. It is not permissible to draw such a conclusion from a few stray solitary lines, paragraphs, or quotations from the publication. It should be seen as a whole.[33] Forfeiture of a publication written in a contemptuous and insulting language pertaining to a religion and thereby deliberately outraging or insulting religious feelings of others is justified.[34]

However, no prosecution under s 295A is possible, except with the prior sanction of the Central Government or of the State Government under s 196, CrPC. If the Government withholds its sanction arbitrarily, it can be challenged in an appropriate proceeding. But no proceedings without such sanction are maintainable and are liable to be quashed.[35] Disturbing Religious Assembly

Section 296. Disturbing religious assembly.--Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

The essential ingredients of this section are: (i) there must be an assembly which is engaged in the performance of religious worship or religious ceremony; (ii) such assembly and performance of religious ceremony

should be lawful; (iii) the accused must cause disturbance to such assembly, and (iv) the accused must do so voluntarily.

Under this section, special protection is given to congregational worship. This section does not cover individual worship. A religious procession may be regarded as a lawful assembly engaged in performance of religious worship. It, however, should not interfere with the ordinary use of the streets by the public or contravene any traffic regulations or lawful directions. Such a regulation does not amount to disturbing the religious assembly. Thus, any disturbance caused to a religious procession will be an offence under this section. Where a mosque is abetting on a highway, going in a procession with music at a time when prayer is going on in the mosque, will be an offence, as such music will necessarily disturb the congregation engaged in the prayer.[36] However, disturbance caused to a procession through a private grove does not warrant s 296.[37]

PROPOSALS FOR REFORM

The Fifth Law Commission has endorsed the propriety of the chapter. However, it expressed three reservations about s 295A: (i) it is 'needlessly hedged in too many conditions'; (ii) the word 'malicious' loses its import when the same section has used the word 'deliberate' for indicating equally reprehensible state of mind of the wrongdoer; and, (iii) s 295A, which refers to 'outraging' of religious feelings of 'a class', in the backdrop of ss 297 and 298, which refer to 'wounding' of religious feelings' of 'any person', seems to accomplish 'any particular point' by using a different expression, i.e., outraging. It, therefore, recommended that the requisite mens rea for s 295A be indicated by the words 'with deliberate intention of wounding the religious feelings'.[38]

It, however, seems that neither the Indian Penal Code (Amendment) Bill 1978 nor the Fourteenth Law Commission[39] has taken cognisance of the proposal for reform suggested by the Fifth Law Commission.

1 Macaulay, Macleod, Anderson and Millett, *A Penal Code Prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note 'J', p 136.

2 *Gopinath Puja Panda Samanta v Ramchandra Deb* AIR 1958 Ori 220.

3 *S Veerabhadra Chettiar v EV Ramaswami Naicker* AIR 1958 SC 1032, (1958) Cr LJ 1565(SC) .

4 *Mustaffa Rahim v Motilal* (1909) Cr LJ 160.

5 *Jan Mohmmad v Narain Das* (1883) All WN 39.

6 *Soban Ram v Crown* 67 IC 686.

7 (1886) ILR 10 Mad 126.

8 *Chandanmal v State of West Bengal* (1986) Cr LJ 182(Cal) .

9 *Atmaran v King Emperor* AIR 1924 Nag 121, (1925) Cr LJ 155(Nag) ; *Kuttichani Moothan v Rama Pattar* AIR 1919 Mad 755, (1919) Cr LJ 960(Mad) . However, these two judgments were rendered in the pre-Constitution era in the context of practice of untouchability. Today, as per art 17 of the Constitution, untouchability is abolished and its practice in any form is forbidden. Further, art 15 of the Constitution prohibits discrimination, inter alia, on grounds of caste. The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989 and the Protection of Civil Rights Act, 1955, may also be referred to in this regard.

10 AIR 1961 Ker 28.

11 AIR 1958 SC 1032, (1958) Cr LJ 1565(SC) .

12 *Ram Prasad v State of Uttar Pradesh* AIR 1952 All 878.

13 *Jhulan Sain v Emperor* (1913) 40 ILR Cal 548.

14 *Jhari Singh v Emperor* AIR 1920 Pat 349.

15 (1896) ILR 18 All 395.

16 (1886) ILR 10 Mad 126.

17 *Maqsud Hussain v Emperor* AIR 1924 All 9.

18 AIR 1953 SC 293.

19 (2000) Cr LJ 1618 (MP).

20 *Trustees of Safdar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ 3689(Del) ; *State of Andhra Pradesh v Goverdhanal Pitti* AIR 2003 SC 1941, (2003) 4 SCC 739.

21 (1962) Cr LJ 146 (Mad).

22 *Baba Khalil Ahmad v State* AIR 1960 All 715.

23 *T Parmeswaran v District Collector* AIR 1988 Ker 175.

24 *Lalai Singh v State of Uttar Pradesh* (1971) Cr LJ 1773(All) .

25 *Bhau v State* (1999) Cr LJ 1230(Bom) .

26 *Chakra Behra v Balakrushna Mohapatra* AIR 1963 Orissa 23, 1963 Cri LJ 212.

27 *Shalibhadra Shah v Swamy Krishna Bharati* (1981) Cr LJ 113(Guj), (1980) GLR 881.

28 Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India*, Pelham Richardson, 1838, Note I, p 137, Also see *Ashok Singhal v State of Uttar Pradesh* (2005) Cr LJ 2324(All) .

29 AIR 1957 SC 620, (1957) Cr LJ 1006(SC) .

30 *Nand Kishore Singh v State of Bihar* AIR 1986 Pat 98; *Trustees of Safdar Hashmi Memorial Trust v Govt of NCT of Delhi* (2001) Cr LJ 3689(Del), 2001(60) DRJ 208.

31 *Baragur Ramchandrappa v State of Karnataka* (2007) 5 SCC 11, (2007) Cr LJ 2933(SC) .

32 *Harnam Das v State of Uttar Pradesh* AIR 1961 SC 1662; *State of Uttar Pradesh v Lalai Singh* AIR 1977 SC 202; see also, *Chandan Mal v State of West Bengal* (1986) Cr LJ 183(Cal) ; *Acharya Rajneesh v Nawal Thakur* (1990) Cr LJ 2511(HP) ; *Anand Chintamani Dighe v State of Maharashtra* (2002) Cr LJ 8(Bom) ; *Sujato Bhadra v State of West Bengal* (2005) Cr LJ 368(Cal), 2005 (4) CHN 601.

33 *State of Maharashtra v Sangharaj Damodar Rupwate* (2010) Cr LJ 4290(SC) (2010) 7 SCC 398.

34 *RV Bhasin v State of Maharashtra, Marine drive Police Station, Indian Muslim League* (2012) Cr LJ 1375(Bom), 2010 (112) Bom LR 154.

35 *Shalibhadra Shah v Swami Krishna Bharati* (1981) Cr LJ 113(Guj) .

36 *Public Prosecutor v Sunku Seethalah* (1910) Cr LJ 400(Mad), (1910) ILR 34 Mad 92; see also *Mohammud Khan v Emperor* AIR 1949 Nag 132.

37 *Bulgar Singh v Emperor* AIR 1933 Oudh 196; but see, *Mahabub Sahib v Sri Sidheswara Swami Temple* AIR 1945 Mad 496; *Prabhas Kumar v Rani Nagar Police Station* (1985) Cr LJ 957(Cal), and *Debnarayan Saodagar v Inspector of Police* (1986) 1 Cal LJ 320.

38 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1971, para 15.2.

39 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997.

CHAPTER 31

Criminal Breach of Contracts of Service

(Indian Penal Code 1860,Section 491)

INTRODUCTION

Chapter XIX of the IPC deals with the breach of a contract of service. Originally, there were three sections in this chapter--ss 490-492, but of these, s 490, which dealt with breach of contract of service during voyage or journey, and s 492, which dealt with breach of contract to serve at a distant place to which servant is taken by his master, have now been repealed by s 2 and Schedule of the Workmen's Breach of Contract (Repealing) Act 1925. The only surviving section which punishes a breach of contract is s 491.

Introducing this section, the Indian Law Commissioners said thus:

> We agree with the great body of Jurists in thinking that, in general a mere breach of contract ought not to be an offence, but only to be the subject of a civil act ion. To this general rule there are, however, some exceptions. ...We also think that persons who contract to take care of infants, of the sick and of the hapless, lay themselves under an obligation of a very peculiar kind, and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment could not repair; they generally come from the lower ranks of life, and would be unable to pay anything. We, therefore, propose to add to this class of contracts the sanction of the penal law.[1]

Section 491. Breach of contract to attend on and supply wants of helpless person.--Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

To warrant s 491, it is required for the prosecution to prove that: (i) the accused entered into a contract to attend on or to supply the wants of a person; (ii) such a contract was valid; (iii) such a person was helpless or incapable of providing for his own safety or of supplying his own wants; and, (iv) such helplessness arose out of youth, or unsoundness of mind, or disease or bodily weakness.

The provision seemingly has some ethical justification for its existence in the IPC as a person affected by the breach of contract dealt thereunder is incapable of looking after his own safety or wants due to his either tender age, insanity, disease or bodily weakness.

However, ordinary cooks do not come under this section. For example, in the case of *Solomon*,[2] the master's wife was ill. The cook, who was to supply the wants of his master's wife, one morning, left his service without warning or permission. On a complaint by his master under this section, it was held that as the accused was engaged only as an ordinary cook to the family, this section did not apply.

PROPOSALS FOR REFORM

The Fifth Law Commission, opining that the chapter is a relic of the nineteenth century when it was considered necessary and proper to safeguard contracts of service with a penal sanction, felt that the chapter has lost its practical utility. Its existence in the IPC may be justified only on the ethical ground that a person, who, because of his tender age, unsoundness of mind or bodily weakness, is in a helpless condition needs some protection against the criminal breach of contracts of service. The Law Commission recommended that the chapter deserves to be deleted from the IPC. It justified its proposal on the grounds that: (i) utility of the provision is negligible; (ii) the provision has hardly been used in the recent past; and, (iii) the framers of the Code, by making it punishable by a small fine not exceeding two hundred rupees or a short term of imprisonment not exceeding three months, have treated the offence as trivial.[3] It suggested that the present chapter should be replaced by a new chapter entitled 'Offences against Privacy' comprising the (proposed) ss 490-492.

The Indian Penal Code (Amendment) Bill 1978, through its cl 197, gave effect to both the proposals.

However, the Fourteenth Law Commission,[4] not only recommended retention of the chapter but also discarded the proposal of the earlier Law Commission of its replacement by a chapter on offences against property. It, however, suggested that there is need to have a separate legislation on offences against property. On the contrary, it recommended that a criminal breach of contract of services be punished with the punishment higher than the existing one and be made a cognisable offence.

1 Macaulay, Macleod, Anderson and Millett, *A Penal Code Prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note 'P', p 171.

2 1887 Cri R No 43 of 1887.

3 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 19.1 ad 19.2.

4 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, para 12.88.

CHAPTER 32

Offences Relating to Marriage

(Indian Penal Code 1860,Sections 493 to 498A)

INTRODUCTION

Chapter XX, IPC, deals with offences relating to marriage. All these offences deal with infidelity within the institution of marriage in one way or another.

Chapter XX-A, containing only one section (s 498A) dealing with cruelty to a woman by her husband or his relatives to coerce her and her parents to meet the material greed of dowry, is added to the IPC by the Criminal Law (Second Amendment) Act 1983.[1]

There is growing opinion amongst a section of people that marriage and the relation of spouses within the marriage is in the realm of personal lives and the state should not interfere in this regard. However, in our country, a wide variety of deceitful practices were found to exist, affecting marriage and marital relations, which necessitated turning them into penal offences. Given the nature of gender discrimination prevalent in the Indian society, most often it is women who are victims of offences relating to marriage. There is thus a contrary view that while the offence needs to be redefined to reflect contemporary social mores and values, the various offences enumerated in ch XX, IPC, should be repealed. The merits of either viewpoint notwithstanding, it is relevant to note that though the offences defined are materially different from the English law, it is essentially based on the English concepts of fidelity and monogamy. Ironically, while in England, these offences now stand removed from the statute books, they prevail in India. A thorough public debate is called for to re-examine and re-define the nature of offences relating to marriage.

OFFENCES RELATING TO MARRIAGE

The following are the main offences under this chapter:

(1) Mock or invalid marriages (ss 493 and 496);

(2) Bigamy (ss 494 and 495);
(3) Adultery (s 497);
(4) Criminal elopement- seduction (s 498);
(5) Cruelty by husband or relatives of husband (s 498-A).

MOCK OR INVALID MARRIAGES

Section 493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.--Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 496. Marriage ceremony fraudulently gone through without lawful marriage.--Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Essential Ingredients

Deceit or Fraudulent Intention

In both the sections, one of the essential elements of the offence is that the accused should have practiced deception on the woman, as a consequence of which she is led to believe that she is lawfully married to him, though in reality she is not.[2] In s 493, the word used is 'deceit' and in s 496, the words 'dishonestly' and 'fraudulent intention' have been used. Basically, both the sections denote the fact that the woman is cheated by the man into believing that she is legally wedded to him, whereas the man is fully aware that the same is not true. The deceit and fraudulent intention should exist at the time of the marriage.[3] If both the man and the woman go through the marriage ceremonies under the bona fide impression that it constituted a valid marriage, although the marriage in reality was invalid and they cohabited thereafter, s 496 is not attracted. That is because at the time of the marriage, the man did not practice any deception or behave with any fraudulent intention of deceiving the woman, as he himself was under the impression that he was going through a valid marriage.[4] Thus, it is seen that mens rea is an essential element of an offence under these sections.

Causing of False Belief

Section 493 stipulates that the deception caused by the man should lead the woman to believe that she is lawfully married to him and she should have sexual intercourse with him in that belief. Thus, mere deception on the part of the man is not sufficient. It envisages the case when a man deceitfully induces a woman to have sexual intercourse with him causing her to believe that he is lawfully married to her.[5] If the woman is aware that the marriage is not a valid one and still allows the man to have sexual intercourse, then no offence is made out under this section.[6] When a woman voluntarily left her husband and went through marriage ceremonies with another man without any persuasion from him, she cannot file a complaint under this section.[7]Under s 15 of the Hindu Marriage Act, 1955 a man should not marry when an appeal against decree of divorce is pending. However, when a man married a girl after informing her and her parents of the pendency of the appeal, it was held that the man did not marry with any dishonest or fraudulent intention and hence, he was not guilty of the offence under s 496, IPC.[8]

Cohabit or Have Sexual Intercourse

Both ss 493 and 496 provide that there must be a deception or fraudulent intention in going through the marriage ceremony, knowing fully well that the marriage contracted is invalid. While this is sufficient to constitute an offence under s 496, s 493 further stipulates that such deception should not only cause belief in the woman that she is lawfully married, but should also lead her to cohabit or have sexual intercourse with the man in that belief. If there is no cohabitation or sexual intercourse, s 493 is not attracted. S 496 does not require cohabitation or sexual intercourse as a necessary requisite. Mere dishonest or fraudulent marriage ceremony knowing that he is not legally married thereby is enough to invoke it.

BIGAMY

Section 494. Marrying again during lifetime of husband or wife.--Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.--This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction,

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

Section 495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted--Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Essential Ingredients

Existence of a Previous Marriage

One of the essential ingredients of the offence of bigamy is the existence of a previously contracted marriage. It attaches criminality to the act of second marriage by a husband or by a wife who has a living wife or husband. The second marriage is void. It is, therefore, essential to establish the offence of bigamy that at the time of the second marriage, the person was already married. The first marriage should be subsisting at the time of the second marriage and should be a validly contracted one. If the first marriage is not a valid marriage, the second marriage does not amount to bigamy. The first husband or wife should be alive when the second marriage was contracted.

Section 494 itself carves out two exceptions wherein the contracting of the second marriage will not be an offence. They are: (i) when the first marriage has been declared void by a competent court, and (ii) when the former husband or wife has been continually absent for a period of over seven years and not heard of as being alive, provided that these facts are disclosed to the person with whom the second marriage is contracted.

In the first circumstance stated in the exception, the previous marriage is not in subsistence in view of the fact that it had been declared void by a court and hence, one of the essential ingredients to constitute the offence of bigamy is absent. The second circumstance envisages a situation wherein a person has been missing continuously for a period of over seven years. Under s 108 of the Indian Evidence Act, 1872 when it is proved that a man has not been heard of for more than seven years by those who would naturally have heard of him if he had been alive, there is a presumption that he is dead. The burden of proving that he is alive is on the person wanting to establish the same. The second exception to s 494 is in recognition of this principle. By virtue of the presumption provided under s 108 of the Evidence Act, it may be safely concluded that a person who is missing for more than seven years, is presumed to be dead and when the other spouse contracts a second marriage, it follows that there is no husband or wife living at the time of the second marriage and hence, the offence of bigamy is not made out.

Second Marriage to be Valid

The second essential element to constitute the offence of bigamy is that the person concerned should have married again. In order to attract the provisions of this section, not only the first marriage, but also the second

marriage should be a valid one. This means that all the necessary ceremonies required by the personal laws governing the parties to the marriage should have been duly performed.[9] The words 'whoever...marries' occurring in s 494 means 'whoever marries validly or legally'.[10] Where the essential ceremonies necessary to constitute a valid marriage are not performed, there is no marriage at all in the eye of law. Such a case will not fall within this section.[11]

The factum of second marriage, with necessary ceremonies thereof, needs to be proved. Mere admission by the accused is not enough.[12] Further, the mere keeping of a concubine or mistress is not sufficient to attract the penal consequences of this section as there is no marriage and the concubine or the mistress does not enjoy the status of a wife.[13]

Second Marriage to be Void by Reason of First Husband or Wife Living

The offence of bigamy is made out only when the second marriage is rendered void by reason of its taking place during the life of the first wife or husband. It has no application to cases where a second marriage is permitted under the personal laws or customs governing the parties.[14]Second marriage by a Muslim, who is entitled to four wives, is not an offence under this section. Prior to the enactment of the Hindu Marriage Act, a Hindu man could marry more than one wife. However, after the coming into force of the Hindu Marriage Act, the situation has changed.Section 17of the Hindu Marriage Act makes a second marriage void. The effect of this provision is to make s 494 of thePenal Code applicable to Hindus.

Effect of Conversion

Conversion of one of the spouses without the consent of the other, from one religion to another, often causes tremendous domestic upheavals in the lives of the other spouse and children. This is because the personal laws governing people vary from religion to religion. The problem is particularly severe when one religion permits polygamy, whereas the other religion does not.

Prior to the enactment of the Hindu Marriage Act, a Hindu male was permitted to practice polygamy. However, the Hindu Marriage Act strictly enforces monogamy. The Christian conception of marriage is also monogamous, where marriage is considered to be the voluntary union for life between the man and woman. However, Islamic personal law permits a Muslim man to have four wives. The phenomenon of Hindu men converting to Islam, only for the purpose of contracting a second marriage, thereby circumventing the strict Hindu law enforcing monogamy, has been the subject of a lot of controversy--both in legal circles as also socially. Conversion of a Hindu man to Islam has generally been nothing but an attempt to legalise his second marriage, which is not only prohibited under the Hindu law, but is also made a penal offence.

The question whether a Hindu husband would be guilty of the offence of bigamy under s 494, IPC, when he originally married under Hindu law and subsequently converts to Islam and marries for a second time came up for consideration before the Supreme Court in *Sarla Mudgal*, *President, Kalyani v Union of India* .[15]This case was act ually a batch of four writ petitions filed before the Supreme Court.

Sarla Mudgal was the petitioner in the first writ petition and was the President of 'Kalyani', a registered society which worked for the welfare of women in distress. The second petitioner was Meena Mathur, who was married to Jitender Mathur. They had three children. After 10 years of marriage, Jitender Mathur married one Sunita Narula. Both Jitender and Sunita converted themselves to Islam for the purpose of going through the second marriage. Sunita subsequently changed her name to Fathima. Interestingly, a writ petition had been filed separately by Jitender's second wife, Sunita @ Fathima, who alleged that her husband, after converting to Islam and marrying her, reconverted to Hinduism and refused to maintain her and the son she begat through him. Having converted to Islam, she had no protection under her new personal law. There were two other writ petitioners, Geetha Ram and Sushmita Ghosh, who faced similar predicament, wherein their respective husbands converted to Islam and married other women.

The question before the Supreme Court was, whether by virtue of the conversion of the respective husbands to Islam, would the second marriage be a valid marriage. A further question was as to whether such husbands would be guilty of the offence of bigamy under s 494, IPC? In answering these two questions, the Supreme Court laid down the following principles:

(1) If a marriage is solemnised under a particular personal law, it cannot be dissolved by the application of another personal law, to which one of the spouses converts. One spouse, by changing his or her religious beliefs, cannot forcefully enforce his or her newly acquired personal law on a party to whom it is entirely alien. Such a practice would be opposed to justice, equity and good conscience or even common sense. Where a marriage takes place under the Hindu law, the parties acquire a status and certain rights by virtue of the marriage under the Hindu law. Such rights cannot be extinguished by the conversion of one of the spouses.

(2) There is no automatic dissolution of the Hindu marriage upon the conversion of one of the spouses to another religion. Under s 13(1)(ii), Hindu Marriage Act, conversion to another religion is only a ground for divorce. Thus, the first marriage under the Hindu Marriage Act subsists even after the conversion. It can be dissolved only by a decree of divorce granted under the Act.

(3) Under s 11, Hindu Marriage Act, if a person marries again during the lifetime of his or her spouse, then such second marriage is void. As per s 17, if a marriage is void for reason that the person has married during the lifetime of his or her spouse, then they are punishable under ss 494 and 495, IPC, for bigamy.

(4) So, though strictly speaking, a second marriage cannot be said to be void after a husband has embraced Islam, it would be void *qua*the first wife, who married him under the Hindu law and which marriage continues to be governed by the Hindu Marriage Act.

(5) In cases such as the present, where one spouse remains a Hindu and the other converts to Islam, it is obviously not a case where the parties are Muslims, in order to decide the case under the Muslim personal law. In such cases, the court shall act and decide according to justice, equity and good conscience. Viewed in this manner, the second marriage would be against principles of justice, equity and good conscience. If the second marriage is held to be void, it would attract the provisions of s 494, IPC.

As against the judgment in the *Sarla Mudgal* case, separate writ petitions and review petitions were filed seeking a reconsideration of the ratio laid down in the *Sarla Mudgal's* case. The Supreme Court delivered the judgment in the review petitions, as also the various writ petitions through a common order in *Lily Thomas v Union of India* .[16] One of the main contentions raised was that the judgment was in violation of arts 20 (1) and 25 of the Constitution of India and hence, the ratio of the case should be applied prospectively, only to future cases. The Supreme Court dismissed the review petitions, inter alia, on the ground that in the *Sarla Mudgal's* case, the court did not make a new law, but only interpreted the existing penal law and hence, it cannot be said to be violative of art 20(1) of the Constitution. It also brushed aside the contention that ratio of the *Sarla Mudgal* case goes against the freedom of conscience and free profession, practice and propagation of a religion as a farfetched one and artificially carved out by those who have violated the penal law for attempting to cloak themselves under the fundamental right guaranteed under art 25 of the Constitution.

To summarise the law, when parties to a marriage get married under a particular personal law, that marriage will continue to be governed by the personal law under which they got married, irrespective of the fact that either of the spouses have converted to another religion. Hence, spouses cannot escape liability under s 494, IPC, by resorting to conversion to Islam or any other religion. Mere conversion does not automatically dissolve the first marriage, and thereby does not absolve the person from criminal liability for committing the offence of bigamy.

Non-disclosure of the first marriage

Section 495 subjects perpetrator of the offence of bigamy to severe punishment if he or she has concealed the fact of his or her former marriage while contracting the second marriage. It provides simple or rigorous imprisonment for a term up to ten years, with unspecified amount of fine. S 495 is an aggravated form of bigamy criminalized under s 494, IPC. The concealment of the fact of the former marriage to the person with whom the second marriage is contracted is an aggravating circumstance. The opening words 'whoever commits the offence defined in the preceding section' of s 495 make it clear that bigamy is the essence of the offence under s 495. Hence, all the necessary elements of bigamy need to be read under s 495. The person from whom the factum of former marriage is concealed at the time of second marriage is an aggrieved person within the meaning of s 198 CrPC.

ADULTERY

Section 497. Adultery.--Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment or either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Background

Before the IPC was enacted adultery was not an offence in India either for men or women. It was also not included in the first draft of the Penal Code. However, the Second Law Commission added to it. The Law Commissioners noted that the then prevalent social infrastructure and the secondary and economically dependent position of women were not conducive to punish adulterous men. Further, the authors noted, that a wife was socially conditioned to accept her husband's adulterous relationship as polygamy was an everyday affair. She neither felt humiliated nor was it a culture shock for her. The Law Commissioners incorporated adultery an offence in the Penal Code punishing only the adulterous men, leaving women, who, in their opinion, were already living in humiliated and oppressive conditions within the family.

Essential Ingredients of the Offence

Sexual Intercourse

A man having sexual intercourse with a married woman is an essential ingredient of the offence. So where the wife went over to the shop of the accused to have sexual intercourse, but was at once followed and entrapped, it was held that her act did not go beyond the stage of preparation and hence this section was not attracted.[17] Similarly, when an accused was provided with a married woman to pass the night with, and before the accused could have sexual intercourse with the woman, the husband intervened and took her away, the accused was held not guilty under this section.[18] Though proof of sexual intercourse is essential for the offence of adultery, it can rarely be proved by direct evidence. A story of seeing adultery through a keyhole is only an imaginary one and it cannot be accepted.[19] It has to be inferred from the facts and circumstances of a case.[20] However, the circumstances must be of such a nature that they fairly infer that sexual intercourse took place.[21] Evidence of opportunities sought for and obtained and of undue familiarities, which point strongly to an inference of guilt, is sufficient to establish the fact of sexual intercourse.[22] The entire background and context of the case needs to be taken into consideration for ascertaining sexual intercourse. Where, the parties concerned are sophisticated, no conclusion can be drawn on the mere basis of opportunities for sexual intercourse. Conclusion of adultery should not be reached by rash and intemperate judgments and upon assumptions equally capable of two interpretations.[23]

Woman must be Married

The section indicts sexual intercourse by a man, who is the wife of another man. The factum of lawful marriage must be strictly proved. Sexual intercourse with a prostitute, an unmarried woman, or a widow, therefore, does not amount to adultery under the IPC. Even sexual intercourse with a woman who lived with another man without marriage and has got children from him does not amount to adultery, as she is not 'wife of another'.[24]

Knowledge

In order to be brought within the purview of this section, a man should not only have intercourse with a married woman, but he must also 'know' or have 'reason to believe' that such woman is the 'wife of another man'. This does not mean that he should know the identity of the husband. It is sufficient if he knows or has reason to believe that the woman is married. Such 'reason to believe' may arise from the fact that in the case of a Hindu woman, outward insignia of married life are exhibited by wearing *mangalsutra*, the application of *kumkum* in the parting of hair, use of bangles, toe rings, etc.

The prosecution should establish the presence of such knowledge or reasonable belief. It constitutes mens rea and the prosecution should place sufficient material before the court to prove that the accused had knowledge or reasonable belief that the woman was married.

Consent or Connivance of the Husband

Another requirement of law is that the adultery complained of has not been committed either with the consent or connivance of the husband. This is based on the principle *volenti non fit injuria*, meaning 'what is consented to cannot injure'.[25]Such consent can be express or implied. 'Connivance' is a figurative expression that indicates a voluntary blindness to some act or conduct, which is known to be going on without protest or desire to disturb or interfere with. If the husband was fully aware of the fact that his wife was committing adultery but did not do anything to stop the same, then the adulterous relationship may be considered to have been committed with his acquiescence,[26] and therefore no offence can be said to have been committed. The absence or presence of consent or connivance can be inferred from the circumstances of the case. Strict proof of the same is not necessary.[27]

Should not Constitute Rape

The offence of adultery by its very nature connotes that it is sexual intercourse between two consenting adults. The woman, although married, must be a willing partner to the sexual intercourse. However, if the accused has sexual intercourse without the consent of the woman, then it is a much more graver offence and would amount to rape. Here, the consent or connivance of the husband is immaterial. Consent of the woman is primary. If her consent is absent, then it will amount to an act of rape, punishable under s 376 of the IPC.

Exemption of Woman from Prosecution

Section 497 expressly exempts the women from prosecution and from being charged as an abettor. The contemplation of law is that the wife, who is having an illicit relationship with another man, is a victim and not the author of the crime. A woman cannot be charged and prosecuted for committing adultery. She is completely immune to the charge of adultery.[28] Such an exemption seems to be based on a set of realities and assumptions about women, about women's sexuality and about the relationships between women and men originated from the traditional gender biased approach to, and unequal status of 'husband' and 'wife' in the marriage institution in India. The authors of the Code were influenced by the then prevalent rampant child marriages and polygamous marriages, and the privilege of the husband to fill his *zenana* with women, and thereby make his wife to seek his attention with several rivals; for not punishing the infidelity of wives.[29] Other prominent assumptions about women for exempting women from liability, it seems, are: (i) a man is a seducer and the married woman is merely his hapless and passive victim, and (ii) he trespasses upon the man's marital property, i.e., his wife by establishing a sexual liaison with the married woman with her consent but without the consent or connivance of her husband. The philosophy of the statutory provision seems to promote goodwill between husband and wife and permit them to 'make up' rather than to drag each other to the court.

Constitutional Validity of 'Adultery '

Women's rights act ivists have also time and again opposed the retention of the provision relating to adultery. The provision, though are purportedly enacted for protecting women and make only the man in most circumstances liable, in fact only help reiterate the social belief that women are weak, have no mind of their own and hence, must be protected by men. The definition of adultery in the IPC is in fact most offending to the concept of equality of sexes guaranteed under the Constitution. If a man has sexual intercourse with a married woman, without the consent or connivance of her husband, then he commits adultery. A reading of the section itself clearly shows that the entire essence of the offence is that the wife is the property of the husband and such property should not be trespassed upon or encroached upon by another man, without the consent of the man concerned. It treats women as no better than chattels. It is obscurantist to say the least, for first, it gives power to the husband over the body of the woman inasmuch as, if the husband gives his consent or connives with the person and gives permission to have sexual intercourse with his wife, the offence of adultery is not committed. Secondly, the man alone who has had intercourse with the married woman is punished. This has been justified on the laudable ground that women are weak and hence should

be protected. It negates the woman as a thinking, discriminating and responsible person capable of taking responsibility for her actions. If the purpose of the provision is to protect unwitting, gullible women, it is strange as to why the provision does not make sexual intercourse by a married man with an unmarried woman an offence. In such a situation, both the wife of the man and the unmarried woman are victims of the male dominated patriarchal society, and a man should be punished equally in a situation like this. Further, the husband alone has the right to prosecute the man who had an adulterous relationship with the wife.

On occasions more than one,[30] the constitutional *vires* of s 497 was challenged in the Supreme Court on the grounds, inter alia, that it: (i) by making only a man responsible for adultery and mandating a court that the adulteress wife be not punished even as an abettor, discriminates in favor of women and against men only on the ground of sex, and thereby goes against the spirit of equality embodied in the Constitution; and (ii) by conferring upon the husband the right to prosecute the adulterer but not conferring a corresponding right upon the wife to prosecute the woman with whom her husband has committed adultery and her husband who has committed adultery with another woman, makes an irrational classification between women and men.

However, the Supreme Court rejected all the arguments advanced against adultery to uphold its constitutional *vires*. It opined that 'adultery', which deals only with 'an outsider' to the matrimonial unit who invades the peace and privacy of the matrimonial unit and poisons the relationship between the two partners constituting the matrimonial unit, is a beneficiary provision for a woman. The apex court also ruled that s 497 does not violate the gender equality clauses of the Constitution. And if it offends the equality clauses of the Constitution, it is a question of 'policy of law' that has nothing to do with the constitutionality of s 497.

CRIMINAL ELOPEMENT/SEDUCTION

Section 498. Enticing or taking away or detaining with criminal intent a married woman.--Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Essential Ingredients

Takes or Entices Away

The first essential ingredient of this offence is the act of 'taking or enticing away' a married woman. 'Taking' does not imply 'taking by force'. It implies some sort of assistance to, or physical or moral influence on, the wife to get away from her husband. Even if the woman was the tempter or the woman willingly accompanied the man it does not diminish the criminality of the man. If, whilst the wife is living with the husband, a man knowingly goes away with her in such a way as to deprive the husband of his control over her, with the intent to have illicit intercourse, then it constitutes an offence within the meaning of the section.[31] The words 'takes or entices away' includes every form of elopement irrespective of the fact whether the first proposal came from the man or the woman. It embraces every form of seduction culminating in the going away of the wife from her husband's control.[32] However, if the husband has turned the wife out of his house, or the wife has left the house of the husband on her own and she lives with another man, this section will not apply.[33]

Woman to be a Married Woman

As in all the preceding sections, this section also is applicable only in respect of a woman, who is legally married to a man. The factum of her marriage has to be proved by the prosecution before a person can be convicted under this section. As in the earlier section, it must be proved that marriage was performed in accordance with the requirements of law and custom governing the parties.

Knowledge

Again, as in the previous sections, the person enticing or taking away the married woman should have knowledge or reason to believe that she is the wife of another man.

Taken from Control of Husband or Person Having Care of Her on Behalf of Her Husband

An important ingredient of this section is that the taking away or the enticing of the woman should be from the control of her husband or persons such as parents, parents-in-law etc taking care of her on behalf of the husband. If the woman had been discarded and deserted by her husband and she was living with her father and brother, then she cannot be said to be under their care on behalf of the husband. If she is taken away from there, this section will not be attracted.[34] But at the same time 'control of husband' need not be under the actual physical control of the husband. If the wife is residing in the house provided by her husband and at his expense, she is deemed to be living under his protection, even during his temporary absence.[35]

Intention to Have Illicit Intercourse

This section further elaborates as to what should be the intention or mens rea before an offence under this section is made out. The taking away or enticing a married woman from the control of her husband must be done with the intention of making her have illicit intercourse with any person, or conceals or hides her with intention that she may have illicit intercourse alone is punishable. For instance, if a married woman is taken away with the intention that she be given in marriage to somebody else, then an offence under this section is committed, as any intercourse between her and the man she is made to marry a second time, is illicit.[36] If the taking away of the married woman is with any other intention other than illicit intercourse, then no offence under this section is made out.[37] The question of intention is a question of fact, which has to be established by proper evidence by the prosecution.

Conceals or Detains Any Such Woman

Section 498 , IPC, punishes not only the 'enticing or taking away' of a married woman, but also punishes those who 'conceal or detain' a married woman with the intention that she should have illicit intercourse with any person. The word 'detains' means 'keeps back'. There may be various ways of 'keeping back'. The keeping back a wife from her husband need not necessarily be by physical force. It may be by persuasion, allurement, or blandishment.[38] There needs to have some sort of control or influence on the part of the accused to hold the woman back.

The words 'such woman' does not refer to a woman who has been enticed or taken away, but refers to a married woman.[39] Where the accused had found the girl in a brothel, and took her to live with him in a rented house, it cannot be said that he 'detained' her in any sense of the term.[40]

Who can Complain

Generally, when a crime is committed, any person who has knowledge of the crime can set the law in motion. The person giving the information or the complaint need not be in any way connected with the crime. However, there are certain offences, where it is provided that only the affected or the aggrieved party can prefer a complaint. As per s 198, CrPC, no court can take cognisance or note of an offence punishable under ch XX of the IPC, except on a complaint by some person 'aggrieved' of the offence. It further provides that if the person aggrieved is a person under 18 years, a lunatic, sick, infirm or a woman, whose customs prevent her from appearing in public, then some other person can file the complaint after obtaining leave of the court.

If the aggrieved party is the husband, employed in the armed forces, he can authorise someone to file a complaint on his behalf.

In case of a mock or invalid fraudulent marriage, the woman who, believing that she has married to the man who by deceit made her to believe that she married him, or has gone through a fraudulent marriage ceremony, has cohabited with the man is victim of the offence. She only can file a complaint under s 493 or 496, IPC. Compliant filed by any other person, including her mother, without leave of the court, becomes untenable.[41]

If an offence of bigamy is committed and the wife is the aggrieved party. She can file a complaint. In addition, her father, mother, brother, sister, son or daughter or other relatives can file the complaint on her behalf.[42]

However, interestingly in *A Subash Babu v State of Andhra Pradesh* [43] the Supreme Court ruled that even the second wife can file a complaint of bigamy against her husband. The court argued that the expression 'aggrieved party', which is an elusive and elastic concept, cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged and the extent of complainant's interest and the extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict right of filing complaint to the first wife, the apex court declared, and there is no reason to read it in a restricted manner. It would be height of perversity to hold that a woman with whom second marriage is performed is not entitled to maintain a complaint under s 494 though she suffers legal injuries due to the second marriage. The court failed to see any reason for not allowing a woman with whom the second marriage was contracted by concealment of former marriage, who, being an aggrieved person in the context of s 495, is allowed to make a complaint under s 495, to file a complaint under s 494, IPC. In case of s 495, IPC, the wife with whom the subsequent marriage is contracted after concealment of the former marriage is entitled to lodge complaint.[44]

In respect of adultery and criminal elopement, the husband alone is deemed to be the aggrieved person. However, in the absence of the husband, any person under whose care the wife is, on behalf of the husband, can, with permission of the court, prefer a complaint. A complaint filed by a person other than the husband of the adulteress wife, therefore, is liable to be quashed.[45] Cruelty By Husband Or Relatives Of Husband

Section 498A. Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative of the husband of a woman, subject such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.--For the purposes of this section, 'cruelty' means--

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Introduction

Chapter XXA was inserted in the IPC in 1983 by the Criminal Law (Second Amendment) Act, 1983. It consists of only one section, namely, s 498A, which makes cruelty to a wife by the husband or his relatives, an offence.

It endeavors to prevent torture to a married woman by her husband or by his relatives and to punish them for harassing or torturing the wife to coerce her or her relatives to concede unlawful demands of dowry.[46] Until then, harassment of a wife by her husband or her in-laws was covered by the general provisions of the IPC dealing with assault, hurt, grievous hurt or homicide. The increasing violence against women especially young, newly married women and growing incidents of bride-burning became a matter of concern to everyone. It was felt that the general offences already provided for in the IPC were not adequate and stringent enough to deal with the atrocities against women.

Cruelty against women within the institution of marriage posed certain difficulties in matters of prosecuting the accused and proving their guilt. This was because, very often, women bear their sufferings in silence. Obtaining independent witnesses is also difficult because the violence against the wife is generally inflicted within the confines of the home, away from public gaze. Further, demands for dowry and harassment of women if they fail to meet the demands, may not always be in the form of direct assault on the body of the woman. The violence is often in subtler forms, but equally tortuous, many a time driving the woman to take her own life.

In order to tackle this, it was felt by the Parliament that comprehensive legislative changes were required at three levels:

(i) To define the substantive offence of cruelty to women by husbands and relatives of husbands;
(ii) To introduce procedures which make investigation in cases of certain deaths of women mandatory;
(iii) To bring changes in the Evidence Act, which will make prosecution and conviction of accused in cases of violence against women easier.

Accordingly, ss 498A and 304B were added to the IPC, creating separate offences in respect of acts of cruelty to a woman by a husband and his relatives and dowry death respectively.

Similarly s 174, CrPC, was amended making inquests by executive magistrates mandatory in cases of suicides or suspicious deaths of a woman within seven years of her marriage.

Section 113B was added to the Evidence Act, wherein it was provided that if it was shown that soon before the death of a woman she was subjected to cruelty or harassment by a person in connection with demand for dowry, then it shall be presumed that such person who harassed the woman had caused the death of the woman.

These three-pronged changes in the IPC, the CrPC and the Evidence Act are no doubt an improvement to the earlier laws and are important to some extent to safeguard the rights of women. However, in the ultimate analysis, any number of legislative changes will be inadequate, unless the gender bias in social institutions and the generally discriminative social attitude towards women are transformed. Equally important is the need for changing and redefining the nature of gender roles within the institution of marriage, so that a patriarchal order is replaced by a gender equal order.

Having considered the historical context in which s 498A was introduced into the IPC, we will now examine different dimensions of the law on the subject.

Cruelty by Husband or Relatives of Husband--An Essential Ingredient

The offence under s 498A is restricted to only act s of commission or omission done by the husband or his relatives. The word 'relative' has not been defined. But a perusal of the case law reveals that generally, the parents, sisters and brothers of the husband have been prosecuted under this section. A person who is not a relative, but a friend, however close he is to the family of the husband, cannot be prosecuted under this section.[47]

In *Reema Aggarwal v Anupam* ,[48] it was argued that 'husband' of the 'second wife', who marries her during the subsistence of his earlier legal marriage, is not the 'husband' within the meaning of s 498A, and the 'second wife', therefore, cannot invoke s 498A for the cruelty and harassment caused to her by him or his relatives. The appellant, Reema Aggarwal, who was harassed by her husband and his relatives for not bringing sufficient dowry, consumed poisonous substance. She admitted that she married him during the lifetime of his first wife. Based on these facts, her husband, with others, was charge-sheeted under ss 307 and 498A of the IPC. The trial court acquitted him accepting the contention that the charge under s 498A was thoroughly misconceived as it presupposes a valid marriage of the alleged victim-woman with the offender-husband. The contention was also accepted by the high court.

However, the Supreme Court rejected the contention. Comparing the legislative intent and context of ss 494 and 498A and stressing the legislative intent of s 498A, it opined that the concept of marriage to constitute the relationship of 'husband' and 'wife' might require strict interpretation where claims for civil rights or right to property follow or flow. However, a liberal approach and different perception cannot be an anathema when the question of curbing a social evil is concerned. It ruled:

> ...[T]here could be no impediment in law to liberally construe the words or expressions relating to the persons committing the offence so as to rope in not only those validly married but also anyone who has undergone some or other form of marriage and thereby assumed for himself the position of husband to live, cohabitate and exercise authority as such husband over another woman.[49]

It was also argued by the husband that when the validity of the (second) marriage itself is under legal scrutiny, the provisions of the Dowry Prohibition Act, 1961 cannot be relied upon as 'dowry' is linked with 'marriage' and the alleged demand of dowry, therefore, becomes legally non-recognisable.

The apex court, rejecting this contention, asserted that the legislative intent of ss 498A and 304B, IPC, and s 113B, Evidence Act, cannot be lost sight of. These provisions were added to the respective statutes for curbing and eliminating the rampant social evil of dowry. They intend to prevent harassment to a woman who enters into a marital relationship with a person and later on becomes a victim of the greed for money. A person who enters into a marital arrangement, the court felt, should not be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise. Such a hair-splitting legalistic approach, the court apprehended, would encourage harassment to a woman over demand of dowry.

In *John Idiculla v State of Kerala* ,[50] a set of arguments leading to three interesting questions pertaining to the interpretation of words 'the husband or the relative of the husband' appearing in s 498A was advanced before the Kerala High Court. The issues involved are: (i) can the so-called 'second wife' of the husband, who marries her during the subsistence of his earlier legal marriage, be treated as 'the relative of the husband', for the purpose of s 498A?; (ii) if so, under what circumstances?; and (iii) does an offence under s 498A lie against such a 'second wife', if she inflicts cruelty on the first legally-wedded wife of the husband?

It was argued that an offence under s 498A lies only against the 'husband' and/or 'the relative of the husband' of a woman and not against the 'second wife' of the husband, whose marriage is invalid, as she cannot be treated as 'the relative of the husband'. Law can treat such a second wife only as a 'mistress' and not as a 'wife' and hence it would be paradoxical and even ridiculous for a court to hold her liable under s 498A by conferring upon her the status of 'wife' and 'relative of the husband' by (illegal) marriage. A 'relative of the husband', it was argued, is a person with whom the wife will normally interact after marriage, but such an interaction between the first and second wife, like in the instant one, is out of question.

Rejecting these contentions, the high court ruled that if 'second wife', whose marriage is not strictly legal but she is treated as wife by the husband, relatives, friends or society, commits matrimonial cruelty on the legally-wedded wife of her alleged husband, cannot be allowed to wriggle out of the criminal liability under s 498A on the ground of invalidity of her marriage. And a 'second wife' can be considered to be 'the relative of the husband' for the purpose of s 498A and thereby she can be held liable under s 498A.

Justifying its reasoning the high court observed:

> ...[N]on-existence of a strictly legal marriage cannot be made a ground for an offending second wife to run away. The invalidity of the marriage can under no circumstances be granted as a licence to her to harass none other than the legally-wedded wife. She shall not be allowed to skip-out of the strong grip of law. ... A Court cannot remain divinely silent to forgive her or calmly shut its eyes to this tragic situation, assert and justify that a second wife is not precisely referred to in the section and hence she is not covered by Section 498A , IPC . The legal system in this country cannot shy away and hide itself under the mask of an evasive explanation that a second wife cannot be treated as a 'relative' as Legislature did not specifically include the second wife in Section 498A etc.[51]

> The word 'relative' conveys the idea of status (of another accused with the husband). Status of a 'relative' is conferred only by blood, marriage or adoption. A 'girlfriend' or 'concubine', being not connected by blood or marriage, is not 'relative' of the husband for the purpose of s 498A, IPC.[52] In *Sunita Jha v State of Jharkhand,* [53] the Supreme Court, disagreeing with the trial court and the high court, categorically ruled that a woman who is in a live-in-relationship with the husband of the complainant (of cruelty), by no stretch of imagination, can be a 'relative of husband'. It stressed that s 498A, being a penal provision, deserves strict interpretation. A girl-friend, concubine, or a woman in live-in-relationship with a married man cannot, therefore, be accused of subjecting cruelty to the wife of the man.

What is Cruelty?

It is not possible for the legislature to enumerate all acts amounting to cruelty or to put cruel conduct into any strait jacket formula. The term 'cruelty' has deliberately been left undefined by the statute. This is to enable the courts to adapt the meaning to suit changing societal values and mores. The social standing and background of parties, their economic situation, and other relevant factors will all have to be taken into consideration by the courts in each individual case, to decide whether an act will amount to cruelty.

The explanation to s 498A clarifies what amounts to cruelty for the purposes of s 498A. According to *explanation (a)*, any wilful conduct which is likely to drive the woman to commit suicide or to cause any grave inju-

ry or danger to life, limb or mental or physical health of the woman, is cruelty.[54] By virtue of *explanation (b)*, 'harassment' of a woman, with a view to coerce her or her relatives, to meet unlawful demand for any property or valuable security, is cruelty.

'Cruelty' includes both mental and physical cruelty.[55] Contours and effects of 'cruelty' depend upon a number of factors such as sensitivity of the individual victim concerned, the social background, the environment, education, etc.[56] Abnormal behaviour;[57] continuous taunting or teasing;[58] keeping a concubine and bringing up her child by the husband,[59] or pressing for obtaining consent of the first wife for the second marriage,[60] depriving his wife and children from elementary means of subsistence and spending his earning on gambling and other vices,[61] frequent false attacks on her chastity,[62] depending upon the circumstances, for example, amount to cruelty. A series of malicious and vexatious litigations in which extremely hurtful and offensive accusations are leveled against a married woman and wherein she, with a sense of vindictiveness, is humiliated and tortured through the execution of search warrants and seizure of personal property, also amount to 'cruelty' within the *explanation*.[63]'Cruelty' postulates such a treatment that causes reasonable apprehension in the mind of the wife that her living with her husband will be harmful and injurious to her life.[64]'Cruelty' in s 498A, therefore, does not warrant dictionary meaning as it is used to save a married woman from ill-treatment and to ensure that she lives with dignity at her matrimonial home.[65] In fact, what amounts to cruelty is a question of fact. Matrimonial relationship between the husband and wife, their cultural and temperamental state of life, state of health and their interaction in daily life, among others, operate as relevant factors in determining 'cruelty'. Whether certain complaints, taunts or accusations on a person amounts to cruelty or not depends upon sensitivity of the individual victim concerned, the social background, and education. Mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty.[66] Nevertheless, in any event it needs to prove that the willful act or conduct of the husband or his relatives has been a proximate cause for cruelty.[67] When there is no intent on the part of the husband of a woman or his relatives to injure her, a conduct, though willful and hurts her feelings, does not amount to cruelty.[68]

In a case of 'cruelty' as contemplated under s 498A, it is important to bear in mind that what is provided for is 'cruelty' which takes place within the institution of marriage. By its very nature, it may be quite probable that often even the neighbours may not be aware of the happenings in the house. It is more likely that both the victims and the aggressors would keep it secret and away from the knowledge of neighbours or friends. The family of the victim wife is very often the only people in whom the girl might confide in. So, it is not necessary to examine the neighbours or tenants to prove the prosecution case.[69]

It may also be borne in mind that women seldom come out with complaints against their husbands or in-laws on the occurrence of the very first act of cruelty. It is only after suffering for long years and after prolonged acts of cruelty that the woman or her family comes forward with complaints. Under these circumstances, where being cruel has become a way of life with the husband and relatives, the Delhi High Court has held that failure to furnish exact dates, timings and an account of all the details as to the manner in which the woman was taunted and teased does not have much significance. A complaint of a woman cannot be rejected on this ground.[70]

When there were repeated demands for dowry and harassment was meted out, both mental and physical, it was held by the Rajasthan High Court that it is not necessary that the husband or his relatives must be always present at the time when the wife was subjected to cruelty. If their conduct either by act s of commission or omission is of such a nature which results in mental and physical harassment, it will amount to cruelty. It is immaterial whether the woman was living in her parent's house or in her matrimonial home.[71]

Mere allegation of simple desertion of wife by husband will not be covered by the definition of cruelty under s 498A. Being a penal provision, it has to be strictly construed.[72]Simple desertion may however amount to cruelty for the purposes of obtaining a divorce under the Hindu Marriage Act, 1955 or the Special Marriages Act, 1954.

The word 'harassment' in ordinary sense means to torment a person subjecting him or her through constant interference or intimidation. If such tormentation is done with a view to 'coerce' the wife to meet the unlawful demand of property or valuable security, it amounts to 'harassment' as contemplated by s 498A. 'Coercion' means persuading or compelling a person to do something by using force or threats. Thus, to constitute 'harassment' a cruelty, it is essential to prove that: (i) the woman was tormented, i.e., tortured either physi-

cally or mentally through constant interference or intimidation; (ii) such act was with a view to persuade or compel her to do something which she is legally or otherwise not expected to do by using force or threats, and (iii) intention to subject the woman was to compel or force her or her relatives to fulfill unlawful demands for any property or valuable security.[73]

It is, however, important to note that every cruelty or harassment does not attract the provisions of s 498A. Cruelty or harassment (caused with a view to meeting dowry demand) to a married woman which only is likely to drive her to commit suicide or to cause grave injury to life or limb or health, whether mental or physical, comes within the ambit of s 498A, IPC.[74]

Cruelty, a Continuing Offence

In *Arun Vyas v Anita Vyas* ,[75] the Supreme Court held that cruelty is a continuing offence and hence every act of cruelty would be a new starting point of limitation under s 472, CrPC. However, in cases of cruelty falling under s 498A, the courts, according to the Supreme Court, should take cognisance of the offence even after the limitation period if the facts so warrant by placing reliance on s 473, CrPC, which provides that courts may take cognisance of an offence even beyond the limitation period in the interests of justice. The apex court held that women are oppressed and interest of justice demand that court should protect the oppressed and punish the oppressor. It also observed that courts should construe liberally the provisions of s 473, CrPC, in favour of a wife who is subjected to cruelty.

Another consequence of the proposition that cruelty is a continuous offence is that a wife can initiate proceedings against her husband and his relatives in any of the courts in which local jurisdiction she was subjected to cruelty over a period of time.[76] The only necessary requisite for the court to entertain it is that the alleged ill-treatment, cruelty or demand of dowry constitutes a continued offence and a part of it took place within its jurisdiction.[77]

Who can Complain of Cruelty?

Section 198A of the mandates a court not to take cognisance of an offence punishable under s 498A of the IPC except upon a police report of facts that constitute the offence or upon a complaint made by the aggrieved wife or by her father, mother, brother, sister, her father's or mother's brother or sister, or, with the leave of the court, by any other person related to her by blood, marriage or adoption.

However, the National Commission for Women (NCW) has *locus standi* to maintain a curative petition before the Supreme Court in respect of proceedings in relation to an offence under s 498A, IPC, as NCW is constituted to take up cases for violation of constitutional provisions and other laws relating to women.[78]

Constitutional Validity of Section 498A

In *Sushil Kumar Sharma v Union of India,* [79] the constitutional validity of s 498A was assailed on the grounds that: (i) it has been grossly abused by married women to harass their husbands, in-laws and relatives by instituting frivolous and unfounded criminal proceedings, (ii) it has become an easy tool in the hands of the Police and other agencies, like the Crime Against Women Cell, to hound the (accused) persons with the threat of arrest making them run here and there till they get anticipatory bail as the offence has been made cognisable and non-bailable; (iii) the investigating agencies and the courts start with the presumptions that the accused persons are guilty and that the complainant is speaking the truth; (iv) it has been exploited by the women and their relatives to such an extent that the provision has become most ineffective in curbing the evil of dowry as well as disciplining the husband and his relatives to treat the wife with respect and honour.[80]

However, the Supreme Court, repelling these arguments, upheld the constitutional validity of s 498A. It held that mere possibility of abuse of a statutory provision does not per se make a provision of law objectionable and ultra vires to the Constitutional. In such cases, 'action' and not the 'section' may be vulnerable. If it is so, a court, by upholding the provision of law, may still set aside the 'action' and grant appropriate relief to the person aggrieved. The court also opined that it must be presumed, unless contrary is proved, that administration and application of a provision of law is done 'not with an evil eye and unequal hand'. Nevertheless, the apex court reminded the investigating agencies and the courts that their role is of a watchdog and not of a bloodhound. They, therefore, have to make effort to see that an innocent person is not made to suffer be-

cause of unfounded, baseless and malicious allegations. It also turned the contention that to formulate a set of 'guidelines' to protect innocents from the abuse of the provision.

Compounding of Offences under Section 498A

Compounding an offence is settling or condoning the matter. Section 320 , CrPC , provides for the compounding of certain offence by the parties directly and compounding of some others with the permission of the court. Compounding an offence will have the effect of an acquittal in a case.

Section 498A, being a very serious offence, is not included in s 320, CrPC. However, there seems to be no agreement among different high courts about compounding of the offence under s 498A. Despite the clear provision in s 320(a), CrPC, that no offence shall be compounded except as provided by that section, several high courts have held that if the parties have reconciled and if the husband and wife are living together, then in exercise of the inherent powers of the high court under s 482, CrPC, to secure the ends of justice, the court can permit the parties to compound the offence;[81] while a few high courts, in the light of mandatory language of s 320 of the CrPC, have declined to allow the parties to compound the offence.[82] The Bombay High Court, placing reliance on s 320 of the CrPC, has not only doubted the judicial propriety of orders permitting parties to compound the offence under s 498A but also held that an order passed for compounding of a non-compoundable offence is illegal.[83]

However, recently the Supreme Court, in *BS Joshi v State of Haryana* ,[84] has set the judicial ambivalence at rest. Delving into the judicial propriety of a high court's refusal, in the exercise of its inherent powers under s 482 of the CrPC read with art 226 of the Constitution, to compound criminal proceedings or quash FIR or complaint relating to s 498A on the ground that s 320 of the CrPC does not allow it to do so, the Supreme Court ruled that s 320 of the CrPC does not either limit or affect the inherent powers of a high court for quashing criminal proceedings initiated under s 498A, IPC. The apex court accordingly held that a high court, when approached by both the parties and jointly prayed for quashing of the criminal proceedings filed by the wife under s 498A, is, for securing the ends of justice,[85] empowered to quash the criminal proceedings even though s 498A is not made compoundable under s 320 of the CrPC.

Nevertheless, it is pertinent to note that in the recent past a two-judge Bench of the Supreme Court, in *Bankat & Anor v State of Maharashtra* ,[86] in the light of legislative mandate of s 320 of the CrPC, ruled that only the offences which are covered by s 320 of the CrPC can be compounded and rest of the offences punishable under the IPC cannot be compounded. Further, relying upon the ruling of the *Bankat* case, the Karnataka High Court, in *Nazimunnisa v State of Karnataka* ,[87] showed its reluctance to quash the criminal proceedings relating to s 498A of the IPC.

Sections 498A and 304B, Indian Penal Code --A Comparison

Section 498A deals with cruelty to a woman by husband or relatives of husband, which cruelty should be of nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical, of the woman. Making unlawful demands is also cruelty. Section 304B deals with 'dowry deaths', where the death of a woman if caused by any burns or bodily injuries or where the death is not under normal circumstances, within seven years of marriage and where the woman was subjected to cruelty or harassment by the husband or his relatives, for or in connection with any demand for dowry. While s 304B deals with the actual death, s 498A deals with the 'cruelty' part alone. But, these sections are not mutually exclusive.[88] The word 'cruelty' has not been defined under 304B, IPC. However, having regard to the common background of these offences, it can be construed that the term 'cruelty' occurring in s 304B has the same meaning as given in the explanation to s 498A.[89] However, s 304B only deals with dowry deaths occurring within seven years of marriage. No such period is stipulated in s 498A.[90] Thus, a person charged and acquitted under s 304B can be convicted under s 498A without the charge being there, if such a case is made out.[91] There can be conviction under both.[92] Ss 498A and 304B are not mutually exclusive even though they deal with different and distinct offences.[93]

PROPOSALS FOR REFORM

Law Commission of India has offered a couple of major proposals for reform in the existing law relating to bigamy, adultery, and cruelty by husband or his relatives.

Bigamy

The Fifth Law Commission offered the following proposals for reform in the existing ss 494, 495, and 496, IPC[94]:

(1) Appreciating propriety of the words 'having a husband or wife living' in the existing definition of bigamy 'when divorces were rare even where permissible by law and the bond of marriage subsisted until death of one party to the marriage' and arguing that these words ('having a husband or wife living') become irrelevant when the first marriage gets dissolved under the law as each of the parties to the marriage ceases to be 'husband' and 'wife', it suggested that s 494 should be redrafted to define bigamy as: 'Whoever, being married, contracts another marriage in any case in which such marriage is void by reason of its taking place during the subsistence of the earlier marriage, commits bigamy'.

(2) With a view to clarifying the ambit of bigamy as an offence when earlier marriage is dissolved by a decree of divorce but the governing law fixes a period during which either party to the marriage is precluded from getting remarried and a party gets married within such a period, it proposed that a new *explanation* should be added to s 494 to make it clear that the marriage, in spite of its dissolution, subsists during that period.

(3) It recommended that the first *exception* to s 494 should be deleted as a person whose alleged first marriage was void ab initio cannot be said to 'be married' and his subsequent marriage, therefore, cannot be said to be contracted during the 'subsistence' of the earlier marriage.

(4) Perceiving that punishment provided for bigamy as well as for its aggravated form (bigamy accompanied with the concealment of former marriage) is 'unnecessarily high', it suggested that the existing term of imprisonment should be reduced to three and seven years respectively.

(5) It recommended that the maximum punishment of seven years' imprisonment provided for fraudulent marriage ceremony should be reduced to three years' imprisonment.

The Indian Penal Code (Amendment) Bill, 1978, had incorporated all the recommended substantive proposals for reform. And it sought to add an additional*explanation* to s 494 stipulating that a person be deemed to marry again irrespective of any legal defects in contracting, celebrating or performing the marriage. It, however, did not give effect to the Law Commission's proposal for scaling down the existing punishment for bigamy and its aggravated form, and for going through a fraudulent marriage ceremony. However, the Bill, which passed by the *Rajya Sabha*, could not take the form of law as it lapsed due to subsequent dissolution of the *Lok Sabha*.

The Fourteenth Law Commission, which reviewed the 1978 Amendment Bill, proposed that conversion to another religion should have no effect on s 494, IPC.

(1) With a view to giving legislative effect to the ratio of the Supreme Court's decision in *Sarala Mudgal* case, it recommended that a new *explanation*, making it clear that conversion to another religion for the purpose of getting married again during the subsistence of earlier marriage amounts to the offence of bigamy, should be added to s 494.[95]

Recently, the Eighteenth Law Commission, in its exclusive Report on Preventing Bigamy via Conversion to Islam, has recommended specific reforms in different personal laws of marriage for giving effect to the ruling of the apex court in *Sarala Mudgal*. They are[96]:

(1) A provision to the effect that a married person whose marriage is governed by his/her personal law cannot marry again even after changing religion unless the first marriage is dissolved or declared null and void in accordance with law, and if such a marriage is contracted it will be null and void and will attract the provisions of ss 494 & 495 of the IPC should be, at appropriate place, inserted in the Hindu Marriage Act, 1955; the Christian Marriage Act, 1872; the Parsi Marriage and Divorce Act, 1936, and the Dissolution of Muslim Marriages Act, 1939.

(2) The Proviso to s 4 of the Dissolution of Muslim Marriages Act, 1939 -saying that this Section would not apply to a married woman who was originally a non-Muslim if she reverts to her original faith- should be deleted.
(3) In the Special Marriage Act, 1954 a provision should be inserted to the effect that if an existing marriage, by whatever law it is governed, becomes inter-religious due to change of religion by either party it will thenceforth be governed by the provisions of the Special Marriage Act including its anti-bigamy provisions.
(4) The offences relating to bigamy under ss 494 & 495 should be made cognizable by appropriate amendments in the CrPC.

Adultery

The Fifth Law Commission recommended two reforms in the law relating to adultery in the IPC. They are[97]:

(1) With a view to doing with the immunity of the adulterous wife from prosecution and conviction for committing adultery, it recommended that the wife, who has sexual intercourse with a person other than her husband, should be punished for committing adultery as the reasons that prompted authors of the Penal Code in the nineteenth century for exempting her from punishment are 'not valid' and there is 'hardly any justification for not treating the guilty pair alike'.
(2) The existing punishment of imprisonment for a term up to five years for adultery should be scaled down to imprisonment for a term up to two years as the existing punishment, according to it, is 'unreal and not called for in any circumstances'.

The Amendment Bill of 1978 gave effect to the first proposal only. It kept the penal clause intact. However, the first proposal premised on the equality of sexes and the legislative recognition thereto in the Bill could not take the form of law as the Bill lapsed.[1]

In 2003, the Justice Malimath Committee also suggested that suitable amendments to s 497, IPC, should be made to bring adulterous woman within its purview as the object of s 497 is to preserve the sanctity of the marriage.[2]

Cruelty by Husband or His Relatives

The Nineteenth Law Commission, while delving into the feasibility of adding a few IPC-offences in the list of compoundable offences under s 320, CrPC, has recommended that s 498A, IPC, should be made a compoundable offence with the permission of the court.[3] However, in order to ensure that the compromise is free and voluntary, the Law Commission has suggested that a new section (2A), laying down the procedure for dealing with an application for compounding of an offence under s 498A, IPC, should added to s 320 of the CrPC. The recommended s 2A runs as under:

> After the application for compounding an offence under S. 498A of Indian Penal Code is filed and on interviewing the aggrieved woman, preferably in the Chamber in the presence of a lady judicial officer or a representative of District Legal Services Authority or a counselor or a close relation, if the Magistrate is satisfied that there was prima facie a voluntary and genuine settlement between the parties, the Magistrate shall make a record to that effect and the hearing of application shall be adjourned by three months or such other earlier date which the Magistrate may fix in the interests of Justice. On the adjourned date, the Magistrate shall again interview the victim woman in the like manner and then pass the final order permitting or refusing to compound the offence after giving opportunity of hearing to the accused. In the interregnum, it shall be open to the aggrieved woman to file an application revoking her earlier offer to compound the offence on sufficient grounds.[4]

1 Act No 46 of 1983.

2 Re *Abdul Khader*(1970) Cr LJ 1321(Mad) .

3 *KAN Subrahmanyam v J Ramalakshmi* (1971) Mad LJ (Cr) 604.

4 *Raghunath Padhy v State of Orissa* AIR 1957 Ori 198, (1957) Cr LJ 989(Ori) .

5 *Moideen Kutty Haji v Kunhikoya* AIR 1987 Ker 184.

6 *Amruta Gadtia v Trilochan Pradhan* (1993) Cr LJ 1022(Ori) ; *Saurava Barik v Gouri Kaudi* (1994) Cr LJ 440(Ori) ; *Akhaya Kumar v State* (1998) Cr LJ 1757(Ori) .

7 *Dr AN Mukerji v State* AIR 1969 All 489, (1969) Cr LJ 1203(All) ; see also *Saurava Barik v Gouri Kaudi* (1994) Cr LJ 440(Ori) wherein it was observed that the main requisites for attracting s 493 are: (i) the accused practiced deception, (ii) such deception was to induce the woman to believe that she was lawfully married to her, and (iii) there was cohabitation or sexual intercourse as a result of deception.

8 *Kailash Singh v Priti Pratihar* (1982) Cr LJ 1005(Raj) ; *Ashwin Nanabhai v State of Maharashtra* AIR 1970 SC 1998.

9 *Gopal Lal v State of Rajasthan* AIR 1979 SC 713, (1979) 2 SCC 170; *Manju Ram Kalita v State of Assam* (2009) 12 SCC 330.

10 *Abdul Hamid v Smt Asghari* (1973) Cr LJ 1710(All) .

11 *Lingari Obulamma v L Venkata Reddy* AIR 1979 SC 848; *Smt Priya Bala Ghosh v Suresh Chandra Ghosh* AIR 1971 SC 1153; *Kanwal Ram v Himachal Pradesh Administration* AIR 1966 SC 614; *Bhaurao Shankar Lokhande v State of Maharastra* AIR 1965 SC 1564; *Shanti Deb Berma v Kanchan Prava Devi* AIR 1991 SC 816; *Gopal Lal v State of Rajasthan* AIR 1979 SC 713; *S Nagalingam v Sivagami* AIR 2001 SC 3576, (2001) 7 SCC 487; *Rajkumari v Kalawati* (1992) Cr LJ 1373(All) ; *Yelamanchali Nageshwari v Yelamanchali Venkata Prasada Rao* (1998) Cr LJ 4128(AP) ; *Sham Singh v Sarabit Kaur* (1998) Cr LJ 4788(P&H) ; *Shridhar G Jigade v Smt Satyavathi* (2000) Cr LJ 2862(Kant) ; *Ram Sanehi v State of Madhya Pradesh* (2000) Cr LJ 3252(MP), *Dr Vijaya Lakshmi v D Sanjeeva Reddy* (2001) Cr LJ 1583(AP) ; *Trilochan Sahoo v Srimati Saral Sahoo* (2009) Cr LJ 3281(Ori), 2009 (1) OLR 623.

12 *P Satyanarayana v P Mallaiah* (1966) 6 SCC 122.

13 *Bhaurao Shankar Lokhande v State of Maharastra* AIR 1965 SC 1564; (1978) Mad LJ (Cri) 452.

14 *Smt Priya Bala Ghosh v Suresh Chandra Ghosh* AIR 1971 SC 1153.

15 AIR 1995 SC 1531, (1995) 3 SCC 635, (1995) Cr LJ 2926(SC) .

16 AIR 2000 SC 1650, (2000) 6 SCC 224, (2000) Cr LJ 2433(SC) .

17 Hari Singh Gour, *Penal Law of India*, eleventh edn, vol 4, Law Publishers, Allahabad, 1998, p 4656.

18 AIR Manual, fourth edn, vol 28, 901.

19 *Ramchandran v Baburaj* (2009) 4 KLT 744(Ker) .

20 *Kashuri v Ramaswamy* (1979) Cr LJ 741(Mad) .

21 *WJ Phillips v Emperor* AIR 1935 Oudh 506; *Sita Devi v Gopal Saran* AIR 1928 Pat 375.

22 *Vedavalli v MC Ramaswamy* AIR 1964 Mys 280.

23 *AS Puri v KC Ahuja* AIR 1970 Del 214, (1970) Cr LJ 1441(Del) .

24 *Brij Lal Bishnoi v State* (1996) Cr LJ 4286(Del) .

25 Re *CS Subramaniam*AIR 1953 Mad 422.

26 *Pothi Gollari v Ghani Mondal* AIR 1963 Ori 60, (1963) Cr LJ 312(Ori) ; *Rajesh Paul Choudhury v State of Assam* (2008) 2 Ass. LT (Cri) 18, 2007 (2) GLT 543.

27 *State of Rajasthan v Bhanwaria* AIR 1965 Raj 191, (1965) Cr LJ 673(Raj) .

28 *W Kalyani v State through Inspector of Police* AIR 2012 SC 497, (2012) 1 SCC 3058.

29 See Macaulay, Macleod, Anderson and Millett, *A Penal Code Prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note 'Q', p 175.

30 See *Yusuf Abdul Aziz v State of Bombay* [1954] SCR 930; *Sowmithri Vishnu v Union of India* AIR 1985 SC 1618, (1985) Cr LJ 1302(SC) ; *V Revathi v Union of India* AIR 1988 SC 835, (1988) 2 SCC 72.

31 *Alamgir v State of Bihar* AIR 1969 SC 436, (1959) Cr LJ 527(SC) .

32 *Ram Narayan Baburao Kapor v Emperor* AIR 1937 Bom 186

33 *Norman O'conner v Emperor* 1935 Cal 345.

34 *Ram Narayan Baburao Kapor v Emperor* AIR 1937 Bom 186; *Alamgir v State of Bihar* AIR 1969 SC 436, (1959) Cr LJ 527(SC) ; *DR Kumthekar v State of Punjab* AIR 1967 Punj 330; *Chaman Lal v H Sabir Ali* (1973) Cr LJ 1249(Del) .

35 AIR Manual, vol 28, fourth edn, p 907.

36 *Anuara Begum v Habil Mea* (1962) Cr LJ 159(Tri) .

37 *Singana Naga Nooka Chakrarao v State of Andhra Pradesh* (2007) Cr LJ 3466(AP), 2007 (2) ALT (Cri) 323.

38 *Ram Narayan Baburao Kapor v Emperor* AIR 1937 Bom 186; *Emperor v Mahiji Fula* (1933) ILR 58 Bom 88; *Venkata Ramana v Govt of Mysore* (1952) Cr LJ 705(Mys) .

39 *Bipad Bhanjan Sarkar*AIR 1940 Cal 477.

40 *Adikanda Samal v Madhabananda Nayak* AIR 1979 SC 1729, (1979) 4 SCC 488. See also *Bipad Bhanjan Sarkar v Emperor* AIR 1940 Cal 477.

41 *Ravichandran v Yashdhai* (2012) 1 Mad LJ 758(Mad) .

42 *Dr Manish Das v State of Uttar Pradesh* (2006) 6 SCC 536; *Ushaben v Kishorbhai Chunilal Talpada* (2012) Cr LJ 2234(SC) .

43 AIR 2011 SC 3031, (2011) 7 SCC 616.

44 *Praveen Choube v State of Madhya Pradesh* (2011) ILR MP 3214.

45 *BS Puttaswamy Sannaiah v MS Shamla Kumari Puttaswamy* (2008) 1 Kar LJ 327(Kant), 2008 (1) KCCR 1.

46 *BS Joshi v State of Haryana* (2003) Cr LJ 2028(SC) ; *K Prema S Rao v Yadla Srinivasa Rao* (2003) 1 SCC 217.

47 *Anil Kumar v State of Punjab* (1997) 2 AI Cri LR 638(P&H) .

48 AIR 2004 SC 1418, (2004) 3 SCC 199, (2004) Cr LJ 892(SC) .

49 Ibid, para 9.

50 (2005) Cr LJ 2935 (Ker).

51 Ibid, para 18.

52 *Ranjana Gopalrao Thorat v State of Maharashtra* (2007) Cr LJ 3866(Bom), 2007 (5) Mh LJ 425; *U Suvetha v State* (2009) 6 SCC 757, (2009) Cr LJ 2974(SC) .

53 (2010) 10 SCC 190.

54 *Alamuri Lalitha Devi v State of Andhra Pradesh* (1994) 3 Crimes 761(AP) ; *Sarala Prabhakar Waghmare v State of Maharashtra* (1990) Cr LJ 407(Bom) ; *Jatinder Kumar v State (Delhi Administration)* (1992) Cr LJ 1482(Del) .

55 *Pawan Kumar v State of Haryana* AIR 1998 SC 958, (1998) 3 SCC 309; *Satpal v State of Haryana* (1998) 5 SCC 687.

56 *Mohd Hoshan v State of Andhra Pradesh* (2002) 7 SCC 414.

57 *Gananath Patnaik v State of Orissa* (2002) 2 SCC 619.

58 *Mohd Hoshan v State of Andhra Pradesh* (2002) 7 SCC 414.

59 *Packirisamy v State of Tamil Nadu* (2005) Cr LJ 487(Mad) . However, the mere fact that husband developed some intimacy with another woman during the subsistence of marriage and failed to discharge his marital obligations does not amount to cruelty. See *Pinakin Mahipatray Rawal v State of Gujarat* (2013) 10 SCC 48, (2013) 11 SCALE 198.

60 *State of Karnataka v Anni Poojary* (2005) Cr LJ 2662(Kant) .

61 *State of Karnataka v Moorthy* (2002) Cr LJ 1683(Kant) 2002 (3) Kar LJ 351.

62 *State of Karnataka v KS Manjunath achari* (1999) Cr LJ 3949(Kant) 1999 (3) Kar LJ 593.

63 *Madhuri Mukund Chitins v Mukund Martand Chitnis* (1992) Cr LJ 111(Bom), 1995 (2) MhLJ 113.

64 *Sarojakshan v State o0f Maharashtra* (1995) Cr LJ 340(Bom), 1995 (2) Mh LJ 113.

65 *Krishan Lal v Union of India* (1994) Cr LJ 3472(P&H) .

66 *Mohd. Hoshan v State of Andhra Pradesh* (2002) 7 SCC 414, AIR 2002 SC 3270.

67 *Girdhar Shankar Tawade v State of Maharashtra* AIR 2002 SC 2078, (2002) 5 SCC 177; *Basheer v State of Kerala* (2004) Cr LJ 3785(Ker) .

68 *Savitri Devi v Ramesh Chand* (2003) Cr LJ 2759(Del) .

69 *State of West Bengal v Orilal Jaiswal* (1994) Cr LJ 2104(SC) .

70 *Sudhir Kumar Jain v State* (1994) 2 Crimes 954(Del) .

71 *Jagdish v State of Rajasthan* (1998) Cr LJ 554(Raj) ; *Balram Prasad Agrawal v State* AIR 1997 SC 1830, (1997) 9 SCC 338; *Sujatna Mukherjee v Prashant Kumar* AIR 1997 SC 2465.

72 *Hanumanthan Rao v S Ramani* AIR 1999 SC 1318, (1999) 3 SCC 620; *Paparambaka Rosamma v State of Andhra Pradesh* (1999) 7 SCC 695.

73 *Savitri Devi v Ramesh Chand* (2003) Cr LJ 2759(Del) .

74 *Giridhar Shanlar Tawade v State of Maharashtra* (2002) 5 SCC 177, AIR 2002 SC 2078; *Noorjahan v State* (2008) 11 SCC 55, AIR 2008 SC 2131; *Ran Singh v State of Haryana* (2008) 4 SCC 70, AIR 2008 SC 1994.

75 AIR 1999 SC 2071, (1994) 4 SCC 690; see also *State of Himachal Pradesh v Tara Dutt* (2000) 1 SCC 230.

76 *Sunita Kumari Kashyap v State of Bihar* AIR 2011 SC 1674, (2011) Cr LJ 2667(SC), (2011) 11 SCC 301.

77 *Manish Ratan v State of Madhya Pradesh* (2007) 1 SCC 262, 2006 (11) SCALE 34.

78 *National Commission for Women v Bhaskar Lal Sharma* (2014) 4 SCC 252.

79 AIR 2005 SC 3100, (2005) 6 SCC 281, (2005) Cr LJ 3439(SC) .

80 The petitioner relied upon some of the observations made by the Delhi High Court in *Savitri Devi v Ramesh Chand* (2003) Cr LJ 2759(Del) and referred to in *Sushil Kumar Sharma v Union of India* AIR 2005 SC 3100, (2005) 6 SCC 281, (2005) Cr LJ 3439(SC) .

81 *State of Rajasthan v Gopal Lal* (1992) Cr LJ 273(Raj) ; *Daggupati Jayalakshmi v State of Andhra Pradesh* (1993) Cr LJ 3162(AP) ; *T Venkatalakshmi v State of Andhra Pradesh* (1993) 3 Andh LT 424; *Saraswathi Sutradhar v State of Tripura* (1999) Cr LJ 117(Gau) ; *Gurusharan Kaur v State of Rajasthan* (1993) Cr LJ 2076(Raj) ;

82 For example see *Manoj Kumar v State of Rajasthan* (1999) Cr LJ 10(Raj) .

83 *Neeta Sanjay Tagade v Smt Vimal Sadashiv Tagade* (1997) Cr LJ 3263(Bom) .

84 AIR 2003 SC 1386, (2003) 4 SCC 675, (2003) Cr LJ 2028(SC) ; followed in *Rajeev Verma v State of Uttar Pradesh* (2004) Cr LJ 2956(All) . The Allahabad High Court also proposed, with convincing reasoning, that s 498A be, with a court's permission, made a compoundable offence under s 320 of the CrPC. Similar proposal for reform was also made by the Allahabad High Court in *Madhurima Bhargava v State of Uttar Pradesh* (1999) Cr LJ 685(All) . The Delhi High Court also pleaded for such a re-form. See, *Savitri Devi v Ramesh Chand* (2003) Cr LJ 2759(Del) .

85 In *Ruchi Agarwal v Amit Kumar Agarwal* [(2005) 3 SCC 299] the Supreme Court, with a view to doing complete justice and to preventing abuse of process of law to harass respondents, quashed the criminal proceedings relating s 498A, IPC.

86 (2005) 1 SCC 343, (2005) Cr LJ 646(SC) .

87 (2006) 1 Kant LJ 577.

88 *Keshab Chander Panda v State* (1995) Cr LJ 174(Ori) ; *Dinesh Sheth v State (NCT) of Delhi* (2008) 14 SCC 94, 2008 Cri LJ 4345; *Noorjahan v State* AIR 2008 SC 2113, (2008) 11 SCC 55; *State of Uttar Pradesh v Santosh Kumar* (2009) 9 SCC 626, 2009 (12) SCALE 269.

89 *Hira Lal v State (Govt of NCT) Delhi* (2003) 8 SCC 80; *Kaliyaperumal v State of Tamil Nadu* AIR 2003 SC 3828, (2004) 9 SCC 157, (2003) Cr LJ 4321(SC) .

90 *Gurdip Singh v State of Punjab* (2013) 10 SCC 395, (2013) 4 Crimes 96(SC) .

91 *Nand Kishore v State* (1995) Cr LJ 3706(Bom) ; *Nirmala Devi v State* (1995) Cr LJ 3553(P&H) ; *Mahendra Sahu v State of Madhya Pradesh* (2005) Cr LJ 874(MP) ; *Hira Lal v State (Govt of NCT) Delhi* (2003) 8 SCC 80. However, in such a case a notice to the accused to defend needs to be given. See *Shamnsaheb M Multani v State of Karnataka* (2001) Cr LJ 1075(SC) .

92 *Akula Ravinder v State of Andhra Pradesh* AIR 1991 SC 1142, (1991) SCC 990; *Shanti v State of Haryana* AIR 1991 SC 1226; *Babaji Charan Barik v State* (1994) Cr LJ 1684(Ori) ; *Kaliyaperumal v State of Tamil Nadu* AIR 2003 SC 3828, (2004) 9 SCC 157, (2003) Cr LJ 4321(SC) .

93 *Hira Lal v State (NCT) Delhi* (2003) 8 SCC 80, AIR 2003 SC 2865; *Arun Garg v State of Punjab* (2004) 8 SCC 251, 2004 (8) SCALE 273.

94 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 20.3-20.4, and 20.7-20.11.

95 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, para 9.42.

96 See, Law Commission of India, 'Two Hundred Twenty-Seventh Report: Preventing Bigamy via Conversion to Islam- A Proposal for giving Statutory Effect to Supreme Court Rulings' Government of India, 2009, ch VIII.

97 Law Commission of India, 'Forty- Second Report: The Indian Penal Code ', Government of India, 1972, para 20.18.

1 For further comments on the proposals, see KI Vibhute, 'Adultery and the Indian Penal Code: Need for a Gender Equality Perspective', Supreme Court Cases, no 6, 2001, 16 (J).

2 Ministry of Home Affairs, 'Committee on Reforms of Criminal Justice System', Government of India, 2003, para 16.3.2.

3 Nevertheless, it is important to note that prior to the Nineteenth Law Commission, the Fourteenth Law Commission (154th Report on CrPC), the Sixteenth Law Commission (177th Report on Arrest), and the Justice Malimath Committee (2003) recommended that s 498A of the IPC should be made a compoundable offence.

4 Law Commission of India, 'Two Hundred and Thirty-Seventh Report: Compounding of (IPC) Offence', Government of India, 2011, para 5.6.

CHAPTER 33

Homicide

(Indian Penal Code 1860,Sections 299 to 311)

INTRODUCTION

The word 'homicide' has been derived from Latin terms *homi* (man) and *cido* (cut). Literally, the word 'homicide' means the killing of a human being by another human being. 'Homicide' is the generic term for the causing, or accelerating the death of a human being by another human being.

However, every homicide is not unlawful or criminal. Death caused by an innocent agent, like a child under the age of discretion (*doli incapax*) or a person of unsound mind, or death of the assailant caused in exercise of the right of private defence, for example, is not unlawful. In the former, the doer is 'excused', while in the latter the defendant's act is 'justified'. Homicides, therefore, are of two types: (1) lawful homicides, and (2) unlawful homicides. Lawful homicides are those which are covered by 'Chapter IV: Of General Exceptions' of the IPC and which, therefore, are not punishable. The homicides that are made punishable under the Code obviously carry the label of unlawful homicides.

Lawful homicides, relying on the nature of 'general exception' that envelopes the homicide, can further be classified into: (i) excusable homicides, and (ii) justifiable homicides. Thus, there are three forms of homicide known to the IPC. They are: (i) excusable homicides, (ii) justifiable homicides, and (iii) unlawful or criminal homicides (i.e. homicides that are neither excused nor justified). Here we are concerned with unlawful homicides.

Chapter XVI of the IPC begins with the 'Offences Affecting Life' and deals with homicide offences. It incorporates in it four homicide offences. They are: (1) culpable homicide not amounting to murder, (2) culpable homicide amounting to murder, (3) death by a rash or negligent act, and (4) dowry death. It also deals with suicide and thugs.

PART A - CULPABLE HOMICIDE

Section 299. Culpable Homicide.--Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge, that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) *A* lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. *Z* believing the ground to be firm, treads on it, falls in and is killed. *A* has committed the offence of culpable homicide.

(b) *A* knows *Z* to be behind a bush. *B* does not know it. *A*, intending to cause, or knowing it to be likely to cause *Z's* death, induces *B* to fire at the bush. *B* fires and kills *Z*. Here *B* may be guilty of no offence; but *A* has committed the offence of culpable homicide.

(c) *A*, by shooting at a fowl with intent to kill and steal it, kills *B*, who is behind a bush; *A* not knowing that he was there. Here, although *A* was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill *B*, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.--A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.--Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.--The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Section 301. Culpable homicide by causing death of person other than person whose death was intended.--If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Introduction

Sections 299 and 300, IPC, define culpable homicide, which is of two types:

(1) Culpable homicide amounting to murder;
(2) Culpable homicide not amounting to murder.

The provisions relating to murder and culpable homicide are probably the most complicated in the IPC, and are so technical that very often they lead to confusion. A murder is merely a particular form of culpable homi-

cide. Every murder is culpable homicide, but every culpable homicide is not murder. Culpable homicide is the genus, and murder, its species.

Section 299 defines culpable homicide *simpliciter*. Section 300 defines murder, which is also a culpable homicide with some special characteristics, which are set out in cll 1-4 of s 300, subject to the *exceptions* given in s 300. If any culpable homicide falls within any of the four clauses in s 300, then it will amount to murder. All other instances of culpable homicide including the ones, which may fall within the *exceptions* to s 300, will be culpable homicide not amounting to murder.

While s 299 defines 'culpable homicide', it is not an exhaustive definition. It is important to remember that s 300 also defines culpable homicide, but which amounts to murder. Before going into further details about distinctions between s 299 and s 300, IPC, it is important to understand the sections.

The essential ingredients of culpable homicide are: (i) there must be death of a person; (ii) the death should have been caused by the act of another person; and (iii) the act causing death should have been done with: (a) the intention of causing death; or (b) the intention of causing such bodily injury as is likely to cause death, or (c) with knowledge that such act is likely to cause death.

The definition itself provides for three circumstances, wherein the presence or absence of certain factors in causing death is nevertheless treated as causing culpable homicide. These circumstances are dealt with in explanations 1-3.

Explanation 1 provides for a situation where the injured person is suffering from some disorder, disease or bodily infirmity, which quickened his death. The fact that his death was quickened or hastened by the disorder or disease he was already suffering from, will not reduce the guilt or culpability of the person causing the injury. In other words, the person who caused the injury cannot escape criminal liability of culpable homicide by stating that if the person injured did not suffer from the said disease or disorder, he would not have died.

Explanation 2 provides for a situation wherein a person who has been injured could have recovered and escaped death, if, he had been given prompt and proper medical treatment. In such situations too, the fact that the injured person died because he could not avail of good medical treatment, cannot be a ground for negating guilt or culpability of the person who inflicted the injury in the first place.

Explanation 3 is in respect of a slightly different situation. It takes into consideration death caused to a child in the mother's womb. The law states that if the death of the child is caused when still in the mother's womb, it is not culpable homicide. However, if any portion of the child, comes out of the mother's womb, even if it is not fully born, and if death is caused to such child, then it would amount to culpable homicide.

'CAUSING DEATH': TESTS FOR DETERMINING

The term 'whoever causes death' may be simple enough to understand, but has shown itself to be words of great import in deciding whether a particular act would amount to culpable homicide or not. The very first test to decide whether a particular act or omission would be covered by the definition of culpable homicide, is to verify whether the act done by the accused has 'caused' the death of another person. The relevant consideration for such verification is to see whether the death is caused as a direct result of the act committed by the accused.

In *Moti Singh v State of Uttar Pradesh* ,[1] the deceased Gayacharan, had received two gunshot wounds in the abdomen, which were dangerous to life (i.e., which were life threatening). The injury was received on 9 February 1960. There was no evidence as to whether he had fully recovered or not when he was discharged from the hospital. He, however, died on 1 March 1960. His body was cremated without any postmortem being done. The Supreme Court held that the mere fact that the two gunshot injuries were dangerous to life were not sufficient for holding that Gayacharan's death, which took place about three weeks after the incident, was on account of the injuries received by him. The court observed that in order to prove the charge of Gayacharan's murder, it was necessary to establish that he had died on account of the injuries received by him. Since there was no evidence to establish the cause of death, the accused could not be said to have caused the death of Gayacharan. A crucial aspect highlighted by the court in this case was that the connection between the primary cause and the death should not be too remote.

In *Joginder Singh v State of Punjab* ,[2] the deceased Rupinder Singh had teased the sister of the accused. In retaliation, the two accused went to Rupinder's house and shouted that they had come to take away the sister of Rupinder Singh. In the meantime, the cousins of Rupinder Singh intervened. One of them was given a blow on the neck by the accused. Meanwhile, Rupinder Singh started running towards the field. The accused started chasing him and Rupinder Singh jumped into a well. As a result of this, he sustained head injuries, which made him loose consciousness and thereafter he died due to drowning. The Supreme Court held that the accused were about 15 to 20 feet from Rupinder Singh, when he jumped into the well. There was no evidence to show that the accused drove Rupinder Singh into the well or that they left him no option but to jump into the well. Under these circumstances, it was held, that the accused could not have caused the death of Rupinder Singh, and hence they were entitled to be acquitted of the charge of murder.

In *Rewa Ram v State of Madhya Pradesh* ,[3] the accused had caused multiple injuries with a knife to his wife, Gyanvatibai. She was admitted into the hospital and an operation was performed on her. Thereafter, she developed hyperpyrexia, i.e., high temperature, as a result of which she died. This hyperpyrexia was a result of atmospheric temperature on weak, debilitated individuals, who already had some temperature. The doctor who performed the postmortem opined that the death was not as a result of multiple injuries, but because of hyperpyrexia. The Madhya Pradesh High Court placed reliance on expln 2 to s 299, IPC. It observed that if the supervening causes are attributed to the injuries caused, then the person inflicting the injuries is liable for causing death, even if death was not the direct result of the injuries. In the instant case, there was medical evidence to show that the hyperpyrexia was a result of her debilitated condition. Gyanvatibai fell into debilitated condition because of multiple injuries, which she had sustained, due to which she had to undergo operation, and the post-operative starvation, which was necessary for her recovery, resulted in her death. Thus, her death was a direct consequence of the injuries inflicted on her. Intervening or supervening cause of hyperpyrexia was a direct result of the multiple injuries and was not independent or unconnected with the serious injuries sustained by her. As a result, it was held, the accused 'had caused' her death and therefore his conviction for murder was upheld.

INTENTION OR KNOWLEDGE

Both the terms 'intention' and 'knowledge' appear in ss 299 and 300, however, having different consequences. Intention and knowledge are used as alternate ingredients to constitute the offence of culpable homicide. However, intention and knowledge are two different things.

The difference between the two came to be considered by the Supreme Court in *Basdev v State of Pepsu* .[4] In this case, the accused was alleged to have shot a 16-year old boy in a marriage feast after having got drunk. It was his defence that he was so drunk that he did not have the knowledge or intention to kill the boy for what was a trifling incident. The court differentiated between motive, intention and knowledge:

> Motive is something which prompts a man to form an intention. Knowledge is an awareness of the consequences of the act. In many cases, intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin, but it is not difficult to perceive that they connote different things.[5]

Intention or the mental element in committing the crime is an essential ingredient of culpable homicide. While 'intention' is a very important element in all crimes, it becomes crucial in the offence of culpable homicide, because it is the degree of intention of the accused, which determines the degree of crime. In other words, it is the mental element of the accused alone, which is material to decide whether a particular act is culpable homicide amounting to murder, or culpable homicide not amounting to murder.

As far as the offence of culpable homicide is concerned, there are three species or degrees of mens rea present: (i) an intention to cause death; (ii) an intention to cause dangerous bodily injury as is likely to cause death, and (iii) knowledge that the act is likely to cause death.[6]

'Intention', in the context of the definition of culpable homicide, does not always necessarily mean pre-meditation or pre-planning to kill a person. The expectation that the act of a person is likely to result in death is sufficient to constitute intention. A man expects the natural consequences of his acts and therefore, in law, he is presumed to intend the consequences of his act s. So, if a person in performing some act either:

(i) expects death to be the consequence thereof; or (ii) expects a dangerous injury to be the consequence of his act ; or (iii) knows that death is a likely consequence of his act, and in each case death ensues, his intention in the first two cases, and his knowledge in the third, renders the act a homicide. However, no hard and fast rule can be laid down for determining the existence of intention.[7] Whether there is intention or not is a question of fact.[8] A guilty intention or knowledge is thus essential to the offence under this section. 'Intent' and 'knowledge' in s 299 postulate the existence of positive mental attitude which is of different degrees.[9]

KNOWLEDGE AS MENS REA

As has been stated earlier, the third degree of intention contemplated under the definition of culpable homicide is knowledge. The third part of s 299 states 'whoever causes death by doing an act...with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide'. In the scheme of the section, the least or minimum degree of mental element contemplated to make an act of homicide culpable is the knowledge that the act is likely to cause death.

Knowledge means consciousness. It denotes a state of conscious awareness of certain facts in which human mind remains inactive. It connotes a bare awareness of the consequences of his conduct.[10]The offender should reasonably expect that the consequence of his act would probably result in the death of a person, even if he did not intend to cause the death.[11] The word 'likely' as used in s 299 is to denote a lower degree of likelihood, whereas the same word 'likely' in s 300 would denote a higher degree of likelihood of death. The word 'likely' in s 299 conveys the sense of probability as distinguished from merely possibility or probability.[12]

ACT OF KILLING A PERSON NOT INTENDED TO BE KILLED

The first illustration to s 299 explains that even if the act of a person is not intended or aimed at any particular person, it would still amount to culpable homicide. Illustration (d) to cl (4) of s 300 also gives an example of a person randomly shooting into a crowd and killing one of them. He is said to be guilty of murder. Both these illustrations are examples where the offender did not have intention against any particular person. But the same analogy would apply even in cases where the intention to kill may be in respect of *A*, but the act of the person results in the death of *B*. Even in such an instance, the required mens rea or intention exists and the homicide would amount to murder. It is called transferred malice or transferred mens rea.[13]

But then, again intention is always a question of fact and the fact that the accused did not intend to cause the injury he did, may be a mitigating factor. In *Gurmail Singh v State of Punjab* ,[14] there was an argument between *B* and *G* on the one hand and the accused on the other, over cracking of some indecent jokes by the accused before *B's* wife. The deceased intervened to stop the two sides from fighting. The accused raised a *barchha* to give a blow to *A*, which fell on the deceased. The Supreme Court held that the accused had no animosity against the deceased, even if transmission of malice from *G* to the deceased can be inferred, in view of the fact that there is no evidence to show that the accused intended to cause the injury he inflicted, his conviction was converted from s 302 to s 304, Pt II, IPC. In *Kashi Ram v State of Madhya Pradesh* ,[15] in which the accused fired a shot at a particular member of the adversary's party but it hit another person and killed him, the Supreme Court applied the doctrine of transferred malice to hold him guilty under s 304, Pt II as he neither aimed at nor intended death of the deceased.

PROOF OF INTENTION

Direct proof of intention is always very difficult to obtain. However, intention is something which can be gathered and inferred from the act ion of the person and the surrounding circumstances, such as motive of the accused, the nature of the attack, the time and place of attack, the nature of weapons used, the nature of injuries caused to the deceased and so on. These and other factors may be taken into consideration to determine whether a person had the requisite intention.

When injuries are inflicted on vital parts of the body like the abdomen by a lethal or sharp edged weapon, the irresistible inference is that the accused intended to kill the deceased.[16]

PART B - MURDER

Section 300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

Secondly--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

Thirdly--If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

Fourthly--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) *A* shoots *Z* with the intention of killing him. *Z* dies in consequence. A commits murder.

(b) *A*, knowing that *Z* is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. *Z* dies in consequence of the blow. *A* is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if *A*, not knowing that *Z* is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here *A*, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) *A* intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here, *A* is guilty of murder, although he may not have intended to cause *Z's* death.

(d) *A* without any excuse fires a loaded cannon into a crowd of persons and kills one of them. *A* is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.--When culpable homicide is not murder.--Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:--

First.--That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.--That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.--That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) *A*, under the influence of passion excited by a provocation given by *Z*, intentionally kills *Y*, *Z'*schild. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) *Y* gives grave and sudden provocation to *A*. *A*, on this provocation, fires a pistol at *Y*, neither intending nor knowing himself to be likely to kill *Z*, who is near him, but out of sight. *A* kills *Z*. Here A has not committed murder, but merely culpable homicide.

(c) *A* is lawfully arrested by *Z*, a bailiff. *A* is excited to sudden and violent passion by the arrest, and kills *Z*. This is murder, inasmuch as the provocation was given by a, thing done by a public servant in the exercise of his powers.

(d) *A* appears as a witness before *Z*, a Magistrate. *Z* says that he does not believe a word of *A's* deposition, and that *A* has perjured himself. *A* is moved to sudden passion by these words, and kills *Z*. This is murder.

(e) *A* attempts to pull *Z's* nose. *Z*, in the exercise of the right of private defence, lays hold of *A* to prevent him from doing so. *A* is moved to sudden and violent passion in consequence, and kills *Z*. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) *Z* strikes *B*. *B* is by this provocation excited to violent rage. *A*, a bystander, intending to take advantage of *B's* rage, and to cause him to kill *Z*, puts a knife into B's hand for that purpose. *B* kills *Z* with the knife. Here *B* may have committed only culpable homicide, but *A* is a guilty of murder.

Exception 2.--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip *A*, not in such a manner as to cause grievous hurt to *A*. *A* draws out a pistol. *Z* persists in the assault. *A* believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots *Z* dead. A has not committed murder, but only culpable homicide.

Exception 3.--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner.

Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death without his consent.

Illustration

A, by instigation, voluntarily causes *Z*, a person under eighteen years of age, to commit suicide. Here, on account of *Z*'s youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

SCOPE OF SECTION 300

Section 300 defines murder with reference to culpable homicide defined in s 299. If the special requirements provided in cl1-4 of s 300 are fulfilled, culpable homicide will then amount to murder, provided, of course, the act does not fall within any of the Exceptions provided in s 300. If an act, which falls within cl 1-4 of s 300, also falls within one of the Exceptions, then it will be culpable homicide not amounting to murder.

A careful reading of s 300, in the backdrop of s 299, reveals that some clauses in ss 299 and 300 overlap. Such overlapping, rather defining murder with reference to culpable homicide, has led to a lot of discussions, debates and differences in judicial pronouncements about the scope of each section and the distinctions and differences between them.

Culpable homicide is murder, if it is done with: (i) intention to cause death; or (ii) intention to cause bodily injury knowing that the injury caused is likely to cause death, or (iii) intention of causing bodily injury sufficient in the ordinary course of nature to cause death, or (iv) knowledge that the act is: (a) imminently dangerous

that in all probability it will cause death or bodily injury which is likely to cause death, and (b) done without any justification for incurring the risk of causing death or the injury.

Culpable homicide does not amount to murder, if it is:

(1) Committed on grave and sudden provocation, provided the provocation was not: (a) voluntarily sought or deliberately caused by the accused; (b) a result of any act done by public servant or in obedience to law; or (c) given by any act done in the exercise of the private defence.
(2) Committed in the exercise of the right of private defence of body or of property by exceeding, in good faith and without premeditation & without any intention of causing harm more than that was necessary for exercising the right of private defence, the right of self-defence.
(3) Committed by a public servant or a person aiding a public servant acting in advancement of public justice by exceeding his powers conferred by law on him, provided: (a) he believed, in good faith, that the act (leading to death) was lawful; (b) he thought it was necessary for discharging his duty, and (c) he had no ill-will towards the person whose death was caused.
(4) Committed, without premeditation, in a sudden fight in the heat of passion without taking any undue advantage or acting in a cruel or unusual manner.
(5) Caused to a person above eighteen years of age with his consent.

INTENTIONALLY CAUSING DEATH--CLAUSE (1) OF SECTION 300

The first clause of s 300 stipulates that when an act (including legal omission) is done with the intention of causing death, then it is culpable homicide amounting to murder. It is the simplest and at the same time, the most gravest of the species of murder. The definition in this clause is direct and without any subtleties about it. It is the action of a person with the clear intention of killing a person. 'Intention is what intention does.' So, the intention of the person can be gathered from the act ion of the person. If a person administers a deadly poison to a man, then it is very clear that he has an intention to kill that man, because the cause and effect of the act are very clear. It is evident that the cause of death is poisoning and effect of poisoning is to cause instant death. Intention to cause death can be inferred from the act . If the identity of the person who has administered the poison is known, then the case is all neatly wrapped. However, seldom are cases in real life so simple to come by.

Since intention is always a state of mind, it can be proved only by its external manifestations. When injuries are inflicted on vital parts of the body with sharp edged instruments then the intention to kill can be attributed to the offender.[17]

When a person sets fire to the deceased, after another had poured kerosene on his body, there cannot be any doubt that the intention of the accused was to kill the deceased.[18]

When an accused hit the deceased on a vital part of the body, the chest, with the blade of a sword, two feet in length with such force as to impair the liver and the aorta, it was held the offence was plainly one of murder.[19]

When the accused, on seeing the deceased said that he was searching for him everywhere and stabbed him with a knife, and especially when the knife was drawn downwards as if to cut the body into two, it was held that the intention to kill the deceased was very clear from the facts.[20]

When the accused pierced a sharp edged weapon in the heart of the deceased and uttered words of 'doing away with the deceased' before the commissioning of the crime, it was held by the Supreme Court that the intention to kill can be inferred.[21]

In *Vasanth v State of Maharashtra* ,[22] there was previous enmity between the accused and the deceased. The accused and the deceased were seen grappling with each other. Some persons who were present separated the two. The accused then went running to his jeep, drove it on the wrong side and towards the deceased in high speed, knocked him down and ran over him, killing him. The road on which the incident took place was a wide and deserted one. There was no reason or necessity for the accused to have driven the jeep in the wrong direction. The Supreme Court held that the accused had deliberately dashed his jeep against the accused and ran over him with the intention to cause his death.

So what's the difference between the two?

It is pertinent to point out that the first clause of s 300, which is 'act done with intention of causing death', is identical to the first clause of s 299, which is also 'doing an act with the intention of causing death'. Therefore, an act coming under cl (1) of s 300 will also fall under cl (1) of s 299, and in both instances, it will be culpable homicide amounting to murder.[23]

INTENTIONAL CAUSING OF BODILY INJURY WITH KNOWLEDGE THAT IT WILL CAUSE DEATH--CLAUSE (2) OF SECTION 300

The second clause of s 300 stipulates that if a person intentionally causes bodily injury, with the knowledge that such bodily injury will cause death of the person injured, then it will be culpable homicide amounting to murder. Thus, the mens rea or the mental attitude contemplated under cl 2 of s 300 is twofold. First, there must be an intention to cause bodily harm. Secondly, there must be 'knowledge' that death is the 'likely' result or consequence of such intended bodily injury.

The second clause of s 300 will apply if there is first, the intention to cause bodily harm and next, there is the 'subjective knowledge' that death will be the likely consequence of the intended injury.'[24] It is said to be 'subjective knowledge', because it is the accused's own personal perception of the consequences of his act. The knowledge here is subjective, as opposed to the objective requirement in cl 3 of s 300. Clause 3 of s 300 stipulates that the bodily injury intended is sufficient in the ordinary course of nature to cause death. Therefore, the requirement of cl (3) of s 300 is that it must be objectively established that the injury is sufficient in the ordinary course to cause death. By objective, it means it is not the personal perception of the accused that matters, but whether objectively speaking, in real terms, the injury intentionally caused is sufficient to cause death.

The second clause of s 300 is less precise than the first clause. In the first clause, the act is done with the intention to cause death, straight and simple. But in cl (2), the intention is only to cause such bodily injury, as the offender subjectively knows is likely to cause death. Thus, the only difference between cl (1) and cl (2) is the degree of intention. In a way, the essence of cl (2) is the knowledge of the accused that the act is likely to cause death.

The second clause of s 299, which states 'with the intention of causing such bodily injury as is likely to cause death', is similar to cl 2 of s 300. But, in s 299, 'knowledge' that the injury is likely to cause death is not postulated as contemplated in cl (2) of s 300. So the difference is knowledge's presence in S.300 (2) and not S.299 (2)

The word 'likely' in cl (2) of s 300, coupled with the word 'knowledge', indicates definiteness or certainty of death and not a mere probability. It imports some kind of certainty and not mere probability. It conveys that the chances of a thing happening are very high.[25] This clause contemplates a situation, where the offender has a certain special knowledge regarding the peculiar situation or health condition of the particular victim that the intentional bodily injury is likely to be fatal.[26]

In *Willie (William) Slaney v State of Madhya Pradesh* ,[27] the accused was in love with the deceased's sister, which the deceased did not like. There was a quarrel between them and the deceased asked the accused to leave the house. The accused went and came back with his brother. He called out for the deceased's sister. Instead, the deceased came out. There was a heated exchange of words. The accused snatched a hockey stick, which was with his brother, and hit the deceased on his head. As a result, there was a fracture of the skull and the deceased died. In this case, the Supreme Court held that the act of the accused is only one which was likely to cause death and the accused did not have any special knowledge to bring in under cl (2) of s 300. The accused was convicted under s 304, Pt II, and not under s 300.

In *BN Srikantiah v State of Mysore* ,[28] there were as many as 24 injuries on the deceased and of them 21 were incised. They were on his head, the neck, the shoulders, and the forearms. Since, most of the injuries were on vital parts and the weapons used were sharp, it was held that the intention of causing bodily injuries was established; bringing it under the cover of s 300.

In *State of Rajasthan v Dhool Singh* ,[29] the Supreme Court held the accused guilty of murder who inflicted incised cut with a sword on the neck of the deceased, which led to excessive bleeding and the consequential heart failure, on the ground that he knew that the bodily injury caused by him would likely cause death of the injured.

INTENTIONAL CAUSING OF INJURY SUFFICIENT TO CAUSE DEATH--CLAUSE (3) OF SECTION 300

The third clause, as stated earlier, views the matter from an objective standpoint. It consists of two parts. Under the first part, it has to be shown that there was an intention to inflict the particular injury. The second part requires that the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. It speaks of an intention to cause bodily injury, which is sufficient in the ordinary course of nature to cause death. The essence of the clause is the sufficiency of the injury in the ordinary course of nature to cause death.[30] When the word 'sufficiency' is used, it means where there is a very high probability of the injury resulting in death.

In *Virsa Singh v State of Punjab* ,[31] the Supreme Court laid down that in order to bring a case within cl (3) of s 300, the prosecution must prove the following:

(1) It must establish, quite objectively, that a bodily injury is present.
(2) The nature of the injury must be proved.
(3) It must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further, and

(4) It must be proved that the injury of the type just described made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature.

The apex court also stressed that: (i) the existence and nature of bodily injury must be a matter of pure objective investigation, and (ii) the sufficiency of injury to cause death in ordinary course of nature is a matter of pure objective and inferential and it has nothing to do with the intention of the offender. It does not matter there was no intention to cause death. It does not matter that there was no intention even to cause injury of a kind that is sufficient to cause death in the ordinary course of nature. It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury act ually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.[32]

Intention as to Sufficiency of Injury Not Required

It has been seen that the earlier cl (2) contemplates two levels of intention--first, intention to cause bodily injury and thereafter secondly, the knowledge that such bodily injury is likely to cause death. But, as far as cl (3) is concerned, it is sufficient that there is intention to cause the bodily injury that was actually caused. The subjective factor ends with that. There need be no further enquiry whether the offender had the intention or the knowledge that such bodily injury should be sufficient in the ordinary course of nature to cause death. In *Virsa Singh*'s case, the Supreme Court had observed that the requirement that the accused should have the intention or knowledge to cause injury, that is sufficient in the ordinary course to cause death, is fallacious. The court held that the two parts to cl (3) are disjunctive. The first part is subjective to the offender: 'If it is done with the intention of causing bodily injury to any person'. Once this is established, the sufficiency of the injury is purely an objective fact. It is a matter of inference or deduction from the proven facts about the nature of the injury and has nothing to do with the intention. The term 'sufficiency' used in this clause is the high probability of death in the ordinary course of nature, and if such 'sufficiency' exists and death is caused and the injury causing it is intentional, the case falls under cl (3) of s 300.[33] The injury caused should be the cause of death.[34] Whether a particular injury is sufficient in the ordinary course of nature to cause death or not, is obviously a question of fact.

From the above discussion, what emerges is that the accused, who intentionally caused the injury, may not be aware that injury was sufficient to cause death or was likely to cause death. But, if his intention to cause the injury is established and the injury caused is sufficient to cause death in the ordinary course of nature, then the accused is guilty of culpable homicide amounting to murder.[35] For cases to fall within cl (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature.[36]

Intention to Cause Particular Injury Required

In the *Virsa Singh* case, while postulating the ingredients of cl (3) of s 300, the apex court has observed inter alia 'it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended'. This aspect of the matter came up for consideration before the Supreme Court in *Harjinder Singh v Delhi Administration* .[37] In this case, the accused was trying to assault one Dalip Singh and the deceased intervened. The accused finding himself one against two, took out the knife and stabbed the deceased. At that stage, the deceased happened to be in a crouching position presumably to intervene and separate the two. The knife pierced the upper portion of the left thigh. The stab wound was oblique and it cut the femoral artery and vein under the muscle, which are important main vessels of the body. The cutting of these vessels would result in great loss of blood and would lead to immediate death or death after a short duration. The Supreme Court held that from the evidence, it was not proved that it was the intention of the appellant to inflict that particular injury on that particular place. In view of this, it was held that cl (3) of s 300 would not apply. The accused was convicted under s 304, Pt I.

In *Laxman Kalu Nikalje v State of Maharashtra* ,[38] there was a quarrel between the accused and the deceased and the accused whipped out a knife and stabbed the accused on the chest near the shoulder. The stab injury was not on a vital part of the chest, but since the knife cut the artery inside, it resulted in death. Even in this case, the Supreme Court held that there was no proof that the injury caused was the injury intended, as but for the severing of the artery, death might not have ensued. It was held that the case would not fall under cl (3) of s 300. Accordingly, the accused was convicted under s 304, IPC.[39] Similarly, in *Addha v State of Madhya Pradesh* ,[40] wherein the accused in a sudden fight between the two groups attacked the deceased with *lathi* that resulted in his death, the Supreme Court, in the absence of evidence indicating his intention to cause death, convicted the accused under s 304 and not for murder.

KNOWLEDGE THAT ACT IS SO IMMINENTLY DANGEROUS SO AS TO CAUSE DEATH-- CLAUSE (4) OF SECTION 300

Clause (4) of s 300 contemplates generally, commission of act s which are so imminently dangerous that it is likely to cause death. Under this clause, the act need not be directed at any particular individual nor need there be an intention to cause the death of any particular individual. It has to merely be a reckless act, which is imminently dangerous. Illustration (d) clearly sets out the scope of the clause. '*A* without any excuses fires a loaded cannon into a crowd of persons and kills one of them. *A* is guilty of murder, although he may not have had a pre-meditated design to kill any particular individual.'

The essential ingredients of this clause are: (i) the act must be imminently dangerous; (ii) the person committing the act must have knowledge that it is so imminently dangerous; (iii) that in all probability it will cause (a) death or (b) bodily injury as is likely to cause death, and (iv) such imminently dangerous act should be done without any reason or justification for running the risk of causing death or such injury.

The mental element contemplated under this clause is 'knowledge' that the act is so imminently dangerous that it is likely to cause death or such bodily injury that is likely to cause death. The term 'imminently dangerous' requires that the danger should be immediate and close at hand. Hence, under this clause, the intention to kill anybody is not required in order to constitute the offence of murder. The recklessness and inexcusability of an act must be by the facts and circumstances of each case, because, such imminently dangerous act s causing death will amount to murder only if it has been done without any reasonable excuse for taking such a risk.

In *State of Madhya Pradesh v Ram Prasad* ,[41] this clause was applied by the Supreme Court in a totally different context. In this case, the accused Ram Prasad and his wife Raji had a quarrel. Villagers were called to mediate, but to no avail. At that time, the accused poured kerosene oil over the wife and set her on fire. She suffered extensive burn injuries and died as a result of the injuries. The Supreme Court observed that in respect of cll 1-3 of s 300, the question would arise as what was the intention of the accused, the nature of injuries he intended to cause etc, which would all be matters of speculation. The Supreme Court opined that it would be simpler to place reliance on cl (4), because it contemplates only 'knowledge' and no intention. The court held that though generally the clause is invoked where there is no intention to cause the death of any particular person, the clause may on its terms be used in those cases where there is such callousness to-

wards the result, and the risk taken is such that it may be stated that the person knows that the act is likely to cause death. In the present case, when the accused poured kerosene and set fire to his wife, he must have known that the act would result in her death. As he had no reason for incurring such risk, the offence was held to fall within cl (4) of s 300 and would be culpable homicide amounting to murder.

In *Thangaiya v State of Tamil Nadu* ,[42] the Supreme Court categorically ruled that cl (4) of s 300 would be applicable where the knowledge of the offender as to the probability of death of a person approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability.

In *Sehaj Ram v State of Haryana* ,[43] a constable, who was armed with a 303 rifle, fired several shots at another constable. One shot hit the victim beneath the knee of his right leg and he fell down. Even after that, the accused fired another shot at him, though the shot did not hit him. Since, the bullet hit the deceased below the knee, it was contended that the intention of the accused was only to frighten the deceased or cause grievous hurt and not to kill him. The Supreme Court rejected the contention and held that the act would fall within the ambit of cl 4 of s 300 and convicted the accused of murder.

> Further, s 300 '*fourthly*' requires the proof that the accused incurred the risk of causing death or bodily injury 'without any excuse'. A casual reading of the clause might create an impression that the phrase 'without any excuse' refers to the special five *exceptions* appended to s 300. But a careful reading thereof reveals that the words 'without any excuse' do not contemplate the situations that fall within any of these *exceptions* to s 300. The phrase does connote the situations that fall short of, or other than, these *exceptions*. It conveys that culpable homicide based on knowledge does not amount to murder if the accused has an 'excuse' for 'incurring the risk', even if none of the five special *exceptions* to s 300 is applicable. The words 'without excuse' used in cl 4, thus, contemplate situations other than those which fall within the five *exceptions* to s 300, IPC.[44]

WHEN CULPABLE HOMICIDE IS NOT MURDER

Clauses 1-4 of s 300 provide the essential ingredients wherein culpable homicide amounts to murder. The section also provides five exceptional situations, the existence of which will remove a case from the purview of s 300. In other words, even if a case falls within any of the four clauses of s 300, if it also falls within any of the five exceptions provided thereunder, then it will cease to be murder. It will merely be culpable homicide not amounting to murder.

The *exceptions*provided for under s 300 are: (1) grave and sudden provocation; (2) private defence; (3) act s of public servants; (4) sudden fight, and (5) consent.

However, it becomes necessary to take note of two significant propositions about the nature and operation of these exceptions to s 300. First, these are the 'special exceptions' to murder only. In this sense, they are distinct from 'General Exceptions' enumerated in Chapter IV (ss 76-106) of the IPC. The latter, unlike the former, by virtue of s 6 read with s 40, IPC, are applicable to offences created under the IPC as well as under other special or local laws in force in India. Secondly, the 'special exceptions' merely cover 'murder' to 'culpable homicide not amounting to murder' and thereby reduce the criminal liability of its perpetrator. These exceptions to s 300, unlike the 'general exceptions', do not exonerate the wrongdoer. They only operate as mitigation factors.

Exception 1--Grave and Sudden Provocation

Culpable homicide will not be murder, if, the offender, on account of grave and sudden provocation, is deprived of his power of self-control and causes the death of a person. The person, whose death is caused, may be the person who gave the provocation or any other person by mistake or accident.

The exception is itself subject to three exceptions:

(1) The provocation should not have been sought for voluntarily by the offender, as an excuse for killing or doing any harm to any person.
(2) The provocation is not as a result of an act done in obedience of law or by the act of a public servant in the lawful exercise of his powers.
(3) The provocation is not a result of anything done in the exercise of the right of private defence.

In order that this exception should apply, the provocation should be both grave and sudden. If the provocation is sudden but not grave, or grave but not sudden, then the offender cannot avail of the benefit of this exception. Further, it should also be shown that the provocation was of such a nature that the offender was deprived of the power of self-control.

In *KM Nanavati v State of Maharashtra* ,[45] the accused was a naval officer. He was married with three children. One day, his wife confessed to him that she had developed intimacy with the deceased. Enraged at this, the accused went to his ship, took a semi-automatic revolver and six cartridges from the store of the ship, went to the flat of the deceased, entered his bedroom and shot him dead. Thereafter, the accused surrendered himself to the police. The question before the Supreme Court was whether the act of the accused could be said to fall within Exception 1 of s 300. The Supreme Court laid down the following postulates relating to grave and sudden provocation:

(1) The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed, would be so provoked as to lose his self-control.

(2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused, so as to bring his act within the first exception to section 300 , IPC .

(3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

(4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.

The Supreme Court held that the accused, after his wife confessed to her illicit relationship with the deceased, may have momentarily lost control. He had thereafter dropped his wife and children at a cinema, went to the ship, collected the revolver, did some official business there, drove his car to the office of the deceased and later to his house. Three hours had lapsed by then and therefore, there was sufficient time for him to regain his self-control. In view of this, the court held that the provisions of Exception 1 to s 300 were not attracted. The accused was convicted for murder and sentenced to life imprisonment.

The Explanation to Exception 1 states that whether the provocation was grave and sudden is a question of fact.

In *Hansa Singh v State of Punjab* ,[46] the accused saw the deceased committing an act of sodomy on his son, which enraged him and he killed the deceased. It was held that it amounted to a grave and sudden provocation. The conviction under s 302 was set aside. He was convicted under s 304, IPC.

In *Dattu Genu Gaikwad v State of Maharashtra* ,[47] the reason given by the accused for killing the deceased was the fact that he attempted to outrage the modesty of his wife a month back. In view of the long time interval, it was held that the plea of 'sudden and grave' provocation was not available.

In *Mannam Balaswamy v State of Andhra Pradesh* ,[48] the accused had a quarrel with his father. The deceased tried to intervene and pacify. The accused then went into the house, brought out a knife and stabbed the deceased. The plea of grave and sudden provocation was rejected, holding that there was no provocation and the accused merely tried to use the quarrel as an excuse to kill the deceased.

In *Bhura Ram v State of Rajasthan* ,[49] the accused, accompanied with others, entered into the hut of the deceased. Apprehending danger to his life, the deceased fired at one of the companions of the accused and thereby caused his death. The accused then attacked the deceased with an axe on his head and killed him. During trial, he pleaded that the death of his companion caused grave and sudden provocation to him. The Supreme Court refused to accept the plea as the accused solicited the provocation. A killing under provocation sought by the accused cannot be covered by the exception.[50]

It may be pointed out that even in cases where the court may not accept the plea of 'sudden and grave' provocation, the background facts of earlier incidents, which may cause a grave provocation but are not sudden, may be considered by courts as factors that mitigate the sentence. In *Franscis alias Pannan v State of Kerala* ,[51] the deceased had on two previous occasions attacked the accused's brother and brother-in-law.

The accused was in constant fear of menace from the deceased to the lives and safety of the near and dear of the accused. So, even though the earlier incidents of attack on family members did not constitute 'sudden and grave' provocation, his sentence was reduced to life imprisonment.

Exception 2--Exceeding the Right of Private Defence

As seen in the chapter on 'General Exceptions', a person has a right of private defence of property and person. This right, under certain circumstances, even extends to the causing of death. This clause is in respect of cases where a person has exceeded his right of private defence. It may be pointed out that the fact that a person has exceeded his right of private defence does not totally exonerate a person under this exception. It merely is considered as a mitigating factor to reduce the offence from that of murder to culpable homicide not amounting to murder. Of course, before this exception can be availed of, it has to be proved that the accused had the right of private defence as stipulated in ss 96-106, IPC. It is only after the existence of the right is established that the question whether the accused had exceeded his right to private defence will arise. If, in the first instance, it appears that the accused does not have the right of private defence, then obviously this clause will not come into play.

As already noted in the chapter on General Exceptions, if a person genuinely exercises his right of private defence within the limits prescribed by law, then he commits no offence. However, if he exceeds the right, it will amount to a lesser offence than murder. The most important circumstance in determining this factor is the intention of the offender. The second exception stipulates that the exceeding of the right of private defence should be without pre-meditation, and without any intention of doing more harm than is necessary for the purpose of coverage by the exception. In other words, the exceeding of private defence by the accused should be done unintentionally. Only then can the accused avail of the exception provided under this clause. The question whether the exceeding of the right of private defence was done intentionally or unintentionally is a question of fact, which has to be decided on the facts and circumstances of each case.

In *Nathan v State of Madras* ,[52] the accused and his wife were in possession of some land which they had been cultivating for several years. They fell into arrears in respect of the lease amount due to the landlady. The landlord tried to evict the accused forcefully and tried to harvest the crop. So, the accused, in the exercise of his right to private defence of property, killed the deceased. The Supreme Court accepted the contention that the incident took place when the accused had exercised his lawful right of private defence against the property. However, since the deceased party was not armed with any deadly weapons and there could not have been any fear of death or grievous hurt on the part of the accused and his party, the right to private defence of property was limited to the extent of causing any harm other than death under s 104, IPC. It was therefore held that the accused exceeded his right of private defence and the case would fall under Exception 2 to s 300, IPC, and the offence committed by the accused was held to be culpable homicide not amounting to murder, as it was committed in good faith and without any intention of causing death. The sentence of death imposed upon the accused was reduced to one of life imprisonment.

In *Onkarnath Singh v State of Uttar Pradesh* ,[53] the deceased party had initially attempted to attack the accused party. There was an incident of grappling between the parties. When the deceased party was fleeing, the accused party made a murderous assault. It was held in this case that since the murder was committed when the deceased were fleeing, the right of private defence ended with that, since the right is co-terminus with the commencement and existence of a reasonable apprehension of danger to body or property and not after the threat had ceased to exist. The Supreme Court held that the accused were guilty of vindictive and maliciously excessive act. The force used was out of all proportion to the supposed danger, which no longer existed from the deceased party. Under these circumstances, it was held that the accused were neither entitled to a right of private defence, nor to the benefit of Exception 2 to s 300, IPC.

In *Mohinder Pal Jolly v State of Punjab* ,[54] the deceased and his colleagues were workers in the factory of the accused. There was a dispute between them with regard to payment of wages. On the day of occurrence, the workers had assembled outside the factory and raised provocative slogans and hurled brickbats at the factory. Some property of the accused was damaged. The accused thereafter came out of his office room and standing on the *Thari* fired a shot from his revolver which killed the deceased instantaneously. The Supreme Court held that the accused had a right of private defence of his body, but the circumstances were not such as to create apprehension in his mind that the death or grievous hurt would be the consequence, if his

right of private defence was not exercised. It was held that the accused had exceeded his right of private defence. Exception 2 to s 300 was held not applicable to the facts of the case.

In *Kattu Surendra v State of Andhra Pradesh* ,[55] the Supreme Court ruled that death caused by a person after his right to private defence ceases to exist falls outside the ambit of the exception.

Exception 3--Act of Public Servant

Exception 3 is similar to Exception 2, in the sense that it deals with situations where a public servant exceeds his lawful powers in the discharge of his duties and thereby causes death. The essential ingredients of this exception are: (i) the offence must be committed by a public servant or by a person aiding a public servant; (ii) the act alleged must have been committed by the public servant in the discharge of his official duties; (iii) he should have exceeded the powers given to him by law; (iv) the act should be done in good faith; (v) the public servant should have believed that his act was lawful and necessary for the due discharge of his duties, and (vi) he should not have borne any ill-will towards the person whose death was caused.

A suspected thief was arrested by a police constable and was being taken in a train. The thief escaped from the running train. The constable pursued him. When he was not in a position to apprehend him, he fired at him. But, in that process, he hit the fireman and killed him. It was held that the case was covered by this exception.[56]

Where an order to shoot was given by the public servant and his subordinate carried his orders, when there was no occasion to do so, it was held that the order of the public servant was illegal and neither the public servant nor the person acting under the order can be said to have act ed in good faith.[57] Obedience of a superior's lawful order protects a subordinate. Causing death by the subordinate in pursuance of an ex facie unlawful order, therefore, cannot be exonerated.[58]

Exception 4--Sudden Fight

The fourth Exception to s 300 covers acts done without premeditation in a sudden fight. In a way, this also deals with a case of provocation provided in the first Exception. This exception applies to instances, which are covered by the first Exception. However, under Exception 1, the provocation should not only be sudden and grave, but it should also cause total deprivation of self-control. Only under such circumstances, can the offender seek shelter under Exception 1. However, under Exception 4 offender loses his power of reasoning due to heat of passion aroused suddenly. Further, under the first Exception, the offender should not have sought or voluntarily provoked the provocation. However, under this exception, the term 'sudden fight' implies mutual provocation and aggravation. It implies the absence of previous deliberation or determination to fight. In such situations, it may not be possible to trace from which party the initial provocation emanated.[59] The only requisites[60] of this Exception are that: (i) the murder should have been committed without premeditation; (ii) it should have been committed in a sudden fight; (iii) it should have been committed in the heat of passion; (iv) it should have been committed upon a sudden quarrel, and (v) it should have been committed without the offender having taken undue advantage or act ed in a cruel or unusual manner.

All these conditions are required to be proved for bringing the case within the ambit of Exception 4 to s 300.[61]

There has to have a fight. Where there is no fight at all, the Exception is not attracted.[62] The word 'fight', which not defined under the IPC, conveys something more than a verbal quarrel. It implies mutual attack in which both the parties participate. It implies exchange of blows.[63] An actual attack by one party and retreat by another does not constitute fight.[64] One-sided attack cannot be a fight. Nevertheless, attack by one and preparation to attack by another constitutes a fight. However, the Exception will come into play only when a culpable homicide is committed in an unpremeditated sudden fight.[65]

The words 'sudden fight' or 'upon sudden quarrel' indicate something in the nature of a 'free fight'. Free fight is said to take place when both sides mean to fight from the start, go out to fight and there is a pitched battle.[66] The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders. There can be no question of a free fight in the face of the clear finding of the court that one of the parties was the aggressor.[67]

Where an accused inflicted three fatal blows with an axe on the deceased who was unarmed, it was held that it could not be said to be a sudden fight, as a fight postulates a bilateral transaction in which blows are exchanged by both the parties. When the aggression is only on one side, it cannot be said to be a fight.[68]

Merely sudden quarrel and the absence of premeditation do not warrant the Exception. It is also required to show that the accused has not taken undue advantage[69] or act ed in cruel or unusual manner.[70]

In *Dharman v State of Punjab* ,[71] there was a dispute between the accused and the deceased concerning a vacant piece of land. The accused claimed that he was in possession of the land. On the other hand, the deceased party claimed that they had set up a lime-crushing machine on the land. Proceedings were pending under s 145, CrPC, between the parties. In the meantime, the accused party destroyed the lime-crushing machine. The deceased party intervened at that time. Immediately, a fight ensued and in the course of this fight, the deceased received fatal injuries. It was held that the injuries caused to the deceased were done without pre-meditation in a sudden fight and the accused caused the injuries in the heat of passion and upon a sudden quarrel. The accused had also not taken undue advantage or acted in a cruel or unusual manner. It was therefore held that the accused clearly fell within Exception 4 to s 300, IPC.[72]

In *Narayanan Nair Raghavan Nair v State of Travancore* ,[73] there was a fight between the accused and one Velayuthan Nair. It resulted in a minor scuffle between the two. The deceased came up to them and tried to separate them and admonished Velayuthan, who was the son-in-law, not to quarrel. The accused thereupon took a penknife from his waist and hit out at the deceased. The deceased tried to ward off the blow and was hit on the back of his left forearm. The accused struck again and this time the blow landed on the chest and caused the injury, which eventually killed the man. It was contended on behalf of the accused that this was a case of sudden fight and so the case falls within the fourth Exception to s 300, IPC. The Supreme Court rejected this contention and said that the accused stabbed an unarmed man who made no threats against him, but merely asked the accused's opponent to stop fighting. The fight of the accused was not with the deceased, but with the son-in-law of the deceased. The accused simply took undue advantage and stabbed the deceased. The court held that the Exception 4 to s 300 would not apply.

In *Sukhbir Singh v State of Haryana* ,[74] a sudden quarrel, over splashing of mud by the son of the deceased while sweeping of the street on the accused, ensued between the accused and the deceased along with his son. The deceased, for no fault of his, gave slaps to the accused. Thereafter, the accused went home, which was at a very nearby place, and came back armed in the company of others, including his relatives, though without telling his intention to vehemently retaliate his slaps. He gave two blows with his *bhala* on the upper right chest of the deceased. The deceased fell down and thereafter other persons, who had accompanied the accused, assaulted the deceased with their respective weapons. The deceased, ultimately, succumbed to his injuries. The Supreme Court, setting aside conviction of the accused under s 302 by the Punjab High Court based on the fact that the accused acted in a cruel and unusual manner, held that the homicide was caused in a sudden fight and the time gap between the quarrel and the fight did not enable the accused to premeditate the death. It gave benefit of Exception 4 to the accused. The court also held that sudden fight must follow sudden quarrel. If there intervenes a sufficient time for passion to subside giving the accused time to premeditate and the fight takes place thereafter, the accused may disqualify for getting benefits of the Exception as the killing with premeditation amounts to murder.

In *Manke Ram v State of Haryana* ,[75] the Supreme Court gave benefit of exception 4 to a police inspector who, in a set of peculiar facts, killed his subordinate. He invited the deceased to drink in his room. When they were drinking the nephew of the deceased came to the room and called him for dinner. As the deceased got up to leave the room, the appellant got annoyed and started abusing the deceased in filthy language to which the deceased objected. This further infuriated the appellant. A fight started between the two. The appellant picked up his service revolver, which kept nearby, and fired two shots at the deceased. These shots proved fatal. Reversing his conviction under s 302 of the Code by the Punjab High Court, the Supreme Court held that the incident took place in a sudden fight in the heat of passion and granted benefit of Exception 4 to the appellant. It held that the appellant, in the totality of facts and circumstances of the case, did not take an undue advantage of the fight or act ed in a cruel or unusual manner.

Exception 5--Death by Consent

Culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent.

The points to be proved are: (i) the death was caused with the consent of the deceased; (ii) the deceased was then above 18 years of age, and (iii) the consent given was free and voluntary, and was not given through fear or misconception of facts.

In *Ujagar Singh*[76] the accused killed his stepfather who was an infirm, old and invalid man, with the latter's consent, his motive being to get three innocent men (his enemies) implicated. It was held that the offence was covered by the Fifth Exception to s 300, IPC, and punishable under the first part of s 304, IPC.

In *Dasrath Paswan v State of Bihar* ,[77] the accused, who was a student of the tenth class, failed in his examination thrice in succession. He was upset and frustrated by these failures and decided to put an end to his life and informed his wife, a literate girl of about 19 years of age. The wife thereupon requested him to kill her first and then kill himself. In pursuance of the pact, he killed his wife but was arrested before he could end his life. The Patna High Court, relying upon Exception 5 to s 300, IPC, convicted him under s 304, Pt I of the IPC.

The following illustrations may also be noted. A wounded soldier requests his comrade to shoot him and thereby relieve him of his agonising pain. The latter shoots him to death. This exception will apply, as the soldier is certainly above 18 years of age and he gave consent to his own death.

A and *B*, snake charmers, induced *C* and *D* to allow themselves to be bitten by a snake, whose fangs had been imperfectly extracted, under the belief that they would be protected from harm. *C* and *D* died. *A* and *B* were held guilty of culpable homicide under this Exception, on the ground that the deceased gave their consent 'with a full knowledge of the fact, in the belief of the existence of powers which the prisoners asserted and believed themselves to possess'.[78]

DISTINCTION BETWEEN MURDER AND CULPABLE HOMICIDE

As seen in the introductory paragraphs, both culpable homicide and murder deal with the killing of a person. Culpable homicide is the genus and murder is its specie. All murders are culpable homicides, but all culpable homicides are not murders. So, the distinction really is as to whether an act is culpable homicide amounting to murder, or culpable homicide not amounting to murder. There are practically three degrees of culpable homicide recognised in the IPC:

(1) Culpable homicide of the first degree, which is made punishable with death or imprisonment for life, to either of which fine may be added (s 302);
(2) Culpable homicide of the second degree, which is made punishable with imprisonment up to a limit of 10 years, or with imprisonment for life, to either of which fine may be added (s 304, Pt I); and
(3) Culpable homicide of the third degree, which is punishable with fine only, or with imprisonment up to a limit of 10 years or with both (s 304, Pt II).

From the above, it is clear that there is no radical difference between culpable homicide and murder. The true difference between culpable homicide and murder is only the difference in degrees of intention and knowledge. A greater the degree of intention and knowledge, the case would fall under murder. A lesser degree of intention or knowledge, the case would fall under culpable homicide. It is therefore difficult to arrive at any categorical demarcations or strait jacket differences between culpable homicide and murder.

A practical approach to distinguish whether a particular situation would come under murder or culpable homicide is to appreciate the facts and apply the law in stages as indicated below.

(1) The first stage is to establish whether the accused had done an act, which has caused the death of another person. This is obviously the most fundamental fact, which has to be established before any further enquiry into the intention, and knowledge of the accused is gone into.
(2) The second stage is to establish whether the act of the accused would amount to culpable homicide. In other words, it has to be ascertained that a particular act, which has caused the death of a person, is not as a result of accident or any other *exceptions* provided under the

IPC. It has to be further established that the intention of the accused was not merely to cause hurt or grievous hurt but homicide.

(3) Once it is established that an accused has caused death either with the intention of causing it or with the intention of causing such bodily injury as is likely to cause death, or with knowledge that his act is likely to cause death, then the next stage of enquiry is to ascertain whether the act would fall under any of the four clauses of s 300, IPC.

(4) If it is established that culpable homicide is murder and the act falls under any of the four clauses of s 300, then there must be a further enquiry to consider whether the act falls within any of the five exceptions provided under s 300, IPC. If it does not fall under any of the exceptions, then the act is murder. If the act, however, falls under any of the exceptions, then it will be culpable homicide not amounting to murder.[79]

The distinction between culpable homicide not amounting to murder and murder, as very aptly and ably articulated by Melville J[80] and repeatedly quoted with approval by the Supreme Court,[81] may be outlined thus.

Table 33.1

Culpable Homicide (section 299)	Murder (section 300)
A person commits culpable homicide, if the act by which the death is caused is done:	Subject to certain exceptions, culpable homicide is murder, if the act by which the death is caused is done:
(a) With the intention of causing death;	(1) With the intention of causing death;
	(2) With the intention of causing such bodily injury, as the offender *knows to be likely to cause the death of the person to whom the harm is caused*;
(b) With the intention of causing such bodily injury as is likely to cause death;	(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted *is sufficient in the ordinary course of nature to cause death*;
(c) With the knowledge that the act is likely to cause death;	(4) With the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death and committed without any excuse for incurring the risk or causing death or such injury as aforesaid.

On a comparison of ss 299 and 300, the following points of distinction may be arrived at.

Intention to Kill

Clause (a) of s 299 and cl (1) of s 300 are identical. If death is caused by an act, which is done with the intention of causing death, then it is culpable homicide under s 299 (a). It also amounts to murder under cl (1) of s 300, unless it falls under any of the *exceptions*.

Intention to Cause Bodily Injury Likely to Cause Death

Clause (b) of s 299 and cll 2 and 3 of s 300, both deal with intention to cause bodily injury as is likely to cause death. As far as s 299(b) is concerned, it merely stipulates that if death is caused by an act, with the intention of causing such bodily injury as is likely to cause death it amounts to culpable homicide. Clause (2) of s 300 while stating that if an act is done with the intention of causing such bodily injury which is likely to cause death, also further stipulates that the intentional causing of bodily injury should be accompanied with the knowledge that the bodily injury is likely to cause death. The word 'likely' used in s 299(b) means a mere probability or possibility that the injury could result in death. But, the usage of the word 'likely' in cl (2) of s 300 denotes, to an extent, certainty of death. Illustration (b) to s 300 explains this aspect. It imputes a certain special knowledge which the accused has about the condition of the deceased, such as any disease that he might be labouring under, which brings in certainty to the fact that the bodily injury will result in death. The distinction in the meaning attributed to the word 'likely' in ss 299(b) and 300 (2) is only in the degree of probability.

As far as cl (3) of s 300 is concerned, the intention of causing bodily injury is accompanied by a further objective of certainty that such bodily injury is sufficient in the ordinary course of nature to cause death. The word 'sufficient' in the ordinary course of nature to cause death, again imputes the certainty of death to a greater extent than the words 'likely' in s 299(b).

Thus, the essential distinction between death under ss 299(b) and 300 (2) and (3) is that there is a lesser degree of likelihood that the bodily injury caused will result in death under s 299(b) and there is a greater degree of likelihood that the bodily injury caused will result in death under s 300 (2) and (3).

Knowledge of Death

Clause (c) of s 299 and cl 4 of s 300 deal with instances where the accused has knowledge that the act is likely to cause death. Similar to the earlier clauses, here again, the requirement of knowledge under s 300(4) is a very high degree of probability of death. This high degree of probability of death is indicated in the latter part of the clause, wherein it is provided that the act should be so imminently dangerous that in all probability it will cause death or such bodily injury as is likely to cause death, and such act is done without any excuse for incurring the risk. Both cl (c) of s 299 and cl (4) of 300 apply to cases where the accused has no intention to cause death or bodily injury, but there is knowledge that the act is essentially a risky one. Whether the act amounts to murder or culpable homicide depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.[82]

PART C - DEATH BY NEGLIGENCE

Section 304A. Causing death by negligence.--Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The original IPC had no provision providing punishment for causing death by negligence. Section 304A was inserted in the Code in 1870 by the Indian Penal Code (Amendment) Act 1870. It does not create a new offence. This section is directed at offences, which fall outside the range of ss 299 and 300, where neither intention nor knowledge to cause death is present. This section deals with homicide by negligence and covers that class of offences, where death is caused neither intentionally nor with the knowledge that theact of the offender is likely to cause death, but because of the rash and negligent act of the offender. This clause limits itself to rash and negligent acts which cause death, but falls short of culpable homicide of either description.[83] When any of these two elements, namely, intention or knowledge, is present, s 304A has no application.[84]

In fact, if this section is also taken into consideration, there are three types of homicides which are punishable under the IPC, namely, (i) culpable homicide amounting to murder; (ii) culpable homicide not amounting to murder, and (iii) homicide by negligence.

RASH OR NEGLIGENT ACT

Section 304A deals with 'death' caused by a 'rash' or 'negligent' act .[85] However, in both the cases, the death caused should not amount to culpable homicide.[86] The doing of a rash or negligent act, which causes death, is the essence of s 304A. There is a distinction between a rash act and a negligent act. 'Rashness' conveys the idea of recklessness or doing of an act without due consideration and 'negligence' connotes want of proper care.[87] A rash act implies an act done by a person with recklessness or indifference as to its consequences. The doer, being conscious of the mischievous or illegal consequences, does the act knowing that his act may bring some undesirable or illegal results but without hoping or intending them to occur.[88] A negligent act, on the other hand, refers to an act done by a person without taking sufficient precautions or reasonable precautions to avoid its probable mischievous or illegal consequences. It implies an omission to do something, which a reasonable man, in the given circumstances, would not do.[89]

The term 'negligence' as used in this section does not mean mere carelessness. The rashness or negligence must be of such nature so as to be termed as a criminal act of negligence or rashness. Section 80 of the IPC provides 'nothing is an offence which is done by accident or misfortune and without any criminal knowledge or intention in the doing of a lawful act in a lawful manner by a lawful means and with proper care and cau-

tion'. It is absence of such proper care and caution, which is required of a reasonable man in doing an act, which is made punishable under this action.

It is the degree of negligence that really determines whether a particular act would amount to a rash and negligent act as defined under this section. It is only when the rash and negligent act is of such a degree that the risk run by the doer of the act is very high or is done with such recklessness and with total disregard and indifference to the consequences of this act, the act can be constituted as a rash and negligent act under this section. Negligence is the gross and culpable neglect or failure to exercise reasonable and proper care, and precaution to guard against injury, either to the public generally or to an individual in particular, which a reasonable man would have adopted.[90]

In *Cherubin Gregory v State of Bihar* ,[91] the deceased was an inmate of a house near that of the accused. The wall of the latrine of the house of the deceased had fallen down a week prior to the day of occurrence, with the result that his latrine had become exposed to public view. Consequently, the deceased, among others, started using the latrine of the accused. The accused resented this and made it clear to them that they did not have his permission to use it and protested against their coming there. The oral warnings, however, proved ineffective. Therefore, the accused fixed a naked and uninsulated live wire of high voltage in the passage to the latrine, to make entry into his latrine dangerous to intruders. There was no warning put up that the wire was live. The deceased managed to pass into the latrine without contacting the wire, but as she came out, her hand happened to touch it, she got a shock and died because of it.

It was contended on behalf of the accused that he had a right of private defence of property and death was caused in the course of the exercise of that right, as the deceased was a trespasser. The Supreme Court rejected the contention stating that the mere fact that the person entering a land is a trespasser does not entitle the owner or occupier to inflict on him personal injury by direct violence. The court observed that it is no doubt true that the trespasser enters the property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time, the occupier is not entitled to wilfully do any act, such as setting a trap of naked live wire of high voltage, with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespasser. It was held that since the trespasser died soon after the shock, the owner who set up the trap was guilty under s 304A, IPC. The Supreme Court upheld the conviction of the accused.

An assistant station master gave a 'line clear' signal to a passenger train with the knowledge that a goods train was standing at a particular point, where the train might collide, hoping to remove the goods train before the arrival of the passenger train. The goods train was not removed in time and a collision occurred which was attended with loss of life. The assistant station master was held guilty of a rash act punishable under this section.[92]

ABSENCE OF INTENTIONAL VIOLENCE

The essence of s 304A is that the act, which has resulted in the death of a person, should not have been done with the intention of causing death. Voluntary and intentional act s either with the intention to cause death or the knowledge that the act is likely to cause death, will amount to culpable homicide.

In *Sarabjeet Singh v State of Uttar Pradesh* ,[93] the accused was part of an unlawful assembly and attacked the opposite party. He had come to attack the father of the deceased (who was a small child of about four years). With a view of causing some harm and taking vengeance on the father of the young child, he threw the innocent child on the ground. The Supreme Court held that the act of throwing the child on the ground could not be called as rash within the meaning of s 304A, as he had knowledge that his act was likely to cause death. Under the circumstances, it would amount to culpable homicide under s 299 and punishable under s 304, Pt II, IPC.

DEATH MUST BE THE DIRECT RESULT

In order to impose criminal liability under this section, it is essential to establish that death is the direct result of the rash and negligent act of the accused.[94] It must be *causa causans*--the immediate cause, and it is not enough that it may be *causa sine qua non*--the proximate cause.[95]

In *Suleman Rahiman Mulam v State of Maharashtra* ,[96] the accused, who was driving a jeep struck the deceased, as a result of which he sustained serious injuries. The accused put the injured person in the jeep for medical treatment, but he died. Thereafter, the accused cremated the body. The accused was charged under ss 304A and 201, IPC. As per s 304A, there must be a direct nexus between the death of a person and rash and negligent act of the accused that caused the death of the deceased. It was the case of the prosecution that the accused had possessed only a learner's licence and hence, was guilty of causing the death of the deceased. The Supreme Court held that there was no presumption in law that a person who possesses only a learner's licence or possesses no licence at all does not know driving. A person could, for various reasons, including sheer indifference, might not have taken a regular licence. There was evidence to show that the accused had driven the jeep to various places on the previous day of the occurrence. So, before the accused is convicted under s 304A, there must be proof that the accused drove in a rash and negligent manner and the death was a direct consequence of such rash and negligent driving. In the instant case, there was absolutely no evidence that the accused had driven in a rash and negligent manner. In the absence of such evidence, no offence under s 304A was made out. The accused was acquitted of the charges.

In *Ambalal D Bhatt v State of Gujarat* ,[1] the accused was a chemist in charge of the injection department of Sanitax Chemical industries Limited, Baroda. The company prepared glucose in normal saline, a solution containing dextrose, distilled water and sodium chloride. The sodium chloride sometimes contained quantities of lead nitrate, the permissible limit for lead nitrate being five parts in one million. The saline solution, which was supplied by the company, was found to have lead nitrate higher than the permissible limits and hence was dangerous to human life. The bottles, which were sold by the company, were purchased by different hospitals and nursing homes and were administered to several patients of whom 12 patients died. As per the Drugs Act 1940, and the rules framed thereunder, a chemist of a chemical company has to give a batch number to every lot to bottles containing preparation of glucose in normal saline. The accused, who was responsible for giving the batch numbers, failed to do so. He gave a single batch number to four lots of saline. It was the contention of the prosecution that had the appellant given separate batch numbers to each lot as required under the rules, the chief-analyst would have separately analysed each lot and would have certainly discovered the heavy deposits of lead nitrate in the sodium chloride and the lot which contained lead would have been rejected. As the accused had been negligent in conforming to the rules, the deaths were the direct consequence of the negligence. The Supreme Court held that for an offence under s 304A, the mere fact that an accused contravened certain rules or regulations in the doing of an act which caused death of another, does not establish that the death was the result of a rash or negligent act or that any such act was a proximate and sufficient cause of the death. It was established in evidence that it was the general practice prevalent in the company of giving one batch number to different lots manufactured in one day. This practice was to the knowledge of the drug inspector and to the production superintendent. The court held that the drug inspector himself knew fully well that this was the practice, but did not lift a finger to prohibit the practice and instead turned his blind eye to a serious contravention of the drug rules. To hold the accused responsible for the contravention of the rule would be to make an attempt to somehow find the scapegoat for the deaths of the 12 persons. Accordingly, the conviction of the accused under s 304A was set aside.[2]

Difference Between Rashness and Negligence

A rash act is primarily an overhasty act.[3] Negligence is a breach of a duty caused by omission to do something, which a reasonable man guided, by those considerations which ordinarily regulate the conduct of human affairs would do.[4]

In *Bhalachandra Waman Pathe v State of Maharashtra* ,[5] the Supreme Court explained the distinction between a rash and a negligent act in the following manner:

> There is a distinction between a rash act and a negligent act . In the case of a rash act, the criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. Negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. A culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the act or has taken sufficient precautions to prevent their happening. The imputability

> arises from acting despite the consciousness. Culpable negligence is act ing without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

In the instant case, the appellant was driving his car at a speed of 35 miles an hour, the speed permissible under the rules. No other circumstance was pointed out to show that he was driving in a reckless manner. Therefore, he cannot be said to have been running the risk of doing an act with recklessness or indifference as to the consequences. However, he was undoubtedly guilty of negligence. He had a duty to look ahead and see whether there was any pedestrian in the pedestrian crossing. It is likely that while driving the car, he was engrossed in talking with the person who was sitting by his side. By doing so, he failed to exercise the caution incumbent upon him. His culpable negligence and failure to exercise that reasonable and proper care and caution required of him resulted in the occurrence. He was therefore held guilty of the offence punishable under s 304A.

RASH AND NEGLIGENT ACT IN DRIVING ALONG A PUBLIC HIGHWAY

Generally, a person who is driving a motor vehicle is expected to always be in control of the vehicle in such a manner as to enable him to prevent hitting against any other vehicle or running over any pedestrian, who may be on the road. In *Baldevji v State of Gujarat* ,[6] the accused had run over the deceased while the deceased was trying to cross over the road. The accused did not attempt to save the deceased by swerving to the other side, when there was sufficient space. This was a result of his rash and negligent driving. His conviction under s 304A, IPC, was upheld.

In *Duli Chand v Delhi Administration* ,[7] the accused was driving a public transport bus, and he had reached a crossroad. At that time, although he was not going at a great speed, he failed to look to his right and thus did not see the deceased, who was coming from his right and was crossing the road. The main road was 42 feet wide and had the accused been reasonably alert and careful, he would have seen the deceased coming from his right trying to cross the road, and in that event he could have immediately applied the brake and brought the bus to a grinding halt. The act of the accused in failing to look to his right, although he was approaching a crossroad, amounted to culpable homicide on his part and hence, he was convicted under s 304A, IPC.[8]

In *Thakur Singh v State of Punjab* ,[9] the Supreme Court held the driver of a bus, carrying 41 passengers, while crossing a bridge, fell into a nearby canal resulting death of all the passengers, guilty of rash and negligent driving. Refuting his plea that the prosecution failed to prove negligence on his part, the court invoked the doctrine of *res ipsa loquitur*to shift the onus of proof to him to prove that the accident did not happen due to his negligence. In view of the galloping trend in road accidents in India and the devastating consequences thereof on the victims and their families, the apex court refused to give benefits of benevolent provisions of the Probation of Offenders Act 1958. It also stressed the need to impose deterrent punishment on the negligent and callous drivers of automobiles to make them careful drivers and thereby to bring down the high rate of motor accidents.[10]

In *Naresh Giri v State of Madhya Pradesh* ,[11] wherein death and injury caused to passengers when the bus driver attempted to cross a unmanned railway crossing and hit by a passing train, the Supreme Court altered the charges from s 304 to 304A on the ground that his gross negligence.

RASH OR NEGLIGENT ACT IN MEDICAL TREATMENT

Courts have repeatedly held that great care should be taken before imputing criminal rashness or negligence to a professional man act ing in the course of his professional duties. A doctor is not criminally liable for a patient's death, unless his negligence or incompetence passes beyond a mere matter of competence and shows such a disregard for life and safety, as to amount to a crime against the state.

In *John Oni Akerele's* case,[12] a medical practitioner had administered a medical dose of sorbital injection to a child, because of which the child died. The doctor was charged under s 304A, IPC. The contention of the accused doctor was that the child was peculiarly susceptible to the medicine and therefore unexpectedly

succumbed to a dose which would have been harmless in case of a normal child. The Privy Council held that the doctor was guilty of criminal negligence.

In *Juggan Khan v State of Madhya Pradesh* ,[13] the accused was a registered homeopath who had administered to a patient suffering from guinea worm, 24 drops of stramonium and a leaf of *dathura* without properly studying its effect. The patient died as a result of the medicine given by the accused. Stramonium and *dathura* are poisonous. So, giving the same without being aware of its effects was held to be a rash and negligent act. The accused was convicted under s 304A, IPC, and sentenced to two years rigorous imprisonment.

When a *hakim* gave a procaine penicillin injection to a patient because of which he died, it was held that the *hakim* was guilty under s 304A.

In *Ram Niwas v State of Uttar Pradesh* ,[14] the accused, an unqualified doctor, treated a five-year old boy who was suffering from fever. He administered an injection to the boy upon which the boy turned blue and his condition worsened. Thereafter, the boy died. According to the evidence, the accused did not administer the injection after giving any test dose to the boy. In view of the fact that the accused was not a qualified medical practitioner who had given an injection to the boy without giving any test dose, the court held that he had act ed with rashness, recklessness, negligence and indifference to the consequences. It amounted to taking hazard of such degree that the injury was most likely to be occasioned thereby. The court held that it was amply established that the accused caused the death of the deceased by doing the said rash and negligent act which did not amount to culpable homicide and held that the accused was guilty under s 304A, IPC.

However, during the recent past the Supreme Court has attributed a different standard to 'negligence' when it comes to a professional, particularly, a medical practitioner.

In *Suresh Gupta (Dr) v Govt of NCT of Delhi & Anor* ,[15] the Supreme Court held that for fixing criminal liability of a doctor, the standard of negligence should not merely be lack of necessary care, attention and skill. The standard of negligence required to be proved should be so high as can be described as 'gross negligence' or 'recklessness'. With this perception, the court observed:

> ...[W]hen a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.[16]... [T]he act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.[17]

In *Jacob Mathew v State of Punjab* ,[18] the Supreme Court not only approved the principle laid down in the *Dr Gupta*case but also opined that 'negligence in the context of medical profession necessarily calls for a treatment with a difference...a case of occupational negligence is different from one of professional negligence.' Delving into liability of a doctor for his rash or negligent act leading to death of his patient, it ruled that:

> ... [A] professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession.[19]

Recently, in *Martin F. D'Souza v Mohd. Ishfaq* ,[20] the Supreme Court, after making a survey of thitherto judicial pronouncements on medical negligence, reiterated, with approval, that the *Jacob Mathew* dictum holds good in handling cases of medical negligence. It endorsed the concept of gross negligence delved in *Jacob Mathew* and stressed that the degree of negligence sufficient to fasten criminal liability for medical negligence has to be higher than that required to fasten civil liability. For holding a medical practitioner guilty under se 304A, gross negligence on his part amounting to recklessness needs to be proved. For judicial determination of such negligence, the court has to rely upon evidence of medical professionals.

PUNISHMENT

The punishment prescribed under this section is simple or rigorous imprisonment for a term up to two years, or with fine, or with both. Sentence in cases arising under this section is a matter of discretion of the trial court.[21] Sentence depends on the degree of carelessness seen in the conduct of the accused.[22] Though, contributory negligence is not a factor, which can be taken into consideration on the question of the guilt of the accused,[23] it can be a factor for consideration in determination of sentence.

PART D - DOWRY DEATH

Section 304B. Dowry death.--

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.

Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

The offence of dowry death has been inserted in the IPC as s 304B by the Dowry Prohibition (Amendment) Act 1986 (43 of 1986). Section 304B has been inserted with a view to curb the growing atrocities against woman, where thousands of young women were being done to death due to failure to pay up the dowry demanded. The Amendment Act has also made a couple of consequential amendments in the CrPC and the Evidence Act, in order to make the prosecution of offenders in cases of dowry death more effective.

The essential ingredients of s 304B [24] are: (i) the death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances; (ii) such a death should have occurred within seven years of her marriage; (iii) she must have been subjected to cruelty or harassment by her husband or by any relative of her husband; (iv) such cruelty or harassment should be for, or in connection with, the demand for dowry; and (v) such cruelty or harassment is shown to have been meted out to the woman soon before her death.

Section 304B imposes a statutory obligation on a court to presume that the accused has committed the dowry death when the prosecution proves that: (i) death of his wife has occurred otherwise than under normal circumstances within seven years of her marriage; and (ii) soon before her death she was subjected to cruelty or harassment by her husband or his relatives in connection with demand for dowry. If any accused wants to escape from the said catch, the burden is on him to disprove it. If he fails to rebut the presumption, the court is bound to act upon it.[25]

Demand for Dowry

The main component of s 304B is that the death of the woman should not only be under the circumstances specified in the section, but should also be the consequence of demands for dowry. According to *Explanation*to s 304B, the term 'dowry' shall have the same meaning as in s 2 of the Dowry Prohibition Act 1961.Section 2(1)of the Dowry Prohibition Act 1961, defines dowry as follows:

...

Any property or valuable security given or agreed to be given either directly or indirectly:

(a) by one party to a marriage to the other party to the marriage; or
(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mehar in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation I--For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section, unless they are made as consideration for the marriage of the said parties.

Explanation II--The expression 'valuable security' has the same meaning in Section 30 of the Indian Penal Code (45 of 1860).

In *Nunna Venkateswarlu v State of Andhra Pradesh* ,[26]the deceased had consumed pesticides and died an unnatural death after five years of marriage. There was evidence that she was tortured continuously and was harassed to sell the five acres of land gifted to her by her father at the time of marriage and to give the sale proceeds to her husband. Unable to bear the harassment, she committed suicide. Though there was ample evidence that the demands for dowry were made, the High Court of Andhra Pradesh observed that the prosecution has to prove that there was a prior agreement by the parents of the girl to the husband or the in-laws to pay a valuable security, money, etc. Unless the existence of the prior agreement between the parties was proved, the court held that the accused would not be liable to be punished for an offence under s 304B, IPC. The high court held that since the demands made by the accused were not demands which were agreed to be paid by the father of the deceased at the time of the marriage, they would not amount to demands for dowry. So, it convicted the accused only under ss 498A and 306, IPC, and not under s 304B. The high court, it seems, was influenced by the words 'agreed to be given' in the definition of dowry in the Dowry Prohibition Act 1961.

However, the above-mentioned judgment of the Andhra Pradesh may not be good law in view of the judgment of the Supreme Court in *State of Himachal Pradesh v Nikku Ram* .[27]The Supreme Court interestingly started off the judgment with the words 'Dowry, dowry and dowry'. It went on to explain why it has mentioned the words 'dowry' thrice. This is because demand for dowry is made on three occasions: (i) before marriage; (ii) at the time of marriage; (iii) after the marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture of the girl leading to either suicide in some cases or murder in some. The Supreme Court has explained in this case that though the definition of 'dowry' is stated as 'property or valuable security given or agreed to be given...' demands made after marriage could also be a part of the consideration because an implied agreement has to be read to give property or valuable securities, even if asked after the marriage as a part of consideration for the marriage. When the Dowry Prohibition Act 1961 was enacted, the legislature was well aware of the fact that demands for dowry are made and indeed very often even after the marriage has been solemnised, and this demand is founded on the factum of marriage alone. Such demands, therefore, would also be in our mind as consideration for marriage.

In *Pawan Kumar v State of Haryana* ,[28] the Supreme Court held:

> The word 'agreement' referred to in section 2 has to be inferred on the facts and circumstances of each case. The plea that conviction can only be if there is agreement for dowry is misconceived. This would be contrary to the mandate and object of the Act . 'Dowry' definition is to be interpreted with the other provisions of the Act including section 3, which refers to giving or taking dowry, and section 4- penalty for demanding dowry, under the 1961 Act and the Indian Penal Code. This makes it clear that even demand of dowry on other ingredients being satisfied is punishable. This leads to the inference, when persistent demands for TV and scooter are made from the bride after marriage or from her parents, it would constitute to be in connection with the marriage and it would be a case of demand of dowry within the meaning of section 304B , IPC . It is not always necessary that there be any agreement for dowry. In the instant case, the evidence of the prosecution witnesses was very clear. After a few days of the marriage, there was demand of scooter and fridge, which when not being met, led to repetitive taunts and maltreatment. Such demands cannot be said to be not in connection with the marriage. Hence, the evidence qualifies to be demand for dowry in connection with the marriage and in the circumstances of the case constitutes to be a case falling within the definition of 'dowry' under section 2 of 1961 and section 304B ,.[29]

In *K Prema S Rao & State of Andhra Pradesh v Yadla Srinivas Rao* ,[30] the Supreme Court, in a set of facts similar to that of the *Nunna Venkateswarlu* case, refused to treat death of the deceased resulting from harassment and cruelty of her husband as 'dowry death'. After three to four months of the marriage, the husband started demanding that his wife to execute a deed of transfer in his favor of five acres of land and a

house site gifted to her as *Pasupukumkuma (Stridhana)* by her father in the marriage. When she refused, he started harassing and ill-treating her. When it became grave and unbearable, she committed suicide by consuming poison. The Andhra Pradesh High Court as well as the Supreme Court held that the harassment and cruel treatment meted out to the deceased by the husband to force her to transfer the land and the house site in his name was not 'in connection with any demand for dowry' and thereby refused to invoke s 304B of the IPC. The demand for transfer of the land and of the house site, according to both the courts, was not 'demand for dowry'. Similarly, in *Baldev Singh v State of Punjab,* [31] the Supreme Court held that demand for wife's share in estate of her late father and the consequential pressure put on her by her husband, leading to her suicidal death, does not amount to 'demand for dowry' under s 304B, the IPC.

In *Appasaheb & Anr v State of Maharashtra,* [32] the apex court ruled that a demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a 'demand for dowry'. The court set aside conviction of the appellant under s 304B. However, in *Bachni Devi v State of Haryana* ,[33] the Supreme Court clarified that the *Appasaheb* dictum cannot be read as an absolute proposition that a demand for money or some property on account of some financial stringency or meeting some urgent domestic expenses cannot be termed as a demand for dowry and stressed that the dictum should be understood in its factual settings. It accordingly refused to treat the demand of a motorcycle for starting milk-vending business as 'demand for dowry'. It ruled that a demand for property or valuable security constitutes 'demand for dowry' if it has direct or indirect nexus with marriage. The cause or reason for such demand is immaterial.

It is not necessary that there should be demand of a particular item to make a dowry demand.[34]

Cruelty

Section 304B does not explain the term 'cruelty'. However, s 498A, IPC, explains as to what amounts to 'cruelty'. In *Shanti v State of Haryana* ,[35] the Supreme Court held that ss 304B and 498A are not mutually exclusive. And the meaning of 'cruelty' given in *explanation* to s 498A, having regard to the common background to ss 304B and 498A, can be applied to s 304B. Section 498A explains cruelty to mean: (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental or physical, of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her, or any person related to her, to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. The explanation of cruelty as given in s 498A can be relied on for the purposes of s 304B as well.[36]

'Soon Before'

Section 304B uses the words that it should be shown that 'soon before' her death, the woman was subjected to cruelty or harassment by her husband or any relative of her husband. In view of these words, it is crucial for the prosecution to establish that any cruel treatment or harassment was in close proximity immediately preceding her death. 'Soon before' is a relative term, and it would depend on the circumstances of each case and no strait jacket formula can be laid down as to what would constitute a period 'soon before' the occurrence. It would be hazardous to indicate any fixed period.[37]The importance of proximity test is both for the proof of an offence of dowry death, as well as for raising a presumption under s 113B of the Evidence Act. The determination of the period which can come within the term 'soon before' is left to be determined by the courts depending upon the facts and circumstances of each case. It cannot be construed as any determinate period of time that can be mechanically applied in each case irrespective of its facts. It needs to be decided by the court after analyzing facts and circumstances leading to the victim's death. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and had become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.[38]

In *Keshab Chandra Pande v State* ,[39] the accused married the deceased in January 1989. There were differences between them due to non-fulfillment of demands for dowry made at the time of marriage. The ac-

cused assaulted the deceased in June 1989 with an iron rod. The deceased went to stay with her parents thereafter. She returned to the house of her husband in January 1990, after some mediation between them by well-wishers. In March 1991, the accused left the deceased in her parent's house. After, about a fortnight, she came back to the house of the accused. Two days after that, she died. There was no material evidence to show that after her return in January 1990, she had been subjected to any cruelty or harassment by the accused. It was submitted by the prosecution that the assault by iron rod in June 1989, must have left an indelible scar in the mind of the deceased. However, the court felt that if she was so much upset or affected by that assault, she could not have waited for about two years to vent out her feelings, that too after having reconciled in January 1990. In view of this, the court held that there was no proximate link between the cruelty based on dowry demand and the concerned death. The Orissa High Court acquitted the accused.

In *Rajinder Amar Singh v State of Haryana* ,[40] the Punjab High Court set aside conviction of the accused on the ground that the unnatural death of his wife, though took place within seven years of the marriage, occurred after about two years after his demand for dowry. In *Uday Chakraborty v State of West Bengal* ,[41] wherein the wife of the accused died of burn injuries within two years of her marriage, the Supreme Court considered the entire period of two years as 'soon before' as the marriage did not survive even for two years.

The expression 'soon before', thus, is not synonymous with the term 'immediately before'. It normally implies that the interval should not be much between the concerned cruelty or harassment and the death in question. Cruelty should not be remote in time to become stale enough not to disturb mental equilibrium of the woman concerned.[42] It should neither be too late nor too stale before the date of death of the victim.[43]

PRESUMPTION AS TO DOWRY DEATH

At the time of introducing the offence of dowry death in the IPC, the legislature had simultaneously brought in amendments to the Evidence Act . Section 113B of the Evidence Act provides for presumption as to dowry death. As per this section:

Section 113B. Presumption as to dowry death.--When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused such dowry death.

Explanation.--For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860.)

This presumption will arise only when the prosecution has established the basic element of demand for dowry. The initial burden lies on the prosecution to prove the ingredients of s 304B, including the fact that soon before her death, she had been subjected by the accused persons to cruelty or harassment for, or in connection with, any demand for dowry. If the prosecution succeeds in discharging this initial burden, then positively the provisions of s 113B of the Evidence Act come into play and can be pressed into service for drawing the presumption against the accused person that he has caused dowry death.[44] The presumption, therefore, needs to be invoked by having regard to the proximity of the cruelty or harassment and death of the victim.[45] It cannot be invoked merely because the alleged death occurred within seven years of her marriage.[46]

Once statutory requisites are established, a court is bound by law to invoke the presumption as s 30413, IPC, and s 11313, Evidence Act, use the words 'shall presume'.[47] And it is for the accused to rebut the presumption.[48]If he fails, the court is bound to act upon it.[49] The presumption cannot be said rebutted by the accused even if his co-accused, put on trial with him under the said presumption, has been given benefit of doubt and acquitted of the charge of dowry death, if primary evidence is against him.[50]

The period of operation of the presumption is only seven years from the date of marriage of the deceased woman. In case of death of married woman resulting from cruelty or harassment by her husband or his relatives after seven years of her marriage, the husband or his relatives, as the case may be, cannot be presumed perpetrator of the death. If it is proved that cruelty or harassment by her husband or his relatives for dowry was the causal factor of her death, liability of the perpetrator would be governed by s 498A of the IPC.[51]

The presumption, thus, makes the traditional criminal law dictum that an accused is presumed to be innocent unless proved guilty inapplicable to dowry death cases. It helps the prosecution to overcome the difficulty proving case against the accused.[52]

PART E - ATTEMPT TO COMMIT MURDER AND CULPABLE HOMICIDE

Section 307. Attempt to murder.--Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

Attempts by life-convicts.--When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

Illustrations

(a) *A* shoots at *Z* with intention to kill him, under such circumstances that, if death ensued, *A* would be guilty of murder. *A* is liable to punishment under this section.

(b) *A*, with the intention of causing the death of a child of tender years, exposes it in a desert place. *A* has committed the offence defined by this section, though the death of the child does not ensue.

(c) *A*, intending to murder *Z*, buys a gun and loads it. *A* has not yet committed the offence. *A* fires the gun at *Z*. He has committed the offence defined in this section, and, if by such firing he wounds *Z*, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) *A*, intending to murder *Z* by poison, purchases poison and mixes the same with food which remains in *A's* keeping; *A* has not yet committed the offence defined in this section. *A* places the food on *Z's* table or delivers it to *Z's* servants to place it on *Z's* table. A has committed the offence defined in this section.

SCOPE OF SECTION 307

Section 307 deals with the offence of attempt to commit murder. In order to constitute an offence under this section, two elements are essential. First, the intention or knowledge to commit murder. Secondly, the act ual act of trying to commit the murder.[53] Thus, it must have both the necessary mens rea and act us reus. In other words, for offences under this section, all the elements of murder exist, except for the fact that death has not occurred. However, an attempt, in order to be criminal, need not be the penultimate act foreboding death. It is sufficient if there is present an intention to commit homicide coupled with some overt act in execution thereof. Such an overt act would have accomplished the intended crime had there been no extraneous and unanticipated intervention that frustrated its consummation.[54]

Act Must be One Capable of Causing Death

To sustain a conviction under this section, it is necessary to establish that had the accused succeeded in his attempt and the victim met with his death, then the offence committed would have been one punishable under s 302, IPC. In a case before the Bombay High Court,[55] the victim had received injuries, which were described by the doctor as dangerous and were likely to cause death. The doctor did not state that the injury was sufficient in the ordinary course of nature to cause death, which alone would bring it within the purview of s 300, IPC. In view of this, the high court held that an offence under s 307, IPC, was ruled out.

In *Jai Narain Mishra v State of Bihar* ,[56] the accused was responsible for causing injury on the head of the victim with a *farsa*. The injury was described as a simple injury. Though the weapon used by the offender was one which was likely to cause death, the Supreme Court held that the accused could not be held guilty under s 307, IPC. Instead, his conviction was changed to one under s 327, IPC. Thus, even if an act was

done with the intention to commit murder, but if the act was not capable of causing death, the offence will not fall under this section. However, it may be punishable under s 300 read with s 511, IPC.

However, an accused charged under s 307 cannot be acquitted merely because the injuries inflicted on the victim were in the nature of simple hurt. The determinative factor is intention or knowledge and not the nature of injury.[57] Nevertheless, the nature of injury actually caused render considerable assistance to the court in finding intention of the accused. However, it can ascertain intention from other circumstances, even without reference to act ual wounds.[58]

It is not necessary for the applicability of the section that any injury should have been caused to the person on whom the attempt to murder was made. In *State of Maharashtra v Balram Bama Pate* ,[59] the Supreme Court held:

> To justify a conviction under s 307, it is not essential that bodily injury capable of causing death should have been inflicted. Although, the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to act ual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result as far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.[60]

Intention

The words 'such intention' found in s 307, refer to the intention referred to in s 300. It means: (i) intention to cause death; (ii) intention to cause such bodily injury, which the offender knows is likely to cause death; (iii) intention to cause such bodily injury, which is sufficient in the ordinary course of nature to cause death. Thus, the intention to cause death is the essence of the offence of attempt to murder. Intention is something which precedes the actual attempt. It has to be proved independently of the act or the actus reus. Once the necessary intention to commit murder is established, the ultimate result of the attempt will be immaterial, unless of course, the attempt results in murder, in which case, it will fall under s 300, IPC. If intention is not proved, then the accused cannot be convicted under this section.

However, intention is something which can be gathered from circumstances like the nature of the weapon used, the words used by the accused at the time of the act, the motive of the accused, the parts of the body where the injuries are caused, the nature of injuries and the severity and persistence of the blows given etc. In *Sarju Prasad v State of Bihar* ,[61] the Supreme Court, while accepting the proposition that no injury need be caused in order to sustain a conviction under s 307, IPC, held that the prosecution had led no evidence from which it could be inferred that the accused had an intention to kill the victim, or the requisite knowledge that the injuries caused by him are sufficient in the ordinary course of nature to cause death. Under the circumstances, the Supreme Court held that the offence would only amount to one under s 324, IPC.

Knowledge

The word 'intention' and the term 'knowledge' used in s 307, IPC, refer to knowledge as found in s 300, cl (4). The term 'knowledge' refers to the 'knowledge' of the offender that the act done by him is so imminently dangerous that it must in all probability cause death or such bodily injury, as is likely to cause death.

In *Liyakat Mian v State of Bihar* ,[62] the accused shot a person from very close quarters causing injuries on the abdomen and the left arm. It was held that from these circumstances, the knowledge that the injury caused by him would result in death could be imputed to the accused. The accused was convicted under s 307, IPC.

MEANING OF ATTEMPT

The question whether a certain act amounts to the commission of a particular offence, is a question of fact dependant on the nature of the offence and the steps necessary to take, in order to commit it. No exhaustive and precise definition of what would amount to an attempt to commit an offence is possible.

There is a thin line of demarcation between the preparation for, and an attempt to, commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes necessary preparations for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted it. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence, and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. A person commits the offence of 'attempt to commit a particular offence' when: (i) he intends to commit that particular offence; (ii) having made preparations and with the intention to commit the offence, he does an act towards its commission. Such an act need not be the penultimate act towards the commission of that offence, but must be an act during the course of committing that offence.[63]

The act towards commission of the murder need not be a single act. Nor does it mean that the immediate effect of the act committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time. The word 'act' does not mean only any particular specific instantaneous act of a person, but denotes, according to s 33, a series of actions as well. When an accused deliberately starved his wife and denied food to her for days together and did not allow her to leave his house, it was held that the course of conduct adopted by the accused in regularly starving the wife in order to accelerate her end, came within the purview of s 307, though it was not the last act, which if effective, would cause death.[64]

Section 308. Attempt to commit culpable homicide.--Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at *Z*, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. *A* has committed the offence defined in this section.

A reading of the provisions of ss 307 and 308, show that while s 307 is linked with the offence of murder defined under s 300, IPC, s 308 is linked with the offence of culpable homicide defined under s 299, IPC. This section and s 307 are expressed in similar language and should be interpreted in the same way.[65]

PART F - SUICIDE

Section 305. Abetment of suicide of child or insane person.--If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Section 306. Abetment of suicide.--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Suicide has not been declared as a crime by the IPC obviously because once a person successfully commits suicide, that person is no longer alive to be prosecuted and the crime abates with him. However, an attempt to commit suicide is punishable under s 309. An abetment to commit suicide is also made punishable under ss 305 and 306, IPC.

These sections are based on a reasonable public policy to prevent other persons' involvement, instigation and aiding in terminating one's life.[66] It takes care of situations and threats imposed by death baiters.[67]

To make out a case of abetment, there must be some act ive suggestion/instigation, provocation, incitement or encouragement by the accused to a person to do an act. The offence of abetment must confirm to the definition of the term 'abetment' given in s 107. There must be instigation, cooperation or intentional assistance given to the would-be suicidee. Neither a mere suggestion nor a casual remark suggesting a suicidee to commit suicide amounts to abetment to commit suicide.[68] It is not necessary, nor indeed is it a part of the definition, that the suicide should have been committed in consequence of the abetment. But, in order to render a person liable as an abettor, it is necessary that the abettor should do something more than remaining a mute spectator. But, sometimes, it is conceivable that even the person mere presence as spectator may encourage a person to do a deed, which she might otherwise refrain from. In such cases, the question whether mere presence amounted to intentionally aiding another will have to be decided.[69]

Before a person can be convicted for abetment of suicide, it must first be established that such other person has committed suicide. In *Wazir Chand v State of Haryana* ,[70] the deceased was a newly married woman, who died due to burn injuries. The accused persons, the husband and the father-in-law of the deceased, were charged for abetting the suicide. The prosecution case was that the accused sprinkled kerosene on her cloth and set her on fire. The defence of the accused was that the burns were caused to the deceased by accident. The Supreme Court rejected the defence version, but in view of the fact that the prosecution had failed to establish beyond reasonable doubt that the deceased committed suicide, because of some procedural lapses, set aside the conviction of the accused under s 306, IPC. Instead, it convicted them under s 498A, IPC.

In *Gurbachan Singh v Satpal Singh* ,[71] the deceased, a newly-wedded girl, died of burn injuries. There was sufficient evidence about harassment and torture for bringing insufficient dowry. She was also accused of carrying an illegitimate child. In view of this harassment, the deceased committed suicide by setting herself afire. It was held that the provocations given to the deceased were grave and serious enough for an ordinary Indian woman to kill herself. The evidence also revealed that none of her in-laws made any attempt to save her from burn injuries. The deceased's parents were neither informed about her burns nor were prompt steps taken for giving her medical assistance. The accused were convicted for abetting the suicide.

However, mere unhappiness in matrimonial life pushing the wife to commit suicide will not attract s 498A and s 306 of the IPC. In *Thangappandian v State* ,[72] the only evidence against the accused was that there were some petty quarrels between him and his deceased wife. The Madras High Court held that such petty quarrels could not be sought to be brought within the term 'cruelty' contemplated under s 498A, IPC. Under explanation to s 498A of IPC, cruelty is stated to be wilful conduct, which is of such nature as is likely to drive a person to commit suicide. A reasonable nexus, therefore, needs to be established between the cruelty and the suicide of the woman, in order to make good the offence of cruelty. Accordingly, the court refused to convict the accused under s 306 read with 498A, IPC.

Encouraging a widow to commit *sati* has been held to be abetment of suicide. In *Tej Singh v State* ,[73] the accused were members of the crowd, who had joined the funeral procession from the house of the deceased to the cremation ground. The widow of the deceased was walking in front of the procession with an intention to commit *sati*. The accused started shouting '*sati mata ki jai*'. As the procession proceeded, about 100-150 people surrounded the police in order to make it impossible for them to prevent the widow from committing *sati*. Ultimately, the funeral pyre was set on fire with the widow sitting on it. It was held that all those persons who joined that procession were aiding the widow in committing *sati*.

In *Aruna Ramchandra Shanbaug v Union of India* ,[74] the Supreme Court held, and rightly so, that physician-assisted suicide is an offence under s 306 of the IPC. The assistance of a doctor may be active or passive. In the former, he (or a third party) act ively assists another in ending his life, while in the latter; he simply does not do anything to save his life. In either case, active or passive euthanasia, he becomes liable as an abettor of suicide. If a person becomes unsuccessful in terminating his life, he becomes liable under s 309, IPC. If he is not in a position, say because of brain death or vegetative state, to end his life, and someone else helps him to do so, he becomes abettor.

In *Common Cause (A Registered Society) v Union of India* ,[75] the petitioner, contending that *Aruna Ramchandra Shanbaug*case was wrongly decided, urged the Supreme Court to declare that 'right to live with dignity' guaranteed under art 21 of the Constitution takes in its fold the 'right to die with dignity' and that a person with deteriorated health or terminally-ill is entitled to execute 'My Living Will and Attorney Authorisation',

which can be presented to hospital for appropriate act ion in the event of the executant being admitted to the hospital with serious illness or chronic diseases or likely to go into a state of terminal illness or permanent vegetative state so as to get rid of cruel and unwanted medical treatment (like feeding through hydration tubes, being kept on ventilator and other life-supporting machines) from doctors in order to artificially prolong his natural life-span and to relieve those who help him in ending his life from criminal liability. The prayer was counter argued by the fact that it is, as per the Hippocratic Oath, the primary duty of doctors to save life of his patients. The Supreme Court, after hearing arguments of both the parties, carefully looking into its pronouncements in the *Gian Kaur* and the *Aruna Ramchandra Shanbaug* cases and realising that the latter case holds the field in regard to assisted-suicide in India, referred the question to a Constitution Bench for its consideration and for clear enunciation of propositions of law.

PRESUMPTION AS TO ABETMENT

Section 113A of the Evidence Act, which was inserted in the year 1983 by the Criminal Law (Amendment) Act 1983, lays down presumption of abetment. Under this section, when it is found that a woman has been subjected to cruelty as defined in s 498A, IPC, by her husband or his relatives, and she is shown to have committed suicide within a period of seven years from the date of her marriage, then the court may presume that such suicide had been abetted by her husband or such relative of her husband.

A court may presume and convict the husband (or his relatives) for harassing and subjecting his wife to 'cruelty' and thereby driving her to commit suicide even if he (or his relatives) is (or are) not formally charged under s 306 along with s 498A of the IPC. And where an accused is held guilty for cruelty under s 498A, he can, on the same evidence, be convicted under s 306 for abetting the suicide.[76] Similarly, a court can convict a person under s 306 even if he is not charged under s 498A, IPC.[77]

However, the mere fact that a married woman committed suicide within seven years of her marriage and that she was subjected to cruelty by her husband or his relatives does not automatically give rise the presumption that the suicide was abetted by the husband or his relatives, as the case may be. A court is not bound to presume that the accused persons have abetted the suicide even though the prosecution has established that the deceased woman committed suicide within a period of seven years of her marriage and that the accused subjected her to cruelty.[78]

ATTEMPT TO COMMIT SUICIDE

Section 309. Attempt to commit suicide.--Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.

As stated earlier, suicide is as such no crime under the IPC. However, attempt to commit suicide is made punishable under this section. Mens rea is one of the essential elements of this offence.

Constitutional Validity of Section 309

The constitutional validity of s 309 was initially struck down as a cruel and irrational provision and violative of art 21 of the Constitution, in the case of *P Rathinam v Union of India* .[79] However, in *Gian Kaur v State of Punjab* ,[80] the *P Rathinam* dictum was reversed and a Constitutional Bench of the Supreme Court upheld the constitutional validity of s 309, by indicating that it does not violate arts 14, 19 and 21 of the Constitution. It held that the' right to life' under art 21 of the Constitution does not include the 'right to die'.

Intention

As stated earlier, intention to commit suicide is essential in order to constitute an offence under this section. Where an accused jumped into a well to avoid the police and later came out of the well of his own accord, it was held that in the absence of evidence that he jumped into the well to commit suicide, he could not be convicted of the offence under this section.[81]

Hunger Strike

Announcement of hunger strikes is a common scenario in India. Very often, these hunger strikes are resorted to as a means to pressurise some authority to concede demands of the hunger strikers. So, generally speaking, the intention of a person on a hunger striker is not to kill himself, but, to the contrary, very often it is done for improvement, advancement or amelioration of some situation. In view of this, the essential requirement of the offence, namely, the intention to kill oneself, is absent and hence, it cannot amount to an offence under this section. Thus, only in cases where the accused intends to persevere to the end, refuses all nourishment and reaches such a stage that there is imminent danger of death ensuing, can he be held guilty of the offence of attempt to commit suicide.[82]

PART G - THUGS

Section 310. Thug.--Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

Section 311. Punishment.--Whoever is a thug, shall be punished with imprisonment for life and shall also be liable to fine.

SCOPE OF SECTION 310

This section provides for a species of crime, which has now become extinct. *Thugee* was once rampant in the country and the *thug* regarded himself as an object of protection by the Goddess Kali or Devi, whose protege he claimed to be, and to whom he offered up the blood of his victims. Thugs must be distinguished from robbers and dacoits. Thugs are organised gangs, whose object is to rob or kidnap accompanied by murder. Thus, the committing of murder itself is one of the set purposes of thugs. They first kill and then rob their victims. This section makes the habitual association with thugs an offence. The actual commission of an offence by him is not necessary.[83]

Thugs as such have now passed away into history and thus ss 310 and 311 have become more or less redundant.

PART H - PROPOSALS FOR REFORM

The Fifth Law Commission of India, which undertook rigorous analysis of the IPC in its Forty-second Report,[84] after having a comprehensive analysis of the law of homicides in India, offered a set of proposals for reform.

However, before one peeps into these proposals for reform, it is worth to recall, as done by the Law Commission, critical reflections of Sir James Stephen Fitzjames on ss 299 and 300 of the IPC. As early as in 1883, he observed:

> The definitions of culpable homicide and murder are, I think, the weakest part of the Code. They are obscure, and it is obvious to me that the subject has not been fully thought out when they were drawn. Culpable homicide is first defined, but homicide is not defined at all, except by way of explanation to culpable homicide. Moreover, culpable homicide, the genus, and murder, the species, are defined in terms so closely resembling each other that it is difficult to distinguish them.[85] ...The difficulty of these sections is that the definitions of culpable homicide and murder all but repeat each other, but not quite, or at least, not explicitly.[86]

However, the Fifth Law Commission failed to see any substance in these criticisms, except the last one, namely, culpable homicide and murder are defined 'in terms so closely resembling each other that is difficult to distinguish them' from each other. And it, by comparing the relevant portions of both the sections, has eloquently demonstrated that ss 299 and 300 are coached in the closely resembling expressions indicating similar ideas.[87]

With a view to doing away with the obscurity, repletion of ideas, and employment of terms resembling each other for expressing similar ideas, the Law Commission offered the following proposals for reform[88]:

(1) The offences of culpable homicide and of murder should be redefined. 'Murder', being the offence of primary importance, should be defined first in a self-contained manner rather than retaining it as a graver form of 'culpable homicide not amounting to murder'. It, however, suggested that the existing formulation of ideas should be retained in the proposed definitional clauses, as they, through thitherto judicial interpretation, have acquired some significance. Against this backdrop, the Commission offered draft ss 299 and 300 defining respectively 'murder' and 'culpable homicide not amounting to murder'.
(2) A new chapter (ch VB: Attempt) should be added to the IPC, and appropriate changes (as suggested by it) should be carried out in the existing ss 307 and 308 (dealing with attempt to commit murder and culpable homicide not amounting to murder respectively).
(3) Delving into reforms in s 309 of the IPC dealing with attempt to commit suicide, the Law Commission, after referring to *Dharma Sastras* that, in certain situations, justify taking one's own life and the British Suicide Act of 1861, which has decriminalized attempt to commit suicide in the UK, argued that the persons who attempt to take their lives need active sympathy of the society rather than social condemnation in the form of punishment. It, therefore, perceived s 309 as 'harsh and unjustifiable' and suggested its deletion from the IPC. It proposed that a new s 309, in the place of existing s 309, should be inserted in the IPC to penalize the husband and his relatives if they drive a married woman to commit suicide.[89]
(4) It suggested that ss 310 and 311, dealing with 'thugs', should be deleted as they have become obsolete.

The Indian Penal Code (Amendment) Bill 1978, prepared in the light of, and to give effect to, the Forty-second Report of the Law Commission, revealed the following response to the proposals for reform:

(1) SIt did not give any place in it to the recommended ss 299 and 300.
(2) It proposed, through its clause 131, only deletion of s 309 from the IPC, without incorporating the proposed new s 309 in place of the existing one.
(3) It incorporated, through cl 130, the suggested revised ss 307 & 308, with some minor modifications.

However, the Fourteenth Law Commission, which deliberated upon the feasibility of the Amendment Bill, responded to these proposals as under[90]:

(1) After taking into account the pleas of the abolitionists and retainists of s 309 of the IPC as well as the Supreme Court's dictum in the *Gian Kaur* case, it favored retention of the existing s 309 in the Code. It accordingly recommended the deletion of cl 131 of the Bill. Justifying its stand, the Law Commission observed that 'rise in narcotic drug-trafficking offences, terrorism in different parts of the country, the phenomenon of human bombs, etc. have led rethinking on the need to keep attempt to commit suicide an offence, and a terrorist or drug trafficker who fails in his/her attempt to consume the cyanide pill and the human bomb who fails in the attempt to kill himself or herself along with the targets of attack, have to be charged under section 309 and investigations be carried out to prove the offence'.
(2) It failed to see any reason for disturbing the existing ss 307 and 308, and therefore, it did not accord its approval to cl 130 of the Amendment Bill.

However, the Eighteenth Law Commission recommended that attempt to commit should be effaced from the Penal Code as s 309 is inhuman and anachronistic law. Attempt to suicide is more a manifestation of diseased condition of mind deserving of treatment and care rather than punishment. It is unjust and unfair to inflict additional legal punishment on a person who, for a variety of depressive or frustrating reasons, loses the instinct of self-preservation and decides to extinguish his own life, has already suffered agony and ignominy in his failure to commit suicide.[91]

Recently, the Supreme Court also urged the Parliament to consider feasibility of decriminalizing the offence of attempt to commit suicide by deleting s 309 from the IPC as it has become anachronistic. 'A person attempts to commit suicide in a depression and hence he', it observed, 'needs help, rather than punishment'.[92]

1 AIR 1964 SC 900, (1964) Cr LJ 727(SC) .

2 AIR 1979 SC 1876, (1979) Cr LJ 1406(SC) .

3 (1978) Cr LJ 858 (MP); see also *Virsa Singh v State of Punjab* AIR 1958 SC 465; *Kishore Singh v State of Madhya Pradesh* AIR 1977 SC 2267.

4 AIR 1956 SC 488. For more detailed discussion on the facts, see ch 11: Intoxication, above.

5 Ibid. para 5.

6 *Jayaraj v State of Tamil Nadu* AIR 1976 SC 1519, (1976) Cr LJ 1186(SC) ; see also *Anda v State of Rajasthan* AIR 1966 SC 148, (1966) Cr LJ 171(SC) .

7 *Mohd. Arif v State of Uttranchal* (2009) 11 SCC 497, (2009) Cr LJ 2789(SC) .

8 *Kesar Singh v State of Haryana* (2008) 15 SCC 753, 2008 (6) SCALE 433.

9 *Jagriti Devi v State of Himachal Pradesh* (2009) 14 SCC 771, AIR 2009 SC 2869.

10 *Jai Prakash v State (Delhi)* (1991) 2 SCC 32, 1991 (1) SCALE 114.

11 See, *Takhaji Hiraji v Thakore Kubersing Chamansing* AIR 2001 SC 2328, (2010) 6 SCC 145, *Sham Madhavrao v State of Maharashtra* (2000) Cr LJ 2389(Bom) ; *Shamsher Khan v State* (2001) Cr LJ 119(SC), AIR 2000 SC 3662.

12 *Raj Pal v State of Haryana* (2006) 9 SCC 678, 2006 (4) SCALE 456.

13 *State of Maharashtra v Kashirao* (2003) 10 SCC 434, AIR 2003 SC 3901.

14 AIR 1982 SC 1466.

15 AIR 2001 SC 2002, (2002) 1 SCC 71.

16 *Chahat Khan v State of Haryana* AIR 1972 SC 2574, (1973) Cr LJ 36(SC) ; *State of Karnataka v Vedanayagam* (1995) SCC 231(Cri) .

17 *Chahat Khan v State of Haryana* AIR 1972 SC 2574, (1972) 3 SCC 408.

18 *Bandampalli Venkateswarlu v State of Andhra Pradesh* (1975) 3 SCC 492.

19 *Rau Bhagwanta Hargude v State of Maharashtra* AIR 1979 SC 1224, (1979) Cr LJ 1022(SC) .

20 *Selvaraj v State of Tamil Nadu* (1998) 9 SCC 308.

21 *Katta Ramudu v State of Andhra Pradesh* AIR 1997 SC 2428.

22 AIR 1998 SC 699, (1998) Cr LJ 844(SC) .

23 *Gudar Dusadh v State of Bihar* (1972) 3 SCC 118, AIR 1972 SC 952.

24 *Rajwant Singh v State of Kerala* AIR 1966 SC 1874 (1878); see also *State of Uttar Pradesh v Virendra Prasad* AIR 2004 SC 1517.

25 *Arun Nivalaji More v State of Maharashtra* (2006) 12 SCC 613, AIR 2006 SC 2886.

26 *Illustration (b)* appended to s 300 elucidates the proposition. Also see *R v Govinda* (1876) ILR 1 Bom 342; *Anda v S State of Rajasthan* AIR 1966 SC 148, 1966 Cr LJ 171.

27 AIR 1956 SC 116, (1956) Cr LJ 291(SC) .

28 AIR 1958 SC 672, (1958) Cr LJ 1251(SC) .

29 (2004) 12 SCC 546, AIR 2004 SC 1264.

30 *Gudar Dusadh v State of Bihar* (1972) 3 SCC 118, AIR 1972 SC 952; *Anda v State of Rajasthan* AIR 1966 SC 148, (1968) Cr LJ 171(SC) .

31 AIR 1958 SC 465.

32 Ibid, paras 12 & 13.These essentials and observations of the apex court have become *locus classicus*, are ingrained in our legal system, and have become part of the rule of law. See, *Chacko @ Aniyan Kunju v State of Kerala* (2004) 12 SCC 269, AIR 2004 SC 2688; *Shankar Narayan Bhadolkar v State of Maharashtra* AIR 2004 SC 1966, (2005) 9 SCC 71; *Thangaiya v State of Tamil Nadu* (2005) 9 SCC 650, 2005 Cr LJ 684; *Rajinder v State of Haryana* AIR 2006 SC 2257; (2006) 5 SCC 425, (2006) Cr LJ 2926(SC) ; *Raj Pal v State of Haryana* (2006) 9 SCC 678, 2006 (4) SCALE 456; *Abbas Ali v State of Rajasthan* (2007) 9 SCC 129, AIR 2007 SC 1239, (2007) Cr LJ 1667(SC) ; *Kesar Singh v State of Haryana* (2008) 15 SCC 753, 2008(6) SCALE 433.

33 *State of Andhra Pradesh v Rayaavarapu Punnayya* (1976) 4 SCC 382.

34 *Dashrath Singh v State of Uttar Pradesh* (2004) 7 SCC 408, AIR 2004 SC 4488.

35 *Veera Muthu v State of Madras* (1971) 3 SCC 427; *State of Andhra Pradesh v Rayavarappu Punnayya* AIR 1977 SC 45, (1977) Cr LJ 1(SC) ; *Kishore Singh v State of Madhya Pradesh* AIR 1977 SC 2267; *Ramashraya v State of Madhya Pradesh* (2001) Cr LJ 1452(SC) ; *State of Uttar Pradesh v Virendra Prasad* AIR 2004 SC 1517.

36 *Shankar Narayan Bhadolkar v State of Maharashtra* AIR 2004 SC 1966, (2005) 9 SCC 71.

37 AIR 1968 SC 867, (1968) Cr LJ 1025(SC) .

38 AIR 1968 SC 1390.

39 See also, *Jagrup Singh v State of Bihar* AIR 1972 SC 952, (1972) Cr LJ 587(SC) ; *Hardev Singh v State of Punjab* AIR 1975 SC 179, (1975) 3 SCC 731; *Anda v State of Rajasthan* AIR 1966 SC 148, (1966) Cr LJ 171(SC) .

40 (2001) Cr LJ 4675 (SC).

41 AIR 1968 SC 881.

42 (2005) 9 SCC 650.

43 AIR 1983 SC 614.

44 See *Emperor v Dhirajia* AIR 1940 All 486; *Gyarsibai v State* AIR 1953 MP 61.

45 AIR 1962 SC 605.

46 AIR 1977 SC 1801, (1977) Cr LJ 1448(SC) .

47 AIR 1974 SC 387, (1974) Cr LJ 446(SC) .

48 AIR 1980 SC 448.

49 (2003) 9 SCC 205.

50 *Raj Kumar v State of Maharashtra* (2009) 15 SCC 292, 2009 (9) SCALE 495.

51 AIR 1974 SC 2281, (1974) Cr LJ 1310(SC) .

52 AIR 1973 SC 665, (1973) Cr LJ 608(SC) .

53 AIR 1974 SC 1550, (1974) Cr LJ 1015(SC) .

54 AIR 1979 SC 577, (1979) Cr LJ 584(SC) .

55 (2008) 11 SCC 360, (2008) Cr LJ 3196(SC) .

56 *Dakhi Singh v State* AIR 1955 All 379, (1955) Cr LJ 905(All) (DB) .

57 AIR 1950 EP 32(DB) .

58 *State of West Bengal v Shew Mangal Singh* AIR 1981 SC 1917.

59 *Dhirajbhai Gorakhbhai Nayak v State of Gujarat* (2003) 9 SCC 322; see also, *Sukhdev Singh v State* (2003) 7 SCC 441; *Sachchey Lal Tiwari v State of Uttar Pradesh* (2004) 11 SCC 410, AIR 2004 SC 5039; *Sridhar Bhuyan v State of Orissa* (2004) 6 JT 299.

60 *Kikar Singh v State of Rajasthan* AIR 1993 SC 2426; *Rajendra Singh v State of Bihar* AIR 2000 SC 1779; *Sukhdev Singh v State* (2003) 7 SCC 441, *Prakash Chand v State of Himachal Pradesh* (2004) 11 SCC 381; *Gola Yeluga Govinda v State of Andhra Pradesh* (2008) 12 SCC 769, AIR 2008 SC 1842, (2008) Cr LJ 2607(SC) ; *Trimbak v State of Maharashtra* (2008) 7 SCC 213, 2008 (3) SCALE 405; *Hawa Singh v State of Haryana* (2009) 3 SCC 411, (2009) Cr LJ 1146(SC) .

61 *Sikander v State (Delhi Administration)* AIR 1999 SC 1406; *Subhash Shamrao Pachunde v State of Maharashtra* (2006) SCC 384; *Pappu v State of Madhya Pradesh* (2006) 7 SCALE 24; *D Saila v State of Andhra Pradesh* AIR 2008 SC 505, (2008) Cr LJ 686(SC) ; *Kulesh Mondal v State of West Bengal* (2007) 8 SCC 578, AIR 2007 SC 3228.

62 *Jaswant Singh v State of Uttar Pradesh* (1998) SCC 1344(Cri) .

63 *Kesar Singh v State of Haryana* (2008) 15 SCC 753.

64 *Mohammad Mythen Shahul Hamid v State of Kerala* AIR 1980 SC 108; *Ashok Kumar Barik v State of Orissa* (1992) Cr LJ 1849(Ori) ; *Prakash Chand v State of Himachal Pradesh* (2004) 11 SCC 381.

65 *Chonadan Karunan v State of Kerala* (1994) SCC 501(Cri) ; *Krishna Tiwary v State of Bihar* (2001) Cr LJ 3277(SC) ; *Sukhbir Singh v State of Haryana* (2002) 3 SCC 327; *Sachchey Lal Tiwari v State of Uttar Pradesh* AIR 2004 SC 5039, (2004) 11 SCC 410; *Subhash Shamrao Pachunde v State of Maharash- tra* (2006) 1 SCC 384; *Chinnathaman v State* AIR 2008 SC 784, (2008) Cr LJ 1372(SC) .

66 *Pran Das v State* (1954) Cr LJ 331(SC) ; *Dattu Shamrao Valake v State of Maharashtra* AIR 2005 SC 2331, (2005) Cr LJ 2555(SC) .

67 *Gajanand v State of Uttar Pradesh* AIR 1954 SC 695, (1954) Cr LJ 1746(SC) .

68 *Bhagwan Munjaji Pavade v State of Maharashtra* AIR 1979 SC 133, (1979) Cr LJ 46(SC) ; *Imtiaz v State of Uttar Pradesh* (2007) 15 SCC 299.

69 The expression 'undue advantage' as used in the Exception meant 'unfair advantage'. See *Dhirajbhai Gorakhbhai Nayak v State of Gujarat* (2003) 9 SCC 322; *Prakash Chand v State of Himachal Pradesh* (2004) 11 SCC 381; *Anil v State of Haryana* (2007) 10 SCC 274, (2007) Cr LJ 4294(SC) .

70 *Ramkishan Madhav Shelke v State of Maharashtra* (2007) 3 SCC 89, AIR 2007 SC 761; *Suresh Kumar v State of Himachal Pradesh* (2008) 13 SCC 459, AIR 2008 SC 1973; *Bengaru Venkata Rao v State of Andhra Pradesh* (2008) 9 SCC 707, (2008) Cr LJ 4353(SC) .

71 AIR 1957 SC 324, (1957) Cr LJ 420(SC) ; see also *Mahesh Balmiki v State of Madhya Pradesh* (2000) 1 SCC 319; *Jaipal v State of Haryana* (2000) 3 SCC 436.

72 See also *State of Himachal Pradesh v Wazir Chand* AIR 1976 SC 315, (1978) Cr LJ 347(SC) ; *Jamman v State of Punjab* AIR 1957 SC 469, (1957) Cr LJ 586(SC) ; *Thakarda Lalji Gamaji v State of Gujarat* AIR 1974 SC 1351; *Chamru Budhwa v State of Madhya Pradesh* AIR 1954 SC 652, (1954) Cr LJ 1976(SC) ; *Amrithalinga Nadar v State of Tamil Nadu* AIR 1976 SC 1133, (1976) Cr LJ 848(SC) .

73 AIR 1956 SC 99, (1956) Cr LJ 278(SC) .

74 (2002) 3 SCC 327.; see also, *Prakash Chand v State of Himachal Pradesh* (2004) 11 SCC 381.

75 (2003) 11 SCC 238.

76 AIR 1918 Lah 145.

77 AIR 1958 Pat 190.

78 *Ganesh Dooley*(1879) ILR 5 Cal 351.

79 *State of Andhra Pradesh v Rayavarappu Punnayya* ; *Chacko @ Aniyan Kunju v State of Kerala* (2004) 12 SCC 269.

80 *R v Govinda* (1876) ILR 1 Bom 342.

81 *State of Andhra Pradesh v Rayavarappu Punnayya* AIR 1977 SC 45, (1977) Cr LJ 1(SC) ; *Abdul Waheed Khan v State of Andhra Pradesh* (2002) 7 SCC 175; *Chacko @ Aniyan Kunju v State of Kerala* (2004) 12 SCC 269; *Shankar Narayan Bhadol- kar v State of Maharashtra* AIR 2004 SC 1966, (2005) 9 SCC 71; *Thangaiya v State of Tamil Nadu* (2005) 9 SCC 650; *Rajinder v State of Haryana* (2006) 5 SCC 425.

82 Hari Singh Gour, *Penal Law of India*, vol 3, 11th edn, Law Publishers, Allahabad, 1998.

83 *Raghunath Bahesa v State of Orissa* (1968) Cr LJ 851(Ori) ; *State of Gujarat v Haidarali* AIR 1976 SC 1012.

84 *Shankar Narayan Bhadolkar v State of Maharashtra* AIR 2004 SC 1966, (2005) 9 SCC 71; *Prabhakaran v State of Kerala* (2007) 14 SCC 269, AIR 2007 SC 2378; *Kuldeep Singh v State of Himachal Pradesh* AIR 2008 SC 3062; *Mahadev Prasad Kaushik v State of Uttar Pradesh* (2008) 14 SCC 479, AIR 2009 SC 125.

85 By virtue of s 32, IPC, the term 'act' also includes an 'illegal omission'. Therefore death caused by an illegal omission resulting from negligence comes within the purview of s 304A. See *Captain D'Souza v Pashupati Nath Sarkar* (1968) Cr LJ 405(Cal) .

86 *State of Gujarat v Haiderali* AIR 1976 SC 1012.

87 *Emperor v Abdul Latif* AIR 1944 Lah 163.

88 See *Pitala Yadagiri v State of Andhra Pradesh* (1991) 2 Crimes 359(AP) ; *Shiv Dev Singh v State (Delhi)* (1995) Cr LJ 2142(Del) .

89 See Re *JC May*AIR 1960 Mad 50; *Padmacharan v State of Orissa* (1982) Cr LJ (NOC) 192(Ori) ; *Mahadev Prasad Kaushik v State of Uttar Pradesh* (2008) 14 SCC 479, AIR 2009 SC 125.

90 *SN Hussain v State of AP* AIR 1972 SC 685; *State of Himachal Pradesh v Mohinder Singh* (1989) 2 Crimes 159; *R Payani v State of AP* (1994) Cr LJ 78(AP) ; *Surender Kumar v State of Uttar Pradesh* (1996) Cr LJ 94(All) .

91 AIR 1964 SC 205, (1964) Cr LJ 138(SC) .

92 AIR 1918 All 429.

93 AIR 1983 SC 529.

94 *Kurban Hussain v State of Maharashtra* [1965] 2 SCR 622; *Satya Prakash Choudhary v State of Madhya Pradesh* (1990) Cr LJ (NOC) 132(MP) .

95 *Md Rangawalla v State of Maharashtra* AIR 1965 SC 1616.

96 AIR 1968 SC 829, (1968) Cr LJ 1013(SC) .

1 AIR 1972 SC 1150.

2 See also *Baijnath Singh v State of Bihar* AIR 1972 SC 1485.

3 *Balwant Singh v State of Punjab* 1994 SCC (Cri) 844.

4 Hari Singh Gour, *Penal Law of India*, vol 3, 11th edn, Law Publishers, Allahabad, 1998, p 3028.

5 (1968) 71 Bom LR 634(SC), (1968) SCD 198.

6 AIR 1979 SC 1327.

7 AIR 1975 SC 1960.

8 But see *State v Mohammad Yusuf* (2001) Cr LJ 5(SC) .

9 (2003) 9 SCC 208.

10 See also *Murari v State of Madhya Pradesh* (2001) Cr LJ 2968(SC) ; *Dalbir Singh v State of Haryana* (2000) 5 SCC 82; *Suyambu v State* (2001) Cr LJ 1577(SC) .

11 AIR 2007 SC 7104, 2007 (13) SCALE 7.

12 AIR 1943 PC 72, (1944) Cr LJ 569(PC) .

13 AIR 1965 SC 831.

14 (1998) Cr LJ 635 (All).

15 AIR 2004 SC 4091, (2004) 6 SCC 422. Followed in *Katcherala Venkata Sunil v Dr. Vanguri Seshumamba* (2008) Cr LJ 853(AP) .

16 Ibid, para 20.

17 Ibid, para 25.

18 (2005) 6 SCC 1.

19 Ibid, para 53.

20 (2009) 3 SCC 1, AIR 2009 SC 2049.

21 *State of Karnataka v A Joseph* (1988) 3 Crimes 452(Kant) .

22 *Emperor v Khan Mohammed Shermahomed* (1938) Cr LJ 660(Bom) .

23 See *Eso Mathew v State of Kerala* (1967) ILR 1 Ker 352; *Gangadhar Biswas v State of Orissa* (1989) 3 Crimes 314; *Padmolochan v State of Orissa* (1982) Cr LJ 192(Ori) (NOC) .

24 *Keshab Chandra Pande v State* (1995) Cr LJ 174(Ori) ; *Pawan Kumar v State of Haryana* (1998) 3 SCC 309; *Kans Raj v State of Punjab* AIR 2000 SC 2324; *Satvir Singh v State of Punjab* AIR 2001 SC 2828; *State of Andhra Pradesh v Raj Gopal Asawa* AIR 2004 SC 1933; *Baljeet Singh v State of Haryana* AIR 2004 SC 1714; *Arun Garg v State of Punjab* (2004) 8 SCC 251; *Kamesh Panjiyar v State of Bihar* (2005) 2 SCC 388, AIR 2005 SC 785; *Kishan Singh v State of Punjab* (2007) 14 SCC 204, AIR 2008 SC 233; *Tarsem Singh v State of Punjab* (2008) 16 SCC 155, AIR 2009 SC 1454; *Rajesh Bhatnagar v State of Uttarakhand* (2012) 5 SCALE 311, 2012 Cri LJ 3442.

25 *Shanti v State of Haryana* AIR 1991 SC 1126; *Vemuri Venkateswara Rao v State of Andhra Pradesh* (1992) Cr LJ 563(AP) ; *Gurditta Singh v State of Rajasthan* (1992) Cr LJ 309(Raj) ; *Bhuneshwar Prasad Chaurasia v State* (2001) Cr LJ 3541(Pat) ; *Heera Singh v State of Uttaranchal* (2005) Cr LJ 2062(Uttar) ; *Devinder Singh v State* (2005) Cr LJ 4160(SC) . However, irrespective of the seven years time factor, there has to have cogent evidence on record before a court to apply the presumption. See *Venugopal v State of Karnataka* (1999) 2 SCC 216; *Fatima Kom Mastansab Nadaf v State of Karnataka* (1999) Cr LJ 1175(Kant) .

26 (1996) Cr LJ 108 (AP).

27 (1995) Cr LJ 41 84 (SC).

28 (1998) Cr LJ 1144 (SC).

29 In *State of Andhra Pradesh v Raj Gopal Asawa* AIR 2004 SC 1933, the Supreme Court reiterated the view and quoted it with approval.

30 AIR 2003 SC 11, (2003) 1 SCC 217.

31 (2008) 8 JT 690, (2008) 11 SCR 828.

32 (2007) 9 SCC 721, AIR 2007 SC 763.

33 AIR 2011 SC 1098, (2011) 4 SCC 427.

34 *Devi Lal v State of Rajasthan* (2007) 14 SCC 176, AIR 2008 SC 332.

35 AIR 1991 SC 1226.

36 See also *Kaliyaperumal v State of Tamil Nadu* (2004) 9 SCC 157.

37 *State of Andhra Pradesh v Raj Gopal Asawa* AIR 2004 SC 1933; *Kamesh Panjiyar v State of Bihar* (2005) 2 SCC 388.

38 *Satvir Singh v State of Punjab* AIR 2001 SC 2828; *Hira Lal v State (Govt of NCT Delhi)* (2003) 8 SCC 80; *Kaliyaperumal v State of Tamil Nadu* (2004) 9 SCC 157; *Kamesh Panjiyar @ Kamlesh Panjiyar*(2005) Cr LJ 1418(SC) ; *T Aruntperunjothi v State* (2006) 9 SCC 467; *State of Rajasthan v Jaggu Ram* (2008) 12 SCC 51, AIR 2008 SC 982; *Deen Dayal v State of Uttar Pradesh* (2009) 11 SCC 157, AIR 2009 SC 1238, (2009) Cr LJ 1119(SC) ; *Narayananmurthy v State of Karnataka* (2008) 16 SCC 512, AIR 2008 SC 2377.

39 (1995) Cr LJ 174 (Ori).

40 (2000) Cr LJ 2492 (P&H).

41 (2010) 7 SCC 518, AIR 2010 SC 3506.

42 *Heera Singh v State of Uttaranchal* 2005 Cr LJ 2062(Uttaranchal) .

43 *Hira Lal v State (Govt of NCT) Delhi* (2003) 8 SCC 80; *Biswajit Haldar @ Babu Haldar v State of Bihar* (2008) 1 SCC 202, 2007 Cri LJ 2300; *Uday Chakraborty v State of West Bengal,* (2010) 7 SCC 518, AIR 2010 SC 3506; *Undavalli Narayana Rao v State of Andhra Pradesh,* (2009) 14 SCC 588, AIR 2010 SC 3708.

44 *GM Natarajan v State* (1995) Cr LJ 2728(Mad) ; *State of Karnataka v MV Manjunethegowda* (2003) 2 SCC 188; *State v Niranjan Mohapatra* (2005) Cr LJ 1427(SC) ; *Harjit Singh v State of Punjab* (2006) 1 SCC 463, (2006) Cr LJ 554(SC) ; *Ram Badan v State of Bihar* (2006) 10 SCC 115, AIR 2011 (6) SC 2855; *Tarsem Singh v State of Punjab* (2008) 16 SCALE 148; *Shindo @ Sawinder Kaor v State of Punjab* (2011) 11 SCC 517, JT 2011 (6) SC 364.

45 *Amar Singh v State of Rajasthan* (2010) 9 SCC 64, AIR 2010 SC 3391.

46 *Baljeet Singh v State of Haryana* (2004) 3 SCC 122, AIR 2004 SC 1714.

47 *Bansi Lal v State of Haryana* AIR 2011 SC 691, (2011) 11 SCC 359.

48 *State of Karnataka v MV Manjunethegowda* (2003) 2 SCC 188, AIR 203 SC 809; *Satbir Singh v State of Haryana* (2005) 12 SCC 72, AIR 2005 SC 3546.

49 *Hira Lal v State (Govt of NCT Delhi)* (2003) 8 SCC 80, AIR 2003 SC 2865; *Devinder Singh v State* (2005) Cr LJ 4160(SC), AIR 2005 SC 3501; *Anand Kumar v State of Madhya Pradesh* (2009) 3 SCC 799, AIR 2009 SC 2155.

50 *Sudhir Kumar v State of Punjab* (2010) 3 SCC 239, 2010 Cr LJ 2052.

51 *Hira Lal v State (Govt of NCT Delhi)* (2003) 8 SCC 80, AIR 2009 SC 2155.

52 *Kunhiabdullah v State of Kerala* (2004) 4 SCC 13, AIR 2004 SC 1731; *State of Andhra Pradesh v Raj Gopal Asawa* (2004) 4 SCC 470, 2004 Cr LJ 1791; *Kaliyaperumal v state of Tamil Nadu* (2004) 9 SCC 157, (2003) Cr LJ 4321(SC) .

53 *Sumersimbh Umedsinh Rajput v State of Gujarat* (2007) 13 SCC 83, AIR 2008 SC 904, (2008) Cr LJ 1388(SC) .

54 *Devi Lal v State of Rajasthan* (2007) 14 SCC 176, AIR 2008 SC 332.

55 *State of Maharashtra v Bodya Ramji Patil* (1978) Cr LJ 411(Bom) .

56 AIR 1972 SC 1764.

57 *State of Madhya Pradesh v Saleem @ Chamaru* (2005) 5 SCC 554; *Ratan Singh v State of Madhya Pradesh* (2009) 12 SCC 585, AIR 2010 SC 597.

58 *Bipin Bihari v State of Madhya Pradesh* (2006) 8 SCC 798.

59 AIR 1983 SC 305, (1983) Cr LJ 331(SC), see also *Harkishan & State of Haryana v Sukhbir Singh* AIR 1988 SC 2127; *Parveen v State of Haryana* AIR 1997 SC 310.

60 Also reiterated in *Girija Shankar v State of Uttar Pradesh* AIR 2004 SC 1808, (2004) 3 SCC 793; *Bappa @ Bapu v State of Maharashtra* (2004) 6 SCC 485, AIR 2004 SC 4119; *State of Madhya Pradesh v Saleem @ Chamaru* (2005) 5 SCC 554, AIR 2005 SC 3996.

61 AIR 1965 SC 843; see also *State of Rajasthan v Ani* AIR 1997 SC 1023; *Antony v State of Kerala* AIR 1995 SC 2450.

62 AIR 1973 SC 807, AIR 2000 SC 2160.

63 *Abhayanand Mishra v State of Bihar* AIR 1961 SC 1698; *Sagayam v State of Karnataka* (2000) 4 SCC 454, AIR 2000 SC 2161.

64 *Om Parkash v State of Punjab* AIR 1961 SC 1782.

65 *Om Parkash v State of Punjab* AIR 1961 SC 1782. See *Tukaram Gundu Naik v State of Maharashtra* (1994) Cr LJ 224(SC), (1994) 1 SCC 465.

66 *Naresh Marotrao v Union of India* (1995) Cr LJ 96(Bom) .

67 *Raghunath Das v Emperor* AIR 1920 Pat 502.

68 *Ganga Debi v State (Delhi Administration)* (1985) 28 Del LT 35; *Hari Singh v State of Punjab* (1983) Cr LJ 217(P&H) ; *Swamy Prahadas v State of Madhya Pradesh* (1995) SCC 943(Cri) .

69 *Krushanahari Debnath v State* (1995) Cr LJ 3049(Ori).

70 AIR 1989 SC 378.

71 AIR 1990 SC 209; see also, *Pawan Kumar v State of Haryana* AIR 1998 SC 958.

72 (1998) Cr LJ 993 (Mad).

73 AIR 1958 Raj 169, (1958) Cr LJ 967(Raj) .

74 AIR 2011 SC 1290, (2011) 4 SCC 454.

75 (2014) 3 SCALE 1.

76 *K Prema S Rao & State of Andhra Pradesh v Yadla Srinivas Rao* AIR 2003 SC 11, (2003) 1 SCC 217; *Dalbir Singh (Dr) v State of Uttar Pradesh* AIR 2004 SC 1990: (2004) 5 SCC 334; *Arvind Kumar v State of Madhya Pradesh* (2007) 12 SCC 681, AIR 2007 SC 2674; *Amalendu Pal v State of West Bengal* (2010) 1 SCC 707, AIR 2010 SC 512.

77 *State of Karnataka v Anni Poojary* (2005) Cr LJ 2662(Kant) .

78 *Ramesh Kumar v State of Chhattisgarh* (2001) 9 SCC 618; *Sanju @ Sanjay Singh Sengar v State of Madhya Pradesh* (2002) 5 SCC 371, AIR 2002 SC 1998; *Hans Raj v State of Haryana* AIR 2004 SC 2790, (2004) 12 SCC 257; *Sahebrao v State of Maharashtra* (2006) 9 SCC 794.

79 AIR 1994 SC 1844, (1994) 3 SCC 394. For comments, see KI Vibhute, 'The Right to Die and Chance to Live--A Fundamental Right in India: Some Critical Reflections', Indian Bar Review, 1997, vol 24, pp 65-96.

80 AIR 1996 SC 946, (1996) 2 SCC 648. Voluntary termination of life, which cannot be distinguished from suicide, attracts the provisions of ss 309 and 306 of the IPC. See *CA Thomas Master v Union of India* (2000) Cr LJ 3729(Ker) .

81 *Emperor v Dwarka Poonja* (1912) 13 Cr LJ 246(Bom) .

82 *Ram Sunder Dubey v State* AIR 1962 All 262, (1962) Cr LJ 697(All) ; *Ramamoorthy Vanila Adikalar v State of Tamil Nadu* (1992) Cr LJ 2074(Mad) .

83 Hari Singh Gour, *Penal Law of India*, vol 3, 11th edn, Law Publishers, Allahabad, 1998, p 3169.

84 Law Commission of India, 'Forty- Second Report: The Indian Penal Code ', Government of India, 1972.

85 Sir James Stephen Fitzjames, *A History of the Criminal Law of England*, vol 3, Burt Franklin, New York, 1883, p 313.

86 Ibid, p 314.

87 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code', Government of India, 1972, paras 16.4 and 16.5.

88 See, ibid, paras 16.6-16.7, 5.55, 16.33-16.36.

89 However, the proposal has lost its significance as subsequently in 1986, s 304B, dealing with so-called dowry-death, was inserted in the IPC.

90 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code,' Government of India, 1997, paras 6.11, 12.48-12.49, 8.16.

91 Law Commission of India, 'Two Hundred and Tenth Report: Humanization and Decriminalization of Attempt to Suicide', Government of India, 2008, paras 5.1-5.4.

92 *Aruna Ramchandra Shanbaug v Union of India* AIR 2011 SC 1290, (2011) 4 SCC 454.

CHAPTER 34

Punishment for Murder and Culpable Homicide

(Indian Penal Code 1860,Sections 302 to 304)

PART A - PUNISHMENT FOR MURDER

Section 302. Punishment for murder.--Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

SCOPE OF SECTION 302

Section 302 provides punishment for murder. It stipulates a punishment of death or imprisonment for life and fine. Once an offender is found by the court to be guilty of the offence of murder under s 300, then it has to sentence the offender to either death sentence or imprisonment for life. The court has no power to impose any other lesser sentence.[1]

It is not at all, however, necessary for a conviction for murder that the *corpus delicti* be found. In the absence of *corpus delicti*, obviously, there must be direct or circumstantial evidence leading to the inescapable conclusion that the person has died and that the accused are the persons who had committed murder.[2]

If there is any doubt about the guilt of the offender, the only proper verdict is to acquit him and not to impose a lesser sentence of imprisonment for life.[3]

LIFE IMPRISONMENT THE RULE, DEATH SENTENCE AN EXCEPTION--CHOICE OF SENTENCE

Death Sentence:[4] Legislative Mandate

Section 302 , IPC, beyond stating that the sentence for murder is either death or imprisonment, does not elaborate any further on what are the circumstances under which death sentence could be imposed and what are the circumstances under which the lesser sentence of imprisonment for life should be imposed. The manner in which the proper sentence is to be determined is provided for in the CrPC.

Prior to 1955, under the old Code of Criminal Procedure 1898, s 367(5) of the Code stipulated that the court had to give reason, if the sentence of death was not imposed in a case of murder. In other words, imposition of death sentence for the offence of murder was the rule, and if the court desired to make a departure from the rule and imposed the lesser punishment of imprisonment for life, it was required to give reasons for the same. In 1955, sub-s 5 of s 367 was deleted. The result of the deletion was that the discretion available to the court in the matter of the sentence to be imposed in a given case widened. Several high courts also interpreted the consequence of the deletion to mean that the sentence of life imprisonment was a normal sentence for murder and the sentence of death could be imposed only if there were aggravating circumstances.The Code of the Criminal Procedure was further amended in 1973, making life imprisonment the normal rule. Section 354(3) of the new Code provides:

When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

In the new Code, the discretion of the judge to impose death sentence has been narrowed, for the court has now to provide special reasons for imposing a sentence of death. It has now made imprisonment for life a rule and death sentence an exception, in the matter of awarding punishment for murder. In *Bachan Singh v State of Punjab* ,[5] the Supreme Court, while upholding the constitutional validity of death sentence, observed:

> Section 354(3) of the Code of Criminal Procedure, 1973, marks a significant shift in the legislative policy underlying the Code of 1898... according to which both the alternative sentences of death or imprisonment for life provided for murder and certain other capital sentences provided under thePenal Code, were normal sentences. Now, according to this changed policy which is patent on the face of Section 354(3),the normal punishment for murder and six other capital offences under the Penal Code is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception.[6]

The Supreme Court, quoting from the Report of the Joint Committee of Parliament, observed:

> A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence.[7]

Awarding Death Sentence: General Guidelines and Principles

In the *Bachan Singh* case,[8] the apex court, suggesting a guideline for opting either of the alternative punishments provided for murder, observed:

> ...[F]or making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined, that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But, such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist.[9]

During the hearing of *Bachan Singh's* case, it was suggested that the following circumstances may be considered as guidelines for determining aggravating circumstances which would warrant the imposition of death penalty:

(1) if the murder has been committed after previous planning and involves extreme brutality; or
(2) if the murder involves exceptional depravity; or
(3) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed--
    (i) while such member of public servant was on duty; or
    (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member of public servant; or

(4) if the murder is of a person who had acted in the lawful discharge of his duty under s 43 of the Code of Criminal Procedure 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under ss 37 and 129 of the said Code.[10]

The Supreme Court stated that 'broadly speaking there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other'. It, while being reluctant to categorise or list out all aggravating circumstances, held that the aggravating circumstances, which may qualify and form the basis of special reasons in s 354(3), must be aggravation of abnormal or special degree. And it further held that the sentence of death must be imposed only in 'the rarest of rare cases'.

It was also suggested that in exercising its discretion, the court should take into consideration the following circumstances as mitigating for awarding the lesser punishment of imprisonment for life.

(1) That the offence was committed under the influence of extreme mental or emotional disturbance;
(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death;
(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;
(4) The probability that the accused can be reformed and rehabilitated;

The state shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above;

(5) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;

(6) That the accused act ed under the duress of domination of another person;

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.[11]

The Supreme Court also agreed that these mitigating circumstances are undoubtedly relevant and are of great weight in the determination of sentence. It, however, stressed that there are several other mitigating as well as aggravating circumstances that cannot obviously be feed to a judicial computer. Nonetheless, the court emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in s 354(3) of the CrPC. Judges should never be bloodthirsty. Hence, courts aided by the broad illustrative guidelines indicated, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in s 354(3), namely, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest or rare cases, when the alternative option is unquestionably foreclosed.[12]

Referring to, and recalling the guidelines and the rarest of rare case formula spelled out in the *Bachan Singh* cases, the apex court, in *Machhi Singh v State of Punjab* ,[13] has culled out a set of precise guidelines to be applied to the facts of each individual case where the question of imposing death sentence arises. They are:

(1) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(2) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(3) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(4) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.[14] In order to apply these guidelines by a court, however, needs to pose and answer the following two questions, namely: (i) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?; (ii) are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?[15] And the court, in the light of circumstances of the case at hand, the answers received to the questions posed, has to decide as to whether the case falls or not in the category of 'rarest or rare case' and thereby does or does not warrant death sentence.

The Supreme Court has also explained the circumstances that constitute 'rarest of rare cases' and thereby attract death sentence. It observed:

> In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:
>
> (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward, (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or *vis--vis* whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. ...In cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance, when multiple murders, say of all or almost all the members of a family or a large number or persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is (a) an innocent child..., (b) a helpless woman rendered helpless by old or infirmity, (c) when the victim is person *vis--vis* whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.[16]

However, recently the Supreme Court stressed that these categories of the offences deserving the label of rarest of rare case and thereby the offender thereof of the death sentence cannot be taken as inflexible, absolute or immutable in the post-*Machhi Singh* crime scenario. These categories do warrant a fresh outlook and reflection. It observed:

> A careful reading of the *Machhi* Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organized and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code . At the time of *Machhi* Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today.[17]

Nevertheless, it is important to note that these guidelines, as indicated by the Supreme Court, are merely illustrative and they need to be applied by a court in the light of circumstances of each case. Therefore, one finds that the courts, including the apex court, have given prominence to mitigating factors over the factors indicated in these guidelines for awarding life imprisonment in lieu of death sentence. A mention of a few latest cases[18] would substantiate the proposition.

In *Reddy Sampath Kumar v State* ,[19] wherein the accused, a doctor, who was involved in multiple murders of his in-laws, was allowed by the apex court to go with life imprisonment. However, with a view to making it deterrent, the court disentitled him for receiving any remissions during auspicious occasions. Similarly, in *Lehna,*[20] the Supreme Court held the death sentence awarded by the trial court and confirmed by the high court to the accused for killing his mother, brother, and sister-in-law improper and commuted it to life imprisonment by holding that the multiple murders, though cruel, did not result from diabolic and sinister planning.[21]

In *Ram Anup Singh v State of Bihar* ,[22] the Supreme Court, while delving into the appropriateness of the death sentence awarded to the accused for killing all the members of a family, set aside the sentence of death as it, in its opinion, was unwarranted. It held that the killings, though 'inhuman, cruel and dastardly' and 'heinous and brutal', did not fall in the category of the 'rarest or rare cases' deserving death sentence to the appellants.[23] The court justified its ruling on the ground that there was no evidence on record to suggest that the appellants are either a menace to the society or likely to repeat such barbarism in future. It had also no reason to believe that the accused could not be reformed or rehabilitated. However, in *Gurdev Singh v State of Punjab* ,[24] the Supreme Court refused to commute death sentence to life imprisonment of the accused,

who were convicted for killing 15 persons in a brutal and inhuman manner, even though they, admittedly, were not menace to the society. Justifying its decision, it observed:

> It is true that we cannot say that they would be further menace to the society or not as 'we live as creatures saddled with an imperfect ability to predict future'. Nevertheless, the law prescribes for future, based upon its knowledge of past and is being forced to deal with tomorrow's problems with yesterday's tools. The entire incident is extremely revolting and shocks the collective conscience of the community. The act s committed by the appellants are so gruesome, merciless and brutal that the aggravating circumstances far outweigh the mitigating circumstances.[25]

In *Vashram Narshibhai Rajpara v State of Gujarat* ,[26] the Supreme Court substituted the sentence of death awarded to the accused by the trial court and in turn confirmed by the high court for killing, in a brutal and cold-blooded manner, his wife and four daughters by setting them on fire when they were in fast sleep, by life imprisonment. His poor family background, past non-criminal records and the possibility of his rehabilitation influenced the court to commute the sentence of death to imprisonment for life. However, in *State of Rajasthan v Kheraj Ram* ,[27] wherein the accused killed his wife, two children and his brother-in-law, the Supreme Court refused to convert the death sentence into life imprisonment. It ruled that the accused, who acted in the most cruel and inhuman manner and caused homicidal deaths of two innocent children and a helpless woman in an extremely brutal, grotesque, diabolical, revolting and dastardly manner, deserved the death sentence.

In *Sardar Khan v State of Karnataka* ,[28] the accused was convicted and sentenced by the trial court under ss 302 and 498A of the IPC for brutally killing and harassing his wife. It sentenced him to rigorous imprisonment for life under s 302. On appeal to the high court against the conviction, the high court enhanced his sentence from life imprisonment to death sentence by holding the case as one of the rarest of rare cases. However, the Supreme Court, on appeal, set aside the death sentence and replaced it by life imprisonment. Maintaining the sentence of life imprisonment, the Supreme Court observed that 'brutality in taking away the life of the victim is only one of the factors which required to be taken into consideration for coming to the conclusion that the case at hand is one of the rarest of rare cases warranting imposition of death penalty'. Brutality of the manner in which the murder was perpetrated cannot be the sole ground for judging whether the case is one of the 'rarest of rare cases' for imposing death sentence. Therefore, murder committed in the simmering thirst for vengeance, a though brutal one, does not warrant death sentence.[29]

In *Om Prakash v State of Haryana* ,[30] the Supreme Court, keeping in view the extreme mental disturbances of the accused due to ongoing property dispute and the consequential harassment to his family members by some of the deceased persons, his young age, and the possibility of his rehabilitation, commuted death sentence of the accused to life imprisonment even though he was held guilty of killing seven members of a family in a brutal and well-thought out manner. But in *Suresh v State of Uttar Pradesh* ,[31] wherein the accused and his brother-in-law killed all the family members, except one child, of his brother because of land dispute, the Supreme Court held that the case squarely fitted into the phrase 'rarest of rare' category and thereby refused to interfere with the death sentence awarded to both the convicts. In another case,[32] the apex court approved of rigorous imprisonment for life imposed on the accused by the lower court for killing, with a diabolic plan, an innocent person.[33]

In *State of Uttar Pradesh v Satish* ,[34] wherein the respondent raped & sodomized a girl of six years, killed and threw her body in a sugarcane field, the Supreme Court held that the diabolic, iniquitous and flagitious act of the accused that reached the lowest level of humanity did not deserve any leniency. It, therefore, justified the death sentence.

In *Ram Singh v Sonia* ,[35] the wife, in collusion with her husband, killed not only her step brother and his whole family including three children of 45 days, 2 and 1/2 years, and 4 years, but also her own father, mother and sister so as to deprive her father from giving property to her step brother and his family. The murders were committed in a cruel, pre-planned and diabolic manner while the victims were sleeping. The Supreme Court treated it a rarest of rare case as the accused did not possess any humanity and lacked the psyche or mindset amenable to any reformation. It justified the death sentence.[36]

In *M A Antony v State of Kerala* ,[37] wherein the accused killed all six members of a family at their residence for money, upheld the death sentence awarded by the lower court even though it was imposed on mere circumstantial evidence.[38]

In *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* ,[39] the Supreme Court has stressed that it is the responsibility and duty of all courts, including the apex court, to ensure that the doctrine of rarest of rare case laid down in *Bachan Singh* case is scrupulously followed in sentencing with the same standard of rigor and fairness.

In *State of Maharashtra v Goraksha Ambaji Adsul* ,[40] the Supreme Court has reminded courts that legislative condition of providing 'special reasons' for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. Death sentence should be awarded only when case at hand pricks the judicial conscience of the court to the extent that imposing capital sentence becomes inevitable.

The doctrine of rarest of rare case expects a judge, inter alia, to engage in analysis and balancing of aggravating and mitigating circumstances, relating to both crime and the criminal, for picking up of either of the two penal alternatives provided in s 302,[41]IPC. It has to accord primacy to the mitigating factors.[42] There, obviously, cannot be uniform yardsticks or formulae of rarest of rare case that can be mechanically applied to every case.

Death penalty can be awarded only if in the opinion of the court, the case at hand, in the backdrop of the facts and circumstances, falls in the category of rarest of rare case. But courts, including the Supreme Court, have adopted different criteria for awarding death sentence (or commuting it to life imprisonment) although the offences, as mentioned above, are similar in nature. They have given their own meaning to the doctrine of rarest of rare case.[43] A two-judge Bench of the Supreme Court, after undertaking instructive analysis of various judicial pronouncements of different benches of the Supreme Court on the issue of rarest of rare case delivered during the last two decades, admitted that the Supreme Court has failed to evolve in clear cut terms a sentencing policy in capital sentence cases and to determine as to what constitutes a 'rarest of rare' case. Different Benches of the court have given contrary views on awarding death sentence to the convicts in the set of facts.[44] A three-judge Bench of the Supreme Court divulging the 'truth' of the operation of the doctrine of 'rarest of rare' case, observed:

> The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench.[45]

The nature of the death sentence in the rarest of rare cases is controversial and vexed subject. Nevertheless, it needs to stress that the expression of 'rarest of rare case' is not to play on words or a tautologous expression. It is a very loaded expression and is not to be trifled with. It is pregnant with respect for the inviolability of human life.[46] The court must show real and abiding respect to the dignity of life.[47]

Nonetheless, the Supreme Court offers the following three-facet guiding formula for the sentencing and courts having confirmation and review powers of the sentence of death. It observed:

> ... [T]he crime being brutal and heinous itself does not turn the scale towards the death sentence. When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present the court has to see as to whether the accused is a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and a just balance is to be struck. So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer dehors their personal opinion and inflict death penalty. These are the broad guidelines which this Court had laid down for imposition of the death penalty.[48]

> The doctrine of rarest of race case, in ultimate analysis, draws, for the purpose of punishment, a distinction between ordinary murders and murders that are gruesome, ghastly or horrendous, and insists that perpetrators of the former should be given life sentenced and that of the latter should be sent to gallows.

Delay in Execution of Death Sentence--An Extenuating Factor?[49]

Delay in the execution of death sentence is a factor which may be taken into consideration for commuting the sentence of death to life imprisonment. Initially, in *TV Vatheeswaran v State of Tamil Nadu* ,[50] a two-Judge Bench of the Supreme Court laid down the two-year rule, under which, any accused who was under a sentence of death for more than two years, was entitled to have the sentence of death commuted to that of life imprisonment. In calculating the two years, the Supreme Court said that the period will begin from the date of conviction by the trial court. The Supreme Court held that the right to speedy trial is part of the right to life and liberty guaranteed under the Constitution. The court held, making all reasonable allowance for the time necessary for appeal before the high court and Supreme Court and the time taken for consideration for mercy petitions, the delay exceeding two years in the execution of a sentence of death should be considered sufficient to commute the same to life imprisonment. However, a three-Judge Bench of the Supreme Court in *Sher Singh v State of Punjab* ,[51] disagreed with the two-year rule laid down in the *Vatheeswaran's* case. The Bench observed that with the common experience as regards the time generally taken for proceedings in the high court and Supreme Court and proceedings before the executive authorities, the two-year rule would be unrealistic. It ruled that the substitution of the death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula, as a matter of *quod erat demonstrandum*. However, two years after the *Sher Singh*, a two-Judge Bench of the apex court, in *Javed Ahmed v State of Maharashtra* ,[52] not only doubted the judicial propriety of the three-Judge Bench's ruling in *Sher Singh* overruling the decision of the two-Judge Bench in *Vatheeswaran,* but also justified and stuck to the *ratio* of the *Vatheeswaran's* case.

In view of the conflicting decisions of different Benches of the Supreme Court, the matter was referred to a five-Judge Constitution Bench in *Triveniben v State of Gujarat* .[53] Overruling the *Vatheeswaran*'s case, the Supreme Court, in *Triveniben*, observed:

> ...[U]ndue long delay in execution of the sentence of death will entitle the condemned person to approach this court under article 32, but this court will only examine the nature of delay caused and circumstances ensued after sentence was finally confirmed by the judicial process... This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in *Vatheeswaran's* case cannot be said to lay down the correct law and therefore to that extent stands overruled.[54]

The Supreme Court also relied upon *Triveniben* in its subsequent rulings in *Madhu Mehta v Union of India* ,[55]*Juman Khan v State of Uttar Pradesh* ,[56] and *State of Uttar Pradesh v Dharmendra Singh* .[57] However, it declined to give benefit of the *Triveniben* ratio to a convict who was sentenced to death but it remained unexecuted for a considerably long period on the ground that a third-party (his friend) and not the convict himself approached the court for seeking the relief. It ruled that a third-party does not have locus standi to invoke art 32 of the Constitution to enforce fundamental rights of others.[58]

In *Jagdish v State of Madhya Pradesh,* [59] the Supreme Court reiterated that no hard and fast rule can be laid down with respect to delay in the execution of death sentence as a mitigating circumstance and the court should proceed further if it is satisfied that the case appears to be rarest of rare case.

Recently, death convicts whose mercy petitions were rejected after a considerable lapse of time urged the Supreme Court to commute death sentence to life imprisonment on the ground of inordinate delay in execution of death sentence due to inordinate delay in disposing mercy petition by the executive.

In *Shatrughan Chauhan v Union of India* ,[60] the Supreme Court, stressing the fact that execution of death sentence must also be in consonance with the constitutional mandate, held that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed violates the hitherto accepted contours of the right to life guaranteed under art 21 of the Constitution.

It observed:

> Prolonged delay in execution of a sentence of death has a dehumanizing effect and this has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the fundamental right under art 21 of the Constitution.[61]

Delay in execution of death sentence, the court asserted, operates as the ground for commuting death sentence to life imprisonment, if (a) the delay occurred was inordinate and unreasonable, and (b) it was not caused at the instance of the accused.

Subsequently, in *V Sriharan @ Murugan v Union of India* ,[62] the Supreme Court did not reiterate the legal principles articulated by it in the *Shatrughan Chauhan* but relied thereon to commute death sentence to imprisonment for life on the ground that the executive took almost eleven years to dispose of mercy petition. Explaining rationale for holding delay in disposal of mercy petition a justification for commuting sentence of death to life imprisonment, it observed that 'exorbitant delay in disposal of mercy petition renders the process of execution of death sentence arbitrary, whimsical and capricious and, therefore, inexecutable'. 'Furthermore, such imprisonment, occasioned by inordinate delay in disposal of mercy petition', the court stressed, 'is beyond the sentence accorded by the court and to that extent is extra-legal and excessive'.[63] Further the court made it clear that evidence of suffering of death convict during incarceration when his mercy petition was pending is not a pre-requisite for getting relief of commutation of his death sentence to life imprisonment on the ground of undue and unreasonable delay in disposal of the mercy petition. Regardless and independent of the suffering it causes, the delay makes the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby violative of the procedural due process guaranteed under art 21 of the Constitution and the dehumanising effect is presumed.[64] The apex court made it clear, and rightly so, that whether the delay in disposal of mercy petition was inordinate and unreasonable depends upon the facts and circumstances of each case and it is not possible to lay down exhaustive guidelines therefor. And the exercise of clemency power under art 72 and 161 of the President and a State Governor is per se above judicial review but the manner of exercise of the power is subject to judicial review.

However, it is significant to note that in *Devender Pal Singh Bhullar v State of NCT Delhi* ,[65] the Supreme Court held that there is no question of showing any sympathy or considering supervening circumstances for commutation of death sentence to life imprisonment when the accused is convicted under the Terrorist and Disruptive Act ivities (Prevention) Act 1987 (TADA) or similar statutes. There cannot be any sympathy or leniency even on the ground of delay in disposal of mercy petition. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals. While doing so they do not show any respect for human lives. Before killing their victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of their mercy petition as a ground for commutation of the death sentence.[66]

The distinction made between a person sentenced to death under the TADA (or similar statutes) and one who is sentenced to death for committing an IPC offence for the purpose of commuting death sentence to life imprisonment on the ground of unreasonably delayed disposal of mercy petition[67] is done away with by a larger bench of the Supreme Court in a curative petition filed by the wife of convict Devender Pal Singh Bhullar. His death sentence is commuted to life imprisonment on the ground of inordinate delay of about eight years in disposal of his mercy petition and the acute depression acquired by the convict.[68]

CONVICTION OF A PREGNANT WOMAN

While courts have no compunction in condemning a woman who has committed murder to the gallows, leniency is shown in the case of a pregnant woman. Section 416 , CrPC , as amended by the Amendment Act 5 of 2009, states: 'If a woman sentenced to death is found to be pregnant, the High Court shall commute the sentence to imprisonment for life.' Prior to the amendment, it provided for mere postponement of the execution of the death sentence. Its commutation to life imprisonment was left to the judicial discretion. The pre-amended provision was necessitated by the fact that if a pregnant woman is sentenced to death, it would result in the killing of the foetus also. In the case of assassination of the former Prime Minister, Rajiv Gandhi, the Supreme Court had rejected the review petition filed by one of the women accused Nalini, and confirmed

the death sentence imposed on her by a majority of 2:1. Justice KT Thomas had given a dissenting opinion on the question of her sentence and held that she should be given the lesser sentence of imprisonment for life, in view of the fact that she has a child who was born in captivity. Another factor which weighed with the judge was the fact that Nalini's husband Murugan, who was also an accused in the case, was also sentenced to death. If both Murugan and Nalini were executed, the child would be orphaned. After the child is delivered, if the mother is executed, he argued, it will orphan the child and the child will be punished for no fault of his/hers.[69] The present s 416 is, plausibly, premised on the idea advanced by Justice KT Thomas. It now mandates the High Court to postpone execution of capital sentence to a pregnant woman convict and also to commute it to the imprisonment for life.

CONVICTION OF A MINOR[70]

With the passing of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) (hereinafter Juvenile JusticeAct), the ordinary sentencing applicable to adults will no longer be applicable in the case of juvenile delinquents. The Juvenile Justice Act defines the term 'juvenile' or 'child' as 'a person who has not completed eighteenth year of age'.[71] It provides that no juvenile (child) in conflict with law, who has committed an offence, be sentenced to death or imprisonment for life or committed to prison in default of payment of fine or in default of furnishing security.[72]

However, in respect of even those who may not be juvenile as defined under the Juvenile Justice Act, the young age of an accused may nevertheless be taken into consideration in deciding the question of sentence. In many cases,[73] where the accused were persons below the age of eighteen years, the Supreme Court, on account of the youth of the accused, imposed the lesser punishment of life imprisonment on them.

LESSER SENTENCE TO CO-ACCUSED

In cases where there are more than one accused, and murder has been committed by several persons, under s 34 of the IPC, the act done by one will be considered to be acts done by all. Thus, if a blow is given by one, it will be considered to be a blow given by all the persons. The person act ually giving the blow is considered as a hand or instrument by which the others strike. In view of this, no distinction can be made in the matter of punishment, on the ground that some of the accused did not actually inflict any injury on the accused, or it is doubtful who gave the blow. Similarly, if a lesser sentence of life imprisonment is awarded to one accused, then the co-accused should also generally be given the same sentence, unless it is be established that the role of any one of them in the commission of the crime is more that of others.

In *Wazir Singh v State of Punjab* ,[74] the two accused, armed with rifles, had committed murder. The evidence was not clear as to which one of the accused caused the fatal injury. The Punjab High Court confirmed death sentence on one accused and sentenced the other to transportation for life. The Supreme Court held that the distinction made in the matter of sentence was not justified. The death sentence of the other accused was also reduced to one of transportation for life.

IMPRISONMENT FOR LIFE[75]

'Imprisonment for life' is imprisonment for whole the period of the convicted person's natural life, unless it is remitted or commuted by an appropriate government.[76]'Life imprisonment is also meant 'rigorous imprisonment for life', i.e. imprisonment with hard labour.[77] A convict, therefore, is required to remain in jail and to do hard labour for the rest of his life. However, a convict cannot be ordered to undergo two sentences of life imprisonment (awarded on two different counts) consecutively.[78]

PART B - PUNISHMENT FOR MURDER BY A LIFE-CONVICT

Section 303. Punishment for murder by life-convict.--Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.

Section 303 stipulates that if a person who commits murder as defined in s 300, IPC, is a person who is undergoing a sentence of life imprisonment, then a mandatory sentence of death shall be imposed on him. It, unlike as in s 302, does leave any scope for judicial discretion in sentencing.

In *Mithu v State of Punjab* ,[79] a Constitutional Bench of the Supreme Court declared s 303, IPC, as void and unconstitutional on the ground that it violated arts 14 and 21 of the Constitution. After analysing a catena of judicial pronouncements and relevant statutory provisions, the Bench held:

> ...[W]e are of the opinion that section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section was originally conceived to discourage assaults by life-convicts on the prison staff, but the Legislature chose language which far exceeded its intention. The section also assumes that life-convicts are a dangerous breed of humanity as a class. That assumption is not supported by any scientific data. As observed by the Royal Commission in its Report on 'Capital Punishment': 'There is a popular belief that prisoners serving a life sentence after conviction of murder form a specially troublesome and dangerous class. That is not so. Most find themselves in prison because they have yielded to temptation under the pressure of a combination of circumstances unlikely to recur'.

And it ruled:

> We strike down section 303 of the Penal Code as unconstitutional and declare it void. It is needless to mention that all cases of murder will now fall underSection 302 of the Penal Code and there shall be no mandatory sentence of death for the offence of murder.[80]

Justice O Chinnappa Reddy, in his concurring opinion, observed:

> Section 303 , Indian Penal Code, is an anachronism. It is out of tune with the march of the times. It is out of tune with the rising tide of human consciousness. It is out of tune with philosophy of an enlightened Constitution like ours. It particularly offends Article 21 and the new jurisprudence... [I]t is impossible to upholdSection 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable [*sic* irresuscitable] is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive Section 303is such a law and it must go the way of all bad laws. ... Section 303 , Indian Penal Code , must be struck down as unconstitutional.[81]

However, it is interesting to note that before the *Mithu* dictum, Justice Sarkaria, in *Dilip Kumar Sharma v State of Madhya Pradesh* ,[82] while delving into applicability of s 303 to one of the convicts in the case at his hand, labeled s 303 as draconian in severity and inexorable in operation. He observed:

> Section 303 makes murder by a life-convict punishable with death, with no alternative sentence. Once it is established that at the time of committing the murder, the prisoner was under a sentence of life imprisonment, the Court has no discretion but to award the sentence of death, notwithstanding the existence of mitigating circumstances which by normal judicial standards and modern notions of penology do not justify the imposition of the capital penalty. Viewed from this aspect, the section is Draconian in severity, relentless and inexorable in operation.[83]

In *Surjit Singh v State of Punjab* ,[84] the accused was released on parole while undergoing sentence of life imprisonment in an earlier murder case. He, along with three others, assaulted the deceased in the middle of the night with a blunt side of *gandasa*. He was convicted and sentenced to death under s 303, IPC, by the trial court and confirmed by the Punjab High Court. The Supreme Court, in view of the fact that s 303 had been struck down as unconstitutional, held that the extreme punishment of death penalty was not warranted and reduced the sentence to one of life imprisonment.[85] Similarly, in *Ranjit Singh @ Roda v Union Territory of Chandigarh* ,[86] wherein the accused, while on parole, committed another murder, the Supreme Court commuted death sentence to life imprisonment. However, the court ordered that the instant imprisonment for life awarded to the convict should not run concurrently with his earlier sentence of life imprisonment on the ground that he, when released on parole, committed another murder within a span of one year.

PART C - PUNISHMENT FOR CULPABLE HOMICIDE

Section 304. Punishment for culpable homicide not amounting to murder.--Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

This section prescribes the punishment for the offence of culpable homicide not amounting to murder. The sentence under this section is divided into two parts, popularly referred to as s 304, Pt I and s 304, Pt II, though the section itself does not separate the Parts in this manner. The punishment prescribed under this section varies with a wide range from imprisonment for life to the imposition of a mere fine, though it is a comprehensive section dealing with the single offence of culpable homicide not amounting to murder. The varying sentences depend on the degree of intention and knowledge of causing death that is imputed to the accused.

Section 304, Pt I, prescribes a sentence of imprisonment for life or imprisonment of either description for a term up to ten years and fine, if, the act is done with the intention of causing death or causing such bodily injury as is likely to cause death. This clause corresponds to cll (a) and (b) of s 299. This Part also covers cases wherein an offence of culpable homicide does not amount to murder, on account of the fact that the act falls within one of the exceptions to s 300. Section 304, Pt I, thus applies to culpable homicide, wherein the accused has the intention either to cause death or such bodily injury as is likely to cause death. If the offender has the intention to cause bodily injury accompanied with the knowledge that such injury is likely to cause the death of the person injured as defined in s 300, cl (2), then the offence will come under s 302 and not under s 304, Pt I, unless it falls under any of the five exceptions under s 300, IPC.

A reference to s 304, Pt I, clearly shows that this part covers offences where intention to commit the offence is present. Section 304, Pt II, applies to offences where the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or such bodily injury as is likely to cause death. This clause corresponds to cl (c) of s 299. However, if an offence is committed with the knowledge that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and such act is done without any excuse, then the offence will be taken out of the purview of s 304, Pt II, and would be covered under s 302, as the offence would amount to murder under s 300, cl (4). Thus, the knowledge referred to in Pt II of s 304 is of a lesser degree than the special knowledge referred to in cl (4) of s 300.

The question whether the accused had the knowledge that his act was likely to cause the death, is a question of fact that has to be decided depending on the facts and circumstances of each case.

Thus, the distinction between s 304, Pt I, and s 304, Pt II, is that Pt I applies only to acts done with intention to cause death or such bodily injury as is likely to cause death, whereas Pt II applies to act s which are done without any intention to cause death or such bodily injury as is likely to cause death, but which are done with the knowledge that the act is likely to cause death. The offence under s 300, Pt I is of higher degree than that under its Pt II.[87] The intention and knowledge prescribed under this section is of a lesser degree than that which is described under s 300, IPC.

In *Hardev Singh v State of Punjab* ,[88] the accused aimed a blow at the deceased's son, when the deceased lay herself upon her son in order to save him. The accused inflicted a *kirpan* blow on the head of the deceased. The deceased died as a result of the head injury. The injury in the opinion of the doctor was sufficient in the ordinary course of nature to cause death. However, the intention of the accused was to assault the son of the deceased who had received only simple injuries. It indicated that the accused did not intend to kill the deceased's son or cause any grievous hurt to him. So, therefore from the facts and circumstances of the case, it was held that the accused did not intend to cause injury which was sufficient in the ordinary course of nature to cause death, but had knowledge that the injury is likely to cause death. The accused was convicted under s 304, Pt II.

In *Vishwanath v State of Uttar Pradesh* ,[89] the accused had stabbed the accused with a knife, which entered the heart of the deceased while the deceased was attempting to take away by force the wife and the sister of the accused. The Supreme Court held that the case would fall under s 304, Pt II.

In *MT Nambiar v State of Kerala* ,[90] the Supreme Court refused to impute intention to kill on the part of the appellant who gave one blow with a pair of scissors on the chest of the deceased. It inferred that he had knowledge that any injury on the vital part of the body of the deceased would cause death. Therefore, the court convicted him under s 304, Pt II.

In *Ruli Ram v State of Haryana* ,[91] wherein the accused took lives of two boys aged between 10 and 12 years of a family whose members refused to vote for a particular candidate, the Supreme Court, reversing order of the high court convicting the accused under s 302 and restoring that of the trial court, held the accused guilty under s 304, Pt II, of the IPC. From facts of the case, the court found that the intention of the accused was not to kill the deceased boys but to create some disturbance at the polling station to divert the attention of the crowd collected to facilitate the booth capturing. The court held that the accused did not have any intention to kill the deceased, as they did not cause any injury to the deceased before they were thrown into the pond. There was no attempt to strangulate them. The court, therefore, attributed them the knowledge of the natural consequence of their act, namely, the death of the deceased.[92]

Kedar Prasad v State of Madhya Pradesh ,[93] decided by the Supreme Court illustrates the operation of s 304, IPC. One of the three accused persons who assaulted the deceased, struck on the head, the second caused simple injuries on the knee and arm of the deceased, while the third accused inflicted simple blows on him. The Supreme Court held the first guilty under s 304, Pt I, on the ground of his intentional fatal blow, while the second and third accused were held responsible under s 324 and 323, respectively. The Court also refused to invoke s 34, IPC, against them. But in *Kunhimodeen Kuty v State of Kerala* ,[94] wherein it held both the accused, who were armed with weapons attacked the deceased, guilty under s 304, Pt I/34, IPC.[95]

> In *Atmaram v State of Madhya Pradesh,* [96] the Supreme Court was urged to convert the conviction of the appellants under s 302 to under s 304, Pt II or 326 as none of the injuries caused was on the vital part of the deceased and it in itself was insufficient in the ordinary course of nature to cause the death. The appellants, therefore, had intention to kill the deceased. Hence, they deserved the conviction under s 326 or s 304, Pt II, and not under s 302, IPC. The Supreme Court refused to convert their conviction to s 304, Pt II. It ruled that the cumulative effect of all the injuries was known to each of the accused, i.e. all the injuries were bound to result in the death of the deceased which, in fact, they intended.

PART D - PROPOSALS FOR REFORM

PUNISHMENT FOR MURDER

The Fifth Law Commission, which undertook a comprehensive review of the IPC, did not suggest any changes in the existing s 302 dealing with punishment for murder.

However, the Indian Penal Code (Amendment) Bill 1978, plausibly inspired by the*Bachan Singh* case, through cl 125, sought to substitute the existing s 302 by a new section 302 stipulating death sentence or life imprisonment for murder: (i) committed after previous planning and involves extreme brutality; (ii) committed with exceptional depravity; (iii) of a member of the Armed Forces, the Police Force, or of a public servant committed when: (a) he was on duty, (b) in consequence of anything done or attempted to be done by him in the lawful discharge of his duty; (iv) of a person who had acted in the lawful discharge of his duty under s 43 of the CrPC, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under s 37 or s 129 of the CrPC; or (v) committed by a person serving life imprisonment. It proposed life imprisonment and fine for murder other than those mentioned above.

But the Fourteenth Law Commission did not endorse the proposed legislative move. Recalling the legislative changes brought in the CrPC, the thitherto judicially evolved criteria for recognizing a 'rarest of rare' case for imposing death sentence, and realizing the difficulty in laying down, through a legal provision, the circumstances that make a case a 'rarest of rare' case and thereby warrants death sentence and the circumstances

enumerated in the clause are not exhaustive, it suggested that the existing s 302, IPC, should be kept unaltered.[1]

The Fifth Law Commission, also did not propose any substantive changes in s 303 of the IPC as it is 'very rarely applied' and 'exceptionally hard cases' wherein death sentences is awarded to a life convict, if any, could easily be dealt with by the President or the Governor of a State under the prerogative mercy. However, it suggested that the provision be made applicable to only life convicts who are actually in prison and not to the life convicts who are conditionally released.[2]

The 1978 Amendment Bill, through cl 126, also sought to delete s 303 from the IPC. The Fourteenth Law Commission, in the light of the Supreme Court's dictum in the *Mithu* case, also favored the deletion of s 303 from the IPC.[3]

PUNISHMENT FOR CULPABLE HOMICIDE

Disfavoring the distinction drawn in s 304 between intentional homicide and unintentional homicide for the purpose of imposing imprisonment for life or for a term up to ten years and imprisonment up to ten years or fine or both, respectively, the Fifth Law Commission suggested two proposals for reform: (i) the punishment of life imprisonment, as it has never been awarded, be deleted from the provision; and (ii) only one maximum punishment (of imprisonment for a term up to ten years with fine) should be provided for culpable homicide not amounting to murder.[4]

However, no traces of incorporation of these proposals are found in either the 1978 Amendment Bill or the 156th Report on the IPC of the Fourteenth Law Commission.

1 *State v Savithri* (1976) Cr LJ 37(Mad) .

2 *Ram Gulam Chaudhary v State of Bihar* AIR 2001 SC 2842; *SC Bahri v State* AIR 1994 SC 2420; *Sevaka Perumal v State of Tamil Nadu* AIR 1991 SC 1463; *KT Palanisamy v State of Tamil Nadu* (2008) 3 SCC 100, AIR 2008 SC 1095.

3 *Santosh v State of Madhya Pradesh* AIR 1975 SC 654.

4 For further details see, ch 19, 'Of Punishments', above.

5 AIR 1980 SC 898. However, Justice PN Bhagwati, in his dissenting opinion, held s 302, IPC, unconstitutional, being violative of arts 14 and 21 of the Constitution, as it provides no legislative guidelines for opting for either of the alternative punishments (death sentence or life imprisonment) provided thereunder. See *Bachan Singh v State of Punjab* AIR 1982 SC 1325. For further discussion also see ch 19: 'Of Punishments', above.

6 Ibid, para 151.

7 Ibid.

8 Ibid. See also, *Sheikh Ishaque v State of Bihar* (1995) SCW 2001; *Surja Ram v State of Rajasthan* AIR 1997 SC 18.

9 Ibid, para 199.

10 Ibid, para 200.

11 Ibid, para 204.

12 Ibid, paras 205-207.

13 AIR 1983 SC 957, (1983) Cr LJ 1457(SC), (1983) 3SCC 470.

14 Ibid, para 37.

15 Ibid, para 38.

16 See, ibid, paras 32-36. Also reiterated with approval in: *Lehna v State of Haryana* (2002) 3 SCC 76; *State of Punjab v Gurmej Singh* (2002) SCC 1460; *State of Rajasthan v Kheraj Ram* (2003) 8 SCC 224; *Sushil Murmu v State ofjharkhand* (2004) 2 SCC 338, (2004) Cr LJ 658(SC) .

17 *Swamy Shraddananda (2) v State of Karnataka* AIR 2008 SC 3040, (2008) Cr LJ 3911(SC), para 28.

18 For earlier cases see, *Ratanlal & Dhirajlal's the Indian Penal Code*, VR Manohar and Avtar Singh (eds), 33rd edn, LexisNexis Butterworths Wadhwa, Nagpur, 2010, Reprint 2011, p 546 *et seq*. See also ch 19: 'Of Punishments', above.

19 (2005) Cr LJ 4131 (SC).

20 *Lehna v State of Haryana* (2002) 3 SCC 76.

21 See also *Sambhal Singh v State of Uttar Pradesh* (2004) Cr LJ 1533(All) .

22 (2002) 6 SCC 868.

23 See also *Randhir Basu v State of West Bengal* AIR 2000 SC 908, (2000) 3 SCC 161; but see *Gurmeet Singh v State* (2005) Cr LJ 4384(SC) .

24 (2003) 7 SCC 258, AIR 2003 SC 4187.

25 But see *Ram Pal v State of Uttar Pradesh* (2003) 7 SCC 141, AIR 2003 SC 4168.

26 (2002) 9 SCC 168, AIR 2002 SC 2211.

27 (2003) 8 SCC 224.

28 (2004) Cr LJ 910 (SC).

29 *Panchhi v State of Uttar Pradesh* AIR 1998 SC 2726, (1998) 7 SCC 177; see also *Babu Raveendran v Babu Bahuleyan* (2003) 7 SCC 37.

30 AIR 1999 SC 1332, (1999) 3 SCC 19.

31 AIR 2000 SC 1344, 2000 Cr LJ 2792.

32 *Ezhil v State of Tamil Nadu* (2002) 9 SCC 189.

33 *Sushil Murmu v State of Jharkhand* (2004) 2 SCC 338, (2004) Cr LJ 658(SC) ; see also, *Holiram Bardolai v State of Assam* (2005) Cr LJ 2174(SC) .

34 (2005) 3 SCC 114, AIR 2005 SC 1000.

35 (2007) 3 SCC 1, AIR 2007 SC 1218.

36 Also see, *Holiram Bordoli v State of Assam* (2005) 3 SCC 793, AIR 2005 SC 2059.

37 (2009) 6 SCC 220, AIR 2009 SC 2549.

38 Also see, *Ajitsingh Harnamsingh Gujral v State of Maharashtra* AIR 2011 SC 3690, 2011 (10) SCALE 394.

39 (2009) 6 SCC 498, 2009 (7) SCALE 341.

40 AIR 2011 SC 2689, (2011) 7 SCC 437.

41 *Jagdish v State of Madhya Pradesh* (2009) 9 SCC 498; *State of Uttar Pradesh v Sattan* (2009) 4 SCC 736, 2009 (3) SCALE 394; *Brajendrasingh v State of Madhya Pradesh* AIR 2012 SC 1552, (2012) Cr LJ 1883(SC), (2012) 4 SCC 289.

42 *Sushil Kumar v State of Punjab* (2009) 10 SCC 434, AIR 2010 SC 832; *Neel Kumar @ Anil Kumar v State of Haryana* (2012) 5 SCALE 185, (2012) 5 SCC 766.

43 For illustrative survey of cases see, *Santosh Kumar Satishbhushan Bariyar v State of Maharashtra* (2009) 6 SCC 498, 2009 (7) SCALE 341; *Swamy Shraddananda @ Murli Manohar Mishra (2) v State of Karnataka* AIR 2008 SC 3040, (2008) Cr LJ 3911(SC),

44 *Aloke Nath Dutt v State of West Bengal* (2006) 13 SCALE 467, 2007 (1) ACR 632(SC) .

45 *Swamy Shraddananda @ Murli Manohar Mishra (2) v State of Karnataka* (2008) 12 SCC 767, AIR 2008 SC 3040, (2008) Cr LJ 3911(SC), para 33.

46 *Rameshbhai Chandubhai Rathod v State of Gujarat* (2009) 5 SCC 740, 2009 (6) SCALE 469, paras 95-96.

47 *Rajesh Kumar v State (NCT of Delhi)* (2011) 13 SCC 706, 2011 (11) SCALE 182.

48 *Mohd. Mannan @ Abdul Mannan v State of Bihar* (2011) 5 SCC 317, 2011 (4) SCALE 809, para 24.

49 See also, KI Vibhute, 'Delayed Execution of Death Sentence in India: A Human Right-Oriented Jurisprudence and Jurists' Prudence', in KI Vibhute (ed), *Criminal Justice: A Human Rights Perspective of the Criminal Justice Process in India*, Eastern, Lucknow, 2004, pp 272-285.

50 AIR 1983 SC 361.

51 AIR 1983 SC 465.

52 AIR 1985 SC 231.

53 AIR 1989 SC 1335.

54 Ibid, para 23.

55 AIR 1989 SC 2299.

56 (1990) 2 SCALE 1167.

57 AIR 1999 SC 3789.

58 *Ashok Kumar Pandey v State of West Bengal* AIR 2004 SC 280, (2004) 3 SCC 349.

59 (2009) 12 SCALE 580, JT 2009 (12) SC 300.

60 (2014) 3 SCC 1, (2014) 1 SCALE 437.

61 Ibid, para 38.

62 (2014) 2 SCALE 505, (2014) 4 SCC 242.

63 Ibid, para 16.

64 Ibid, para 18.

65 AIR 2013 SC 1975, (2013) 6 SCC 195, (2013) Cr LJ 2888(SC) .

66 Ibid, para 40.

67 A larger bench of the Supreme Court held that the ratio laid down in *Devender Pal Singh Bhullar* is per incuriam. See *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1, (2014) 1 SCALE 437.

68 *Navneet Kaur v State of NCT of Delhi* (2014) 4 SCALE 459, (2014) 4 JT 280.

69 *State of Tamil Nadu v Nalini* AIR 1999 SC 2640, (1999) Cr LJ 3124(SC) . For further comments on this case, see ch 19: Of Punishments, above.

70 See also, ch 9, 'Infancy', above.

71 S 2(k), Juvenile Justice Act .

72 Ibid, s 16; see also *Bijender Singh v State* (2005) Cr LJ 2195(SC) ; *Pratap Singh v State* (2005) Cr LJ 3091(SC) .

73 *State of Uttar Pradesh v Samman Das* AIR 1972 SC 677, (1972) Cr LJ 487(SC) ; *Harnam v State of Uttar Pradesh* AIR 1976 SC 2071; *Dharambir v State of Uttar Pradesh* AIR 1979 SC 1595; *Om Prakash v State of Haryana* AIR 1971 SC 1388; *Srirangan v State of Tamil Nadu* AIR 1978 SC 274.

74 AIR 1956 SC 754; see also *State of Haryana v Tej Ram* AIR 1980 SC 1496; *Surjit Singh v State of Punjab* AIR 1983 SC 838; *State of Maharashtra v Kalu Shivram Jagtap* AIR 1980 SC 879; *Tehal Singh v State of Punjab* AIR 1979 SC 1347; *Karamat Ali v State of Assam* AIR 1978 SC 1392; *GPL Narasimha Raju v State of Andhra Pradesh* AIR 1971 SC 1232.

75 For further details see, ch 19: Of Imprisonments, above.

76 *Gopal Vinayak Godse v State of Maharashtra* AIR 1961 SC 600; *State of Madhya Pradesh v Ratan Singh* AIR 1976 SC 1552.

77 *KM Nanavati v State of Maharashtra* AIR 1962 SC 605; see also *Naib Singh v State of Punjab* AIR 1983 SC 855; *Sat Pal v State of Haryana* (1992) 4 SCC 172.

78 *Hitesh Pravinchand Shah v State of Maharashtra* (2004) Cr LJ 523(Bom) .

79 AIR 1983 SC 473.

80 Ibid, para 23.

81 Ibid, paras 23 and 24. In the light of the *Mithu* dictum, the Jammu & Kashmir High Court also held s 303 of the Ranbir Penal Code, which is identical to s 303, IPC, as unconstitutional. See, *Jankar Singh v State* (1995) Cr LJ 3263(J&K) .

82 AIR 1976 SC 133.

83 Ibid, para 22.

84 AIR 1983 SC 838.

85 See also *Bhagwan Bax Singh v State of Uttar Pradesh* AIR 1984 SC 1120.

86 AIR 1984 SC 45.

87 *Jarnail Singh v State of Punjab* (2009) 3 SCC 391, (2009) Cr LJ 1141(SC) ; *Jagriti Devi v State of Himachal Pradesh* (2009) 14 SCC 771, AIR 2009 SC 2869.

88 AIR 1975 SC 179; see also *Abdul Mazid v State of Assam* AIR 1994 SC 1487; *RC Stodaria v State of Gujarat* AIR 1994 SC 1060; *Madhusudand Satpathy v State of Orissa* AIR 1994 SC 474; *Massunsha Wasansha Musalman v State of Maharashtra* (2000) 3 SCC 557.

89 AIR 1960 SC 67; see also *Hanuman v State of Haryana* AIR 1994 SC 1302.

90 AIR 1997 SC 687.

91 (2002) 7 SCC 691, AIR 2002 SC 3360.

92 See also *Adu Ram v Mukna* (2005) 10 SCC 597.

93 AIR 1992 SC 1629, (1992) Cr LJ 2520(SC) .

94 AIR 2003 SC 836, (2002) 10 SCC 352.

95 Also see *Arumugan v State* (2008) 15 SCC 590, AIR 2009 SC 331.

96 AIR 2012 SC 1956, (2012) Cr LJ 2882(SC) .

1 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, paras 3.08-3.10 and 13.06.1.

2 Law Commission of India, 'Forty- Second Report: The Indian Penal Code', Government of India, 1972, para 16.17.

3 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, paras 3.14.

4 Law Commission of India, 'Forty- Second Report: The Indian Penal Code', Government of India, 1972, para 16.20.

CHAPTER 35

Offences Relating to Children

(Indian Penal Code 1860,Sections 312 to 318)

INTRODUCTION

The offences relating to children include causing of miscarriage, injuries to unborn children, abandonment and exposure of infants and concealment of births and secret disposal of dead bodies of children.

PART A - CAUSING MISCARRIAGE

Section 312. Causing miscarriage.--Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.--A woman who causes herself to miscarry, is within the meaning of this section.

Section 313. Causing miscarriage without woman's consent.--Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 314. Death caused by act done with intent to cause miscarriage.--Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

If act done without woman's consent.--and if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above mentioned.

Explanation.--It is not essential to this offence that the offender should know that the act is likely to cause death.

Sections 312-14 deal with causing of miscarriage and aggravated forms of the offence, where miscarriage is caused without the consent of the woman and where it results in the death of the woman.

Essential Ingredients

Voluntarily Causing Miscarriage

The provision is applicable to cases where the miscarriage is voluntarily caused and not as a result of any accident or mishap. Section 39 of the IPC defines 'voluntarily' to mean intending to cause an effect or employing means which a person knows or has reason to believe is likely to cause the intended effect. Thus, intention to cause miscarriage or mens rea is an essential ingredient of the offence. It includes such acts as administering medicine to a pregnant woman which causes abortion.

Woman with Child and Woman Quick with Child

The sections use the terms 'woman with child' and 'woman quick with child'. The meaning of the words 'woman with child' simply means a pregnant woman. The moment a woman conceives and the gestation period or the pregnancy begins, then the woman is said to be with child.[1]

However, the factum of pregnancy is an essential ingredient. If a woman was under a misconception that she was pregnant and took an abortive and another helped her, neither of them are guilty because she was not pregnant in the first place.[2]

The term 'quick with child' refers to a more advanced stage of pregnancy.[3]'Quickening' is the perception by the mother that the movement of the foetus has taken place or the embryo has taken a foetal form.[4] This term arises from the old notion that a foetus becomes endowed with life and secures an identity apart from

the mother, when the movements are felt by the mother. However, causing miscarriage of a woman 'quick with child' is considered a much graver offence, than causing miscarriage of a 'woman with child'. So, in the former, the prescribed punishment is simple or rigorous imprisonment for a term up to seven years and fine, whereas in the latter, the term of imprisonment extends to a term up to three years (with fine or both).

Miscarriage

The term 'miscarriage' is nowhere defined in the IPC. The word 'miscarriage' is used synonymously with the word 'abortion'. As per Modi's *Medical Jurisprudence*, 'Legally, miscarriage means the premature expulsion of the product of conception, and ovum or a foetus from the uterus, at any period before the full term is reached'. Medically, three distinct terms, namely, abortion, miscarriage and premature labour, are used to denote the expulsion of a foetus at different stages of gestation. The term 'abortion' is used only when an ovum is expelled within the first months of pregnancy, before the placenta is formed. 'Miscarriage' is used when a foetus is expelled from the fourth to the seventh month of gestation, before it is viable, while 'premature labour' is the delivery of a viable child, possibly capable of being reared, before it has become fully mature.[5]

Acts of doctors and nurses which facilitate or accelerate delivery cannot be treated as offences under these provisions, for the reason that otherwise, the delivery would have been delayed; particularly when the child is born alive and no injury is caused to the mother or the child.[6]

Consent of Woman

Section 312 of the envisages a situation where the miscarriage is caused with the consent of the woman. Thus, the woman herself, whose miscarriage was caused, is also liable to be punished under the section. An offence under this section shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine. If, however, the same offence of causing miscarriage is done without the consent of the woman, it is considered a much more graver offence and as per s 313, it is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and fine. However, under s 313, the person procuring the abortion alone is liable to punishment whereas under s 312 the woman is also liable for punishment.[7]

Causing of Miscarriage Resulting in Death of Woman

Causing the death of the woman, while causing miscarriage, is a further aggravated form of the offences described earlier under ss 312 and 313. As per s 314 of the IPC, when an act is done with the intention of causing miscarriage, but which act results in death, then it is an offence liable for imprisonment for a term up to ten years. As per this provision, it is sufficient if the intent is only to cause miscarriage and not death. In other words, intention to cause death is not an essential element of this crime. It is sufficient to show that an act which is carried out with intent to cause miscarriage resulted in the death of the woman, to bring home the offence under this section. A direct nexus between act done by the accused and the death of the woman needs to be proved.[8] The explanation to the section provides that it is not even essential that the offender should know that the act is likely to cause death.

Under s 314, if the miscarriage resulting in the death of the woman is done without her consent, then the punishment prescribed is harsher which can include life imprisonment.

Exceptions

Section 312 exempts persons who cause miscarriage in good faith for the purpose of saving the life of the woman. In such situations, the person is not liable under this section. He is liable if the abortion is not carried out in good faith for saving life of the pregnant woman.

In one case,[9] a surgical operation for abortion was performed by a quack on a woman with her consent. The woman died due to perforation of her uterus. The trial court acquitted him. On appeal, the Kerala High Court found him guilty under s 314, IPC, and imposed a sentence of rigorous imprisonment for a period of four years and a fine of Rs 5,000, to be paid to the son of the deceased. On a further appeal, the Supreme Court confirmed the conviction under s 314, but reduced the sentence of four years rigorous imprisonment to two

months imprisonment already undergone and instead enhanced the fine of Rs 5,000 to Rs 1,00,000 to be deposited in the name of the deceased's minor son.[10]

In *State of Maharashtra v Flora Santuno Kutino* ,[11] one of the respondents, who had illicit relation with a woman and pregnated her, was instrumental in causing miscarriage. When she died because of excessive bleeding, he, with the help of other respondents, buried her. But the trial court acquitted him. On appeal, the high court convicted him on the ground that the miscarriage was not in good faith for saving life of the deceased. It was carried out for wiping of his illicit relationship.

However, in order to provide for safe abortions, termination of certain pregnancies by registered medical practitioners has been legalised with the enactment of the Medical Termination of Pregnancy Act 1971 (34 of 1971). Under thisAct, a woman can legally get her pregnancy terminated by a registered medical practitioner, if, the continuance of her pregnancy would cause risk or injury to her life, either physical or mental, or if the foetus revealed abnormalities. The Act further provides that if pregnancy is as a result of rape or due to failure of contraception methods, it would constitute injury to the mental health of the pregnant woman. After the enactment of the Act, the provisions relating to miscarriage, thus, have become subservient to the Act because of the non-obstante clause in s 3, which allows abortions or miscarriage by a registered medical practitioner under certain circumstances.[12] It, in general, provides guidelines for, and limitations of, termination of pregnancy.[13]

PART B - INJURY TO AN UNBORN CHILD

Section 315. Act done with intent to prevent child being born alive or to cause it to die after birth.--Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Section 316. Causing death of quick unborn child by act amounting to culpable homicide.--Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration

> *A,* knowing that he is likely to cause the death of a pregnant woman does an act which, if it caused the death of the woman would amount to culpable homicide. The woman is injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. *A* is guilty of the offence defined in this section

ESSENTIAL INGREDIENTS OF SECTION 316

Act to Be Before the Birth of the Child

One of the essential ingredients of an offence under these two sections is that the culpable act or the actus reus should be done before the birth of the child. The act done before the birth of the child should result in preventing the child from being born alive or cause it to die after its birth. If the act of killing the child is done after its birth, this section is not attracted, because it will then be a case of murder or culpable homicide. It is only injury caused to an unborn child which is covered by this section.

Intention

Another important ingredient or element of an offence under s 315 is that the act should be done with the intention of preventing the child from being born alive or cause it to die after its birth. If the act is done in good faith for the purpose of saving the life of the mother, then no offence is made out.

Causing Death of Quick Unborn Child by Act Amounting to Culpable Homicide

Section 316 is a graver variation of s 315. In both these sections, the offence contemplated is death of an unborn child. Under s 315, the offence contemplated is death of an unborn child. Under s 315, the act is done with the intention to cause the death of the unborn child. But under s 316, the act is done with the mens rea or the intention to commit culpable homicide (presumably of the mother), which act though does not result in the actual death of the mother, but results in the death of the quick unborn child.

Merely causing death of the quick unborn child is not sufficient. The prosecution has also to prove that the accused act ed with the necessary intention to cause the death of the victim.[14]

If the act of the accused act ually results in the death of the victim mother, then the offence committed will be culpable homicide.[15]

PART C - ABANDONMENT AND EXPOSURE OF AN INFANT

Section 317. Exposure and abandonment of child under twelve years, by parent or person having care of it.--Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.--This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

Essential Ingredients of Section 317

Child to Be Under twelve Years

Section 317 , IPC, is applicable only where the exposure or abandonment is of a child below twelve years of age. This section is meant to protect the interests of children below twelve years of age, because they are not in a position to protect themselves. The primary responsibility is cast on the parents and adults, who may have the custody of the child to bring up the child and to provide adequate care for children of tender age. It applies equally to legitimate and illegitimate children.[16]

Responsibility is on Both Father and Mother or Person Having Care of Such Child

It is interesting to note that as per the Guardians and Wards Act 1890, the father is the natural guardian of the child and the mother's status is only after that of the father. However, as far as s 317 is concerned, the provision makes both the father and mother equally duty bound to care for the child. The section makes no difference between children born in wedlock or outside the wedlock.

Apart from the parents, the section also makes persons under whose care the child is placed, equally liable. Thus, day care centres, creches, orphanages, etc, are all covered by this provision.[17]

Exposing or Leaving with Intention to Abandon

The gist of this section is exposing or leaving the child with intention to abandon. The words 'expose or leave' mean leaving the child in danger, neglecting the child and not giving the child adequate protection from natural elements like cold, heat and other hazards.

The section further stipulates that the exposing or leaving of the child should be accompanied with 'intention to abandon'. The phrase 'to abandon child' in its ordinary usage means something more than leaving the child behind. It means leaving the child without protection. The word 'leave' must be read along with or read *ejusdem generis* with 'expose'. It does not mean merely temporarily and physically leaving the child, it should be with intention to leave it to its fate.[18]

Death of Child As a Consequence of the Exposure

When the exposure and abandonment of the child under twelve years of age, results in its death, then the father, mother or person in whose care the child has been left in, will be liable for murder or culpable homicide as given in the explanation to the section.

However, such death of the child should be as a consequence of the exposure. The unlawful exposure of the child should directly cause death and should be done with the knowledge that it is likely to cause death, then the explanation to the section will apply. A woman deserted her illegitimate child of ten days under circumstances where the child could and did obtain food. However, the child died of natural causes after four days. It was held that the mother was not guilty of murder.[19]

PART D - CONCEALMENT OF BIRTH OF A CHILD

Section 318. Concealment of birth by secret disposal of dead body.--Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Essential Ingredients of Section 318

Secret Disposal of Bodies of Children

There is a general policy adopted in almost all the countries of the world that there is full publicity given to births and deaths. In India, we have the Registration of Births and Deaths Act 1969, which makes it compulsory on the part of every person to register every birth and death with the local authorities. Birth and death certificates are essential for many civil transactions. One of the main principles behind this section is to detect and if possible, prevent infanticide.

In our country, where birth of a girl child is still considered a curse and a burden, female infanticide is very high.[20] In most such cases, the body of the child is secretly disposed of.

The body of the child may be secretly buried or 'otherwise disposed of', meaning cremated, thrown into river, wells, or left in forest for wild beasts to eat.

Dead Body of Child

As per this section, the secret burying or disposal should be of the 'dead body of the child'. This means that the child should not be in the stage of a mere embryo or foetus, but should have reached such a stage of development and maturity that it may be born alive and be capable of living.[21] The word 'body' indicates that the foetus must have developed in the mother's womb into a human shape. Further, the child should be dead. If the child were alive at the time of secret disposal, then no offence under this section is made out.[22]

Conceals or Endeavours to Conceal Birth

The secret disposal of the body of the child should be with the intention to conceal or attempt to conceal the birth of the child. Thus, when the birth of a child to a widow was known to all the villagers, then it cannot be inferred that the disposal of the body was with the intention to conceal the birth of the child.[23] Similarly, when the birth of the child took place in a hospital and was attended to by nurses and for at least 24 hours, the birth of the child was known to a number of persons; and it was held that there was no concealment of birth.[24]

It may be noted that all the offences enumerated in these sections are accentuated by the social pressures and value-based judgments made on unwed mothers. Though in all cases of pregnancy, a man is also equally responsible, unfortunately, it is the woman alone who faces the social stigma and social ostracisation. It is these circumstances of social excommunication, very often coupled with poverty, that drives women to go in for abortions. Very often these abortions are carried out clandestinely, under unhygienic conditions, and by quacks or midwives, which puts the woman's life to risk. Again, the abandoning of children or infanticide is mostly only in respect of girl children, because of the social pressures where birth of a girl child is considered a burden and both the mother and child are castigated.

Unless this social attitude changes and social reforms are brought in good measure, all of us at large hold a moral responsibility for these offences committed against unborn children.

PART E - PROPOSALS FOR REFORM

The Fifth Law Commission has offered a few proposals for reform in the existing law relating to protection of children. They are[25]:

(1) Stressing that the decision whether to bear a child or not should rest with the mother, it recommended that a proviso stating that it would not be an offence if miscarriage is done within three months of pregnancy by a registered medical practitioner with her consent should be added to s 312.

(2) Perceiving the maximum punishment provided for in s 313 for causing miscarriage without woman's consent (i.e. imprisonment for life) is 'excessive', it suggested that it should be made punishable by 'rigorous imprisonment for a term which may extend to ten years, and fine'.

(3) Keeping in view the severity of the punishment provided under s 317 for exposing and abandoning a child by its mother or father, it proposed three major changes in the section. They are: (i) the age of the child precluded from exposure and abandonment should be reduced to 'five years' from the 'twelve years'; (ii) reference to the risk of life or serious injury to health of the child should be indicated more precisely, and (iii) the *explanation*, stating that the section does not prevent the trial of the offender for murder or culpable homicide if the child dies in consequence of the act of exposure or abandonment, being unnecessary, should be deleted.

(4) Section 318, penalizing the concealment of birth by secret disposal of dead body, should be deleted as the concealment of birth can be punished under the law relating to registration of births and deaths, and killing of a child after birth and concealing the birth to suppress the killing can be punished under s 201 of the IPC.

(5) A new s 318 (in place of the proposed deleted s 318) making illegal omission to provide, without any lawful excuse, necessaries of life, knowing that the omission will endanger the life or seriously impair the health of that person, should be added.

Interestingly, none of these proposals for reform received attention either of the drafters of the Indian Penal Code (Amendment) Bill 1978, prepared in the light of the Forty-second Report or of the Fourteenth Law Commission when it prepared its 156th Report on the IPC.

1 *Queen Empress v Ademma* (1886) ILR 9 Mad 369.

2 Hari Singh Gour, *Penal Law of India*, vol 3, 11th edn, Law Publishers, Allahabad, 1998, p 3175.

3 Re *Malayara Seethu*AIR 1955 Kant 27, (1955) Cr LJ 372(Mys) .

4 Ibid.

5 Ibid.

6 Ibid.

7 *Moidenkutty v Kunhikoya* AIR 1987 Ker 184; *Tulsi Devi v State of Uttar Pradesh* (1996) Cr LJ 940(All) .

8 *Vatchhalabai Maruti Kshirsagar v State of Maharashtra* (1993) Cr LJ 702(Bom) ; see also *Maideen Sab v State of Karnataka* (1993) Cr LJ 1430(Kant) ; *Sorhab Ali v State of Assam* (1993) Cr LJ 3525(Gau) ; *Thelanga Munda v State of Bihar* (2001) Cr LJ 3094(Pat) ; *Madan Raj Bhandari v State of Rajasthan* AIR 1973 SC 436; *Surendra Chauhan v State of Madhya Pradesh* AIR 2000 SC 1436, (2000) 4 SCC 110.

9 *Dr Jacob George v State of Kerala* (1994) 3 SCC 430.

10 See also, *Maideen Sab v State of Karnataka* (1993) Cr LJ 1430(Kant) .

11 (2007) Cr LJ 2233 (Bom), (2007) 109 Bom LR 652.

12 *Dr Jacob George v State of Kerala* (1994) 3 SCC 430, 1994 Cr LJ 3851.

13 *Nand Kishore Sharma v State of Rajasthan* AIR 2006 Raj 166.

14 *Jabbar v State of Uttar Pradesh* AIR 1966 All 590 (593), (1966) Cr LJ 1363(All) ; see also Re *Kumara Thevar*(1971) Mad LW (Cri) 240; *Murugan v State of Tamil Nadu* (1991) Cr LJ 1680(Mad) ; *Narayan v State of Maharashtra* (1997) Cr LJ 4537(Bom) ; *Bhaskar Prasad v State of Madhya Pradesh* (2009) Cr LJ 3275(MP), 2009 (3) MPHT 116.

15 *Motia v State of Rajasthan* AIR 1951 Raj 123.

16 Hari Singh Gour *Penal Law of India*, vol 3, 11th edn, Law Publishers, Allahabad, 1998, p 1133.

17 *Emperor v Blanche Constant Cripps* AIR 1916 Bom 135.

18 Hari Singh Gour, *Penal Law of India*, vol 3, 11th edn, Law Publishers, Allahabad, 1998, p 3187.

19 Ibid.

20 With a view to preventing misuse of sex-determination techniques for the purpose of pre-natal determination leading to female foeticide, the Parliament enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994.

21 (1906) 3 Cr LJ 432.

22 *Radha v State of Rajasthan* (1973) Raj LW 684.

23 *State of Madhya Bharat v Kehari Singh* AIR 1952 MB 124.

24 *Sailabala Dasi v Emperor* AIR 1935 Cal 489; see also *Lulano Lotha v State of Nagaland* (1981) Cr LJ 522(Gau) ; *Leela Wati v State of Punjab* (1982) Cr LJ 27(Punj) .

25 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 16.45-16.47 and 16.49-16.53.

CHAPTER 36

Hurt and Grievous Hurt

(Indian Penal Code 1860,Sections 319 to 338)

INTRODUCTION

Sections 319-338 deal with the causing of hurt and grievous hurt and the punishment therefor. The subject can be broadly divided into the following divisions:

(1) Simple hurt (ss 319, 321, 323).
(2) Grievous hurt (ss 320, 322, 325).
(3) Causing hurt or grievous hurt by dangerous weapons or dangerous means (ss 324 and 326).
(4) Causing grievous hurt by acid (ss 326A and 326B).
(5) Causing hurt or grievous hurt to extort property (ss 327and 329).
(6) Causing hurt by means of poison (s 328).
(7) Causing hurt or grievous hurt to extort confession or compel restoration of property (ss 330 and 331).
(8) Causing hurt or grievous hurt to deter public servant (ss 332 and 333).
(9) Causing hurt or grievous hurt on provocation (ss 334 and 335).
(10) Causing hurt or grievous hurt by endangering life or personal safety of others (ss 336, 337, 338).

SIMPLE HURT

The term 'simple hurt' is used nowhere in the IPC. However, to differentiate ordinary hurt covered by ss 319, 321, 323, from that of grievous hurt, the expression 'simple hurt' has come into popular usage.

Section 319. Hurt.--Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Section 319 defines hurt as 'whoever causes bodily pain, disease or infirmity to any person is said to cause hurt'. This section does not define any offence. It merely states what is the meaning of 'hurt'. The expression 'bodily pain' means that the pain must be physical as opposed to any mental pain. So, mentally or emotionally hurting somebody will not be 'hurt' within the meaning of this section. However, in order to come within this section, it is not necessary that any visible injury should be caused on the victim. All that the section contemplates is the causing of bodily pain.[1] The degree or severity of the pain is not a material factor to decide whether this section will apply or not. A blow or a fisticuff will come within the meaning of 'causing bodily pain' and hence, will be covered under this section.

'Causing disease' means communicating a disease to another person. However, the communication of the disease must be done by contact.

'Infirmity' denotes an unsound or unhealthy state of the body. This infirmity may be a result of a disease or as a result of consumption of some poisonous, deleterious drug or alcohol. 'Infirmity' has been interpreted by courts to mean inability of an organ to perform its normal function. The inability may be temporary or permanent in nature.[2]

As per the section, the hurt must be caused to 'any person'. This means 'any person' other than the person causing the hurt. Self-inflicted hurt does not come within the purview of this section. Section 321 elaborates on what amounts to voluntarily causing hurt.

Section 321. Voluntarily causing hurt.--Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

From a reading of the section, it is clear that the most essential component of this section is 'intention' to cause hurt, or the 'knowledge' that the act is likely to cause hurt. If 'intention' or 'knowledge' is absent, then it will not amount to voluntarily causing hurt.

Section 323. Punishment for voluntarily causing hurt.--Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

As per this section, voluntarily causing hurt is punishable with simple or rigorous imprisonment, which may extend to one year or with a maximum fine of one thousand rupees or both. However, if an act comes within the purview of s 334, which deals with causing hurt on provocation, then the punishment prescribed under this section will not apply, because a lesser punishment of maximum imprisonment of one month and a maximum fine of five hundred rupees is provided under that section.

Intention or Knowledge

Intention to cause hurt, or knowledge that an act is likely to cause hurt, is the most decisive factor to decide whether a person can be held guilty of voluntarily causing hurt. The extent of injury that is act ually caused is not relevant, but what is the intention with which the hurt was caused is relevant. There may be cases where the act may even result in death. But, if the intention of the accused as gathered from the surrounding background facts, was only to cause hurt, then the accused will be punishable only under this section and not for murder.

The following offences have been held to be one of causing only simple hurt, even though death occurred[3]:

(i) Assault with hands and foot; deceased died. Cause of death was not known. It was held that it was an offence under s 323.
(ii) Stick blows on buttocks and thighs with the object of chastisement. There was no intention or apprehension of death.
(iii) Several unarmed people beating a crop thief at night, resulting in his death. Conviction under s 323 was held proper.
(iv) A single blow with open hand was given on the neck. This act was not followed by any other violence. However, there was a fracture of the vertebrae and the victim died. It was held to be an offence only under s 323.
(v) A victim was given a single kick in the abdomen. He died due to fatty heart and enlarged liver. It was held to be an offence of only causing simple hurt.

All the above-mentioned instances have been decided on the settled principle that a person must be punished for the hurt he intended to cause or had knowledge that it is likely to be caused as a result of the act done by the person. No one should be punished for unfortunate and completely unforeseen result of the act s done.

GRIEVOUS HURT

Section 320. Grievous hurt.--The following kinds of hurt only are designated as "n grievous":

First.-- Emasculation.

Secondly.-- Permanent privation of the sight of either eye.

Thirdly.-- Permanent privation of the hearing of either of ear.

Fourthly.-- Privation of any member or joint.

Fifthly.-- Destruction or permanent impairing of the powers of any member or joint.

Sixthly.-- Permanent disfiguration of the head or face.

Seventhly.-- Fracture or dislocation of a bone or tooth.

Eighthly.-- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 320 states specifically the nature of injuries that can be categorised as 'grievous hurt'. No other hurt outside the categories of injuries enumerated in s 320 can be termed as grievous hurt. Therefore, unless a hurt caused comes within the injuries specified in s 320, this section will not apply.[4] All these clauses need to be interpreted strictly.[5]

Clauses 1 to 7 of s 320 state the specific nature of injuries, such as emasculation, loss of sight, loss of hearing, loss of limb or joint, loss of use of any limb or joint, disfiguration of the head or face, fracture or dislocation of a bone or tooth. The eighth clause is a general clause which covers all injuries which endanger life or which caused bodily pain or disrupted a person's routine activity for twenty days or more. Clause 8, like any other clause, needs to be construed strictly. Mere hospitalisation for more than twenty days does not ipso facto turn the 'hurt' into 'grievous hurt'. Therefore, if the victim has not co-operated or not consented for operation, the 'hurt' caused would not be 'grievous hurt' and the accused therefore cannot be held guilty for causing 'grievous hurt'.

Voluntarily Causing Grievous Hurt

Section 322. Voluntarily causing grievous hurt.--Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

Explanation.--A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause

grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he act ually causes grievous hurt of another kind.

Illustration

A, intending or knowing himself to be likely permanently to disfigure *Z's* face, gives *Z* a blow which does not permanently disfigure *Z's* face, but which causes *Z* to suffer severe bodily pain for the space of twenty days. *A* has voluntarily caused grievous hurt.

Section 325. Punishment for voluntarily causing grievous hurt.--Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 322 states what amounts to voluntarily causing grievous hurt. Section 325 provides the punishment for the same.

In *Modi Ram v State of Madhya Pradesh* ,[6] the accused was about 21-22 years of age, married to one Jani Bai. About a year and a half after marriage, Jani Bai was seduced by one Chunnilal and thereafter they started living together in the same area. One morning, when Chunnilal was going to answer the call of nature, about five or six persons caught hold of him and gave him a beating. Apart from causing him other injuries, they also cut off his nose and his male organ. The accused was convicted and sentenced to one year rigorous imprisonment. The high court, however, enhanced the sentence to eight years rigorous imprisonment. On appeal, the Supreme Court, taking into consideration the young age of the accused, the humility and hurt he would have faced in having his wife live with another man soon after marriage in the same vicinity, observed that there was grave provocation and hence reduced the sentence from eight years to three years.

In *Hori Lal v State of Uttar Pradesh* ,[7] the accused had assaulted the victim. All the injuries disclosed that particular bones on which the injuries were inflicted were cut. There were however no fractures. Hence, it was contended that the injuries did not constitute grievous hurt. The Supreme Court rejected this contention. It observed:

> In order to constitute grievous hurt under section 320, it is not necessary that a bone should be cut through, and through or that the crack must extend from the outer to the inner surface or that there should be displacement of any fragment of the bone. If there is a break by cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to a fracture within the meaning of clause (7) of section 320.

Thus, the court held the injuries of cut in the bones would amount to 'grievous hurt'.

In *Pandurang v State of Hyderabad* ,[8] the Supreme Court held that giving a blow on the head with an axe, which penetrates half-an-inch into the head, is an act which is likely to endanger life and will be covered under cl (8) of s 320. The accused was convicted under s 326. The dividing line between culpable homicide not amounting to murder and grievous hurt is very thin. In the former case, injuries must be such as are likely to cause death and in the latter they may endanger life.[9]

CAUSING HURT OR GRIEVOUS HURT BY DANGEROUS WEAPONS

Section 324. Voluntarily causing hurt by dangerous weapon or means.--Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Section 326. Voluntarily causing grievous hurt by dangerous weapons or means.-- Whoever, except, in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death,

or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Where a dangerous weapon has been used to cause a simple hurt, then s 324 will apply.[10] Where a dangerous weapon has been used to cause a grievous hurt as defined in s 320, then s 326 will apply.[11]

Under both these sections, it is not the act ual nature of the injury caused namely, whether simple hurt or grievous hurt, but the manner in which it is caused, which is relevant. Though the end result or nature of injuries may be the same in these and previous sections, the legislature has provided for enhanced punishments when hurt or grievous hurt is caused by dangerous weapons or by dangerous means. Thus, under s 323, the maximum punishment that can be awarded for voluntarily causing simple hurt is imprisonment of either description for a period which may extend to one year or a maximum fine of one thousand rupees. However, if the same simple hurt is caused by a dangerous weapon or by dangerous means, then the punishment prescribed under s 324 is imprisonment of either description for a period which may extend to three years or with (unlimited) fine or both.

Similarly, under s 325, the punishment prescribed for voluntarily causing grievous hurt is imprisonment of either description, which may extend to seven years and fine. However, if the grievous hurt is caused by a dangerous weapon or by dangerous means, then the maximum sentence that is prescribed under s 326 is life imprisonment or imprisonment of either description for a term up to ten years and fine.

Expression 'any instrument which, used as a weapon of offence, is likely to cause death', when read in the light of marginal note to s 324, means dangerous weapon which if used by the offender is likely to cause death.[12] However, what weapon becomes a 'dangerous weapon' depends upon the facts of each case and no generalization can be made.[13]

Causing Hurt or Grievous Hurt on Provocation

Both ss 324 and 326 exempt cases covered by acts causing hurt or grievous hurt on provocation under ss 334 and 335 respectively. When simple hurt or grievous hurt is caused by a person as a result of grave and sudden provocation, even if the offender uses dangerous weapons, his act s will not come within the purview of ss 324 and 326, as the section specifically exempts such acts. The accused will get the benefit of ss 334 and 335, where a lighter sentence has been prescribed by the legislature.

Dangerous Weapons or Dangerous Means

The title of sections 324 and 326 uses the expression 'dangerous weapons'. However, the body of the sections illustrates as to what these dangerous weapons are: 'instrument for shooting, stabbing or cutting or any instrument which, used as weapon of offence is likely to cause death'. This description covers even instruments which are not designed for use as weapons, but are capable of being used as weapons such as crowbars, spades, etc. The following have been held to be dangerous weapons within the meaning of the sections: (a) axe; (b) *dao* or *chavi* or sharp weapon; (c) knife; (d) razor blade; (e) revolver or gun; (f) hot ladle; (g) arrow; (h) jumper or cudgel or iron, shod stick; (i) a thick *lathi*; (j) a broken soda bottle, (k) tooth.[14]

These sections also include causing of hurt by dangerous 'means'. The 'dangerous means' contemplated under the sections are fire or any heated substance, poison, corrosive substance, explosive substance or deleterious substance.

However, it is important to note that whether a particular weapon comes under the category of 'dangerous weapons' or not depends upon various factors. Therefore, no generalisation can be made about what constitutes 'dangerous weapon'. It needs to be ascertained in the light of the facts of each case.[15]

CAUSING GRIEVOUS HURT BY USE OF ACID

Section 326A. Voluntarily causing grievous hurt by use of acid, etc.-- Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

Section 326B. Voluntarily throwing or attempting to throw acid.--Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Explanation 1. -- For the purposes of section 326A and this section, "acid" includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.

Explanation 2.--For the purposes of section 326A and this section, permanent or partial damage or deformity shall not be required to be irreversible.'

Sections 326A and 326B, plausibly realising that the existing provisions of the IPC dealing with grievous hurt and punishments therefor (i.e. ss 320, 322, 325 & 326) are inadequate to check effectively the frequent acid attacks, are inserted in the IPC by the Criminal Law (Amendment) Act 2013 to arrest the growing phenomenon of causing serious injury by use of acid or any substance which has acidic or corrosive character or burning nature that is capable of causing bodily injury leading to scars or disfigurement or permanent or temporary disability.

Causing physical and mental suffering by use of acid is invariably motivated by deep-rooted jealousy or feeling of revenge. Acid attack survivors are physically, psychologically and socially traumatized and crippled.

Section 326A provides for simple or rigorous imprisonment for a term not less than ten years, which may extend to imprisonment for life, and fine, for a person who, by throwing or administering acid, voluntarily causes permanent or partial damage or deformity (not necessarily to be irreversible) to any part of the body of another or causes grievous hurt, burns, maiming, disfiguring, disabling any part of his body. While s 326B prescribes imprisonment of either description for a term ranging between five and seven years, with fine, for the person who throws or attempts to throw acid or any corrosive substance on another or attempts to administer acid or corrosive substance to him or to use any other means with the intention of causing permanent or partial damage, deformity, burns, maiming, disfigurement, disability or grievous hurt to that person.

Further, the amount of fine to be imposed on perpetrator of the offence under s 326A has to be 'just and reasonable to meet the medical expenses of the treatment of the victim' and it must be paid to the victim. However, the amount of compensation paid in the form of fine is not enough to ensure their treatment and rehabilitation. Recently, the Supreme Court, noticing that the Victim Compensation Scheme prepared in pursuance of s 357A of the CrPC by some States and Union Territories is un-uniform and inadequate and realising that victims of acid attack need to undergo a series of plastic surgeries and other corrective treatments, has directed all the States and Union Territories to pay a compensation of at least three lac rupees to every victim of acid attack as the after care and rehabilitation cost. Of this amount, a sum of one lac rupees is to be paid to the victim within fifteen days of occurrence of the incident or being brought to the notice of the State or Union Territory, as the case may be, to facilitate immediate medical attention and expenses, and the balance of two lac rupees be paid as expeditiously as may be possible and positively within two months thereafter.[16]

CAUSING HURT OR GRIEVOUS HURT TO EXTORT PROPERTY

Section 327. Voluntarily causing hurt to extort property, or to constrain to an illegal act.--Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 329. Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.--Whoever voluntarily causes grievous hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Sections 327 and 329 apply to cases where the offender voluntarily causes hurt or grievous hurt for the purpose of extorting property or to compel a person to do an illegal act . The essential ingredients of these two sections are: (i) a person should voluntarily cause hurt or grievous hurt; (ii) it should be for the purpose of extorting from the victim or from any person interested in the victim, any property or valuable security, or should be for the purpose of compelling the victim or any person interested in the victim to do an illegal act or facilitate the commission of an offence.

Thus, the crux of these sections is not the nature of the injury, but the purpose for which the injury has been caused. Of course, the nature of the injury caused will determine the quantum of punishment. If the injury caused is simple hurt, then the punishment prescribed is simple or rigorous imprisonment for a term up to ten years and fine. If the injury caused is grievous hurt, then the punishment prescribed is imprisonment for life or simple or rigorous imprisonment for a term up to ten years and fine.

CAUSING HURT BY MEANS OF POISON

Section 328. Causing hurt by means of poison, etc., with intent to commit an offence.--Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating, or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The essential ingredients of this section are: (i) the offender should administer a poisonous, stupefying, intoxicating or unwholesome drug; (ii) such administration should be with the intention to cause hurt, or to commit or facilitate the commission of an offence; or (iii) such administration should be with the knowledge that it is likely to cause hurt.

Where an accused administered an intoxicating substance to a person with a view to rob him when the person was unconscious or stupefied, it would be an instance of administering intoxicating substance for facilitating the commission of an offence.[17]

In *Dharm Das Wadhwani v State of Uttar Pradesh* ,[18] the accused was a compounder in a small hospital. The senior doctor of the hospital arrived in the morning with a bad headache and asked the accused for 10 grams of aspirin. The accused took 12-13 minutes to bring the aspirin, which was readily available in the dispensing room. The doctor consumed the medicine. It was bitter, which was an unusual taste for aspirin. He asked the attender to fetch him a glass of water. By then, the second doctor was sitting in the next chair. The senior doctor complained about the strange bitterness in the tongue, though aspirin was supposed to be tasteless. He gargled, washed his face with water and asked the attendant to buy some betel leaves to overcome the bad taste. He thereafter proceeded to do his normal work and tried to give injection to a waiting patient but began to feel shaky. He had sensation of cramps in the calf muscles. The other doctor ran into the dispensing room and asked the accused from which bottle he had given the aspirin. The accused showed him the aspirin bottle. The doctor asked him if he had given strychnine, a deadly poison accidentally. The accused denied it, stating that strychnine was not in stock at all. He started trembling. In the meantime, the doctor was

rushed to the hospital and given a stomach wash. It was found that it was indeed strychnine, which was administered to the doctor by the accused. The accused was convicted under s 328, IPC.

CAUSING HURT OR GRIEVOUS HURT TO EXTORT CONFESSION OR COMPEL RESTORATION OF PROPERTY

Section 330. Voluntarily causing hurt to extort confession, or to compel restoration of property.--Whoever voluntarily causes hurt for the purposes of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Illustrations

(a) *A*, a police officer, tortures *Z* in order to induce *Z* to confess that he committed a crime. *A* is guilty of an offence under this section.
(b) *A*, a police officer, tortures *B* to induce him to point out where certain stolen property is deposited. *A* is guilty of an offence under this section.
(c) *A*, a revenue officer, tortures *Z* in order to compel him to pay certain arrears of revenue due from *Z*. *A* is guilty of an offence under this section.
(d) *A*, a zamindar, tortures a raiyat in order to compel him to pay his rent. *A* is guilty of an offence under this section.

Section 331. Voluntarily causing grievous hurt to extort confession or to compel restoration of property.--Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

The essential ingredients of these sections are: (i) the offender should voluntarily cause hurt or grievous hurt; (ii) it should be done for the purpose of: (a) to extort confession or information, (b) to restore or cause restoration of any property or valuable security, (c) to satisfy any claim or demand, or (d) to obtain information, which may lead to the restoration of any property or valuable security; (iii) if it is for the purpose of extorting confession or information, such confession or information should lead to the detection of an offence or misconduct.

The punishment provided for voluntarily causing hurt or grievous hurt under s 330 and s 331 is simple or rigorous imprisonment for a term up to seven and ten years and fine respectively.

In one case,[19] a boy was accused of theft. In order to extort a confession from him that he committed the theft, his hands were tied together, wrapped with a cloth and kerosene oil poured over it and a fire was lit. The accused was found guilty under this section and a sentence of one year's rigorous imprisonment was imposed.

In another case,[20] an investigation officer, investigating a case of house breaking and theft, called an ex-convict and tied up his wrists with cloth, hung him up by wrists to a peg driven into the wall and tortured him whilst so suspended, to extract a confession or information from him regarding the offences under investigation. The ex-convict died because of the torture. Later on, the police officer, with the help of his colleagues, threw the dead body in the nearby well, subsequently removed it from the well and buried it in a place very far away from the police station. The Andhra Pradesh High Court, holding the torture a crude, barbarous and reprehensible method of investigation, held him guilty under s 330 of the IPC.

Any third degree treatment given by police to extort confession falls within the ambit of s 330. It is not duty of a police officer to beat a person at the police station to extort confession.[21]

A police officer who causes grievous hurt to extort confession, even at the behest of his superior officer, is guilty under s 330 of the IPC.[22]

It is duty of a court to pass a deterrent sentence to a police officer engaged in investigation of a crime who causes hurt to a person for extorting confession or information leading to detection of a crime. Such a police officer does not deserve any leniency from the court.[23] The court will be failing in its duty if appropriate punishment is not awarded for offence falling within the ambit of s 330 and the punishment to be awarded must be consistent with the atrocity and brutality with which the offence was committed.[24] The Supreme Court held that the punishment provided under s 330 is inadequate to repair the wrong done to citizens and the victims of crime should be compensated.[25]

However, a simple reading of the provisions exhibits certain limitations that dilute their underlying objectives. They are restricted only to the cases of extorting confession or information pertaining to an offence. It keeps out of its ambit custodial violence caused by officers for other purposes. They are governed by the provision of s 323, dealing with voluntarily causing hurt and providing for milder penalties.

CAUSING HURT OR GRIEVOUS HURT TO DETER PUBLIC SERVANTS

Section 332. Voluntarily causing hurt to deter public servant from his duty.-- Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 333. Voluntarily causing grievous hurt to deter public servant from his duty.--Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The essential ingredients of this section are: (i) the offender should voluntarily cause hurt or grievous hurt to a public servant; (ii) it should be caused: (a) when the public servant act ed in discharge of his duties, (b) to prevent or deter that public servant or any other public servant from discharging his duty; or (c) in consequence of anything done or attempted to be done by the public servant in the discharge of his duty.

The term 'public servant' is defined under s 21, IPC. This section will apply only if the public servant was acting in the discharge of his duty as a public servant, or it should be proved that it was the intention of the accused to prevent or deter the public servant from discharging his duty.

In *Allauddin Jiyauddin v State of Maharashtra* ,[26] a head-constable disclosed his identity and informed the accused that he was arresting him in respect of a cognisable offence of theft. The accused resisted the arrest and beat him. However, since the police officer was not in his uniform at the time of arrest, though he is said to have disclosed his identity and the accused was not fully informed about the charge against him, it may have prompted the accused to resist the arrest. In view of this, the accused was convicted and sentenced to three months rigorous imprisonment.

In *D Chattaiah v State of Andhra Pradesh* ,[27] the accused were working as health inspector, lower division clerk and health worker in a primary health centre. The accused had a private quarrel with the victim complainant, who was working as a typist in the *panchayat samiti*. As a result of the private quarrel, the accused assaulted the complainant. The first accused slapped him. The second accused hit him with a ruler and the third accused hit him with a stick. The complainant caught hold of the stick. The third accused then picked up a pair of scissors from the complainant's table and hit him below the left eye. It was held that there was no real nexus or causal connection or consequential relation with the performance of his duty as public servant

and the assault upon the complainant. There was not even a scintilla of evidence, from which it could be reasonably inferred that the intent of the assailants was to prevent or deter the victim complainant from the discharge of his duty as such public servant. So, it was held that charge under s 332 cannot be sustained. Instead, the accused were convicted under s 323 and were ordered to pay a fine of Rs 200 each, or in default to undergo one month's rigorous imprisonment. The fine, if realised, was directed to be paid as compensation to the complainant.

In *Munumiya v State of Gujarat* ,[28] the accused was a deputy *sarpanch*. He tried to enter a public transport bus from the driver's cabin. At that time, the driver was not occupying the seat, but was standing near the bus. The driver stopped the accused from entering the driver's cabin. The accused abused and kicked the driver, which resulted in a grievous injury. It was held that the driver, while driving the bus or even while standing at the bus stand was discharging his duties and when he tried to prevent the accused from trespassing into the driver's cabin, he was undoubtedly act ing in the due discharge of his duties as a driver of the bus belonging to the transport department. The court observed that the accused, being a deputy *sarpanch* of a village and as such a public servant, should have known that he ought not to have interfered with another public servant in the performance of his duties. He was convicted under s 333 and sentenced to six months rigorous imprisonment.

In *Kesho Ram v Delhi Administration* ,[29] the complainants were section inspectors of the Delhi Municipal Corporation. The accused was in default of payment of milk tax. So, the inspectors went to seize the buffalo belonging to the accused in the discharge of their duty to realise the milk tax from him. The accused obstructed the inspectors when they went to seize the buffalo and struck one of them on the nose with the result that it bled and was also fractured. The Supreme Court found the accused guilty under ss 332 and 333, but in view of the fact that the inspectors did not follow the procedure for recovery of the tax and the accused did not refuse to pay, but merely told them he was not ready to pay the money instantly, the sentence imposed by the lower courts was reduced by the Supreme Court to the period already undergone. The fine amount imposed was set aside.

In *Siyasaran v State of Madhya Pradesh* ,[30] the Supreme Court convicted the accused under s 333 (as well as under s 506) who, being not satisfied with the treatment given to his brother, assaulted the doctor whose tooth was dislocated.

In *Sheikh Aashif v State of Madhya Pradesh* ,[31] wherein the appellant caused injury to a public servant with a blade lying on the table, the high court set aside his conviction under s307 and upheld his sentence under s 332, IPC. It justified its verdict on the ground that the appellant had neither any motive to kill the complainant nor had any inimical terms with him. He did not possess any weapon. His act was spontaneous. He picked-up blade lying on the table of the complainant and gave him a blow without targeting any particular part of the body. The blow fell on vital part but caused simple injury to complainant.

CAUSING HURT OR GRIEVOUS HURT ON PROVOCATION

Section 334. Voluntarily causing hurt on provocation.--Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Section 335. Voluntarily causing grievous hurt on provocation.--Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

Explanation.--The last two sections are subject to the same provisions as Explanation 1, section 300.

The essential ingredients of the section are: (i) offender should voluntarily cause hurt or grievous hurt; (ii) it should be caused on provocation; (iii) provocation caused should be both grave and sudden; (iv) he should not intend to cause hurt to any person other than the person who provoked; (v) or he should not have knowledge that his act is likely to cause hurt to any person other than the person who provoked.

Section 334 and s 335 serve as a proviso to ss 323 & 324, and ss 325 & 326, respectively.

If the injury caused is simple hurt, then the punishment prescribed under s 334 is imprisonment of either description, which may extend to one month or with fine which may extend to five hundred rupees or with both.[32] If the injury caused is grievous hurt, then the punishment prescribed under s 335 is simple or rigorous imprisonment for a term up to four years, or with fine of up to two thousand rupees, or with both.

In order that this section should apply, it is important to establish that there was provocation and such provocation was grave and sudden. If the provocation is only sudden but not grave, the offence will not be one punishable under either of these sections. Similarly, if the provocation is only grave and not sudden, the act will not amount to an offence under these sections.

The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed, would be so provoked as to lose his control'.[33]

In *Dhondey v State of Uttar Pradesh* ,[34] the accused found his wife in the company of the victim and on seeing them together, he completely lost his temper, caught hold of both of them and cut their noses. In view of this, the conviction of the accused was altered from one under s 326 to s 335, IPC. The sentence was reduced from four years rigorous imprisonment to two years. However, in *Sham Behari v State of Orissa* ,[35] the Orissa High Court refused to invoke s 334 of the IPC in favour of the husband of a woman (and his friend), who, suspecting his wife's fidelity and after waiting for a day in his cowshed to catch his wife's paramour red handed, caused hurt to the paramour when he stealthily approached his wife and had sexual intercourse with her, and later, the man died. The high court held that the element of sudden and grave provocation was absent as the accused waited for a day to catch the deceased.

In *State of Madhya Pradesh v Rajesh* ,[36] Madhya Pradesh High Court convicted the accused, who, on provocation, stabbed the victim who was urinating in front of his house, under s 335.

CAUSING HURT OR GRIEVOUS HURT BY ENDANGERING LIFE OR PERSONAL SAFETY OF OTHERS

Section 336. Act endangering life or personal safety of others.--Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.

Section 337. Causing hurt by act endangering life or personal safety of others.--Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Section 338. Causing grievous hurt by act endangering life or personal safety of others.--Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees or both.

Section 336 stipulates that if any act is done in a rash and negligent manner, so as to endanger human life or the personal safety of others, it will be an offence under this section. Such an offence is punishable with imprisonment of either description for a term which may extend to three months or with fine of up to two hundred and fifty rupees or with both. Sections 337 and 338 make the causing of simple hurt and grievous hurt respectively, an act endangering life or personal safety offences. The essential ingredients of these sections are: (i) the act of accused must have resulted in simple or grievous hurt; (ii) the act must be done in a rash and negligent manner; and (iii) the rashness or negligence must be to the extent of endangering human life or personal safety of others.

Sections 337 and 338 are couched in identical phraseology. The only distinction between them is that the latter comes into play when grievous hurt is caused to someone and the consequential punishment.[37]

These sections will be applicable only in cases where the hurt caused is a direct result of the negligent or rash act.[38]

In *Bhalchandra v State of Maharashtra* ,[39]the accused had licences under the Indian Explosives Act 1884, to manufacture, possess and sell fireworks and gunpowder. There was an explosion in the factory manufacturing explosives resulting in the death of eleven persons and injuries to seven. It was found that the accused had stored large quantities of raw material, gunpowder and finished fireworks in the same premises. They also had unauthorised explosives in their possession and it was also found that the accused had committed a number of breaches of the conditions of licence issued to him. In view of this, the accused were found guilty under ss 304A and 337, IPC.

In *Alister Anthony Pereira v State of Maharashtra* ,[40] the appellant drove a car rashly or negligently and killed seven persons sleeping on the pavement. He was convicted under s 304A and 338, IPC. On appeal, Supreme Court upheld his conviction and sentence. It ruled that criminal rashness or negligence is a dangerous or wanton act carried with the knowledge that it may or will probably cause injury, but with no intention of causing it. The criminality lies in running the risk of doing such an act with reckless or indifference to as to the consequences. In such a case, it held, knowledge of the dangerous consequences, referred to in 338, IPC, can be safely presumed, if he, having regard to the circumstances he was placed in, has failed to exercise reasonable care and precaution to guard against injury either to the public generally or to an individual in particular.

PROPOSALS FOR REFORM

The Fifth, Eighteenth and Nineteenth Law Commissions have offered a few proposals for reform, substantive, penal, and formal, in the law relating to 'hurt'.

The Fifth Law Commission has offered the following proposals for reforms, substantive as well as penal, in the provisions dealing with 'hurt' and 'grievous hurt'. They are[41]:

(1) Its proposals for reform in s 320 are: (i) deletion of the *first* clause (as it would be covered by its recommended *fifth* clause); (ii) combination of the *secondly* and the *thirdly* clauses (with addition of some words and changes in its phraseology); (iii) addition of the word 'organ' after the word 'joint' in the *fourthly* and the *fifthly* clauses (for making the clauses more comprehensive); (iv) deletion of the word 'tooth' from the *seventhly* clause, and (vi) replacement of the words 'twenty days' in the *eighthly* clause by the words 'ten days'.

(2) Expressing its reservations about the marginal heading of s 328 as well as the word 'substance' used therein, it suggested that the words 'drug or other thing' should be substituted by the word 'substance' to make the provision more comprehensive.

(3) It recommended only marginal changes in ss 325, 332 and 333 dealing respectively with punishment for voluntarily causing grievous hurt, causing hurt by means of poison with intent to commit an offence, and voluntarily causing hurt and grievous hurt to deter a public servant from his duty.

(4) It suggested enhancement of the punishment provided for: (i) voluntarily causing hurt (s 323), and (ii) doing an act endangering life or personal safety of another (ss 336-338). While it recommended scaling down of the punishment stipulated for: (i) voluntarily causing hurt by dangerous weapons (s 326); (ii) voluntarily causing hurt for extorting property (s 327); (iii) voluntarily causing grievous hurt to extort property (s 329); (iv) voluntarily causing hurt on provocation (334), and (v) voluntarily causing grievous hurt on provocation (s 335).

The Indian Penal Code (Amendment) Bill, 1978 sought to give effect to the suggested changes in ss 320 and 328, IPC. The Fourteenth Law Commission also endorsed the proposed changes in ss 320 and 328 of the IPC.[42] However, none of the changes could materialize as the Bill lapsed due to the dissolution of the *Lok Sabha* during 1979.

The Nineteenth Law Commission recommended that the offence under s 324 (voluntarily causing hurt by dangerous weapons or means) should be made compoundable with the permission of the court. It, however,

declined to propose that s 326 (voluntarily causing grievous hurt by dangerous weapons or means) should also be made compoundable.[43]

1 *Ranganayakamma v State of Andhra Pradesh* AIR 1967 AP 208, (1967) Cr LJ 849.

2 *Anis Beg v Emperor* AIR 1924 All 215, (1926) Cr LJ 413(All) ; *Jashanmal Jhamatmal v Brahmanand Sarupananda* AIR 1944 Sind 19.

3 Re *Marana Goundan*AIR 1941 Mad 560, (1942) Cr LJ 707(Mad) .

4 *Mathai v State of Kerala* AIR 2005 SC 710, (2005) Cr LJ 898(SC) ; *Prabhu v State of Madhya Pradesh* AIR 2009 SC 745, JT 2008 (13) SC 72.

5 *Mathai v State of Kerala* (2005) 3 SCC 260, AIR 2005 SC 710.

6 AIR 1972 SC 2438, (1972) Cr LJ 1521(SC) .

7 AIR 1970 SC 1969.

8 AIR 1955 SC 216.

9 *Government of Bombay v State of Maharashtra* AIR 1974 SC 1803; *Walke v State of Madhya Pradesh* AIR 1994 SC 951; *Lal Mandi v State of West Bengal* AIR 1995 SC 2265; *Dukhmochan Pandey v State of Bihar* AIR 1998 SC 40.

10 See *Keshub Mahindra v State of Madhya Pradesh* (1996) 6 SCC 129; *Ved Praash v State of Haryana* (1996) SCC 1182; *Ch Pitchavadhanulu Appaiah v State of Andhra Pradesh* (2011) Cr LJ 469(AP) .

11 Re *Natraja Goundan*AIR 1939 Mad 507.

12 *Anwarul Haq v State of Uttar Pradesh* (2005) 10 SCC 581, AIR 2005 SC 2382.

13 *Mathai v State of Kerala* (2005) Cr LJ 898(SC), AIR 2005 SC 710; *Prabhu v State of Madhya Pradesh* AIR 2009 SC 745, JT 2008 (13) SC 72.

14 See *Haramant v State of Karnataka* AIR 1994 SC 1545; *Moti Lal v State of Madhya Pradesh* AIR 1994 SC 1544; *Bishwanath Singh v State of Bihar* (1995) Cr LJ 2626(SC) ; *State of Karnataka v Shivelingiah* AIR 1988 SC 115; *Jameel Hassan v State of Uttar Pradesh,* (1974) Cr LJ 867(All) ; *Jagat Singh v State of NCT of Delhi,* (1984) Cr LJ 1551(Del) ; *Mukati Prasad Rai @ Mukti Rai v State of Bihar (Now Jharkhand)* AIR 2005 SC 1271, (2004) 13 SCC 144.

15 *Mathai v State of Kerala* (2005) Cr LJ 898(SC) ; *State of Kerala v Parashram Kallappa Ghevade* (2006) 5 Ker LJ 522.

16 *Laxmi v Union of India* (2013) 9 SCALE 291, (2014) 4 SCC 427.

17 *Madhukar Danu Patil v State of Maharashtra* (1996) Cr LJ 1062(Bom) ; *Gaya Prasad v State of Uttar Pradesh* (1996) Cr LJ 1599(All) ; *Xavier @ Thambi v Inspector of Police* (1993) Cr LJ 3506(Mad) .

18 AIR 1975 SC 241, (1974) Cr LJ 1249(SC) ; see also *Joseph Kurian v State of Kerala* AIR 1995 SC 4; *EK Chandrasenan v State of Kerala* AIR 1995 SC 1066, (1995) Cr LJ 1445(SC) .

19 *Public Prosecutor v Ranniappa* AIR 1955 Mad 424, (1955) Cr LJ 1080(Mad) .

20 *Public Prosecutor v Sheikh Ibrahim* AIR 1964 AP 548, (1964) 2 Cr LJ 636(AP) .

21 *Dhyam Kant v State of Maharashtra* (1972) Supp (2) SCC 521.

22 *Dinanath v Emperor* AIR 1940 Nag 186.

23 *Lal Muhammad v Emperor* AIR 1936 Lah 471; see also *Public Prosecutor v Ranniappa* AIR 1955 Mad 424, (1955) Cr LJ 1080(Mad) ; *Anup Singh v State of Himachal Pradesh* (1995) Cr LJ 3223(SC) .

24 *State of Madhya Pradesh v Saleem* AIR 2005 SC 3996, (2005) Cr LJ 3435(SC), (2005) 5 SCC 554.

25 *DK Basu v State of West Bengal* AIR 1997 SC 610.

26 1968 SCD 477.

27 AIR 1978 SC 1441, (1978) Cr LJ 1473(SC) .

28 AIR 1979 SC 1706, (1979) Cr LJ 1384(SC) .

29 AIR 1974 SC 1158, (1974) Cr LJ 814(SC) .

30 (1995) Cr LJ 2126 (SC).

31 (2010) Cr LJ 140 (MP), 2012 (2) Crimes 812.

32 *Ahmed Ali v State of Tripura* (2009) 6 SCC 704, 2009 (7) SCALE 442.

33 *KM Nanavati v State of Maharashtra* AIR 1962 SC, (1962) 1 Cr LJ 521(SC) .

34 AIR 1972 SC 1273.

35 AIR 1953 Ori 308.

36 (1997) Cr LJ 2466 (MP).

37 *Ashok Chandak v State of Andhra Pradesh* (2011) Cr LJ 638(AP), 2010 (2) ALD (Cri) 297.

38 *Public Prosecutor v Pitchaiah Moopanar* AIR 1970 Mad 198.

39 AIR 1968 SC 1319.

40 (2012) Cr LJ 1160 (SC), (2012) 2 SCC 648.

41 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 16.55 & 16.65.

42 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.51 and 12.52.

43 Law Commission of India, 'Two Hundred and Thirty-Seventh Report: Compounding of (IPC) Offence', Government of India, 2011, paras 6.5 & 6.6.

CHAPTER 37

Criminal Force and Assault

(Indian Penal Code 1860,Sections 349 to 358)

PART A - CRIMINAL FORCE

FORCE

Section 349. Force.--A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feelings; provided that the person causing the motion, or change of motion, or cessation of motion, cause that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First.--By his own bodily power.

Secondly.--By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part or on the part of any other person.

Thirdly.--By inducing any animal to move, to change its motion, or to cease to move.

Section 349 defines 'force'. This section, as defined by itself, does not constitute any offence. It merely explains what amounts to 'force'. An understanding of the term 'force' is necessary to understand the definition of 'criminal force' in s 350. Further, the definition of both 'force' and 'criminal force' is necessary for the purpose of defining and understanding 'assault' as defined in s 351.

The term 'force' has been defined in minute detail in the section. To put the entire first paragraph in one sentence: force is the exertion of energy or strength producing a movement or change in the external world. The second paragraph merely deals with a situation, where some other body is interposed between the person using the force and the person on whom the force is used.

The term 'force' as defined in this section contemplates force used by a human being on another human being. It does not contemplate the use of force against inanimate objects.[1] This is clear from the use of the word 'another' in the section. Thus, a motion or change of motion or cessation of motion caused to property without affecting a human being is not the 'use of force to another' within the meaning of this section.[2]

In *Chandrika Sao v State of Bihar* ,[3] an assistant superintendent of commercial taxes paid a surprise visit to the shop of the accused to inspect the books of account. He found two sets of account books in the shop. He took them and started looking into them. Suddenly, the accused snatched away both the books from him. The accused was charged under s 353, IPC. It was contented on behalf of the accused that the mere snatching of books does not amount to 'using force' as contemplated by s 349. The Supreme Court rejected this argument observing that it would be clear from a bare perusal of the section that one person can be said to have used force against another if he causes motion, change of motion or cessation of motion to that other. By snatching away the books which the official was holding, the accused necessarily caused a jerk to the hand or hands. Further, the natural effect of snatching the books from the hand or hands of the official would be to affect the sense of feeling of the hands of the official. The court, therefore, held that the action of the accused amounts to use of force as contemplated by s 349, IPC.

CRIMINAL FORCE

Section 350. Criminal force.--Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Illustrations

(a) *Z* is sitting in a moored boat on a river. *A* unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here *A* intentionally causes the motion to *Z*, and he does this by disposing substances in such a manner that the motion is produced without any other action on any person's part. A has therefore intentionally used force to *Z*; and if he has done so without *Z's* consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to *Z*, *A* has used criminal force to *Z*.

(b) *Z* is riding in a chariot, A lashes *Z's* horses, and thereby causes them to quicken their pace. Here *A* has caused change of motion to *Z* by inducing the animals to change their motion. *A* has therefore used force to *Z*; and if *A* has done this without *Z's* consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy *Z*, *A* has used criminal force to *Z*.

(c) *Z* is riding in a palanquin. *A*, intending to rob *Z*, seizes the pole and stops the palanquin. Here *A* has caused cessation of motion to *Z*, and he has done this by his own bodily power. *A* has therefore used force to *Z*; and as *A* has acted thus intentionally, without *Z's* consent, in order to the commission of an offence, *A* has used criminal force to *Z*.

(d) *A* intentionally pushes against *Z* in the street. Here *A* has by his own bodily power moved his own person so as to bring it into contact with *Z*. He has therefore intentionally used force to *Z*;

and if he has done so without *Z*'s consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy *Z*, he has used criminal force to *Z*.

(e) *A* throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with *Z*, or with *Z's* clothes, or with something carried by *Z*, or that it will strike water, and dash up the water against *Z's* clothes or something carried by *Z*. Here, if the throwing of the stone produces the effect of causing any substance to come into contact with *Z*, or *Z*'s clothes, A has used force to *Z*; and if he did so without *Z's* consent, intending thereby to injure, frighten or annoy *Z*, he has used criminal force to *Z*.

(f) *A* intentionally pulls up a woman's veil. Here *A* intentionally uses force to her, and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(g) *Z* is bathing, *A* pours into the bath water which he knows to be boiling. Here *A* intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with *Z*, or with other water so situated that such contact must affect *Z's* sense of feeling; *A* has therefore intentionally used force to *Z*; and if has done this without *Z's* consent intending or knowing it to be likely that he may thereby cause injury, fear, or annoyance to *Z*, *A* has used criminal force.

(h) *A* incites a dog to spring upon *Z* without *Z's* consent. Here, if *A* intends to cause injury, fear or annoyance to *Z*, he uses criminal force to *Z*.

Of these illustrations, illust (a) exemplifies motion in s 349; illust (b) 'change of motion'; illust (c) 'cessation of motion'; illusts (d), (e), (f), (g) and (h) 'cause to any substance any such motion'; illusts (d), (e), (g) and (h) also bring that substance into contact with any part of that other's body; and illusts (f) and (g) indicate 'others' sense of feeling.

Clause (1) of s 349 is illustrated by illusts (c), (d), (e), (f) and (g); cl (2) of s 349 is illustrated by illust (a); cl (3) of s 349 is illustrated by illusts (b) and (h).

In brief, force is the exercise of one's energy upon another human being and it may be exercised directly or indirectly. So, if *A* raises his stick at *B* and the latter moves away, *A* uses force within the meaning of this section. Similarly, if a person shouts, cries and calls a dog or any other animal and it moves in consequence, it would amount to the use of force.

Criminal force is equivalent to 'battery' in English law, which means the intentional infliction of force by one person upon another against the latter's consent. The essential ingredients of the section are: (i) there must be use of force as defined by s 349; (ii) such force should be used intentionally; (iii) the force must be used against a person, and (iv) it should have been used without the consent of the person against whom it is used.

> The use of force should be in: (a) pursuit of committing an offence; or (b) intending to cause or knowing that it is likely to cause injury, fear or annoyance to the person to whom the force is used.

FORCE AND CRIMINAL FORCE

The previous s 349 has merely defined force. As stated earlier, that section by itself does not spell out any offence. In fact, force as defined in s 349, can also be put to positive or good use. For instance, pulling a person away from fire, so as to save him from being burnt, or pushing or dragging a person so as to prevent him from being run down by a vehicle are some examples of force put to good use. Force becomes 'criminal force', only when it satisfies all the ingredients set out in s 350. Force should be used: (a) without the consent of the person and in order to the committing of an offence; or (b) when it is used to cause injury, fear or annoyance to the person on whom the force is used.

As seen in the definition of 'force', criminal force is also concerned with the use of force on a human being alone and not against immovable property or other inanimate objects. Further, the section contemplates the physical presence of the person on whom the force is used. When the lock of a house was broken in the absence of the occupant of the house, then it is clear that the accused had taken possession of the house without any force or show of force.[4] But, if a person struck a pot which another person was carrying and

which was in contact with his body, it constitutes the offence of criminal force, if it is done to cause him fear, annoyance, etc. Thus, the physical presence of a person makes the crucial difference between an act amounting to 'criminal force' or not.

Thus, the use of force which causes motion, change of motion or cessation of motion to another person, done without the consent of such person, in order to commit an offence, or cause injury, fear or annoyance to the said person, will amount to criminal force. No bodily injury or hurt need be caused.

The word 'intentional' excludes all involuntary, accidental or even negligent acts. An attendant at a bath, who from pure carelessness turns on the wrong tap and causes boiling water to fall on another, as in illust (g) to s 350, could not be convicted for the use of criminal force.[5]

Consent

The word 'consent' should be taken as defined in s 90, IPC. There is some difference between doing an act 'without one's consent' and 'against his will'. The latter involves active mental opposition to the act .[6]

PART B - ASSAULT

Section 351. Assault.--Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.--Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

Illustrations

(a) *A* shakes his fist at *Z*, intending or knowing it to be likely that he may thereby cause *Z* to believe that *A* is about to strike *Z*. *A* has committed an assault.

(b) *A* begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause *Z* to believe that he is about to cause the dog to attack *Z*. *A* has committed an assault upon *Z*.

(c) *A* takes up a stick, saying to *Z*, 'I will give you a beating'. Here, though the words used by *A* could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstance, might not amount to an assault, the gesture explained by the words may amount to an assault.

INGREDIENTS

The essential ingredients of assault are: (i) the accused should make a gesture or preparation to use criminal force; (ii) such gesture or preparation should be made in the presence of the person in respect of whom it is made; (iii) there should be intention or knowledge on the part of the accused that such gesture or preparation would cause apprehension in the mind of the victim that criminal force would be used against him, and (iv) such gesture or preparation has actually caused apprehension in the mind of the victim, of use of criminal force against him.

Gesture or Preparation

According to this section, the mere gesture or preparation with the intention or knowledge that it is likely to cause apprehension in the mind of the victim, amounts to an offence of assault. The explanation to the section provides that mere words do not amount to assault, unless the words are used in aid of the gesture or preparation which amounts to assault.

The following have been held to be instances of assault.[7]

(1) Pointing of a gun, whether loaded or unloaded, at a person at a short distance away is bound to cause apprehension of violence in the mind of the person at whom the gun is aimed at. Hence, it will amount to an assault.
(2) Fetching a sword and advancing with it towards the victim.
(3) Lifting one's *lota* or *lathi*.
(4) Throwing brick into another's house.
(5) Advancing with a threatening attitude to strike blows.

Cause Apprehension of Assault

Another essential requirement of assault is that the person threatened should be present and near enough to apprehend danger. For instance, if *A* pointed a gun at *B*, which *B* knew to be unloaded, then *B* could not have been under fear of any harm. In order to constitute the offence of assault, it is essential that the person apprehends that there will be use of criminal force against him.

There must have been present ability in the assailant to give effect to his purpose. If a person standing in the compartment of a running train, makes threatening gestures at a person standing on the station platform, the gestures will not amount to assault, for the person has no present ability to effectuate his purpose.

Mere threat of an assault is not an assault. For example, *A* has been constantly taking fruits from *B's* tree. *B* tells *A* that the next time he sees him taking away the fruits, he will beat him. This will not amount to an assault. This is merely threat of an assault from *B* to *A*, that in the future, if *A* persists with a certain behaviour, he will be beaten. At that point in time, there was no apprehension in *A* that *B* would use criminal force against him immediately. It is something in the nature of a conditional assault or a threat to commit assault.

The question whether a particular act amounts to an assault or not, depends on whether the act has caused reasonable apprehension in the mind of the person that criminal force was imminent. As stated earlier, the words or the act ion should not be threat of assault at some future point in time. The apprehension of use of criminal force against the person should be in the present and immediate.

DIFFERENCE BETWEEN ASSAULT, CRIMINAL FORCE AND HURT

The words 'assault', 'criminal force' and 'hurt' have distinct meanings and definitions in the IPC. They deal with different stages of the commission of offence and with different effects. In common parlance, these words are used synonymously. In fact, assault is generally understood to mean the use of criminal force against a person, causing some bodily injury or pain. In other words, in common parlance, when the word 'assault' is used, the meaning of the words 'assault', 'criminal force' and 'hurt' is all telescoped into one meaning or understanding. But, legally, 'assault' denotes the preparatory acts which cause apprehension of use of criminal force against the person. Assault falls short of act ual use of criminal force. The moment criminal force is actually used, then it goes beyond the legal meaning of assault as the act had gone beyond the stage of preparation. An assault is then nothing more than a threat of violence exhibiting an intention to use criminal force accompanied with present ability to effect that purpose. If force is applied, it then becomes criminal force. Now, criminal force is causing motion, change of motion or cessation of motion without the consent of the person, in order to commit any offence or intending to cause or knowing it will cause injury, fear or annoyance. Thus, a man who impertinently puts his arms around a lady's waist, who squirts water at a person, sets a dog to attack a person, uses criminal force without actually causing any bodily pain or injury.[8] But, when the use of such criminal force results in the causing of bodily pain or injury, then it would amount to the offence of 'hurt' as under s 323, IPC.

The points requiring proof in the case of a charge of 'assault' are that: (i) the accused made a gesture or preparation to use criminal force; (ii) it was made in the presence of the complainant; (iii) he intended or knew that it was likely that such gesture, etc, would cause the complainant to apprehend that such criminal force would be used; (iv) such gesture or preparation did cause the complainant to apprehend it, and (v) the accused received no grave and sudden provocation from the complainant.

The points requiring proof in the case of charge of 'using criminal force' are that: (i) the accused used force on the complainant; (ii) he did so intentionally; (iii) he used it without the complainant's consent; (iv) he did so in order to commit an offence, or with the intention of causing or with the knowledge of the likelihood of

causing injury, fear or annoyance to the complainant, and (v) he received no grave and sudden provocation from the complainant.

PUNISHMENT FOR ASSAULT OR CRIMINAL FORCE

Section 352. Punishment for assault or criminal force otherwise than on grave provocation.--Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Explanation.--Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

Section 358. Assault or criminal force on grave provocation.--Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Explanation.--The last section is subject to the same Explanation as section 352.

Section 352 provides the punishment to be awarded for the combined offences of criminal force and assault defined under ss 350 and 351, IPC. It provides punishment for these offences when there are no aggravating circumstances.[9] The section provides for an exception, which is use of assault or criminal force on grave and sudden provocation. This exception clause is however qualified in the explanation to the section, where it states that grave and sudden provocation will not be a mitigating factor if the provocation is sought or provoked by the offender himself. Further, provocation, which is a result of lawful exercise of the powers of a public servant or lawful exercise of the right to private defence, will also not mitigate the punishment.

The *explanation* in this section is a verbatim reproduction of exception 1 of s 300, IPC.

Section 358 provides for a lesser sentence of two months imprisonment in cases where the use of assault or criminal force is on grave and sudden provocation. The *explanation* to the section states that this section is subject to the same limitations as in *explanation* to s 352. This indicates that the benefit of this section will apply only to people who did not seek the provocation or voluntarily provoked, or, if the provocation is not a result of anything done by a public servant in the discharge of his duties, or which is the result of exercise of private defence.

The question whether provocation was grave and sudden in order to mitigate the sentence, is a question of fact.

AGGRAVATED FORMS OF ASSAULT OR CRIMINAL FORCE

Assault or Criminal Force to Deter Public Servant

Section 353. Assault or criminal force to deter public servant from discharge of his duty.--Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

A public servant is often exposed to considerable risks in the discharge of his official duties, and law therefore throws round him a special protection by prescribing specially deterrent sentences to those who offend against the majesty of law, of which he is a minister.

But only an officer engaged compulsorily in the discharge of official duties is entitled to protection.[10] So also, a commissioner attempting to give possession under a time-expired warrant has no authority to go upon land in the possession of the party who resists the execution. Persons offering resistance are not guilty under this section.[11] A public servant, when act ing under an illegal order of his superior, although unaware of the illegality, cannot invoke s 353.[12]

Ingredients

The ingredients of this offence are: (i) the victim must be a public servant; (ii) When assaulted, he must have been acting: (a) in execution of his official duty; (b) and the assault was intended to deter him from discharging his duty; or (c) it was in consequence of anything done or attempted to be done by him in the lawful discharge of his duty.

In *Durgacharan Naik v State of Orissa* ,[13] the complainants had obtained a decree against the accused. In execution of that decree, they obtained an attachment of the movables in the event of failure to pay the decretal amount of Rs 952.10. When the court peon went with the warrant of attachment and when he was about to seize some of the movables, the accused came there with *lathis* and resisted. Thereafter, on the very same day, the complainants obtained a court order for police protection and went to the house of the accused. The accused was not present. The accused's father, who was also one of the judgment-debtors, paid up the amount of Rs 952.10. Thereafter, when the entire complainant's party was returning, the accused came along with 10 or 12 people and demanded that the money be handed over to him. Then, at the intervention of some outsiders, the accused left the spot. The accused was convicted under s 353, IPC, but was acquitted under s 186, IPC, because there was no complaint in writing under s 195, CrPC. It was contended on behalf of the accused that the charge under s 353, IPC was based upon the same facts as the charge under s 186, IPC. Since no cognisance of offence under s 186 can be taken without following the procedure under s 195, CrPC, the conviction under s 353, IPC which was based on the very same facts, would really be an attempt at circumventing the provisions of s 195, CrPC. The Supreme Court rejected this argument. It held that the offences under ss 186 and 353, IPC, are two distinct offences. Section 353 is a cognisable offence, whereas s 186 is not. Section 186 is applicable to a case where the accused voluntarily obstructs a public servant in the discharge of his public functions. But, under s 353, IPC, the ingredient of assault or use of criminal force while the public servant is doing his duty as such is necessary. The Supreme Court held that the quality of the two offences was also well different. In view of this, s 195, CrPC, does not bar a trial of an accused for a distinct offence on the same set of facts, but which is not within the ambit of that section. Accordingly, the accused was convicted under s 353, IPC.

In *P Rama Rao v State* ,[14] the Andhra Pradesh High Court held that the essence of s 353 lies in the assault directed towards a public servant to deter him. The accused was asked by a sub-inspector to stop his car. While pretending to stop the car he sped away and in the process hit the mudguard of the motorcycle carrying the sub-inspector. The court ruled that the facts of the case did not warrant s 353 of the IPC. It is not essential that the assault should be caused to the public servant while he is act ually discharging his official duty. Section 353 can come into play even if hurt is caused to him 'in consequence' of anything done by him in the discharge of his duties as a public servant.[15]

Assault or Criminal Force to Woman to Outrage her Modesty

Section 354. Assault or criminal force to woman with intent to outrage her modesty.--Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

In order to seek conviction under s 354,[16] the prosecution has to prove not only that the accused assaulted or used criminal force to the woman but also that he did it with either the intent to outrage her modesty or the knowledge that it would outrage her modesty.[17]Intention to outrage modesty of a woman, however, is not the sole criterion of the offence. It can be committed by a person, assaulting or using criminal force, if he knows that the modesty of the woman is likely to be affected by his act. The existence of intention or knowledge, are essentially things of the mind, has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed.[18]

However, what constitutes an outrage to modesty of a woman is nowhere defined. It can be described as the quality of being modest and in relation to woman 'womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct; reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions'. It is a virtue attached to a woman owing to her sex.[19]

In *Ram Das v State of West Bengal* ,[20] the accused was charged for having committed an offence contrary to s 354. The facts proved against him were that he boarded at night time a railway compartment in which two females were seated along with their male escorts. He took off his trousers, under which he was wearing underclothes. Thereupon, there developed a heated exchange of words and a quarrel between him and the other group, in the course of which he gave a push to one of those women. It was alleged that before he removed off his trousers he had been looking 'with lustful eyes' at those women. The Supreme Court acquitted the accused. It held that no inference of criminal intention to outrage a woman's modesty can be drawn from a man's act of removing his trousers at night time before lying down on his berth, since it is a natural preparatory act to becoming comfortable on a journey. Similarly, in the absence of any evidence, it declined to read intention of the accused to outrage modesty of the woman in his 'staring with lustful eyes' at them, because such an impression is more psychological than factual. The court ruled that no person, in the absence of any clear and unimpeachable evidence as his intention to outrage modesty of a woman or as to his knowledge that his conduct he was likely to outrage modesty, can be convicted under s 354 of the IPC.

The Orissa High Court also ruled that merely putting hand on the belly of a female in public by itself does not amount to an act of outraging modesty of the woman within the meaning of s 354. For convicting him under s 354, it is required to prove that his act of touching the belly was deliberate and with culpable intention.[21] Hence, an act of pulling a woman, removing her dress coupled with a request for sexual intercourse, amounts to outraging modesty of the woman as the act exhibits his determination and desire.[22]

The reaction of the woman is very relevant in judging as to whether an assault to her amount outraging her modesty, but its absence is not always decisive. It is, therefore, not always necessary to ascertain that the woman, against whom an indecent assault or criminal force used, realised the effect of, or reacted to, such an assault or force to held the person guilty under s 354.

In *State of Punjab v Major Singh* ,[23] the Supreme Court has held that in order to constitute the offence under s 354, the reaction of the woman concerned is not the test of the offence. In this case, the accused, Major Singh, had caused injuries to the vagina of a seven and a half months old infant girl by fingering. He walked into the room where the child was sleeping at 9.30 pm, then after having switched off the lights, he stripped himself naked below the waist, knelt over her and performed indecent act s of unnatural lust on her private part rupturing her hymen and causing a tear 3/4th inch long inside her vagina. It was argued for him before the lower courts that since s 354 states that the offender must have 'outraged her modesty' and in this case since the child concerned had not developed sufficient sex instinct, it could not be said that her modesty was violated. It was argued that a reasonable man would not say that a female child of seven and a half months had womanly modesty. But this contention, though accepted by the lower courts, was rejected by the Supreme Court and the accused was held guilty under s 354, IPC, and sentenced to two years' rigorous imprisonment and a fine of five hundred rupees,, or in default of payment of the fine an additional period of six months' rigorous imprisonment. Justice Bachawat stated:

> ...[T]he essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act, nevertheless, the offender is punishable under the section. A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby of seven and half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless, from her very birth she possesses the modesty which is the attribute of her sex.[24]

Similarly, merely triviality of the harm caused to the woman by an indecent assault or criminal force used against her does not take such an assault or force outside the ambit of s 354. Therefore, it does not absolve the person from criminal liability for outraging modesty of the woman.

In *Rupan Deol Bajaj v Kanwar Pal Singh Gill* ,[25] the petitioner was an officer of the Indian Administrative Service (IAS) belonging to the Punjab cadre. She was posted as Special Secretary, Finance, at the relevant point in time. She filed a complaint alleging commission of offences under ss 341, 342, 352, 354 and 509, IPC, by KPS Gill, the Director General of Police, Punjab. According to the petitioner, she was invited to dinner party in the house of her colleague. The accused KPS Gill was also present at the party. He called out to her and asked her to come and sit next to him. When she went to sit down, he pulled the chair on which she was going to sit close to his chair. The petitioner, surprised at this act, pulled the chair back to its original place and when she was about to sit down, he once again pulled the chair close to his chair. Realising that something was wrong, she immediately left him. Ten minutes later, KPS Gill got up from his seat and came and stood close to her. He crooked his finger and asked her to come along with him. The petitioner objected to his obnoxious behaviour and asked him to leave. He once again repeated that she should accompany him and this time in a commanding voice. The petitioner was apprehensive and frightened as the accused had blocked her way and she could not get up from the chair without touching him. She immediately drew her chair back about a foot and a half, and quickly got up and turned to get out. At this point, the accused KPS Gill slapped Mrs Bajaj on her posterior. This was done in the full presence of the other ladies and guests. The petitioner registered a complaint and a First Information Report (FIR) against KPS Gill. The accused moved the High Court of Punjab & Haryana for quashing the FIR. The high court allowed this case and quashed the FIR, on the ground that the allegations made therein did not disclose any cognisable offence and the nature of harm allegedly caused to Mrs Bajaj was trifling and thereby attracted the provisions of s 95, IPC. On appeal, the Supreme Court disagreed with the high court. The Supreme Court held that the quashi ng of FIR was illegal and s 95 has no manner of application to the allegations made in the FIR. It held that when an offence relates to the modesty of a woman, under no circumstances could it be termed trivial.[26]

The ultimate test for ascertaining whether modesty has been outraged is whether the assault to, or criminal force used against, the prosecutrix woman by the accused is capable of shocking the sense of decency of the woman. In *Raju Pandurang Mahale v State of Maharashtra* ,[27] wherein the Supreme Court held the accused, who brought the victim to the house of the co-accused on a false pretext, confined her in the house, brought liquor which she was forced to drink and was disrobed, and took her nude photographs, guilty under s 354 of the IPC as their acts were 'affront on the normal sense of feminine decency' and 'capable of shocking the sense of decency of a woman'.

Use of criminal force leading to the offence of outraging modesty of a woman, however, can range from mere catching hold of a woman's hand to any heinous nature of sexual assault which may fall short of penile penetration or an attempt to do so, or unnatural offence.[28]The line of distinction between the two is very narrow. Nevertheless, the offence of outraging modesty of a woman is distinct from attempt to commit rape. In the latter, there must be some act ion on the part of the accused to show that he was just going to penetrate her.[29]

It is, however, important to note that the accused cannot be convicted for outraging modesty of the woman, if assault to her emanates from, or with, her consent.[30]

Credible, cogent and unimpeachable evidence of the prosecutrix is adequate to convict a person for outraging modesty of woman. In *State of Maharashtra v Satyendra Dayal Khare* ,[31] the Bombay High Court, holding the respondent guilty of molesting his subordinate trainee-officer and repelling his defence of false implication in the case, observed that 'no decent self-respecting woman would allow herself to be used as a tool in the hands of her superiors to falsely implicate other superior officer in such a serious charge as molestation with a view to improve her prospects, in the organisation, especially since the allegations would be damaging her personal reputation and character'. However, such a judicial presumptive evidentiary rule, i.e., that a woman would not put her character at stake', cannot be applied universally. Each case, according to the Supreme Court, needs to be determined on the touchstone of the factual matrix thereof, as instances of false implication of persons in cases involving rape and outraging modesty are not unknown to the courts.[32]

Assault or Criminal Force with Intent to Disrobe a Woman

Section 354B. Assault or use of criminal force to woman with intent to disrobe.-- Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

Section 354B is added to the IPC by the Criminal Law (Amendment) Act 2013. It makes an assault, or use of criminal force against a woman by a man to disrobe her or make her, against her will, naked, an offence punishable with simple or rigorous imprisonment for a term ranging between three and seven years, with fine. An immediate implication of the provision is that use of force or assault against woman with intent to disrobe her or make her naked against her wish, unlike in the past, will no more amount to mere outraging the modesty of a woman and the perpetrator will not get lighter punishment (stipulated for the offence of outraging modesty of a woman).[33]

Assault with Intent to Dishonour a Person

Section 355. Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.--Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 355, as evident from its phraseology, punishes assault or use of criminal force with intent to dishonour a person otherwise than on grave and sudden provocation. Intention to dishonour is, thus, crux of the provision. So, senior cadets, who rag and assault their junior cadets, cannot be convicted under s 355, as their intention is to show their supremacy and not to dishonour their juniors.[34] Such an intention to dishonour may be supposed to exist when the assault or criminal force is by means of gross insult.[35]

Assault in Attempting Theft

Section 356. Assault or criminal force in attempt to commit theft of property carried by a person.--Whoever assaults or uses criminal force to any person, in attempting to commit theft on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 356 provides punishment for assaulting or using criminal force in attempting to commit theft of the property which the victim is wearing or carrying. It is directed mainly against pick-pockets. The provision becomes inapplicable the moment theft is committed.

Assault in Attempting Wrongful Confinement

Section 357. Assault or criminal force in attempt wrongfully to confine a person.--Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Section 357 comes into play when the accused uses criminal force in attempting to secure the wrongful confinement of a person.

PART C - SPECIFIC ACT S OFFENDING DECENCY OF A WOMAN

Sexual Harassment

Section 354A. Sexual harassment and punishment for sexual harassment.--

(1) A man committing any of the following acts -
- (i) Physical contact and advances involving unwelcome and explicit sexual overtures; or
- (ii) A demand or request for sexual favours; or
- (iii) Showing pornography against the will of a woman; or
- (iv) Making sexually coloured remarks, shall be guilty of the offence of sexual harassment.[36]

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 354A , inserted in the IPC by the Criminal Law (Amendment) Act 2013, for the first time statutorily defines the offence of sexual harassment and stipulates punishment therefor. When a man (a) physically contacts and makes advances involving unwelcome and explicit sexual overtures; (b) demands or requests sexual favours; (c) shows pornography against the will of a woman, or (d) makes sexually coloured remarks is to have sexually harassed the woman. The punishment stipulated for the first three act s [i.e. (a) to (c)] is rigorous imprisonment for a term up to three years, or fine, or both. While the last one [i.e. (d)] is subject to simple or rigorous imprisonment for a term up to one year or fine or both.

Voyeurism

Section 354C. Voyeurism.--Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.--For the purpose of this section, 'private act ' includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.--Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

Section 354C is inserted in the IPC by the Criminal Law (Amendment) Act 2013. It makes watching or capturing the image of a woman engaged in a private act, as explained in its explanation 1, in the circumstances wherein she does not expect others would be observing her, punishable. Capturing of images or an act with the consent of a woman but dissemination thereof to any third party also amount to an offence under the said provision. The offence is punishable with simple or rigorous imprisonment for a term not less than one year and fine. The term of imprisonment may extend to three years. A perpetrator of the offence, on second or subsequent conviction, will be punished with simple or rigorous imprisonment for a term ranging between three and seven years and fine.

Stalking

Section 354D. Stalking.--

(1) Any man who--
- (i) follows a woman and contacts, attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
- (ii) monitors the use by a woman of the internet, email or any other form of electronic communication,

commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that-
- (i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
- (ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Section 354D , which is added to the 2013 by the Criminal Law (Amendment) Act 2013, makes stalking an offence. A man is said to have committed the offence when he follows a woman and contacts or attempts to contact her to foster personal interaction repeatedly in spite of the fact that she clearly indicated her displeasure or monitors her use of internet or e-mail or any other form of electronic communication. However, a man cannot be guilty of the offence of stalking when he pursues a woman: (i) to, as a part his responsibility imposed on him by the State, prevent and detect a crime; (ii) to comply with any law or condition or requirement imposed by person under any law; or (iii) in the particular circumstances that make his conduct reasonable and justified. He, on first conviction, will be punished by simple or grievous imprisonment for a term up to three years, and fine. On the second or subsequent conviction, he will be punished with imprisonment of either description for a term up to five years, and fine.

Sections 354A, 354C and 354D are, thus, aimed at protecting women against certain indecent act s of men. These provisions, in ultimate analysis, do legislatively articulate the acts that are considered offensive not only to women, but also to public morality and decent behaviour.

PART D - PROPOSALS FOR REFORM

The Fifth Law Commission has offered a set of proposals for reform in the provisions dealing with Criminal Force and Assault. These reforms range from revision to deletion of some of the provisions. It also suggested insertion of a new section in the sub-chapter for dealing with incidents of indecent assaults on minors. These proposed reforms are;

(1) Expressing its reservations about the first three sections (ss 349-351) defining 'force', 'criminal force', and 'assault', the Law Commission suggested deletion of 349 and combination of ss 350 and 351. Recalling the complexity of the definition of 'force', as outlined in s 349, and the absence of such a definitional clause in the penal codes of other jurisdictions, it felt that s 349 is unwarranted. It also failed to see any pragmatic utility of having separate definitions of the terms 'criminal force' and 'assault' in two different provisions. Ss 350 and 351, defining respectively 'criminal force' and 'assault', according to it, are incorporated in the Penal Code to simply maintain the distinction between 'assault' and 'battery' known to the Common Law of England. Such a distinction, however, is needless to be maintained in the IPC. The Commission, therefore, opined that both the ideas, namely, 'assault' and 'criminal force', be referred to as 'assault' by bringing them under one section. It accordingly recommended deletion of s 350 and revision of s 351 to bring within its ambit the idea of criminal force articulated in s 350. In the revised s 351, it, however, incorporated some of the illustrations appended to the proposed deleted s 350 and added a few new ones.

(2) Referring to ss 352 and 358, punishing respectively assault otherwise than on grave and sudden provocation and assault on sudden and grave provocation, the Commission recommended merger of these two sections in one (under s 352) and deletion of s 358. It also suggested that the explanation of the existing s 352 should be omitted in the revised s 352 as it has lost its significance after abolition of the jury system in India.

(3) With a view to combating indecent assaults on minor children, the Law Commission suggested that an act of indecency with children should be made especially punishable under the IPC. It accordingly recommended insertion of a new section (s 354A) in the IPC.[37]

(4) The Commission also suggested some marginal changes in the sections dealing with assaults to deter a public servant (s 353); assault to dishonour a person otherwise than on sudden and

grave provocation (s 355); assault to commit theft of the property carried by a person (s 356), and assault in attempt to wrongfully confine a person (s 357).[38]

However, the Indian Penal Code (Amendment) Bill 1978, through its cl 146, sought to give effect only to the Law Commission's proposal of insertion of s 354A in the Code. But the Fourteenth Law Commission, which examined the Bill, has not endorsed the change. Such a change, according to the Commission, would bring the varied forms of sexual violence other than rape on women and female children within the purview of s 354. It, therefore, recommended deletion of the cl 146 from the Bill. Instead, with a view to dealing effectively with the increasing sexual violence against women and female children, it recommended that the words 'sexual assault' be added to the existing s 354 nd punishment should be increased from imprisonment for a term of up to two years to five years for outraging modesty of a woman.[39]

Interestingly, the Criminal Law (Amendment) Act 2013 has not addressed these proposals.

1 *Sadashiv Mondal v Emperor* AIR 1915 Cal 131; *Balaram Sahu v Chandra Sahu* AIR 1921 Pat 391.

2 *Ramakant Rajaram v Manuel Fernandes* AIR 1969 Goa 45, (1969) Cr LJ 469(Goa) ; *Gordhan Das v State of Rajasthan* AIR 1968 Raj 241, (1968) Cr LJ 1304(Raj) ; see also *Bhupinder Singh v State* (1997) Cr LJ 3416(P&H) .

3 AIR 1967 SC 170, (1967) Cr LJ 261(SC) .

4 *Bihari Lal v Emperor* AIR 1934 Lah 454; see also *Ramakant Rajaram v Manuel Fernandes* AIR 1969 Goa 45, (1969) Cr LJ 469(Goa) ; *Nani Gopal Das v Bhima Charan Rakshit* AIR 1956 Cal 32, (1956) Cr LJ 214(Cal) .

5 See John D Mayne, *The Criminal Law of India*, fourth edn, Higginbotham, Madras, 1896, p 559.

6 Ibid.

7 For eg, see, *Mahadeo Pandey v Emperor* AIR 1932 All 322; *Kwaku Mensah v King* AIR 1946 PC 20, (1947) Cr LJ 569(PC) .

8 Hari Singh Gour, *Penal Law of India*, vol 3, 11th edn, Law Publishers, Allahabad, 1998, p 3371.

9 *Nagar Prasad v State of Uttar Pradesh* (1998) Cr LJ 1580(All) .

10 See *Patar Munda v State of Orissa* AIR 1958 Ori 69; *Anadi Giri v State of Orissa* (1963) Cr LJ 826(Ori) ; *Devi Singh v State of Madhya Pradesh* (1993) Cr LJ 1301(MP) ; *Rajendra Dutt v State of Punjab* (1993) Cr LJ 1025(P&H) ; *State of Tripura v Sashimohan* (1977) Cr LJ 1663(Gau) ; *Ramesh Kumar v Sushila Srivastava* (1997) Cr LJ 282(Raj) .

11 *Abinash Chandra Aditya v Ananda Chandra Pal* (1904-31) Cal 424.

12 *Raghunath v State* (1956) Cr LJ 987.

13 AIR 1966 SC 1775.

14 (1984) Cr LJ 27 (AP).

15 *Jogeshwar Dayal v State of Uttar Pradesh* AIR 1952 All 933; *State of Rajasthan v Usman Gani* 1964 Cr LJ 254(Raj) .

16 For constitutional validity of the section see *Girdhari Gopal v State of Madhya Bharat* AIR 1953 MB 147, (1953) Cr LJ 964(MB) .

17 *Vidyadharan v State of Kerala* AIR 2004 SC 536, (2004) 1 SCC 215; *Aman Kumar v State of Haryana* AIR 2004 SC 1497, (2004) 4 SCC 379; *Vasudevan v State of Kerala* (2006) Cr LJ 3173(Ker), 2006 (2) KLJ 289.

18 *Shekara v State of Karnataka* (2009) 14 SCC 76, 2009 (3) SCALE 104.

19 *Tarkeshwar Sahu v State of Bihar (Now Jharkhand)* (2006) 8 SCC 560.

20 AIR 1954 SC 711, (1954) Cr LJ 793(SC) .

21 *SP Malik v State of Orissa* (1982) Cr LJ 19(Ori) ; see also *State of Rajasthan v Hetram* (1982) Cri LR 522(Raj) ; *Divender Singh v Hari Ram* (1990) Cr LJ 1845(HP), ILR 1989 2 HP 1454.

22 *Rameshwar v State of Haryana* (1984) Cr LJ 786(P&H) ; *Damodar Bahera v State of Orissa* (1996) Cr LJ 346(Ori) ; *Aman Kumar v State of Haryana* AIR 2004 SC 1497, (2004) 4 SCC 379.

23 AIR 1967 SC 63, 1967 Cr LJ 1(SC) ; see also *Sudesh Jhaku v KCJ* (1998) Cr LJ 2428(Del) . For comments on the case see, KI Vibhute, 'Reforms in the Law Relating to Child Sexual Abuse in India--A Circuitous Journey from *Sudesh Jhaku* to *Sakshi*,' Cochin University Law Review, 2005, vol 29, p 184.

24 Ibid, paras 18 & 19. However, AK Sarkar J, in his minority opinion, opined that the woman's reaction is very much necessary to hold a person responsible under s 354. See ibid, para 2. Recently, the Supreme Court has ruled that the reaction of the woman is 'very relevant, but its absence is not always decisive'. See *Aman Kumar v State of Haryana* AIR 2004 SC 1497, (2004) 4 SCC 379; *Ramkripal Shyamlal Charmakar v State of Madhya Pradesh* (2007) Cr LJ 2302(SC), 2007 (4) SCALE 438.

25 AIR 1996 SC 309, (1996) Cr LJ 381(SC) .

26 See also *Kanwar Pal Singh Gill er Mrs Rupan Deol Bajaj v State (Admn UT, Chandigarh)* (2005) 6 SCC 161.

27 AIR 2004 SC 1677, (2004) 4 SCC 371.

28 *Administrator, Josgiri hospital v Government of Kerala* (2008) ILR 3 Ker 381, 2008 (2) KLJ 951; *Tukaram Govind Yadav v State of Maharashtra* (2011) Cr LJ 1501(Bom), 2012 Bom CR (Cri) 427.

29 *Aman Kumar v State of Haryana* AIR 2004 SC 1497, (2004) 4 SCC 379.

30 *State of Madhya Pradesh v Sheo Dayal* AIR 1956 Nag 8; *Sadananda Bargohain v State of Assam* (1972) Cr LJ 658(Gau) ; *Camilo Fernandez v State of Maharashtra* (1988) 3 Crimes 179.

31 (2004) Cr LJ 339 (Bom). The Supreme Court refused to interfere with the conviction. See *Satyendra Dayal Khare v State of Maharashtra* (2005) 12 SCC 485.

32 *Pandurang Sitaram Bhagwat v State of Maharashtra* (2005) 9 SCC 44, (2005) Cr LJ 880(SC) .

33 *Kailas v State of Maharashtra* (2011) 1 SCC 793, AIR 2011 SC 598. Also see *Aman Kumar v State of Haryana* AIR 2004 SC 1497, (2004) 4 SCC 379, (2004) Cr LJ 1399(SC) .

34 (1973) ILR 1 Cal 13.

35 Re *Altaf Mian*(1907) 27 All WN 186.

36 This definition of sexual harassment is identical to that was articulated, as one of the guidelines, by the Supreme Court in *Vishaka v State of Rajasthan* AIR 1997 SC 3011, (1997) 6 SCC 241. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 provides for protection to women against sexual harassment at workplace and redressal of their complaints. It, for the purpose of the Act, defines 'sexual harassment', in similar phraseology, to bring in its ambit 'any one or more of the following unwelcome acts or behaviour (whether directly or by implication), namely, (i) physical contact and advances; (ii) a demand or request for sexual favours; (iii) making sexually coloured remarks; (iv) showing pornography, or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature'. See s 2(n) of the Act .

37 However, the recently enacted the Protection of Children from Sexual Offences Act, 2012,*inter alia*, defines 'sexual assault' (against children) and provides punishment therefor. Section 7 of the Act says: 'Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault'. And s 8 of the Act provides for simple or rigorous imprisonment for a term ranging between three and five years, with fine for the offence of sexual assault against children.

38 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 16.84, 16.87-16.89.

39 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.54 & 9.35. See also KI Vibhute, 'Sexual Violence against Children and the Indian Penal Code : Proposals for Reform', Delhi University Law Review, vol 22, 2000, p 21.

CHAPTER 38

Wrongful Restraint and Wrongful Confinement

(Indian Penal Code 1860,Sections 339 to 348)

INTRODUCTION

Sections 339 - 348, IPC, deal with the offences where a person's freedom of motion is interfered with wholly or in part. Where a person is prevented from going to a place where he has got a right to be, it is the offence of wrongful restraint defined in s 339 and made punishable by s 341. However, if he is confined within particular limits against his desire to go outside those limits, it is the offence of wrongful confinement defined in s 340 and punishable by s 342. Sections 343-348 deal with aggravated forms of wrongful confinement.

PART A - WRONGFUL RESTRAINT

Section 339. Wrongful restraint.--Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception.--The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration

A obstructs a path along which *Z* has a right to pass, *A* not believing in good faith that he has a right to stop the path. *Z* is thereby prevented from passing. *A* wrongfully restrains *Z*.

Section 341. Punishment for wrongful restraint.--Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

Ingredients

Section 339 defines 'wrongful restraint'. The essential ingredients of 'wrongful restraint' are: (i) voluntary obstruction of a person, and (ii) the obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed.

Physical obstruction by mere verbal prohibition constitutes wrongful restraint. S 341 does not deal with the means of restraint, but with the effect of the means.[1] Mere direction or demonstration will not constitute wrongful restraint.[2] In wrongful restraint, physical presence of accused is not always necessary. Where, therefore, the complainant and his wife and daughter occupied a house and during their temporary absence, the accused put a lock on the outer door and thereby obstructed them from getting into the house, it was held that the accused was guilty of wrongful restraint.[3] However, a house-owner, who partially restrained his tenant by closing one of the door leaves of the main entrance gate, was not held guilty of wrongful restraint as the complainant had sufficient passage to move in and out.[4]

The 'wrong' defined is a wrong against a 'person' and if a man is prevented from taking his animal or cart along with him in one direction, that will not be an offence within the section. Thus, where the complainant driving a bullock cart was obstructed from taking his cart through the passage, but there was no obstruction to the complainant passing through the passage alone without the cart, it was held that there could be no conviction for wrongful restraint, for though the complainant was hindered from driving his cart through the passage, he himself was unobstructed.[5] But it would amount to wrongful restraint if a person was going to his field with his bulls through a pathway and the accused came there and obstructed him and his bulls and beat and drove away the bulls and the complainant, by fearing that if he proceeded further he would also be beaten, came away.[6]

Obstruction to vehicle alone does not constitute 'wrongful restraint' as defined in s 339 as obstruction of a person only comes within its purview.[7] Only obstruction to plying or parking of a vehicle in a particular place does not amount to wrongful restraint as there is no obstruction to human body.[8] An obstruction caused to a vehicle carrying passengers amounts to wrongful restraint of the passengers. The fact that the passengers

are free to get down and proceed to the desired direction does not take the obstruction to the passengers outside the ambit of wrongful restraint.[9]

The offence is determined by the effect caused and not by the nature of the act by which wrongful restraint is brought about.

In *Raja Ram v State of Haryana* ,[10] a woman and a 13-year old boy were summoned to the police station for interrogation. The proviso to s 160, CrPC, provides that no woman or a male under 15 years of age should be summoned to the police station for interrogation. Instead, they must be interrogated at the place where they reside. The accused, a police officer, was found guilty of infringing s 160, CrPC. It was held that in view of this, detaining of a woman and a 13-year old boy in the police station would amount to wrongful restraint. The accused was found guilty under s 341, IPC, but not under s 342, IPC.

In *Vijay Kumari Magee v Smt SM Rao* ,[11] the complainant was in occupation of a room in the campus of Victoria School. A letter was addressed to her on 1 October stating that since the managing committee has decided not to allow outsiders to reside in the campus, she was to vacate the room. The complainant asked for some extension of time to vacate the room, as the notice given was very short. Since she failed to vacate by end October, her room was locked and she was prevented from entering her room and thus wrongfully restrained. The Supreme Court held that no offence under s 341 was established, as the complainant had 'no right to proceed' in the direction, viz, enter the hostel room. As per s 339, which spells out as to what is wrongful restraint, only if a person has a right to proceed in a particular direction, can an obstruction of the same amount to 'wrongful restraint'. Since, the complainant had no right to enter the room on the cancellation of her allotment, no offence under s 341 was made out.

A person guilty of wrongful restraint is punishable by simple imprisonment for a term up to one month, or a fine of up to five hundred rupees, or both.

PART B - WRONGFUL CONFINEMENT

Section 340. Wrongful confinement.--Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Illustrations

(a) *A* causes *Z* to go within a walled space, and locks *Z* in. *Z* is thus prevented from proceeding in any direction beyond the circumscribing line of the wall. *A* wrongfully confines *Z*.
(b) *A* places men with firearms at the outlets of a building, and tells *Z* that they will fire at *Z* if *Z* attempts to leave the building. *A* wrongfully confines *Z*.

Section 342. Punishment for wrongful confinement.--Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Ingredients

Section 340 defines 'wrongful confinement'. It is a form of 'wrongful restraint'. The essential ingredients of the offence of 'wrongful confinement' are: (i) wrongful restraint of a person, and (ii) the restraint must be to prevent that person from proceeding beyond certain circumscribing limits beyond which (s)he has right to proceed. There must be total restraint and not a partial one.[12]

In *Deep Chand v State of Rajasthan* ,[13] the victim was the son of a wealthy businessman. One day, two masked men entered his room and one of them had a revolver. The two persons threatened to shoot him if he made any noise. They took him outside, where two camels were waiting. The face of the victim was covered with a cloth. They took him on the camel for some distance, and thereafter, he was taken to the house of the accused where he was confined for 17 days. He was forced to write three letters to demand a ransom of Rs 50,000 from the victim's father. After the ransom amount was paid, they released the victim. Thereaf-

ter, the accused were identified and charged under ss 347, 365, 382 and 452, IPC, and were convicted under these sections.

In *Shyam Lal Sharma v State of Madhya Pradesh* ,[14] it was learnt that certain officials were demanding bribes at a traffic barrier from the drivers of the vehicles. A trap was laid. A circle inspector raided the office and recovered the notes which were given. The accused objected to the search as it was done without a warrant and also demanded that a search memo be given. The circle inspector agreed to give the search memo and he was allowed to go. But, after he went out of the office and was on the road, he was forcibly seized, lifted, taken into the office and thrown on a chair. He was confined there and threatened with a *lathi*, till he had complied with the demand that he gives in writing that he had conducted a search of the barrier. It was contended that since the search was conducted in violation of the procedure prescribed under s 165, CrPC, the accused had a right to obstruct the search. The Supreme Court, however, found fault with the behaviour of the accused, subsequently where after the circle inspector was allowed to leave, he was wrongfully restrained. It was held that s 342, IPC, was not confined to offences against public servants, but is a general section and makes a person who wrongfully restrains another, guilty of the offence under that section. A wrongful confinement is a wrongful restraint in such a manner, as to prevent that person from proceeding beyond a certain circumscribed limits. The accused were convicted under ss 342 and 353, IPC.

In *Shamsudheen v State of Kerala* ,[15] the petitioners were convicted for wrongful confinement of two police officers, who went to their place to investigate the matter regarding wrongful confinement of *X*. The court held that the degree of defiance shown by the petitioners to the officers of law enforcement could not be condoned, except at peril to values fundamental to the existence of a system of government based on rule of law. Rule of law postulates duties and not rights alone. The petitioners chose to be a law unto themselves and acted in a high handed manner by keeping the police officers in wrongful confinement.

If such act s are viewed leniently, that would erode the foundation of government established by law. Might should not be allowed to subdue law. It is thus imperative that a eterrent sentence should be imposed. In the circumstances, the sentence imposed on petitioners to pay fine of one thousand rupees each was enhanced, and each of the petitioners was sentenced to suffer simple imprisonment for two months, in addition to the fine already imposed.

Similarly, the police officer who illegally confined a person for five days in a chapter case under s 107 of the CrPC is held guilty under s 342, IPC,[16]

In *Jay Engineering Works v State of West Bengal* ,[17]*gherao* (physical blockade of a target, either by encircle ment intended to blockade the ingress or egress from and to a particular office, workplace, etc) was held to be illegal, amounting to the criminal offences of wrongful restraint and wrongful confinement. In this case, a large number of labourers *gheraoed* the management staff without giving them freedom to move about. The government also issued circulars restraining the police from interfering without obtaining the permission of the labour minister. The Calcutta High Court quashed these circulars as *ultra vires* of the Constitution, infringing art 14.

A person guilty of wrongful confinement is punishable by simple or rigorous imprisonment for a term up to one year or a fine of up to one thousand rupees or both.

Distinction Between Wrongful Restraint and Wrongful Confinement

In wrongful confinement, a person is restrained from proceeding in direction beyond a certain area; in wrongful restraint, he is restrained from proceeding in some particular direction, though free to proceed elsewhere. Punishment for the offence of wrongful restraint is milder than that is stipulated for wrongful confinement.

Aggravated Forms of Wrongful Confinement

Section 343. Wrongful confinement for three or more days.--Whoever wrongfully confines any person for three days, or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 344. Wrongful confinement for ten or more days.--Whoever wrongfully confines any person for ten days, or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 345. Wrongful confinement of person for whose liberation writ has been issued.--Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

Section 346. Wrongful confinement in secret.--Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to ny public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

Section 347. Wrongful confinement to extort property, or constrain to illegal act.--Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 348. Wrongful confinement to extort confession, or compel restoration of property.--Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

PART C - PROPOSALS FOR REFORM

The Fifth Law Commission has suggested no changes in the provisions defining 'wrongful restraint' (s 339) and 'wrongful confinement' (s 340); and dealing with wrongful confinement of a person for whose liberation writ has been issued (s 345); wrongful confinement in secret (s 346); wrongful confinement to extort property (s 347), and wrongful confinement to extort confession (s 348).

However, it has recommended enhancement in the punishment provided for wrongful restraint and wrongful confinement and the abolition of graded punishment provided for wrongful confinement. The proposed reforms are:

(1) The existing amount of fine (of five hundred rupees) provided for wrongful restraint should be raised (to one thousand rupees).
(2) A mandatory simple or rigorous imprisonment for a term up to one year (with or without fine) should be provided for wrongful restraint if, it is jointly committed by ten or more persons.
(3) A fine of unlimited amount (instead of the existing fine of up to one thousand rupees) should be provided for wrongful confinement.
(4) The sentence of imprisonment of a term up to three years should be provided for wrongful confinement when it is jointly committed by ten or more persons.
(5) Referring to the two gradations of punishment provided for in ss 343 to 345 for wrongful confinement of different durations, it felt it unnecessary to have such penal gradations. It suggested that these sections should be incorporated in a single provision.[18]

The Indian Penal Code (Amendment) Bill 1978, through its cl 144, drafted on the lines suggested by the Fifth Law Commission, sought to replace the existing ss 341 to 344 of the IPC. The Fourteenth Law Commission

also endorsed these proposals for reform, except the proposal for limiting the joint liability for committing wrongful restraint and wrongful confinement to two or more persons rather than to the suggested ten or more persons.[19] However, the Bill, as stated earlier, lapsed due to the dissolution of the *Lok Sabha* in 1979.

1 Re *Shanmugham*(1971) Cr LJ 182(Mad) .

2 Re *Subba Row*(1908) 8 Cr LJ 212.

3 *Arumuga Nadar v Emperor* (1910) 11 Cr LJ 708(Mad), also see *Paritosh Chowdhary v Sipra banerjee* (1988) Cr LJ 1299(Cal) .

4 *Shankar Chandra Ghosh v Roopraj S Bhansally* (1981) Cr LJ 1002(Cal) .

5 *Ram Laia*(1912) 15 Bom LR 103.

6 *Madala Periah v Voruganti* AIR 1954 Mad 247, (1954) Cr LJ 283(Mad) .

7 *Durgapada v Nalin Ghosh* AIR 1935 Cal 252; *Shankar Lal Sharma v State of Assam* (1975) Cr LJ 1077(Gau) .

8 *Rita Wilson v State of Himachal Pradesh* (1992) Cr LJ 2400(HP), 1991 (2) Shim LC 1.

9 *Madhab v Nalini* AIR 1964 Cal 286.

10 (1971) 3 SCC 945.

11 AIR 1996 SC 1058.

12 *Raju Pandurang Mahale v State of Maharashtra* AIR 2004 SC 1677, (2004) 4 SCC 371.

13 AIR 1961 SC 1527.

14 AIR 1972 SC 886, (1972) 1 SCC 764.

15 (1989) Cr LJ 2068 (Ker).

16 *Deelip Bhikaji Sonawane v State of Maharashtra* (2003) 2 Mah LJ 629, 2003 Cr LJ 4008.

17 AIR 1968 Cal 407.

18 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 16.72, and 16.74-16.77.

19 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, para 12.53.

CHAPTER 39

Kidnapping and Abduction

(Indian Penal Code 1860,Sections 359 to 374)

PART A - KIDNAPPING

Section 359. Kidnapping.--Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.

Section 360. Kidnapping from India.--Whoever conveys any person beyond the limits of India without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from India.

The IPC recognises two kinds of kidnapping: kidnapping from India and kidnapping from lawful guardianship. Kidnapping in any form curtails the liberty of an individual. Essentially, it impinges the right to life guaranteed under art 21 of the Constitution of India and human rights. It causes terror in the mind of the people and has deleterious effect on civilised society.[1]

KIDNAPPING FROM INDIA

The words used in the section are 'beyond the limits of India'. This means that the offence under this section is complete, the moment a person is taken outside the geographical territory of India. It is not necessary that the persons should reach their destination in some other foreign territory. By the same token, if, a person is apprehended before he crosses the Indian border, then the offence will not be complete. At best, it may amount to an attempt to commit the offence of kidnapping from India under s 360, IPC. Till then, he has a *locus paenitentia*.

The term 'India' has been defined in s 18, IPC, as the territory of India excluding the State of Jammu and Kashmir.

The taking away of a person outside the territory of India is made a separate offence, because it has the effect of removing a person from the jurisdiction of the Indian law enforcing agencies.

KIDNAPPING FROM LAWFUL GUARDIANSHIP

Section 361. Kidnapping from lawful guardianship.--Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.--The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.--This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Section 361 deals with taking away of minor children from lawful guardianship. It is equivalent to what is termed 'child stealing' in England. The object of the section is to protect minor children and persons of unsound mind from being seduced, harmed or otherwise exploited by others. It is to afford protection and security to the wards. It also naturally recognises the right of the guardians to control and take charge of their wards who may be minors and/or persons of unsound mind.

The essential ingredients of the section are: (i) taking or enticing away a minor or a person of unsound mind, (ii) such a minor must be under the age of sixteen years, if a male, or under eighteen years, if a female; (iii) the taking or enticing away must be out of the keeping of the lawful guardian of such minor or person of unsound mind, and (iv) such taking or enticing away must be without the consent of such guardian.

Taking and Enticing

All that is required to bring an act within the purview of this section, is to 'take or entice' a minor or a person of unsound mind from the keeping of the lawful guardian. 'Taking' implies no active or constructive force.[2] The word means 'to go, to escort'. The consent of the minor child is of no relevance. Consent given by a minor or a person of unsound mind is not consent. But there must be some act ive part played by the accused for 'taking' the minor.[3] Simply permitting or allowing a minor to accompany one will not amount to an offence.

In *S Varadarajan v State of Madras* ,[4] a girl who was on the verge of attaining majority, voluntarily left her father's house, arranged to meet the accused at a certain place and went to the sub-registrar's office, where the accused and the girl registered an agreement o marry. There was no evidence whatsoever that the ac-

cused had 'taken' her out of the lawful guardianship of her parents, as there was no active part played by the accused to persuade her to leave the house. It was held that no offence under this section was made out.

In *State of Haryana v Raja Ram* ,[5] the prosecutrix was a young girl of 14 years. She became friendly with a person called Jai Narain, aged 32, who was a frequent visitor. When Jai Narain was forbidden by the prosecutrix's father from coming home, he sent messages through one Raja Ram. She was constantly persuaded to leave the house and come with Jai Narain, who would keep her in a lot of material comfort. One night, the prosecutrix arranged to meet Jai Narain in his house and went to meet him where she was seduced by Jai Narain. Jai Narain was convicted under s 376 for rape of minor and Raja Ram under s 366. The question before the Supreme Court was whether Raja Ram could be said to have 'taken' the minor girl, since she willingly accompanied him. The Supreme Court held that it was not necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person, which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian, would be sufficient to attract the section. Persuading or soliciting a minor to abandon legal guardianship at any stage by a person is sufficient to hold him responsible under s 361, IPC.[6]However, 'taking away' is distinct from 'allowing' a minor to 'accompany'. The former, unlike the latter, implies certain act ive role on the part of the accused in making the minor to leave or keep out of the legal guardian.

The word 'entice' connotes the idea of inducement or pursuance by offer of pleasure or some other form of allurement. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time in achieving its ultimate purpose of successful inducement.[7] Inducing a minor girl by promise of marriage to leave the house of her guardian amounts to enticement within the meaning of the section.[8]

Keeping of Lawful Guardian

Section 361 makes the taking or enticing of any minor person or person of unsound mind 'out of the keeping of the lawful guardian', an offence. The meaning of the words 'keeping of the lawful guardian' came up for consideration before the Supreme Court in *State of Haryana v Raja Ram* .[9] The court observed that the word 'keeping', in the context, connotes the idea of charge, protection, maintenance and control. It is not necessary that the minor should be under physical possession of the guardian. It suffices for the purpose of the section if it is under a continuous control of the guardian. Hence, a minor, who goes on a visit either with or without consent of the guardian, or goes on street, still is in 'keeping' of the guardian, it goes 'out of the keeping' when it is driven away from parental roof or control. The court compared it with the language used in English statutes, where the expression used was 'take out of the possession' and not 'out of the keeping'. The difference in the language between the English statutes and this section only goes to show that s 361 was designed to protect the sacred right of the guardians with respect of their minor wards.

The term used in the IPC is 'lawful guardian' and not 'legal guardian'. The expression 'lawful guardian' is a much more wider and general term than the expression 'legal guardian'. 'Legal guardian' would be parents or guardians appointed by courts. 'Lawful guardian' would include within its meaning not only legal guardians, but also such persons like a teacher, relatives etc, who are lawfully entrusted with the care and custody of a minor.[10]

Age of the Minor

As per the section, the age of a minor child at the relevant point in time should be less than 16 in respect of a male, and less than 18 in respect of a female, in order to constitute an offence under this section. It is for the prosecution to prove that the minor at the time of kidnapping was below the age stipulated under the section.[11]

Consent of the guardian and not of the minor is relevant as the essence of the offence of kidnapping is taking away a minor out of the keeping of the lawful guardian without his consent. It is only the consent of the guardian that absolves the accused from criminal responsibility.[12] Consent of the guardian after kidnapping is totally insignificant and irrelevant in nullifying the offence.

A person of unsound mind is different from an unconscious (because of poisoning or anesthetic drug) person. 'Taking away' the latter does not amount to kidnapping.

PUNISHMENT FOR KIDNAPPING

Section 363. Punishment for kidnapping.--Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 363 provides punishment for the offence of kidnapping defined in s 361. A convict may be sent to prison to undergo simple or rigorous imprisonment for a period up to seven years and be asked to pay fine, In *Chandrakala v Vipin Menon* ,[13] the Supreme Court declined to convict the father, who was accused of kidnapping his minor daughter who was living with her maternal grandfather due to strained relationship between her parents, on the ground that the accused was the natural guardian of the child.

PART B - ABDUCTION

Section 362. Abduction.--Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Section 362 merely defines the term 'abduction'. Therefore, abduction per se is not offence under the IPC. It is an offence when it is accompanied by certain intent to commit another offence. Force or fraud is essential to make abduction punishable.

Ingredients

The essential ingredients of this section are: (i) forcible compulsion or inducement by deceitful means, and (ii) the objects of such compulsion or inducement must be the going of a person from any place.

It must be noted that abduction per se as defined under s 362 is not an offence,[14] and hence is not punishable.[15] There should be an assault which is an offence against the human body and that assault should be with the intention of abducting.[16] Only if the abduction falls in the categories provided under ss 364, 365, 366, 367 and 369, will it amount to an offence. Thus, abduction is an offence only if it is done with intent to: (a) murder (s 364); (b) secretly and wrongfully confining a person (s 365); (c) induce woman to compel her marriage (s 366), and (d) subject person to grievous hurt, slavery, etc, (s 367), and (e) steal from a person under ten years (369).

By Force

The term 'force', as embodied in s 362, IPC, means the use of actual force and not merely show of force or threat of force. Where an accused threatened the prosecutrix with a pistol to make her go with him, it would amount to abduction under this section.[17]

Deceitful Means

Under this section, inducing a person by deceitful means to go from any place is also an offence. Deceitful means is used as an alternative to 'use of force'. Thus, a person can use force to compel, or in the alternative, deceive a person to leave a place. Either way, it amounts to abduction. Deceitful means misleading a person by making false representations and thereby persuading the person to leave any place.

To Go from Any Place

An essential element of abduction is compelling or inducing a person to go from any place. It need not be only from the custody of lawful guardian as in the case of kidnapping. For unlike kidnapping, abduction is a continuing offence. The offence of kidnapping is complete, the moment a person is removed from India or from the keeping of lawful custody of guardian. But, in the case of abduction, a person is being abducted not only when he is first taken away from any place, but also when he is subsequently removed from one place to another. A kidnapped girl managed to escape from the kidnappers when she met the accused, who misrepresented to her that he was a police constable and would take her to the police station. But instead, he took her to his house, kept her there, demanded and took a ransom of Rs 600 from her mother, before he

handed her back. It was held that his act amounted to abduction.[18] Where a woman is passed from hand to hand in several places, each of the persons will be guilty of offence of abduction.[19]

Table 39.1 Distinction Between Kidnapping and Abduction

Kidnapping	*Abduction*
(1) Kidnapping from guardianship is committed only in respect of a minor (of the age specified in s 361) or a person of unsound mind.	(1) Abduction may be in respect of a person of any age.
(2) Person kidnapped is removed out of lawful guardianship.	(2) No such thing necessary. It has reference exclusively to the person abducted.
(3) Taken away or enticed to go away with the kidnapper. The means used are irrelevant.	(3) Force, compulsion and deceitful means are used.
(4) Consent of the person kidnapped is immaterial.	(4) Consent of the person condones the offence.
(5) Intent of the kidnapper is irrelevant.	(5) Intent of the abductor is the all important factor.
(6) Not a continuing offence. It is complete as soon as the minor or person of unsound mind is removed from lawful guardianship.	(6) It is a continuing offence. It continues so long as the abducted person is removed from one place to another.
(7) Kidnapping outside India.	(7) Abduction may be anywhere within or without.
(8) Kidnapping is a substantive offence.	(8) Abduction is an auxiliary act. It becomes punishable only when it is done with either of the intents specified in s 364 to 366.

PART C - AGGRAVATED FORMS OF KIDNAPPING OR ABDUCTION

KIDNAPPING OR MAIMING FOR BEGGING

Section 363A. Kidnapping or maiming a minor for purposes of begging.--

(1) Whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(2) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment for life, and shall also be liable to fine.

(3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

(4) In this section,--

(a) 'begging' means--

(i) soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise;

(ii) entering on any private premises for the purpose of soliciting or receiving alms;

(iii) exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;

(iv) using a minor as an exhibit for the purpose of soliciting or receiving alms;

(b) 'minor' means--

(i) in the case of a male, a person under sixteen years of age; and

(ii) in the case of a female, a person under eighteen years of age.

This section was introduced in the year 1959 to counter the growing of 'organised begging', wherein unscrupulous persons were abducting children and maiming them for the purposes of begging. The term 'begging' is defined in cl (4) of this section.

Clause (3) of the section introduces the presumption that if a person other than the lawful guardian uses or employs a minor for begging, then unless the contrary is proved, it will be presumed that he kidnapped the child.

The offence of kidnapping of a minor for the purpose of employing for begging is made punishable by simple or rigorous imprisonment for a term up to ten years and with fine. If the accused maims such a minor for the purpose of employing for begging, he would be sentenced to life imprisonment.

ABDUCTING TO MURDER

Section 364. Kidnapping or abducting in order to murder.--Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) *A* kidnaps *Z* from India, intending or knowing it to be likely that *Z* may be sacrificed to an idol. *A* has committed the offence defined in this section.

(b) *A* forcibly carries or entices *B* away from his home in order that *B* may be murdered. *A* has committed the offence defined in this section.

This section will apply if a person has been abducted with intention that he be murdered.[20]The act ual murder of the person is not required. It is sufficient that there was abduction with intent to murder.[21] The prosecution is required to prove that: (i) the accused kidnapped the person; (ii) the person was kidnapped in order, (a) that he may be murdered, or (b) that he might be disposed of in such manner as to be put in danger of being murdered.[22] S 364 becomes inapplicable where the man was done to death before he was kidnapped. It may amount to an offence contrary to s 201, but not to s 364, IPC.[23] If the person abducted is done to death, it is for the accused to explain, to the satisfaction of the court, the way he dealt with the victim. In the absence of such an explanation, the court may presume that the abductor caused his death.[24] He can be held responsible for the death even if it is not known to him who caused it.[25]

KIDNAPPING FOR RANSOM

364A. Kidnapping for ransom, etc.--Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.

Section 364A was inserted by the Criminal Law (Amendment) Act1993 [and further amended by the Indian Penal Code (Amendment)Act 1995] to provide for severe punishment for abducting or kidnapping a person and keeping him continuously under detention and threatening him to cause his death or hurt or creating a reasonable apprehension that he may be put to death or hurt to compel the government or any foreign state or international inter-governmental organisation or any other person to refrain from doing any act or to pay a ransom as demanded by the kidnapper or abductor. Before s 364A is pressed in service and a person is convicted thereunder, it is necessary for the prosecution to prove that: (i) accused kidnapped, abducted or detained a person; (ii) he kept such a person under custody or detention, and (iii) the kidnapping, abduction or detention has been for ransom.[26] The essence of the offence is kidnapping and reasonable apprehension that the kidnapped person may be done to death or hurt if the ransom money demanded is not paid.[27]

Kidnapping and abduction are defined in s 359 and s 362 respectively. The term 'ransom' is not defined in the IPC. 'Ransom', according to the Supreme Court, is a sum of money to be demanded to be paid for releasing a captive, prisoner or detenu.[28]

In *Netra Pal v State (National Capital Territory of Delhi)* ,[29] the Delhi High Court, in a set of peculiar facts, delved into some key words and ambit of s 364A of the IPC. The raiding party recovered from the accused the kidnapped child and a letter demanding ransom. He had neither posted the letter nor personally contacted the family of the child for three days after kidnapping till he was arrested. The high court held that mere 'intention to demand ransom' does not come within the ambit of the words 'to pay ransom' used in the section, unless the demand is translated into action of the accused by communicating his demand to the person concerned. Unless the price of retrieval or rescue is made, the question to pay ransom does not arise as the words 'to pay' warrant setting the demand for payment in motion. The court, therefore, declined to convict the accused for kidnapping for ransom as he, by keeping his letter of demand with him only, did not convey his demand for ransom to release the child.

In *Malleshi v State of Karnataka* ,[30] however, the Supreme Court, referring to the *Netra Pal* dictum, ruled that there cannot be a strait-jacket formula that the demand for payment of ransom has to be made to a person who ultimately pays. Even who pays the ransom cannot be the determinative fact. The question to be decided, for conviction under s 364A, is: 'what was the intention, and was it demand of ransom? Non-communication of the demand to pay ransom to the victim does not take away the offence from the purview of s 364A.

Demand for ransom even after murder of victim comes within the purview of s 364A as the main object of the accused is to extort money from parents of the deceased victim by way of ransom.[31]

The offence is punishable by death sentence or life imprisonment, and fine. With a view to arresting the alarming rise in kidnapping for ransom, the Legislature has stipulated severe punishment, which courts are expected to bear in mind while sentencing.[32]

KIDNAPPING OR ABDUCTING WITH INTENT TO SECRET AND WRONGFUL CONFINEMENT

Section 365. Kidnapping or abducting with intent secretly and wrongfully to confine person.--Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 365 comes into play when a person kidnaps or abducts another with intention to secretly and wrongfully confine him.[33] Love affair between the accused and the girl kidnapped from her lawful guardianship does not absolve the accused from liability under the section[34]. An intention to secretly and wrongfully confine of the kidnapper or abductor has to be judged from the facts and circumstances of the case at hand.[35]

KIDNAPPING OR ABDUCTING A WOMAN TO COMPEL HER MARRIAGE, ETC

Section 366. Kidnapping, abducting or inducing women to compel her marriage, etc.--Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, shall also be punishable as aforesaid.

Mere abduction does not warrant s 366. It comes into operation only when the kidnapper or abductor abducts her for the purposes mentioned therein.[36] Even subsequent intent or act of intercourse with the kidnapped or abducted girl cannot bring the case within the purview of s 366, if such an intent was absent at the time when the accused enticed the girl.[37]'Abduction' under this section becomes punishable if the victim had been carried of illegally by 'force' or 'deception' from one place to another place.[38] This section is not directed against seduction, which in its ordinary sense, means the inducing of a girl to submit to sexual intercourse for the first time, or elopement, which is the running away of the woman, married or unmarried, with a lover, but

it is directed against seduction under coercion or under circumstances when she is entirely in the power of the seducer and when her consent would be nothing more than a mere submission to the will of the seducer. Abduction for forcible sexual intercourse or forcible marriage, or seduction for illicit intercourse is the main ingredient of this section. The essence of the crime is compulsion.[39] The intention of the accused to compel a woman to marry or to submit to sexual intercourse against her will is the basis of the section. Intention, volition or conduct of the woman is irrelevant.[40]

Seduction in this section means not merely inducement to submit to illicit sexual intercourse for the first time, but includes subsequent illicit sexual intercourse as well.[41] However, in the case of a woman who habitually carries on the profession of a prostitute, the essential element of seduction is ruled out and hence the offence under s 366 cannot be committed in connection with such a woman.[42]

Minor's Consent to Marry her Kidnapper--Is it valid?

There is a conflict of opinion between the various high courts in India on the question whether the consent given by minor girl to her marriage with the person who kidnaps her is valid or not. The Calcutta High Court in *Fulchand v Emperor* ,[43] and the Oudh Chief Court in *Bisnath Prasad v King Emperor* ,[44] have taken the view that the phrase 'against her will' in s 366 means only the minor's own will and not the will of the lawful guardian, whereas the Allahabad High Court in *Bhagwati Prasad v Emperor* ,[45] and *Sultan v Emperor* ,[46] and the Bombay High Court in *Emperor v Ayubkhan Mir Sultan* ,[47] have held that the minor's consent is no consent at all, even for the purpose of this section, and that an offence under this section will lie in such circumstances. The Madras High Court has agreed with the view of the Bombay High Court and of the Allahabad High Court, though it has not expressly decided the point.[48]

The principle in the above case was affirmed by the Supreme Court in its decision in *Thakoral D Vadgama v State of Gujarat* ,[49] where a rich industrialist had induced a minor girl of 16 to leave her home and come to his garage to have illicit intercourse with him. In this case, the Supreme Court affirmed the conviction under s 366, IPC, passed by the trial court and the Gujarat High Court. The accused came into contact with the family of the girl's father, held out hopes of appointing him as the manager of a new factory, which he was going to start at Mount Abu and Ahmedabad and stayed in big hotels spending lavishly. He also presented Mohini, the concerned girl, with a Parker pen. Within a few days, thereafter, he purchased by way of gifts for Mohini, skirt, silver waist band, etc. He was actually found on Mohini's bed by her mother at Mount Abu and his connection with Mohini was suspected, and in spite of the mother's grave protest, he was in correspondence with her without the knowledge of her parents.

Mohini was a schoolgirl of immature understanding having entered her sixteenth year less than a month before the incident, and out of emotion, she wrote letters to the accused exaggerating incidents of rebuke and beatings by her mother. The accused took advantage of her immature feelings and induced her to come to his house on an appointed day. She came, and was taken to his garage and then she was induced to go to the public road by the accused when the police party came with her father. The accused falsely denied her presence in his house but some of her clothes, her school exercise books, etc, were taken from the garage, where she had been asked to remain by the accused. The accused was given a lenient sentence of only rigorous imprisonment for 18 months.

The Supreme Court remarked that Mohini's mother's dignified protest letter to the accused indicated how the mother of the girl belonging to a comparatively poorer family felt, when confronted with a rich man's dishonourable behaviour towards her young impressionable, immature daughter, who also suggested to render financial help to her husband in time of need. The Supreme Court distinguished its earlier ruling in *Varadarajan*'s case and explained the meaning of the expression 'whoever takes or entices any minor' thus:

> The word 'takes' does not necessarily connote taking by force and it is not confined to the use of force, act ual or constructive. These words merely mean 'to cause to go, to escort' or 'to get into possession'. No doubt, it does mean physical taking, but not necessarily by use of force or fraud. The word 'entice' seems to involve the idea of inducement or allurement by giving rise to hope or desire on the other. This can take many forms, difficult to visualise and describe exhaustively, some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purpose of successful inducement. The two words 'takes' and 'entices' are intended to be read together, so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninflu-

enced by any promise, offer of inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in s 361, IPC. But if the guilty party has laid a foundation by inducement, allurement or threat, etc, and if this gain can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him.[50]

The offence under s 366 is punishable by simple or rigorous imprisonment for a term up to seven years and with fine.

PROCURATION OF MINOR GIRL

Section 366A. Procuration of minor girl.--Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

Section 366B. Importation of girl from foreign country.--Whoever imports into India from any country outside India or from the State of Jammu and Kashmir any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

Sections 366A and 366B were inserted in 1923 in pursuance of the International Convention for Suppression of the Traffic in Women and Children. These provisions intend to punish the export and import of girls for prostitution. Section 366A, which punishes a person who makes a girl under eighteen years of age to move from any place with intend to force or seduce her for illicit intercourse with other person, deals with procuration of minor girls from one part of India (except Jammu & Kashmir) to another. Section 366B deals with import in India of a girl less than twenty-one years for prostitution from any foreign country or Jammu & Kashmir.

The term 'illicit intercourse' used in these provisions means sexual intercourse between a man and woman who are not husband and wife.[51] And the word 'seduced' (to illicit intercourse) means inducing or enticing or tempting a girl of the specified age to submit to illicit intercourse not only for the first time but also at any time or on any occasion.[52]

For convicting a person under s 366A it is essential to establish that he has induced a girl blow the age of eighteen years to go from any place with the intent (or knowledge) that she would be forced or seduced to illicit intercourse with someone other than himself.[53] In the absence of any proof disclosing coercion or inducement by the accused, he deserves acquittal of charges under s 366A.[54]

Section 366B makes it an offence to import a girl under the specified age from any foreign country or the State of Jammu & Kashmir with intent or knowledge that she would be forced or seduced to illicit intercourse with another person.[55]

A convict under s 366A or s 366B is punishable by imprisonment for a term up to ten years and with fine.

KIDNAPPING OR ABDUCTING TO SUBJECT PERSON TO GRIEVOUS HURT

Section 367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.--Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

In *Darshan Singh v State Punjab* ,[56] the Supreme Court convicted the accused under s 367 for abducting the victim and mercilessly beating him.

WRONGFULLY CONCEALING OR KEEPING IN CONFINEMENT A KIDNAPPED OR ABDUCTED PERSON

Section 368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person.--Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

Section 368 does not apply to the perpetrator of the offence of kidnapping or abduction but to his accomplice who knowingly conceals the kidnapped or abducted person.[57] To constitute an offence under s 368 of the IPC, it is necessary that the prosecution must establish that: (i) the person in question has been kidnapped or abducted; (ii) the accused knew that the said person had been kidnapped or abducted, and (iii) the accused having such knowledge, wrongfully conceals or confines the person concerned.

So far as the second ingredient is concerned, it is an inference to be drawn by the courts from the various circumstances. Whether there has been wrongful concealment or confinement under s 368, is a matter to be considered from the facts and circumstances of a particular case.

In *Smt Saroj Kumari v State of Uttar Pradesh* ,[58] the accused had been charged of the offence of stealing a new born child from its mother's delivery bed in the maternity hospital, as the child was found in the bedroom of the accused, although, she had not given birth to any new born child. The Supreme Court upheld her conviction under s 368, holding that under the circumstances, the inferences of concealment and guilt concurrently drawn by the courts below were justifiable and correct.

KIDNAPPING OR ABDUCTING CHILD UNDER TEN YEARS WITH INTENT TO STEAL FROM ITS PERSON

Section 369. Kidnapping or abducting child under ten years with intent to steal from its person.--Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any movable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 369, as evident from its phraseology, provides punishment for kidnapping or abducting a child with the intention of taking movable property from the person of such child. The kidnapper or abductor may be ordered to undergo simple or rigorous imprisonment for a term up to seven years and may be ordered to pay fine.

PART D - TRAFFICKING, SLAVERY AND FORCED LABOUR

Section 370. Trafficking of person.--

(1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by--

First.--using threats, or

Secondly.--using force, or any other form of coercion, or

Thirdly.--by abduction, or

Fourthly.--by practising fraud, or deception, or

Fifthly.--by abuse of power, or

Sixthly.--by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation I.-- The expression 'exploitation' shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.-- The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Section 8 of the Criminal Law (Amendment) Act 2013 substitutes the earlier version of s 370, which, with the marginal caption 'Buying or disposing of any person as a slave', dealt with import, export, removal, buying, selling or disposition of a person as a slave or accepting, receiving or detaining a person against his will as a slave. The instant s 370, though technically substitutes its earlier version, it, in fact, defines the offence of human trafficking in a sense wider than that of slave and provides for minimum and maximum range of punishment therefor. It also gives five forms or categories of 'trafficking' and stipulates punishment that corresponds to gravity of the respective form or category.

A person commits the offence of trafficking when he, with the purpose of physical or sexual exploitation or slavery or a practice akin to slavery, servitude or bondage or forced removal of organs (i) recruits, (ii) transports; (iii) harbours; (iv) transfers, or (v) receives a person or persons, by (a) using threats, (b) using force or any form of coercion, (c) abduction, (d) fraud or deception, (e) abuse of power, or (f) inducing or giving or receiving money or benefits for obtaining consent of a person having control over the person recruited, transported, harboured, transferred or received. When a person commits the offence of trafficking is punished with rigorous imprisonment for a term not less than seven years, which may extend to ten years, and fine. When he perpetrates trafficking of more than one person, the term of his rigorous imprisonment extends to a term not less than ten years. It may extend to imprisonment for life. If he commits the offence of trafficking a minor, the term of his rigorous imprisonment cannot be less than ten years, but it may extend to life. And if his offence of trafficking involves more than one minor, the term of his rigorous imprisonment cannot be less than fourteen years. He may be sentenced to life imprisonment. If a person is convicted of trafficking of minor on more than one occasion, then he will be punished with imprisonment for life, which means imprisonment until he dies of natural death. If the person involved in the offence of trafficking happens to be a public servant or police officer, he will be sentenced to imprisonment for life, which needs to be reckoned as imprisonment for the rest of his natural life.

Section 370A. Exploitation of a trafficked person.--

(1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.

(2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.

Section 370A deals with criminal liability of a person who knowingly engages a trafficked minor or a person for sexual exploitation in any manner. In the former scenario, he will be punished by rigorous imprisonment for a term ranging between five and seven years. While in the latter case, the term of imprisonment ranges between three and five years.

Section 371. Habitual dealing in slaves.--Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with imprisonment for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Section 371 provides punishment for the habitual slave traders.

Section 374. Unlawful compulsory labour.--Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 374 intended to check the practice of forced labour. Therefore, it makes unlawful compulsory labour an offence. It embodies the principle that no person shall be unlawfully forced to undertake labour against his will. The word 'labour' applies both to physical and mental labour. S 374, however, cannot be invoked against a jail officer who asked a prisoner sentenced to rigorous imprisonment to do hard labour as he is, by law, mandated to impose hard labour on him.[59]

PART E - SALE OR PURCHASE OF MINORS FOR IMMORAL PURPOSES

Section 372. Selling minor for purposes of prostitution, etc.--Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.--When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.--For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.

Section 373. Buying minor for purposes of prostitution, etc.--Whoever buys, hires, or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation I.--Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.--"Illicit intercourse" has the same meaning as in section 372.

Section 372 provides punishment for selling a person under the age of eighteen years of either sex for the purpose of prostitution, illicit intercourse or for any other immoral purpose, while s 373 provides punishment for a person who buys such a minor person.

For invoking the provisions of s 372, the prosecution is required to prove that the accused has sold or let to hire a person under the age of eighteen years with intent or knowledge that the person would be used for either of the purposes mentioned therein.[60] Such a person may be of either sex, married or unmarried or leading an immoral life prior to sale or purpose.[61] The offence is complete the moment there is sale or letting to hire a minor with the intention specified in s 372.

Section 373, as stated earlier, makes a person criminally responsible for buying, hiring, or obtaining possession of a minor for the purposes specified therein.

Do these terms 'buying or hiring', used in s 373, necessarily involve a transaction with a person other than the minor herself? Suppose, for instance, a person were to contract with a minor girl, aged 17, for prostitution; would it be 'buying' or 'hiring' within the meaning of the section? There seems to be conflicting judicial opinions on the point. For example, the Bombay High Court, in *Bhagchand v Emperor* ,[62] and the Patna High Court, *Sham Sundar Prrusity v Emperor* ,[63] held that the possession of a minor need not to be obtained from a third person. The words 'buying, hiring or otherwise obtaining possession' used in s 373, according to the courts, are quite wide enough to cover the cases of obtaining possession of a minor person without the inttervention of a third person. A person, therefore, comes within the purview of s 373 the moment he, with the requisite intention, obtains possession of a minor. However, the Calcutta High Court, in *Jateendra Mohan Das v Emperor* ,[64] held that s 373 cannot be pressed into service in a case wherein the accused obtains possession of a minor without the involvement of a third party. In one case, *Dowlat Bee v Saikh Ali* ,[65] Scotland CJ was of the opinion that the terms of this section were wide enough to penalise such suffering. However, Holloway J dissented, holding that this section could not be interpreted to include a hiring by the minor herself. All such cases will be covered by provisions relating to kidnapping and abduction. Hence, the dissenting view is preferable. In this particular case, the judges held the accused not guilty on the ground that he had never obtained possession of the girl within the meaning of this section.

However, there can be no offence under s 373, where a person commits an immoral act with a female member of his own household, for in that case, there is neither obtaining possession nor the other element necessary for the offence. If a girl traveling with her chance protector, elopes with another, the latter will not be guilty.

PART F - PROPOSALS FOR REFORM

The Fifth Law Commission has suggested a couple major reforms in the law relating to kidnapping and abduction. A few prominent among them are:

(1) Doubting the propriety of s 360, dealing with kidnapping from India, as the practice of indentured labor, which was very common in the nineteenth century, has lost its relevance in the modern India and it (kidnapping from India) can be brought under the provisions s 362, the Law Commission recommended its deletion from the IPC. It, as a consequence of this proposal, also suggested deletion of s 359 dealing with 'kidnapping'. It also recommended deletion of s 371, criminalizing 'habitual dealing in slaves', on the ground that the practice of slavery and trafficking in slaves no longer exists in India.

(2) A new section (s 364A) should be inserted in the IPC to criminalize kidnapping for ransom[66] and an additional explanation (Explanation III) should be added to s 373, dealing with buying a minor for the purpose of prostitution. The former proposal was, ostensibly, suggested to combat the increasing instances of kidnapping for ransom and the latter was to clarify the judicial ambivalence prevailing among different High Courts regarding the requirement (or otherwise) of buying, hiring or obtaining possession of minor from a third person as an essential ingredient of s 373.

(3) Sections dealing with: definition of 'kidnapping from lawful guardianship' (s 361); definition of 'abduction' (s 362), and wrongfully concealing or keeping in confinement a kidnapped or abducted person (s 368) should be revised.

After a careful reading of s 361, the Commission failed to see any convincing reasons for having separate ages for boys and girls for bringing their kidnapping within the definition of kidnapping as well as for insisting 'lawful entrustment' of a minor for a person to be a 'lawful guardian' of the minor. It also expressed some reservations about the two exemptions indicated in *Exception* to s 361, as they, in its opinion, do not cover the taking away of legitimate minor by either of the parents.

It also highlighted two defects in the definition of 'abduction' given in s 362. They are: (i) it is not clear as to whether the definition takes into its ambit the act of bodily lifting and carrying away a person when he is unconscious or asleep, as such an act does not literally amount either to compelling him 'by force' or inducing him 'by deceitful means' to go from any place, and (ii) the term 'force' used in the section refers to the 'force used' and not the 'show of force' in abducting a person. It suggested that s 362 should be revised to remove these defects.

(4) S 368, leaving the punishment for wrongfully concealing or keeping in confinement a kidnapped or abducted person to be regulated according to the principal offence of kidnapping or abduction, should be revised by stipulating specific punishment for wrongfully concealing or keeping in confinement a kidnapped or abducted person. It also suggested that such a person should be subjected to rigorous imprisonment, rather than imprisonment of either description, for a term up to seven years with fine.

(5) The second half part of s 366 and s 366-A should be pulled together as they are 'closely connected' with each other.

(6) The punishment provided for: kidnapping (s 363); kidnapping or maiming minor for the purposes of begging (s 363A); importation of girl from foreign country for forced or seduced illicit intercourse (s 366B); kidnapping or abducting a person for subjecting him to grievous hurt (s 367); kidnapping or abducting child under ten years of age with intent to steal (s 369); buying or disposing person as a slave (s 370), and selling minor girl for purposes of prostitution (s 372) should be enhanced. For most of these offences, taking into account their gravity, it suggested rigorous imprisonment instead of the existing imprisonment of simple or rigorous imprisonment.

(7) The existing punishment provided for kidnapping (with some other changes) should be scaled down.[67]

The Indian Penal Code (Amendment) Bill 1978 sought to incorporate in the Code all the revised sections suggested by the Fifth Law Commission. Cl 149 of the Bill, defining abduction on the suggested lines, sought to substitute the existing s 362. Cl 152 of the Bill desired to give effect to the suggested combination of the second half of s 366 with s 366A; while cl 155 sought to substitute s 368 of the Code. The Fourteenth Law Commission also endorsed all these proposals for reform.[68]

However, these clauses could not acquire the status of law as the Bill lapsed due to the dissolution of the *Lok Sabha* in 1979.

1 *Tarun Bora v State of Assam* (2002) 7 SCC 39.

2 *Biswanath Mallick v State of Orissa* (1995) Cr LJ 1416(Ori) .

3 *State v Rajayyan* (1996) Cr LJ 145(Ker) ; *Gaurish v State of Maharashtra* (1997) Cr LJ 1018(Bom) ; *Deep Chand @ Dipu v State (NCT of Delhi*) (2001) Cr LJ 463(Del) .

4 AIR 1965 SC 942, (1965) 2 Cr LJ 33(SC) ; also see, *Lalta Prosad v State of Madhya Pradesh* AIR 1979 SC 1276; *Deb Kumar Jain v Kamala Bai* (1983) 2 Crimes 85(MP) ; *Manornjan v State of Maharashtra* (1992) 1 Crimes 69(Ori) .

5 AIR 1973 SC 819, (1973) Cr LJ 651(SC), also see *Prakash v State of Haryana* (2004) 1 SCC 339, AIR 2004 SC 227, (2004) Cr LJ 595(SC) .

6 *Moniram Hazarika v State of Assam* (2004) 5 SCC 120, AIR 2004 SC 2472.

7 *Thakorlal D Vadgama v State of Gujarat* AIR 1973 SC 2313, (1973) Cr LJ 1541(SC) .

8 *Motiram Hazarika v State of Assam* (2004) 5 SCC 120, AIR 2004 SC 2472.

9 AIR 1973 SC 819, (1973) Cr LJ 651(SC) .

10 *State v Harban Singh Kisan Singh* AIR 1954 Bom 339; *Kesar v Emperor* AIR 1919 Pat 27; *Sajjan Ka-par v State of Bihar* (2005) 9 SCC 426.

11 *Mohan v State of Rajasthan* (2003) Cr LJ 1891(Raj), RLW 2003 (4) Raj 2432.

12 *State of Haryana v Raja Ram* (1973) Cr LJ 651(SC) ; *Prakash v State of Haryana* (2004) 1 SCC 339; *Ramesh v State of Madhya Pradesh* (2009) ILR 1 MP 218, AIR 2005 SC 1186.

13 (1993) 2 SCC 6. Also see *Sudhesh Jhaku v KCJ* (1998) Cr LJ 2428(Del), 62 (1996) DLT 563.

14 *Vishwanath v State of Uttar Pradesh* AIR 1960 SC 67, (1960) Cr LJ 154(SC) .

15 *Chote Lal v State of Haryana* AIR 1979 SC 1494, (1979) Cr LJ 1126(SC) .

16 *Vishwanath v State of Uttar Pradesh* AIR 1960 SC 67, (1960) Cr LJ 154(SC) .

17 *Gurcharan Singh v State of Haryana* AIR 1972 SC 2661, (1973) Cr LJ 179(SC) .

18 *Bahadur Ali v King Emperor* AIR 1923 Lah 158.

19 *Nanhua Dhimar v King Emperor* (1930) ILR 53 All 140.

20 *Upendra Nath v Emperor* AIR 1940 Cal 561; *Paras Nath Mani Tripathi v State* (2000) Cr LJ 3882(All) ; *Subhash Chandra Panda v State* (2001) Cr LJ 4108(Ori) .

21 *State of West Bengal v Mir Mohmad Omar* AIR 2000 SC 2998, (2000) 8 SCC 382.

22 *Badshah v State of Uttar Pradesh* (2008) 3 SCC 681, (2008) Cr LJ 1950(SC) .

23 *Pedda Narayana v State of Andhra Pradesh* AIR 1975 SC 1252, (1975) 4 SCC 153.

24 *State of Madhya Pradesh v Lattora* (2003) 11 SCC 761; *Muralidhar v Stste of Rajasthan* AIR 2005 SC 2345, (2005) 11 SCC 133; *Badshah v State of Uttar Pradesh* (2008) 3 SCC 681, (2008) Cr LJ 1950(SC) ; *Rangnath Sharma v Satendra Sharma* (2008) 12 SCC 259, 2008 (11) SCALE 504.

25 *State v Dallela* (1958) ILR 8 Raj 181.

26 *Malleshi v State of Karnataka* (2004) Cr LJ 4645(SC), (2004) 8 SCC 95. Reiterated in, *Vinod v State of Haryana* AIR 2008 SC 1142, (2008) 2 SCC 246, (2008) Cr LJ 1811(SC) .

27 *Shyam Babu v State of Haryana* AIR 2009 SC 577, (2008) 15 SCC 418.

28 *Sooman Sood @ Kamal Jeet Kaur v State of Rajasthan* AIR 2007 SC 2774, (2007) Cr LJ 4080(SC), (2007) 5 SCC 634.

29 (2001) Cr LJ 1669 (Del).

30 (2004) Cr LJ 4645 (SC), (2004) 8 SCC 95.

31 *Vikas Chaudhary v State of NCT of Delhi* AIR 2010 SC 3380, (2010) 8 SCC 508.

32 *Vinod v State of Haryana* AIR 2008 SC 1142, (2008) 2 SCC 246, (2008) Cr LJ 1811(SC) .

33 *Akbar Ali v Emperor* AIR 1925 Lah 614; *Roshan v State of Uttar Pradesh* AIR 1954 All 51; *Fiyaz Ahmad v State of Bihar* AIR 1990 SC 2147, (1990) Cr LJ 224 2244 (SC).

34 *Deo Narain Mandal v State of Uttar Pradesh* (2004) 7 SCC 257, AIR 2004 SC 5150.

35 *State of Uttar Pradesh v Laiq Singh* (1968) Cr LJ 584(All) ; *Rajendra v State of Maharashtra* (1997) SCC (Cri) 840.

36 *Chhotelal v State of Haryana* AIR 1979 SC 1494, (1979) Cr LJ 1126(SC) ; *Upendra Baraik v State of Bihar* (2001) Cr LJ 286(Pat) ; *Tarkeshwar Sahu v State of Bihar (Now Jharkhand)* (2006) 8 SCC 560; *Gabbu v State of Madhya Pradesh* (2006) 5 SCC 740, AIR 2006 SC 2461.

37 *Dalchand v State of Uttar Pradesh* AIR 1969 All 216.

38 *Rajinder v State of Maharashtra* (2002) 7 SCC 721.

39 *Jinish Lal Sah v State of Bihar* (2003) 1 SCC 605.

40 *Moniram Hazarika v State of Assam* (2004) 5 SCC 120, (2004) Cr LJ 2553(SC), AIR 2005 SC 2472.

41 *Ramesh v State of Maharashtra* AIR 1962 SC 1908, (1963) 1 Cr LJ 16(SC) ; see also *Kuldeep K Mahato v State of Bihar* AIR 1998 SC 2694, (1998) 6 SCC 420; *Rajesh v State of Maharashtra* AIR 1998 SC 2724, (1998) 7 SCC 324.

42 *Ramesh v State of Maharashtra* AIR 1962 SC 1908, (1963) 1 Cr LJ 16(SC) .

43 AIR 1932 Cal 442.

44 (1946) 48 Cr LJ 542(Oudh) .

45 AIR 1929 All 709.

46 AIR 1930 All 19.

47 (1943) 46 Bom LR 203.

48 See *District Magistrate of Chittoor v Subhana* AIR 1952 Mad 257.

49 (1973) 2 SCC 413, AIR 1973 SC 2313, (1973) Cr LJ 1541(SC) .

50 Ibid, para 9.

51 *Kesal Mal v Emperor* AIR 1932 Lah 555.

52 *State of Bombay v Gopichand Fattumal* AIR 1961 Bom 282, (1960) 63 Bom LR 408; *Ramesh v State of Maharashtra* AIR 1962 SC 1908.

53 *Manik Molla v Emperor* AIR 1945 Cal 432; *Ramesh v State of Maharashtra* AIR 1962 SC 1901; *Ganga Dayal Singh v State of Bihar* AIR 1994 SC 859, 1994 Cr LJ 951(SC) ; *Mahesh @ Sanjay v State of Ra- jasthan* (1999) Cr LJ 4625(Raj) ; *Ranjeet Singh v State of Bihar* (2000) Cr LJ 2574(Pat) ; *Krishna Mohan Thakar v State of Bihar* (2000) Cr LJ 1898(Pat) .

54 *Jinish Lal Sah v State of Bihar* (2003) 1 SCC 605.

55 *Ramjilal v State of Rajasthan* AIR 1951 Raj 33.

56 (1994) Cr LJ 226 (SC).

57 *Sohan Singh v Emperor* AIR 1929 Lah 180; *Emperor v Zamin* AIR 1932 Oudh 28; *Francis Hector v Emperor* AIR 1937 All 182; *Fiyaz Ahmad v State of Bihar* AIR 1990 SC 2147, (1990) Cr LJ 224 2244 (SC).

58 AIR 1973 SC 201, (1973) Cr LJ 267(SC), (1973) 3 SCC 669.

59 *State of Gujarat v Hon'ble High Court of Gujarat* (1998) 7 SCC 392, AIR 1988 SC 3164.

60 *Santosh Santra @ Bachu v State of West Bengal* (1983) 2 Crimes 646; see also *Giridharilal v Emperor* AIR 1934 All 324; *Lal Singh v State of Uttar Pradesh* (1954) Cr LJ 859(All) .

61 *Ismail Rustamkhan*(1906) 8 Bom LR 236.

62 AIR 1934 Bom 200, (1934) 36 Bom LR 379; see also *Emperor v Sham Sundarbai* AIR 1921 Bom 323; but see, *Gordhan JUalidas v Emperor* (1941) 43 Bom LR 847.

63 AIR 1930 Pat 219.

64 (1937) 2 ILR Cal 187.

65 5 MHCR 473.

66 The proposal was ultimately carried out in 1993 by the Criminal Law (Amendment) Act 1993 and was further amended by the Indian Penal Code (Amendment) Act 1995.

67 Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 16.92, 16.97, 16.100, 16.106, 16.108, and 16.110-16.111.

68 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.55, 12.57 and 12.58.

CHAPTER 40

Sexual Offences

(Indian Penal Code 1860,Sections 375 to 377)

INTRODUCTION

The word 'rape', which is derived from the Latin term *rapio*, means 'to seize'. 'Rape' literally means a forcible seizure. 'Rape' or *raptus*, in its simplest form, signifies 'the ravishment of a woman against her will or without her consent or with her consent obtained by force, fear or fraud' or the carnal knowledge of a woman by force against her will'.[1]

Section 375 of the defines rape. It is an unlawful sexual intercourse between a man and a woman without the woman's consent or against her will under any of the seven circumstances enumerated in section 375 of the IPC .

However, the original s 375 and the provisions providing punishment therefor have witnessed major amendments, rather overhauling, during 1983[2] and 2013.[3]Both the Amendment Act s were triggered by peculiar instance of custodial rape[4] and of brutal gang rape on young woman in a moving bus in the capital of the country,[5] respectively.

The amendments carried out in the year 1983 overhauled the law relating to rape.[6] These amendments were a result of countrywide criticism by all sections of society including parliamentarians, women and social organisations against the judicial pronouncement of the Supreme Court in *Tukaram v State of Maharashtra* ,[7] which is popularly referred to as the Mathura rape case. In this case, Mathura, an 18 year-old Harijan orphan girl, was, along with her brother and another, brought to the police station for recording statement. After statements were recorded, the accused police constables asked Mathura to wait in the police station and told her brother and another to move out. Immediately thereafter, one of the accused raped her in the police station and another, who could not rape her as he was in a highly intoxicated condition, sexually molested her.

The trial court acquitted both the accused on the ground of the tacit consent of the victim. The Bombay High Court, on appeal, reversed the trial court's order of acquittal. It held one of the accused guilty of rape, and the another for molesting her, and awarded rigorous imprisonment for five years and for one year, respectively. The High Court had observed that there was a difference between 'consent' and 'passive submission', and held that mere passive or helpless surrender of the body and its resignation to other's lust, induced by threats or fear, cannot be equated with the 'desire or will', nor can furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition. The Supreme Court, on appeal by the accused, however, reversed the conviction. It held that Mathura could not have been overawed in the police station, especially since her relatives were waiting outside. It observed that Mathura was subjected to no fear of death or hurt, which may have led her to submit to the act . Further, no injuries were found on Mathura after the incident and the absence of injuries indicated that the alleged intercourse was a peaceful affair. The Supreme Court disbelieved Mathura's version that she put up a stiff resistance and shouted loudly for help. The court described it as a 'tissue of lies' and a concoction on her part. It acquitted both the accused.

To nullify the effect of the Supreme Court judgment in the Mathura case and other cases of that period, extensive amendments were introduced to the IPC and to the Indian Evidence Act 1872. Sections 376A to 376D were added to the IPC and s 114A was inserted in the Evidence Act.

On the late evening of 16 December 2012, a young girl was gang raped in New Delhi in a moving public transport bus in the presence of her friend and thereafter she and her friend were thrown out of the bus. The victim died subsequently. The incidence of brutal gang rape led to a nation-wide protest against the culprits. The Government of India, after giving an anxious consideration to the need to review the existing rape laws and enhance punishment for brutal sexual assaults, appointed a Committee (headed by the Late Justice JS Verma). The Committee was asked to look into possible amendments to criminal law for ensuring quicker trial of, and harsher punishments to, persons accused of committing sexual assault of extreme nature on women. The Committee was mandated to submit its report within thirty days from the date of Notification.[8]

The Committee in its Report[9] not only proposed revision and substitution of sections 375 , 376, and 376A to 376D of the IPC ,[10] but also recommended insertion of a few new ones[11] therein, for making the law relating to sexual assault on women and girls more effective and deterrent.[12]Most of these recommendations were given legislative effect through the Criminal Law (Amendment) Act 2013[13] and were inserted at appropriate places in the IPC.

Section 375 defines 'rape', while s 376 provide for punishment for the offence of 'rape'. Sections 376A to 376E deal with certain forms of sexual assaults on woman and stipulate punishment therefor. Section 377 deals with unnatural offences.

PART A - RAPE

Section 375. Rape.--A man is said to commit "rape" if he;--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions-- *First*.--Against her will.

Secondly.--Without her consent.

Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under eighteen years of age.

Seventhly.--When she is unable to communicate consent.

Explanation 1.--For the purposes of this section 'vagina' shall also include labia majora.

Explanation 2.--Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

*Provided*that a woman who does not physically resist to the act of penetration shall not by reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.--A medical procedure or intervention shall not constitute rape.

Exception 2.--Sexual intercourse or sexual act s by a man with his own wife, the wife not being under fifteen years of age, is not rape.

ESSENTIAL INGREDIENTS

Section 375 defines the offence of rape. The revised section 375 has widened the definition of rape. It, unlike its earlier version, not confined 'rape' merely to penile-vaginal penetration (in the circumstances specified thereunder), but is also extended to (i) penile-urethra, penile-oral, or penile-anal penetration; (ii) object-vaginal, object-urethra, or object-anal insertion; (iii) insertion of a part of body, other than the penis, in the vagina, the urethra or anus of a woman; (iv) manipulation of any part of body of a woman for causing vaginal, urethral or anal penetration, and (v) application by a man of his mouth to the vagina, urethra or anus of a woman or making her to do so with him or any other person.

Nevertheless, the offence of 'rape' retains, in essence, the idea of coercive non-consensual (as well as consensual in certain situations) 'sexual intercourse',[14] in an extended form, between a man and a woman in a set of specified circumstances. Its essence lies in the 'penetration', howsoever slight, of the penis, or 'insertion' of any object or part of body (other than the penis), or manipulation of any part of the body of a woman for penetration into the vagina, urethra, or anus of a woman.

The essential ingredients of the offence of rape are: (i) there must be sexual intercourse, as understood in terms of the provisions of s 375(a) to (d), with a woman by a man; (ii) such a sexual intercourse must be under any of the seven circumstances: (a) against her will; (b) without her consent; (c) with consent obtained under fear of death or of hurt; (d) consent given under misconception of fact that the man is her husband; (e) consent given by reason of unsoundness of mind, intoxication or under influence of any stupefying or unwholesome substance; (f) with a woman under eighteen years of age, with or without her consent; or (g) with a woman who is unable to communicate her consent.

A careful look at these 'circumstances' reveals that the first two clauses, namely, *first* and *secondly*, which deal respectively with sexual intercourse with a woman 'against her will' and 'without her consent', contemplate a conscious woman capable of exercising her will or giving (or withholding) her consent for the sexual act. The next two clauses, namely, *thirdly* and *fourthly*, which deal respectively with sexual intercourse with the consent of the woman obtained by putting her (or a person in whom she is interested in) in fear of death or hurt, or making her to believe that she is his wife, contemplate consent of a woman who is conscious but either afraid or under a misconception. The last two but one clauses, i.e. *fifthly* and *sixthly*, deal with the consensual sexual intercourse with a woman who is, due to either insanity or immaturity, mentally incapable of exercising her will or giving consent for the sexual intercourse. The last clause, i.e. *seventhly*, makes sexual intercourse with a woman who is unable to communicate her consent for sexual act, a rape.

'Sexual Intercourse'

Sexual intercourse, as perceived by s 375, IPC, implies 'penetration', to any extent, of the penis into the vagina, mouth, urethra or anus of a female. The phrase 'to any extent', used in the said provision, makes it evident that mere slightest or partial penetration of the male organ within the vagina, mouth, urethra or anus, as the case may be, is sufficient to constitute 'sexual intercourse'.[15] The depth of penetration of the penis is immaterial.[16] Mere fact that the private part of the accused did enter into the person of the woman is enough to constitute rape. It is not essential that there should be injuries on her private part[17] or her hymen should rupture[18] or he should ejaculate. Penetration, not ejaculation, is the *sine non qua* for the offence of rape.[19] Ejaculation without penetration constitutes an attempt to commit rape and not actual rape.[20] It is, therefore, not necessary to prove the completion of sexual intercourse by the emission of seed. Intercourse is deemed complete upon proof of penetration only.

The Supreme Court, in *State of Uttar Pradesh v Babulnath* ,[21] while delving into the essential ingredients of rape, observed:

> ... [T]o constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of Indian Penal Code , 1860.

> That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.[22]

In the backdrop of hitherto judicial pronouncements and trend, it is seemingly obvious that any slight non-penile-vaginal penetration, referred to in s 375 of the IPC,[23] like in the penile-vaginal penetration,[24] will be sufficient to meet the statutory requirement of 'insertion to any extent'.

'Against Her Will'

The first clause of s 375 stipulates that a man is said to have committed rape, if, he has sexual intercourse with a woman 'against her will'. The expressions 'against her will' and 'without her consent' appear synonymous. The terms 'will' and 'consent' often intermingle. An act done 'against will' can be said an act done 'without consent'.[25]An offending act is said to be done 'against will' of a woman when it is done despite her resistance and opposition.[26] When something is done against the will of the person, the element of active opposition is absent. 'Will' and 'consent', in spite of overlapping, are distinct. Though every act done 'against the will' of a person will also mean that it is done 'without the consent' of the person, an act done 'without the consent' of a person does not necessarily mean 'against the will'. 'Without consent' would denote an act being done in spite of opposition of the person. The element of active opposition will not be present when something is done against the will of the person.[27]

'Without Her Consent'

The second clause of s 375 stipulates that if a man has sexual intercourse with a woman 'without her consent', then it amounts to rape. Consent involves a voluntary act and conscious acceptance of what is proposed to be done by another and concurred in by the former. It implies the exercise of free and untrammeled right of the former to forbid or withhold what is being consented to.[28] Consent is an act of reason accompanied by deliberation,[29]a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in, cannot be deemed to be 'consent'. Consent means active will in the mind of a person to permit the doing of the act of and knowledge of what is to be done. It involves voluntary participation. There has to have voluntary agreement on part of the woman to willingly participate in the specific sexual act communicated to him by either words, gestures or any form of verbal or non-verbal communication. Mere absence of physical resistance to the act of penetration by itself cannot be taken as her consent for the sexual act.[30]

Consent supposes three things-a physical power to act, a mental power of acting, and a free and serious use of them.[31]Consent for the purpose of s 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but also after having fully exercised the choice between resistance and assent.[32]

Consent of a woman, to be an exonerating factor, must be 'unequivocal and voluntary' for participating in the specific sexual act. Withdrawal of the consent during the sexual act does not make the man guilty of rape. When a woman of full age gives her consent to a man for sexual intercourse prior to penetration, it is not rape, no matter how much force is subsequently used by him, no matter how much reluctance is developed by her subsequent to the penetration.[33] In this connection, it is, however, necessary to recall s 90 of the IPC, which states as to what does not amount to 'consent' under the Code. It runs as under:

> **Section 90. Consent known to be given under fear or misconception.--**A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or
>
> ***Consent of insane person*.--**if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
>
> ***Consent of child.--***unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

So, in a way, cll 2, 3, 4, 5 and 6 of s 375 only reinforce and repeat the provisions of s 90.[34]

Apart from these general provisions with regard to consent, s 114A of the Evidence Act, 1872, which was introduced in 1983 and revised in 2013, provides a presumption as to absence of consent in certain prosecution for rape.[35] According to this section, where sexual intercourse[36] by the accused is proved, and the question is whether it was without the consent of the woman and she states in her evidence before the court that she had not given consent, the court has to presume that consent was not given by her. This presumption holds good until it is rebutted by the accused.[37]

In *State of Maharashtra v Madhukar Narayan Mardikar* ,[38] the respondent was a police inspector, who had allegedly gone to raid a hutment as a measure against illicit trade in liquor. The respondent who was in uniform demanded to have sexual intercourse with one Banubi who was present in the hutment. On her refusal, he tried to do so by force. She resisted his attempt and raised a hue and cry. On her complaint, a departmental enquiry was initiated against the respondent. The respondent's plea was that Banubi was an unchaste woman and hence her evidence would be extremely unsafe to rely upon. With regard to that contention, the Supreme Court observed:

> Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.[39]

A woman, who, prior to the alleged non-consensual sexual intercourse, has lost virginity to someone or has been promiscuous in her sexual behaviour, has also a right to refuse to submit herself to sexual intercourse with anyone and everyone. She is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Even if she has lost her virginity earlier, it cannot certainly give a license to any person to rape her. Her virginity or promiscuous character is a totally irrelevant issue in a case of rape.[40] Sexual intercourse with a woman of loose moral character or who is sexually immoral 'without her consent' or 'against her will', therefore, amounts to rape.[41] The fact that the rape victim is used to sexual intercourse or is promiscuous does not necessarily warrant the view that she was a consenting party to sexual intercourse.[42]

'Consent Obtained under Fear of Death or of Hurt'

Clause (3) of s 375 stipulates that consent obtained by putting the woman or any person in whom she is interested, in fear of death or of hurt is not consent and hence, the act would amount to rape. The fear which led to her consent for sexual intercourse must be of death or of hurt to herself to another person she is interested in. Consent obtained by any fear other than of death or of hurt even to her or to a person in whom she is interested does not fall under the clause. The fear of death or of hurt addressed to a person other than the prosecutrix herself or a person she is interested in does come under the clause.

'Consent Obtained by Fraud'

By virtue of cll (4) and (5) of s 375 consent obtained by fraud is no consent. For instance, if a woman gives her consent for sexual intercourse on the bona fide assumption that a professional medical practitioner, through sexual intercourse, is medically treating her ailment; or a girl gives her consent for sexual intercourse to a professional singer teacher on the assumption that he, through sexual intercourse, is treating her breathing to enable her to sing properly; or, if a woman consents for sexual contact under the belief that he is her lawfully married husband, then such consent is not a valid consent under law. To attract the provisions of cl 4, it is, therefore, necessary to prove that the consent was given by the prosecutrix under belief that the accused was another person to whom she believed herself to be married. When consent is given by her for sexual intercourse in the belief that she had been married to the accused, the clause is not attracted.[43]

Is Promise to Marry the Victim a Misconception of Fact Vitiating her Consent?

If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 of the IPC cannot be put in service to pardon the act of the girl and fasten criminal liability on the perpetrator, unless the court can be assured that from the very inception the accused never really intended to marry her.[44] Consent given by the prosecutrix to sexual intercourse

with a person with whom she is deeply in love on a promise that he would marry her on a later date cannot be said to be given under a misconception of fact.[45] Sexual intercourse with a girl above sixteen years, who voluntarily agrees for sexual intercourse on assurance of marriage, does not amount to rape.[46] However, consent for sexual intercourse obtained by a false promise to marry is not a true consent.[47]A deliberate representation by the accused with a view to eliciting the assent of his victim without having any intention or inclination to marry her vitiates the consent. Hence, consent for sexual intercourse induced by the promise of marriage is not true consent, if it is proved that the accused from the very inception of making the promise had no intention to marry her. If his promise to marry is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual act s, the sexual acts premised on such consent do not amount to non-consensual.[48] Consensual sexual intercourse without any assurance of marriage does not amount to rape.[49] Mere breach of promise to marry without *mala fide* intention, however, does not amount to deception.[50] Invasion of person of prosecutrix, by indulging in sexual intercourse with her on a false promise of marriage, in order to appease his lust, all the time knowing that he would not marry her, is an act of braze fraud on his part. The consent obtained on such a promise is not a valid consent in law.[51]

A case of a married man, who enacts remarriage with another woman, without disclosing the fact of his earlier marriage, in a holy place and continues living with her as her husband and cohabits with her, falls under *fourthly* of s 375. In such a situation, the essence of the clause, i.e. the man knows that he is not her husband and the woman has been consenting for sexual intercourse believing that he is her husband, is met with. Such a sexual intercourse becomes non-consensual and it amounts to rape.[52]

A promise to marry after non-consensual sexual intercourse, however, does not absolve the perpetrator from liability. His subsequent promise to marry is of no consequence.[53]

Consent of an Insane or Intoxicated Woman

In *Tulshidas Kanolkar v State of Goa* ,[54] wherein the accused ravished a mentally-challenged girl on occasions more than one that resulted in her pregnancy, the apex court categorically held that consent given by mentally challenged girl cannot be said to be 'consent' for sexual intercourse as she is incapable of understanding the consequences of her consent. It observed:

> An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act . A girl, whose mental faculties are undeveloped, cannot be said in law, to have suffered sexual intercourses with consent.[55]

It also ruled that a rapist by sexually assaulting a mentally underdeveloped girl not only physically ravishes her but also exploits her mental non-development and helplessness.

Similarly, sexual intercourse under influence of drink cannot be said to be intercourse with consent.[56]

Consent of a Woman under Eighteen Years of Age

Clause (6) provides that sexual intercourse with a woman under eighteen years of age will amount to rape, whether it is done with or without her consent.[57] This is because the consent of a minor is no consent. Once it is proved that the girl was below eighteen years of age, the question of her consent becomes wholly irrelevant and sexual intercourse with her amounts to rape irrespective of her consent.[58]

Marital Rape--An Exception to 'Rape'

The *Exception 2* to s 375 states that non-consensual sexual intercourse by a man with his own wife, if she is over fifteen years, does not amount to rape. It, thus, keeps outside the ambit of 'rape' a coercive and non-consensual sexual intercourse by a 'husband' with his 'wife' (above fifteen years of age) and thereby allows a 'husband' to exercise, with impunity, his marital right of (non-consensual or undesired) intercourse with his 'wife'. It is believed that the husband's immunity for marital rape is premised on the assumption that a woman, on marriage, gives forever her consent to the husband for sexual intercourse. Her husband has the

right to have sexual intercourse with her, whether she is willing or not, and she is under obligation to surrender or submit to his will and desire. It also aims at the preservation of family institution by ruling out the possibility of false, fabricated and motivated complaints of 'rape' by 'wife' against her 'husband' and the pragmatic procedural difficulties that might arise in such a legal proceeding.[59]

However, sexual intercourse with a wife, whose marriage with him is void as he was already married and had a living spouse and who was aware of the fact of the first marriage, amounts to rape.[60]

Further, non-consensual sexual intercourse, in terms of the acts mentioned in s 375 (a) to (d), IPC, by a person with his own wife who is, under a decree of separation or otherwise, is living separately is made an offence under the IPC.[61] The punishment provided for non-consensual sexual intercourse by a man with his wife living separately is, however, compared to that is provided for consensual or non-consensual sexual intercourse with his own wife when she is below the age of fifteen years of age, which, by virtue of exception 2 to s 375 of the IPC, amounts to rape, is very mild.[62] No court is empowered to take cognizance of the offence of sexual intercourse by husband upon his wife during separation where the persons are in a marital relationship, except upon *prima facie* satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.[63]

PUNISHMENT FOR RAPE

Section 376. Punishment for rape.--

(1) Whoever, except in the cases provided for by sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,--

(a) being a police officer commits rape--
  (i) within the limits of the police station to which such police officer is appointed; or
  (ii) in the premises of any station house; or
  (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation .--For the purposes of this sub-section,--

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;
(b) "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;
(c) "police officer" shall have the same meaning as assigned to the expression 'police' under the Police Act, 1861;
(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Section 376 provides the punishment for rape. It consists of two sub-sections. The first sub-section is in respect of rape generally. The second sub-section deals with the instances of other forms of rape, which are, compared to the former, are subject to severe punishment.

According to the first sub-section, a person who is convicted of the offence of rape shall be punished with rigorous imprisonment for a term not less than seven years, but which may extend to imprisonment for life and fine.

Sub-section (2) of s 376 deals with the instances of:

(1) Rape committed by a police officer[64] on a woman in his custody[65] or in the custody of a police officer subordinate to him, within the limits of the police station where he is appointed or in the premises of any station house whether or not situated in the police station to which he is appointed.
(2) Rape by a public servant,[66] who rapes a woman when she was in his custody or in the custody of a public servant subordinate to him.
(3) Rape committed by a member of armed forces[67] in the area of his deployment.
(4) Rape committed on the inmates of any jail, remand home, place of custody or women's or children's institution,[68] by a person on the management or staff of such jail, remand home, place of custody, or institution, etc.
(5) Rape of a woman in a hospital by a person on the management or staff of the hospital.[69]
(6) Rape committed by a relative, guardian or teacher or a person in position of trust or authority towards the woman.[70]
(7) Rape during communal or sectarian violence.[71]
(8) Rape of a pregnant woman.--In order to ensure conviction of the accused it is necessary for the prosecution to prove that the prosecutrix was pregnant when the accused raped her and that he knew that she was pregnant. 'Mere possibility' or 'full possibility' of the accused knowing that she was pregnant when he had sexual intercourse with her is not sufficient to convict him.[72]
(9) Rape of a woman under sixteen years of age.--The provision is based on the presumptive premise that a girl below sixteen years of age is legally not in a position to give her consent for sexual intercourse. Consensual intercourse, therefore, amounts to (statutory) rape. Her consent in no way can absolve the accused. Consent of the prosecutrix becomes totally irrelevant.[73] The age of the prosecutrix at the time of so-called consensual sexual intercourse, and not her consent therefor, becomes a matter of crucial consideration.
(10) Rape on a woman, who is incapable of giving consent.-- This clause was inserted in 2013 to probably cover the situations other than that figure in s 376 of the IPC that negative consent of the prosecutrix. It seems to be a sort of residuary clause.

(11) Rape by a man on a woman under his control or dominance.-- This clause was also inserted in the provision in 2013 to bring in its ambit the sexual intercourse with a woman whose consent is obtained or given because of dominance of the accused over the prosecutrix.
(12) Rape on a woman suffering from mental or physical disability.
(13) Rape with causing grievous bodily harm, maiming, disfiguring, or endangering life of the woman.
(14) Repeated rape by a man on the same woman.

In all the above-mentioned instances, a minimum sentence of rigorous imprisonment for ten years, with fine, is provided. The term of ten years' imprisonment may extend to imprisonment for life, which means imprisonment for the remainder of the perpetrator's natural life.[74]

A comparative reading of both the sub-sections of s 376 of the IPC reveals three features of the revised s 376(2). First, it not only widens the ambit of 'rape' by adding thereto a few new forms of non-consensual sexual intercourse but also provides for stern punishment for the perpetrator. Secondly, it takes away the hitherto prevalent judicial discretion of awarding punishment lesser than the minimum punishment (i.e. rigorous imprisonment for a term of ten years) for 'adequate and special reasons'. Thirdly, it, like the pre-amended s 376(2), provides for imprisonment for life but it specifically makes mention that life imprisonment means 'imprisonment for the remainder of his natural life'.

It seems that the courts in India are also more inclined to record conviction and to impose stern punishment for committing rape.[75]The Supreme Court, prior to the 2013 Amendment Act, stressed:

> An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none reasonably exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females or minor children.[76]

The apex court also advised the courts subordinate to it 'to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women, particularly of tender age and children'. It stressed that 'cases of sexual crime against women need to be dealt with by courts sternly and severely'[77] and opined that 'a socially sensitised judge is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos'.[78]

Recently, the Supreme Court took another opportunity to inform the subordinate courts and High Courts that despite stringent provisions for rape, many courts in the past have taken a softer view while awarding punishment to perpetrators of such a heinous crime. The judicial trend, the court stressed, exhibits stark insensitivity to the need for proportionate punishment for perpetrators of rape.[79] It, however, warned them to be cautious as false charges of rape, motivated by personal or economic gains, are not uncommon. Persons accused of sexual assault also need protection from the false or engineered accusation of rape loaded with ill-motives or designs.[80] False allegation of rape, like a rape victim, causes a great distress, humiliation and damage to the accused.[81] Rape, being a monstrous burial of dignity of a woman in the darkness and a crime against the holy body of a woman and the soul of the society, warrants just punishment from the court and the courts are bound to respond, within legal parameters, to the demand. It is a demand for justice and award of punishment has to be in consonance with the legislative command and the discretion vested in the court.[82]

GANG RAPE

Section 376D. Gang rape.--Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

Section 376D, which derives its source from the pre-2013 amended section 376(2)(g) read with explanation 1 thereto, articulates the offence of gang rape in a better way, provides very severe punishment to perpetrator thereof, and mandates a court to order the payment of fine imposed to the victim of gang rape for her medical treatment and rehabilitation.

Where a woman is raped by one or more in a group of persons, each of the persons must be deemed to have committed gang rape, when it is committed, by one or more from the group, in furtherance of their common intention. The offence of gang rape embodies the principle of joint liability. The essence of the joint liability is the existence of common intention. Common intention pre-supposes prior concert or meeting of minds of all the persons constituting the group.[83] In *Bhupinder Sharma v State of Himachal Pradesh* ,[84] the Supreme Court held the appellant, one of the accomplices of gang rape, guilty of committing gang rape even though he, unlike other members of the group, could not sexually assault the victim as she escaped from the place of incident before he could perpetrate the act. However, the trial court convicted and ordered him, without giving any adequate and special reasons, to undergo rigorous imprisonment for four years while it sentenced the perpetrators of act ual rape to rigorous imprisonment for ten years. The high court, by issuing suo moto notice of enhancement of punishment, enhanced the appellant's sentence from rigorous imprisonment for four years to rigorous imprisonment for ten years [ie the minimum sentence provided under old s 376(2)]. The high court placed its reliance on expln 1 of s 376(2) [now s 376D] as well as s 114A of the Evidence Act, 1872 that provides for presumption as to absence of consent in certain prosecution for rape. The Supreme Court, in the special leave to appeal against the high court's judgment, upholding the high court's order and placing its reliance on expln 1, held that it is not necessary for the prosecution to adduce clinching proof of a completed act of rape by each one of the accused on the victim (or each one of the victims where there are more than one) in order to find accused guilty of gang rape and convict them under s 376. The apex court ruled that every member of such a group, acting in furtherance of common intention of the group, by virtue of the deeming explanation, per se deserves the minimum sentence stipulated in s 376(2).[85] Involvement of a group of persons is not necessary.[86]

In *Pradeep Kumar v Union Administrator, Chandigarh* ,[87] the Supreme Court has stressed that the prosecution is required to prove to bring the offence of rape as gang rape that: (i) there was a group of persons that decided to act in concert with the common intention to commit rape on the victim, (ii) more than one person from the group, in furtherance of the common intention, has acted or participated in concert in the commission of rape with pre-arranged plan, and (iii) one or more persons (not necessarily everyone) of the group, in pursuance of the common intention, has act ually committed the offence of rape. Every one of the group is deemed to have committed the rape. The essence of the liability is the existence of common intention. Mere presence of a person when rape was committed by another is insufficient to show that he had prior concert or meeting of mind with others and thereby to hold him guilty of gang rape.[88]

However, a woman, who happened to be a member of the group and has facilitated the commission of rape, cannot be held guilty of committing gang rape as she cannot commit the offence of rape. The expression 'in furtherance of their common intention' in the section 376 relates to intention to commit rape. A woman cannot be said to have an intention to commit rape.[89]

RAPE CAUSING DEATH OR RESULTING IN PERSISTENT VEGETATIVE STATE OF THE VICTIM

Section 376A. Punishment for causing death or resulting in persistent vegetative state of victim.--Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

Sections 376A is inserted in the IPC by the Criminal Law (Amendment) Act 2013. It criminalises the act of inflicting injury on a woman while raping her that results in her death or causes persistent vegetative state and provides for rigorous imprisonment for a term not less than twenty years, which may extend to imprisonment for remainder of his natural life. In this sense, s 376A constitutes one of the aggravated forms of rape.

REPEAT OFFENDER

Section 376E. Punishment for repeat offenders.--Whoever has been previously convicted of an offence punishable under Section 376 or Section 376A or Section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

Sections 376E , which is inserted in the IPC by the Criminal Law (Amendment) Act 2013, provides severe punishment for repeat offenders. A person, who is previously convicted of committing rape or inflicting, in the course of committing rape, injury that caused her death or resulted in persistent vegetative state of his victim or was guilty of gang rape, if subsequently found guilty of committing the same offence, will be punished with imprisonment for life, which means imprisonment for the remainder of his natural life, or with death.[90]

PUNISHMENT FOR CONSENSUAL SEXUAL INTERCOURSE NOT AMOUNTING TO RAPE

Section 376C. Sexual intercourse by a person in authority.--Whoever, being**--**

(a) in a position of authority or in a fiduciary relationship; or
(b) a public servant; or
(c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or
(d) on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1.--In this section, 'sexual intercourse' shall mean any of the act s mentioned in clauses (a) to (d) of section 375.

Explanation 2.--For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

Explanation 3.--"Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.--The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.

Section 376C is another new provision which is inserted in the IPC by the Criminal Law (Amendment) Act 2013. However, a careful reading of the provision reveals that it, in fact, covers the thematic pulse and phraseology of s 376B, s 376C, and s 376D of the pre-2013 IPC, which were deleted by the Amendment Act of 2013. These provisions, like the existing s 376C, dealt respectively with sexual intercourse by a public servant, superintendent of jail, remand home or any other place of custody, and a member of the management or staff of a hospital with a woman in his custody by using his official position to induce for the sexual act. Nevertheless, it distinguishes itself from the latter three sections, from which it drew its source, in two respects. It adds to the list of persons covered thereunder, a person 'in a position of authority or in a fiduciary relationship' and provides for enhanced punishment (rigorous imprisonment of either description for a term between five and ten years in lieu of a term up to five years).

Further, a distinction between the offence of rape contained in s 375, IPC, which is punishable under s 376(2), IPC, and the offence of sexual intercourse by a person in authority with a woman in the situations specified in ss 376B, 376C and 376D of the IPC (now re-worded and re-numbered s 376C) and punishable thereunder, is of worth noting. In the former, the sexual intercourse is with no consent at all of the prosecutrix, while in the latter sexual intercourse is with her consent which has been obtained by the doer by taking undue advantage of his position as a public servant or superintendent of jail or remand home or a member of the management or staff of a hospital. The latter, unlike the former, in s*tricto sensu*, does not amount to rape.[91]

For seeking conviction under s 376C, it must be proved that: (i) the accused is a person belonging to any of the four categories mentioned in clauses (a) to (d) thereof, namely, a person: (a) in a position of authority or in a fiduciary relationship, (b) a public servant,[92](c) superintendent of jail or remand home or a women's or children's institution, (d) a member of the management or staff of a hospital; (ii) he must take advantage of his official position; (iii) he must induce or seduce a woman; (iv) such woman must be in his custody[93] or under his charge or present in the premises; and (v) he must have sexual intercourse with her which does not amount to rape. Such a sexual intercourse must take place within the precincts of the place where the woman was in his custody.[94]

EVIDENCE OF PROSECUTRIX

In every rape case, the evidence of the prosecutrix is a very crucial piece of testimony to prove the case against the accused. Every rape victim in our country is viewed with a lot of suspicion and is also humiliated. More than the culprit, it is the rape victim who faces social stigma. Unfortunately, when a man is prosecuted for committing or attempting rape, the defence endeavors to show that the prosecutrix was of generally immoral character. Very often, it is used as a pretext to harass or humiliate the prosecutrix in the course of cross-examination.[95]

The testimony of victim in cases of sexual offences is vital and unless there are compelling reasons, which necessitate looking for corroboration for her statement, the court should find no difficulty to act on the testimony of a victim of sexual assault alone. The evidence of a girl or a woman who complains of rape or sexual molestation, should not be viewed with doubt, disbelief or suspicion. Her evidence is entitled to great weight even without corroboration. A victim of sexual assault is not an accomplice of the crime[1] and is a victim of another man's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.[2] Her statement has to be evaluated on par with that of an injured witness in cases of physical violence.[3] In fact, testimony of a rape victim stands on a higher pedestal than that of an injured witness for the reason that an injured witness suffers only physical injuries, whereas the prosecutrix suffers psychologically and emotionally too.[4] Sexual assault causes greatest distress and humiliation to her. Ordinarily, no injured witness tells a lie or implicates a person falsely.[5]Refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule is adding to the insult to injury.[6] Viewing to the evidence of a victim of rape with the aid of spectacles fitted with lenses tainted with doubt, disbelief or suspicion justifies the charge of male chauvinism in a male dominated society. In fact, the very nature of the offence of sexual assault negatives the possibility of finding direct witnesses and courts should not insist for it unless probability factor is found to be out of tune.[7]

It is now well settled that conviction for an offence of rape can be based on the sole testimony of prosecutrix, if it is found to be natural, trustworthy and worth being relied on. The apex court has repeatedly asserted that a court can rely upon the evidence of the prosecutrix, even without seeking corroboration, if it seems natural[8] and inspires confidence.[9]

A court should not seek for corroboration of the prosecutrix testimony unless there are some compelling reasons.[10] If for some reason the court finds it difficult to place implicit reliance on her testimony, it has to look for evidence, direct or circumstantial, that may lend assurance to her testimony short of corroboration required in the case of accomplice.[11] If the totality of the circumstances appearing on record discloses that the prosecutrix does not have a strong motive to falsely implicate the person charged, the court should ordinarily have no hesitation in accepting her testimony.[12] If facts and circumstances appearing on record indicate that there is a strong motive of the prosecutrix to falsely implicate the accused, the court should seek for some collaborative evidence.[13] In such a situation, it is a duty of the court to evaluate such evidence with care and

circumspection, and rely thereon only when the court is satisfied that her testimony is creditworthy.[14] There is no rule of law that testimony of prosecutrix cannot be act ed without corroboration in material particulars.[15] In *State v Dayal Sahu* ,[16] the Supreme Court, reversing the acquittal order of the high court, recorded conviction of the accused solely on the confidence inspiring testimony of the prosecutrix. The apex court observed:

> Once the statement of prosecutrix inspires confidence and is accepted by Court as such, conviction can be based on the solitary evidence of the prosecutrix and no corroboration would be required... Corroboration of the testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence.[17]

However, a court is not required to accept testimony of prosecutrix if her story is improbable and belies logic.[18] Such an acceptance goes against the hitherto recognized principles governing appreciation of evidence in a criminal matter.[19] Nevertheless, a court must not assume that her testimony is always correct and free from embellishment or exaggeration. It cannot be taken as a gospel truth in all circumstances and with no exceptions.[20] A court needs to remind itself that persons accused of sexual assault also need its protection from false accusation or implication. False charges or rape, loaded with ill-motives, are not uncommon. Her statements must be examined in the light of the principles governing testimony of injured witness and of the need to protect accused from false implication. Circumstances and facts of the case at hand, which need to be scanned carefully, would exhibit as to whether the prosecutrix was raped or not.[21]

The court has to appreciate evidence in totality of the circumstances. If there appears some contradictions or variations between different exhibits, medical and ocular evidence, the court has to remind itself that minor inconsistency or variation in the medical and ocular evidence, as a rule, does not tilt the balance of justice in favour of the accused. Minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eye-witnesses, the testimony of the eyewitnesses cannot be thrown out. The court, normally, has to look at expert evidence with a greater sense of acceptability, unless it is perfunctory, unsustainable and is the deliberate attempt to misdirect the prosecution. Only where contradictions and variations are of serious nature, which apparently or impliedly are destructive of the substantive case sought to be established by the prosecutrix, prove advantageous to the accused.[22]

Propriety of the hitherto employed 'two-finger test' (i.e. admission of two fingers in the vagina freely or with difficulty) for medically ascertaining as to whether rape victim was habituated to sexual intercourse and hymen was ruptured or intact has been questioned by the Supreme Court. It has asserted that the test and its interpretation violates right to privacy, physical and mental integrity and dignity of the prosecutrix guaranteed under art 21 of the Constitution. The test, even if the report is affirmative, according to the court, cannot ipso facto give rise to the presumption of her consent for the sexual act.[23]

DISCLOSURE OF IDENTITY OF RAPE VICTIMS

Section 228A. Disclosure of identity of the victim of certain offences, etc.--

(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under Section 376,Section 376A, Section 376B, Section 376C, Section 376D or Section 376E is alleged or found to have been committed (hereinafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is--

- (a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence act ing in good faith for the purposes of such investigation; or
- (b) by, or with the authorisation in writing of, the victim; or
- (c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next-of-kin of the victim:

Provided that no such authorisation shall be given by the next-of-kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.

Explanation.--For the purpose of this sub-section, 'recognised welfare institution or organisation' means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a Court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation.--The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

This section has been inserted by the Criminal Law (Amendment) Act 1983, with a view to protect identity of rape victims from public glare. In our country, the stigma attached to a rape victim is much more than the stigma attached to a person accused of rape. There have been instances, where sensitive cases have been sensationalised to the detriment of the rape victims. In order to protect their interest, this section has been enacted which makes the publishing or revealing the identity of any rape victim an offence. However, proceedings of police officials in charge of investigation and a publishing or printing of judgments of high courts or the Supreme Court is excluded from the provisions of this section.[24] The section also protects publication made with the consent of the victim in writing or the guardian of the victim, where the victim is a minor or a person of unsound mind. But, even such authorisation shall be given only to a recognised social welfare institution.

The Supreme Court, keeping in view the legislative intent of s 228A and the social victimisation and ostracisation of the victim of sexual assault, on occasions more than one,[25] has advised the high courts and lower courts not to indicate the name of the victim of sexual assault in their judgments even though the statutory restriction is not applicable to printing or publication of their judgments.

ASSISTANCE TO VICTIMS OF RAPE

In *Delhi Domestic Working Women's Forum v Union of India* ,[26] the Supreme Court, highlighting ordeals of victims of rape and defects in the present criminal law system vis--vis victims of rape, outlined a set of broad parameters to assist them. They are:

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in the court, but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, counseling through medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station, represents her till the end of the case;

(2) Legal assistance will have to be provided at the police station, since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she is being questioned, would be of great assistance to her;

(3) The police should be under a duty to inform the victim of her right to representation, before any questions were asked of her, and that the police report should state that the victim was so informed;

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable;

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient movement, but in order to ensure that victims were questioned without undue delay,

advocates would be authorised to act at the police station before leave of the court was sought or obtained;

(6) In all rape trials, anonymity of the victims must be maintained, as far as necessary;

(7) It is necessary, having regard to the directive principles contained under art 38(1) of the Constitution of India , to set up criminal injuries compensation board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment;

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the criminal injuries compensation board, whether or not a conviction has taken place. The board will take into account the pain, suffering and shock, as well as loss of earnings due to pregnancy and the expenses of childbirth, if this occurred as a result of the rape.[27]

The Supreme Court has also resorted to public law remedies to compensate victims of rape.[28] It has also invoked its extra-ordinary jurisdiction under art 136 of the Constitution for deciding adequacy or otherwise of ex gratia compensation (of two lac Rupees) paid by State to two victims of gang rape (by sixteen persons) and directing the State to pay adequate compensation (of eight lac Rupees) to them, though admitting that that no amount of compensation, as a matter of fact, can compensate the traumatic stress which a gang rape victim undergoes every moment of her life, and restore her dignity.[29]The Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) has added s 357A, dealing with 'victim compensation scheme', in the CrPC. All State Governments, in co-ordination with the Central Government, are required to prepare a scheme for victim compensation. On recommendation by the court for compensation, the District Legal Service Authority or the State Legal Service Authority is mandated to decide the quantum of compensation to be awarded under the Scheme. A court is allowed to pass, at the conclusion of the trial, a compensation order in favor of the crime victim when it is satisfied that the compensation awarded under s 357 of the CrPC is not adequate for rehabilitation of the victim or where the case ends in acquittal or discharge and the victim has to be rehabilitated. There is also a provision for relief after inquiry by the State or District Legal Service Authority in those cases where no trial takes place because the offender cannot be traced or identified, but the victim is identified.

It is worth to recall that fine imposed on perpetrators of gang rape has not only to be just and reasonable to meet the medical expenses and rehabilitation of the victim, but it also is required to be paid to the victim.[30] And the compensation payable by the State Government (under s 357A, CrPC) is in addition to the payment of fine payable to the victim of gang rape (under s 376D, IPC).[31]

The State or District Legal Services Authority, as the case may be, with a view to alleviating the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost to the victim.[32] All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, are statutorily obliged to provide the first-aid or medical treatment, free of cost, to the victims of rape.[33] And when a person in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, in contravention of his statutory obligation, fails to provide the first-aid facility or medical benefits, will be punished with imprisonment for a term up to one year or with fine or with both.[34]

PART B - UNNATURAL OFFENCES

Section 377. Unnatural offences.--Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Section 377 punishes unnatural carnal intercourse and corresponds to the offences of sodomy and bestiality under the English law. Under this section, consent is wholly irrelevant. The party consenting would be equally liable as an abettor. By virtue of *explanation* appended to it, penetration, as in the case of rape, howsoever minimal it be, is required to constitute the 'carnal intercourse'. Voluntary 'carnal intercourse against the order of nature' with a man, woman or animal evinced by 'penetration' is essential to attract s 377.

However, the key terms, 'carnal intercourse' and 'penetration', are not defined in the IPC.

In 1969, the Kerala High Court was invited to interpret 'carnal intercourse' and 'penetration'. It was called upon to decide as to whether an act of inserting a male organ between the thighs kept together and tight amounts to a 'carnal intercourse against the order of nature' and thereby the doer comes within the clutches of 'unnatural offences'. The high court, offering a very wide interpretation to 'intercourse', held that an act of inserting the male organ between the thighs of another amounts to an unnatural offence contrary to s 377. Delving into the terms 'intercourse' and 'penetration' for the purpose of s 377 and justifying its stand, the court observed:

> ...[T]he word intercourse... is the temporary visitation of the organism by a member of the other organisation... .[T]here is no intercourse unless the visiting member if enveloped at least partially by the visited organism, for intercourse connotes reciprocity. Therefore, to decide whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs, the thighs are kept together and tight.[35]

Subsequently, the Madras High Court, inter alia, was also urged to adjudicate as to whether 'manipulation and movement of the penis' whilst being held by a minor boy 'in such a way as to create an orifice like thing for making the manipulated movement of insertion and withdrawal up to the point of ejaculation of semen' comes within the sweep of 'unnatural' carnal intercourse. The high court, relying heavily upon the *Kundumkara Govindan* dictum of the Kerala High Court, observed:

> ...[T]he male organ of the petitioner is said to be held tight by the hands of the victims, creating an orifice like thing for manipulation and movement of the penis by way of insertion and withdrawal. In the process of such manipulation, the visiting male organ is enveloped at least partially by the organism visited, namely, the hands which held tight the penis. The sexual appetite was thus quenched by the ejaculation of semen into the hands of the victims.... [T]he overt act s (of the petitioner)... have to be construed as falling within the ambit and sweep of Section 377 , IPC ....[36]

A reading of s 377 and judicial pronouncements thereon, though scanty, reveals that penile-anal, penile-oral or penile-animal penetration, howsoever slight it be, constitutes the 'carnal intercourse' against the order of nature under s 377.

Penile-anal penetration (sodomy), as held by the courts in India, undeniably comes within the ambit of s 377, as it is carnal intercourse against the order of nature.[37]

A reading of the Delhi High Court's opinion in the *Smt Sudesh Jhaku* case[38] also reveals that penile-mouth penetration amounts to an act contrary to s 377. In *Calvin Francis v State of Orissa* ,[39] the Orissa High Court also held the person guilty of carnal intercourse against the order of nature when he put his sex organ into victim's mouth.

Bestiality, penal-animal penetration, also attracts the provisions of s 377.[40]

It is significant to note that it is, like in rape cases, not required for a court to seek, as a rule, corroboration for testimony of a victim of unnatural offences, if it is reliable and cogent. The rule regarding non-requirement of corroboration is equally applicable to a case relating to s 377 of the IPC.[41]

CONSTITUTIONAL VALIDITY OF S 377

In *Naz Foundation v Government of NCT of Delhi* ,[42] the constitutional validity of s 377 was challenged in the Delhi High Court by Naz Foundation, a NGO. Naz contended that s 377, on account of covering consensual sexual intercourse between two adults in private, is violative of the fundamental rights guaranteed in arts 14, 15, 19 and 21 of the Constitution. It stressed that s 377, in essence, goes against the spirit of the right to personal liberty [encompassing the right to privacy, the right to dignity, individual autonomy] and to equality before law [prohibiting any classification based on irrational rationale] guaranteed under art 21 and art 14 of the Constitution, respectively. Section 377, it argued, is violative of art 15 of the Constitution as it criminalizes homosexual act ivity on the basis of mere sexual orientation. Section 377, by prohibiting homosexuality, Naz asserted, infringes the basic freedoms guaranteed under art 19(1)(a)(b)(c) as individual's ability to make personal statement about his sexual preferences, right to associate or assemble and the right to move freely

(with gays) so as to engage in homosexual conduct is curtailed or restricted. Naz, therefore, urged the High Court to, through judicial interpretation of s 377, decriminalize 'unnatural' sexual intercourse between two consenting adults in private, and to limit it only to non-consensual penile non-vaginal sexual intercourse and penile non-vaginal sex involving minors.

The Union of India, represented by its Ministry of Home Affairs and Ministry of Health & Family Welfare, resisted the claim of the petitioner and pressed for its retention. However, the two Ministries of the Centre strangely took contradictory stands. The Ministry of Home Affairs sought to justify the retention of s 377, while the Ministry of Health & Family Welfare, supporting claim of the Petitioner, stressed that the presence of s 377 in the statute book has hampered the HIV/AIDS prevention efforts, and that its deletion would help NGOs working among HIV/AIDS patients to fight against the killer-disease among homosexuals. The Home Affairs Ministry justified its existence in the Code on the ground of public health, public morality, public disapproval, and social disgust of the act. Its decriminalization, the Ministry pressed, would be against the prevailing sexual *mores* in India. It contended that no right, including the fundamental rights, can be absolute. The Constitution permits reasonable restrictions on the fundamental rights on the ground of decency, morality, and public health. The restriction on homosexual act through s 377, therefore, is justified.

After undertaking extensive examination of arguments and counter-arguments of the parties, in the light of appropriate constitutional provisions & aspirations; judicial pronouncements and juristic opinions from home and abroad; moral justifications for and against (de)criminalization of consensual homosexuality,[43] and reforms carried out in the overseas law relating to sexual act between two willing adults in private, the Delhi High Court accepted all the contentions of the petitioner. It declared s 377 partly *ultra vires* to the Constitution. It ruled that s 377, insofar it criminalizes consensual sexual acts of adults, (i.e. persons of or above 18 years) in private, is, being violative of arts 21, 14 and 15 of the Constitution, unconstitutional. Nevertheless, it, as stressed by the petitioner NGO, ruled that the provisions of s 377 will still continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.

However, some public-spirited individuals and organizations, doubting constitutional propriety of the *Naz Foundation* dictum, have approached the Supreme Court urging it to restore s 377 as it stands originally. Interestingly, during the initial hearing of the matter in the Apex Court, conflicting stand of the Attorney-General's Office and the Union Government resurfaced. The former argued against the *Naz Foundation* dictum, while the Union Government, through a Cabinet decision, decided not to contest the matter.

In *Suresh Kumar Koushal v NAZ Foundation* ,[44] the Supreme Court, after hearing equally forceful arguments for and against the retention of s 377 in the IPC, has overruled the *Naz Foundation* Dictum of the Delhi High Court and thereby upheld the constitutional validity of s 377 of the IPC. It ruled that s 377, IPC, does not offend either of the provisions of arts 14, 15 and 21 of the Constitution. It does not suffer from the vice of unconstitutionality.

There are two classes of people, those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature, and, the court argues, the people falling in the latter category cannot claim that s 377 suffers from the vice of arbitrariness and irrational classification. Section 377 does not criminalize a particular people or identity or sexual orientation. It merely identifies and prohibits carnal intercourse against the order of nature and provides punishment therefor. It merely regulates sexual conduct of persons regardless of gender identity and sexual orientation. The Delhi High Court, according to the apex court, while reading s 377, also overlooked the fact that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and a very negligible number of persons have been prosecuted for committing the offence contrary to s 377. Such a fact cannot be made sound basis for declaring s 377 unconstitutional. The High Court therefore was not right in holding s 377 violative of the provisions of arts 14, 15 and 21 of the Constitution.[45] Constitutionality of the right to liberty, privacy and autonomy, that can obviously be read under art 21 of the Constitution, needs to be judged in the backdrop of not only of the legislated right itself but also of the provision that purports to limit or restrict the right. Any purported restriction must be just, fair and reasonable. Mere possibility of abuse of law by authority does not per se invalidate it or furnishes a ground for holding it unconstitutional. The mere fact that the police have used s 377 to perpetrate harassment, blackmail or torture on sexual minorities, particularly LGBT community, cannot be used to assail constitutionality of the said provision.

The Supreme Court referred to, and relied upon, a plethora of its earlier judicial pronouncements to rule that s 377 is intra vires. Expressing its displeasure over reliance by the Delhi High Court on foreign judicial opinions, the Supreme Court observed that: 'in its anxiety to protect the so-called rights of LGBT persons and to declare that section 377Indian Penal Code violates the right to privacy, autonomy and dignity, the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding constitutionality of the law enacted by the Indian legislature.'[46] Recalling the 'presumption of constitutionality' in favour of legislation, the apex court reminded higher courts to be reluctant to declare a law invalid or ultra vires on account of unconstitutionality and advised then to resort to 'the principle of reading down or reading into' the provision to make it effective, workable and ensure the attainment of the object of the Act . Declaring the law unconstitutional is one of the last resorts taken by courts.[47]

PART C - PROPOSALS FOR REFORM

RAPE

The Fifth Law Commission pondered upon the definition of 'rape' vis--vis 'consent' of the woman in the light of s 90 of the IPC and sexual intercourse by a man with his wife under the stipulated age (marital rape) and separated wife. It suggested that the offence of rape should be split into three categories: (i) rape proper (rape on a woman other than wife); (ii) rape on a child wife (wife below twelve) & a separated wife, and (iii) statutory rape (consensual sexual intercourse with a girl below the stipulated age). Its proposals for reform are:

(1) Clause *thirdly* of s 375, which, according to it, is not in tune with s 90, IPC, should be revised to bring within its ambit also the consent of the victim obtained by putting 'anyone else present at the place' 'in fear of death or of hurt'.
(2) Sexual intercourse by a man with his wife against her will or without her consent (i.e. marital rape) should not be called rape 'even in a technical sense' and it should be taken out of the ambit of s 375 and should be made punishable under a separate provision.
(3) A new section penalizing sexual intercourse by a man with his 'child wife' and 'judicially separated wife' should be added to the Code.
(4) An illicit intercourse with a girl below sixteen years, even with her consent, should be made punishable with simple or rigorous imprisonment for a term up to seven years.

However, in the eighties, when the increasing incidence of rape and frequent liberal and pro-accused judicial interpretations of provisions of ss 375 and 376 evoked intensive lobbying by pro-women activists and organizations for bringing drastic changes in the rape law, the Government of India, in 1980, requested the Ninth Law Commission to suggest substantive as well as procedural reforms in the law relating to rape. Prominent proposals of the Ninth Law Commission are:

(1) The proposed 'restructuring' of s 375 (by splitting it into three categories of rape) suggested by the Fifth Law Commission should not be carried out as it would not only be 'out of tune with the current thinking on the question of trial of offenders for rape' but also would 'produce uncertainty and distortion in s 375'. Therefore, it omitted the proposed provision dealing with sexual intercourse with child wife and another one dealing with illicit intercourse with a girl between 12 and 16 years from its recommended revised s 375.

However, the Fifteenth Law Commission simply refused to recommend criminalization of marital rape on the ground that 'it may amount to excessive interference with the marital relationship'. Similarly, appreciating the force of the argument of Sakshi but refusing to 'ignore the fact that even in such a case (wife living separately under a decree of separation or under any custom or usage) the bond of marriage remains unsevered', it recommended that s 376A should be retained in the IPC. Nevertheless, it recommended an enhanced punishment (an imprisonment for a term between two to seven years) for sexual assault by a husband on his wife living separately.

In 2000, Sakshi,[48] in its deliberations with the Fifteenth Law Commission, which was directed by the Supreme Court to review rape laws, pleaded that forced sexual intercourse by a husband with his 'wife' and 'separated wife' should be treated as offence. It also contended that s 376A, which provides a lesser punishment to a husband who sexually assaults his wife living separately under a decree of separation or under any custom or usage, is arbitrary and discriminatory as it, ultimately, discriminates between a husband, who sexually assaults his wife living separately, and a man who sexually assaults a woman. The deletion of s 376A, according to Sakshi, would make the husband, in such a case, punishable under s 376(1) which carries higher punishment than s 376A.[49]

The Justice JS Verma Committee, taking note of the fact that the exemption of marital rape, which stems from the idea that a wife is deemed to have consented at the time of the marriage to have sexual intercourse with her husband at his whim and such a consent cannot be revoked by her, has been withdrawn in England and other major jurisdictions, has recommended that (i) the marital rape exemption should be removed from the IPC, and (ii) the law should specify that: (a) a marital or other relationship between the perpetrator and victim is not a valid defence against the crimes of rape or sexual violation; (b) the relation between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual act ivity, and (c) the fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentence for rape. And marriage should not be regarded as extinguishing the legal and sexual autonomy of wife.[50]

UNNATURAL OFFENCES

The Fifth Law Commission, referring to the ongoing controversy about decriminalisation of homosexual acts and recalling the public opinion about it in India, recommended decriminalisation of bestiality, as it is a pathological manifestation of the perpetrator. It also felt that the punishment (life imprisonment or imprisonment of either description for a term up to 10 years) provided for unnatural offences under the IPC is 'very harsh' and 'unrealistic'. It suggested leniency in the punishment for buggery. However, it recommended a comparatively longer term of imprisonment for such an unnatural sexual assault on a minor girl or boy by an adult.

Clause 160 of the Indian Penal Code (Amendment) Bill 1978, drafted on the lines suggested by the Fifth Law Commission, sought to substitute the existing s 377 of the IPC.

The Fourteenth Law Commission, endorsing the Fifth Law Commission's proposal for reform and the consequential clause 160 of the 1978 Bill and recalling the growing incidence of unnatural sexual assaults on minor children, however, recommended that a mandatory minimum sentence of imprisonment for a term not less than two years (which may extend to seven years) should be provided for unnatural sexual assault on a minor person. The Commission, however, proposed that a court, for adequate special reasons to be recorded in the judgment, should be allowed to reduce the recommended mandatory minimum sentence.[51]

However, the Fifteenth Law Commission, in its One Hundred and Seventy-second Report on the Review of Rape Laws, in the light of its proposals for reform in s 375 and proposed s 376-E, dealing with unlawful sexual conduct, recommended that s 377 should be deleted from the IPC and the persons having voluntary carnal intercourse with any animal should be left to their just deserts.[52]

In *Suresh Kumar Koushal v NAZ Foundation* ,[53] the Supreme Court overruled the *Naz Foundation* Dictum of the Delhi High Court and thereby upheld the constitutional validity of s 377 of the IPC.

1 *Bhupinder Sharma v State of Himachal Pradesh* AIR 2003 SC 4684, (2003) 8 SCC 551; *Aman Kumar v State of Haryana* AIR 2004 SC 1497, (2004) 4 SCC 379; *State of Madhya Pradesh v Santosh Kumar* (2006) 6 SCC 1, 2006 Cr LJ 3636(SC) .

2 Criminal Law (Amendment) Act 1983 (Act No 43 of 1983). It came into effect on 25 December 1983.

3 Criminal Law (Amendment) Act 2013 (Act No 13 of 2013). It came into operation from 3 February 2013.

4 *Tukaram v State of Maharashtra* AIR 1979 SC 185.

5 *Nirbhaya* gang rape case that occurred on December 16, 2012.

6 The 1983 Amending Act widened the ambit of 'rape' and provided stiffer punishments therefor. It stipulated a mandatory minimum sentence of seven years imprisonment, which may be extended to a term of ten years or for life. It also made gang rape, custodial rape and rape on a pregnant woman, offences, and subjected them to rigorous imprisonment for a term not less than ten years, which may be extended to life imprisonment. It mandated a court desiring to impose punishment lesser than the mandatory minimum one to give 'adequate and special reasons' therefor. For consequences of the amendment see, *Mohan Anna Chavan v State of Maharashtra* (2008) 7 SCC 561, JT 2008 (7) SC 51.

7 AIR 1979 SC 185.

8 See Gazette of India, Extraordinary, Part II, s 3, sub-s (ii), dated 24 December 2012.

9 Government of India, *Report of the Committee on Amendments to Criminal Law* (Government of India, 2013),

10 Ibid, chapter 3: Rape and Sexual Assault.

11 Ibid, chapter 3: Rape and Sexual Assault.

12 Ibid, see chapter 4: Sexual Harassment at Workplace; chapter 5: Other Offences against Women; chapter 6: Trafficking of Women and Children; chapter 7: Child Sexual Abuse; chapter 9: Sentencing and Punishment.

13 It came into force on 3 February 2013.

14 The expression 'sexual intercourse' used in the two penal clauses, namely s 376B and 376C, is given meaning in terms of the act s mentioned in clauses (a) to (d) of s 375 of the IPC. See explanation to s 376B and explanation 1 to s 376C. Same meaning can also be attributed to 'sexual intercourse' appearing in s 375 exception 2 by reading in the light of s 376B.

15 *Madan Gopal Kakkad v Naval Dubey* (1992) 3 SCC 204; *Veer Bahadur v State* (1995) Cr LJ 3169(Del) ; *Ramkripal v State of Madhya Pradesh* (2007) 11 SCC 265, (2007) Cr LJ 2302(SC) ; *Satyapal v State of Haryana* (2009) 6 SCC 635, AIR 2009 SC 2190.

16 *Wahid Khan v State of Madhya Pradesh* (2010) 2 SCC 9; *Parminder @ Ladka Pola v State of Delhi* (2014) 1 SCALE 368, (2014) 2 SCC 592.

17 *Fateh Chand* v *State of Haryana*, (2009) 15 SCC 543, AIR 2009 SC 2729.

18 *Guddu* v *State of M.P.*, (2007) 14 SCC 454, 2006 (5) SCALE 238; *Rajendra Datta Zarekar* v *State of Goa*, AIR 2008 SC 572, 2008 Cr LJ 710(SC) .

19 *Aman Kumar v State of Haryana* AIR 2004 SC 1497, (2004) 4 SCC 379; *Tarkeshwar Sahu v State of Bihar (now Jharkhand)* (2006) 8 SCC 560, 2006 (10) SCALE 45.

20 *Ramkripal Shyamlal Charmarkar v State of Madhya Pradesh* (2007) 11 SCC 265, 2007 Cri LJ 2302(SC) .

21 (1994) 6 SCC 29.

22 Ibid, para 8. Reiterated with approval in: *Koppula Venkat Rao v State of Andhra Pradesh* AIR 2004 SC 1874, (2004) 3 SCC 602; *Tarkeshwar Sahu v State of Bihar (now Jharkhand)* (2006) 8 SCC 560, 2006 (10) SCALE 45.

23 Section 375 (b), IPC.

24 The *Sudhesh Jhaku*fact-scenario, which the Delhi High Court declined to read as 'sexual intercourse' under the earlier version of the Indian Penal Code 1860s 375, if re-enacted, would certainly fit into the legislative framework of the revised s 375 (a) to (d), IPC. The fact scenario, as reported, was: a father of three daughters, an Under-Secretary in the Ministry of Home Affairs, used to take his youngest (minor) daughter to his office and from there to a hotel in the evenings. There he, along with his other colleagues, in company of the girl, used to consume alcohol and watch 'blue films'. While watching the films, he would make his daughter to consume alcohol, remove her clothes, and thrust his fingers in her vagina and anus. At home also he used to, after stupefying his other two daughters and the wife and consuming alcohol with some 'white tablets', bring the daughter to the drawing room. Then he would make himself naked and the daughter too and make her to suck his penis. The CBI charged him under the Indian Penal Code 1860ss 376 (punishment for rape), 377 (unnatural offences), 354 (outraging modesty of a woman), & 366A (seducing a minor girl for illicit intercourse), read with the Indian Penal Code 1860s 109 (abetting an offence). However, the Additional Sessions Judge charged him under the Indian Penal Code 1860ss 354, 377 and 506 (punishment for criminal intimidation) and his colleagues under the Indian Penal Code 1860ss 354 and 377. The Delhi High Court refused to accept the plea of the mother of the child that her accused-husband be charged and prosecuted for committing rape by giving wider interpretation to the expressions 'sexual intercourse' and 'penetration' appearing in the pre-revised version of s 375 of the Indian Penal Code 1860. See,*Sudhesh Jhaku v KCJ* (1998) Cr LJ 2428(Del) .In *Sakshi v Union of India* AIR 2004 SC 3566, (2004) 5 SCC 518, the Supreme Court also declined to read any non-penile-vaginal penetration, such as finger-vaginal, finger-anal, and object-vaginal, in the expression 'sexual intercourse' to avoid, in the interest of the society at large, chaos and confusion in the law dealing with rape.

25 *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203, (2005) 1 SCC 88.

26 *Pradeep Kumar Verma v State of Bihar* AIR 2007 SC 3059; *Kaini Rajan v State of Kerala* (2013) 9 SCC 113, (2013) Cr LJ 4888(SC) .

27 *State of Uttar Pradesh* v *Chhoteylal*, (2011) 2 SCC 550, AIR 2011 SC 697.

28 *Rabinarayan Das v State of Orissa* (1992) Cr LJ 269(Ori) .

29 *Kaini Rajan v State of Kerala* (2013) 9 SCC 113, (2013) Cr LJ 4888(SC) .

30 Section 375 , explanation 2, IPC.

31 *Uday v State of Karnataka* (2003) 4 SCC 46; *Pradeep Kumar @ Pradeep Kumar Verma v State of Bihar* (2007) 7 SCC 413, AIR 2007 SC 3059.

32 Re *Anthony*AIR 1960 Mad 308; *Arjan Ram v State of Punjab* AIR 1960 Punj 303; *Gopi Shankar v State of Rajasthan* AIR 1967 Raj 159; *Bhimrao Harnooji Wanjari v State of Maharashtra* (1975) Mah LJ 660; *Vijayan Pillai v State of Kerala* (1989) 2 Ker LJ 234; *State of Himachal Pradesh v Mange Ram* AIR 2000 SC 2798, (2000) 7 SCC 224; *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203; (2005) 1 SCC 88; *State of Uttar Pradesh* v *Chhoteylal*(2011) 2 SCC 550, AIR 2011 SC 697; *Dilip v State of Madhya Pradesh* (2013) Cr LJ 2449(SC), (2013) 6 SCALE 264; *Rop Singh v State of Madhya Pradesh* (2013) 7 SCALE 761, (2013) 7 SCC 89.

33 *Jarnail Singh v State of Rajasthan* (1972) Cr LJ 824(Raj) .

34 For further discussion see ch 12: Consent and Compulsion, above.

35 Ie under s 376(2)(a) to (n), IPC.The presumption is based on the reasoning that no self-respecting woman can make a false statement about sexual assault on her. See *Ranjit v State* (1998) 8 SCC 635.The reasoning becomes more powerful when she is sexually assaulted by a number of persons simultaneously. No woman can be a consenting party for such sexual intercourse. See *Md Iqbal v State of Jharkhand* AIR 2013 SC 3077, (2013) 9 SCALE 686.In the light of this presumption, the burden of proof that the prosecutrix consented for the sexual act lies on the accused. See *State of Himachal Pradesh v Mange Ram* AIR 2000 SC 2798, (2000) 7 SCC 224; *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 203; (2005) 1 SCC 88; *Bipul Medhi v State of Assam* (2008) Cr LJ 1099(Gau) ; *State of Rajasthan v Roshan Khan* (2014) 2 SCC 476, (2014) Cr LJ 1092(SC) .This presumption, however, in ultimate analysis, exhibits an interesting facet of rape *vis--vis* innocence of the accused and burden of proof. In case of 'rape' falling under s 376(1), unlike that is covered under s 376(2)(a)-(n), the accused is considered innocent until it is otherwise proved beyond reasonable doubt by the prosecution. The onus of proof lies on the prosecution to prove that the sexual act in question was non-consensual. This onus never shifts on the accused. See *Ganga Singh v State of Madhya Pradesh* AIR 2013 SC 3008, (2013) 7 SCC 278, (2013) Cr LJ 3966(SC) .

36 'Sexual intercourse' means any of the acts mentioned in clauses (a) to (d) of s 375 of the IPC. See s 114A explanation, IEA.

37 *Vijay @ Chinee v State of Madhya Pradesh* (2010) 8 SCC 191, 2010 (7) SCALE 502; *Mohan Lal v State of Punjab* AIR 2013 SC 2408, (2013) 6 SCALE 8, (2013) Cr LJ 3265(SC) .

38 AIR 1991 SC 207.

39 Ibid, para 8.

40 *State of Uttar Pradesh v Pappu @ Yunus* AIR 2005 SC 1248, 2005 Cri LJ 331(SC) ; *Narender Kumar v State (NCT of Delhi)* AIR 2012 SC 2281, (2012) 7 SCC 171, (2012) Cr LJ 2033(SC) ; *Lillu @ Rajesh v State of Haryana* AIR 2013 SC 1784, (2013) 7 SCALE 17, (2013) Cr LJ 2446(SC) .

41 *State of Punjab v Gurmit Singh* AIR 1996 SC 1393, (1996) 2 SCC 384; *State of Punjab v Ramdev Singh* AIR 2004 SC 1290, (2004) 1 SCC 421; *State of Uttar Pradesh v Munshi* AIR 2009 SC 370.

42 *Gajanand v State of Gujarat* (1987) Cr LJ 374(Guj) .

43 *Krisharaj v State* (1969) Mys LJ 304.

44 *Jayanti Rani v State of West Bengal* (1984) Cr LJ 1535(Cal) ; *Maran Chandra Paul v State of Tripura* (1997) Cr LJ 715(Gau) ; *Sudhamay Naik @ Bachhu v State of West Bengal* (1999) Cr LJ 4482(Cal) ; *Abhoy Pradhan v State of West Bengal* (1999) Cr LJ 3534(Cal) ; But see, *Saleha Khatoon v State of Bihar* (1989) Cr LJ 202(Pat) ; *Purshottam Mahadev v State of Bombay* AIR 1963 Bom 74.

45 *Uday v State of Karnataka* (2003) Cr LJ 1539(SC) ; folld in *Md Mahasin SK v Sayeda Khatun Bibi er Anr* (2005) Cr LJ 3162(Cal) .

46 *Hari Majhi v State of West Bengal* (1990) Cr LJ 650(Cal) ; *MC Prasannam v State* (1999) Cr LJ 998(Cal) ; *Araj Sk v State of West Bengal* (2001) Cr LJ 416(Cal) .

47 *Addepalli Settibabu v State of Andhra Pradesh* (1994) Cr LJ 1420(AP) ; see also *Kondapalli Laxman Rao v State of Andhra Pradesh* (1999) Cr LJ 1928(AP) .

48 *Deelip Singh @ Dilip Kumar v State of Bihar* (2005) 1 SCC 88; *Pradeep Kumar @ Pradeep Kumar Verma v State of Bihar* (2007) 7 SCC 413; *Yedla Srinivas Rao v State of Andhra Pradesh* (2006) 11 SCC 615, (2006) 9 SCALE 692; *Kaini Rajan v State of Kerala* (2013) 9 SCC 113, (2013) Cr LJ 4888(SC) .

49 *Prashant Bharti v State of NCT Delhi* AIR 2013 SC 2752, (2013) 9 SCC 293, (2013) Cr LJ 3839(SC) .

50 *Deepak Gulati v State of Haryana* AIR 2013 SC 2071, (2013) 7 SCC 675; (2013) Cr LJ 2990(SC) .

51 *State of Uttar Pradesh v Naushad* AIR 2014 SC 384, (2014) Cr LJ 1540(SC) . A woman's body is not a man's plaything and he cannot take advantage of it in order to satisfy his lust and desires by fooling a woman into consenting to sexual intercourse simply because he wants to indulge in it. The accused commits a vile act of rape and deserves to be suitably punished for it.

52 *Bhupinder Sing v Union Territory of Chandigarh* (2008) 8 SCC 531, (2008) Cr LJ 3546(SC) .

53 *Sanatan Ghosh v State of West Bengal* (1987) 1 Crimes 157(Cal) ; see also *State of Karnataka v KP Thimmappa Gowda* (2004) Cr LJ 4785(Kant) .

54 AIR 2004 SC 978, (2003) 8 SCC 590.

55 Ibid, para 8. See also *Shamsher Tappi v State of Uttar Pradesh* (1995) Cr LJ 2328(All) .

56 *Bhoari v State of Rajasthan* (1952) Raj LW 255; *Ashok Rai @ Amit v State* (2010) Cr LJ 1105(Del) .

57 *Bishnu Dayal v State of Bihar* AIR 1981 SC 39; *Jinish Lal Sah v State of Bihar* (2003) 1 SCC 605.

58 *Iqbal v State of Kerala* (2007) 12 SCC 724, AIR 2008 SC 288; *State of Punjab v Rakesh Kumar* AIR 2009 SC 392, (2009) Cr LJ 396(SC) ; *Dilip v State of Madhya Pradesh* (2013) Cr LJ 2449(SC), (2013) 6 SCALE 264.Where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused. See proviso to s 273, CrPC. This proviso is added thereto by the Criminal Law (Amendment) Act 2013, s 20.

59 For further analysis see, KI Vibhute, 'Rape within Marriage' in India: Revisited', Indian Bar Review, 2000, vol 27, p 167. Also, see the references cited therein.

60 *Bhupinder Singh v Union Territory of Chandigarh* (2008) 8 SCC 531, (2008) Cr LJ 3546(SC) .

61 Section 376B , IPC.It says: 'Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine."Explanation: In this section, 'sexual intercourse shall mean any of the act s mentioned in clauses (a) to (d) of section 375.'

62 Punishment for consensual or non-consensual sexual intercourse by a man with own wife below the age of fifteen is imprisonment for a term not less than seven years, which may extend to imprisonment for life, and fine. See s 376(1).

63 See s 198B, Cr PC, 1973, inserted by the Criminal Law (Amendment) Act, 2013 (s 19).

64 For meaning of the term 'police officer' see s 376(2) explanation (c), IPC.

65 Custody must be lawful custody, conferred by a court based on statutory provision or otherwise: *Omkar Prasad Verma v State of Madhya Pradesh* AIR 2007 SC 1381, (2007) 4 SCC 323, (2007) Cr LJ 1831(SC) .

66 'Public servant' is defined under s 21, IPC.

67 For meaning of 'armed forces' see s 376(2) explanation (a), IPC.

68 For 'women's or children's institution' see s 376(2) explanation (d), IPC.

69 'Hospital' is defined under s 376(2) explanation (b), IPC.

70 A woman raped by her own father or a close relative feels totally devastated. She carries an indelible social stigma on her head and deathless shame as long as she lives. See, *State of Himachal Pradesh v Asha Ram* AIR 2006 SC 381, (2005) 13 SCC 166, (2005) Cr LJ 139(SC) . Rape by father on his daughter is most reprehensible and he deserves severe punishment.

See *Siriya v State of Madhya Pradesh* AIR 2008 SC 2314, (2008) 8 SCC 32.Rape by teacher on his student is equally reprehensible and disgusting. See *State of Himachal Pradesh v Shree Kant Shekari* AIR 2004 SC 4404, (2004) 8 SCC 153; *Deelip Singh @ Dilip Kumar v State of Bihar* AIR 2005 SC 2003, (2005) 1 SCC 88; *Mohan Lal v State of Punjab* AIR 2013 SC 2408, (2013) 6 SCALE 8, (2013) Cr LJ 3265(SC) .

71 *Mohd Haroon v Union of India* 2014 (4) SCALE 86.

72 *Om Prakash v State of Uttar Pradesh* AIR 2006 SC 2214, (2006) 9 SCC 787, (2006) Cr LJ 2913(SC) . Also see *Sandesh @ Sainath Kailash Abhang v State of Maharashtra* (2013) 2 SCC 479, (2013) Cr LJ 651(SC) .

73 *Dilip v State of Madhya Pradesh* (2013) Cr LJ 2449(SC), (2013) 6 SCALE 264.

74 *Shankar Kisanrao Khade v State of Maharashtra* (2013) 5 SCC 546, (2013) 6 SCALE 277.

75 For example see, *State of Karnataka v Puttaraja* (2004) Cr LJ 579(SC) ; *Bhupinder Sharma v State of Himachal Pradesh* (2003) 8 SCC 551; *State of Madhya Pradesh v Balu* (2005) 1 SCC 108, (2005) Cr LJ 335(SC) ; *State v Biramlal* (2005) Cr LJ 2561(SC) ; *Mohd Yaseen v State* (2005) Cr LJ 307(J&K) ; *Kripa Ram v State* (2005) Cr LJ 748(MP) ; *Ainal Uddin Ahmad v State of Assam* (2004) Cr LJ 1171(Gau) ; *State of Haryana v Janak Jinhh* AIR 2013 SC 3246, (2013) 9 SCC 431, (2013) Cr LJ 3317(SC) .

76 *State of Punjab v Ramdev Singh* AIR 2004 SC 1290, (2004) 1 SCC 421, para 16.

77 Ibid. Also see *Pushpanjali Sahu v State of Orissa* AIR 2013 SC 1119, (2012) 11 SCC 433.

78 Ibid, para 1.

79 *Shimbhu v State of Haryana* AIR 2014 SC 739, (2014) Cr LJ 308(SC) .

80 *Radha v State of Madhya Pradesh* (2007) 12 SCC 57, 2007 Cr LJ 4704(SC) .

81 *Narender Kumar v State (NCT of Delhi)* AIR 2012 SC 2281, (2012) 7 SCC 171, (2012) Cr LJ 2033(SC) .

82 *Shyam Narain v State of NCT of Delhi* AIR 2013 SC 2209, (2013) Cr LJ 3009, (2013) 7 SCC 77.

83 *Hanuman Prasad v State of Rajasthan* (2009) 1 SCC 507, JT 2008 (13) SC 200; *Sohan Singh v State of Bihar* (2010) 1 SCC 68, (2009) 6 SCR 14.

84 AIR 2003 SC 4684, (2003) 8 SCC 551.

85 Ibid, paras 14 and 15; see also *Pramod Mahto v State of Bihar* AIR 1989 SC 1475; *Devendra Das v State of Bihar* (1999) Cr LJ 4805(Pat) ; *Nitin @ Nitu Ramprasad Bachich (Dhobi) v State of Gujarat* (2009) Cr LJ 2330(Guj), 2009 GLH (2) 242.

86 *Uttam Kumar v State of Maharashtra* (1991) Cr LJ 1644(Bom) ; *Kailash Khangar v State of Madhya Pradesh* (1996) Cr LJ 3189(MP) ; *Debidas Rudra v State of West Bengal* (2002) Cr LJ 1987(Cal), 2002 (1) CHN 129; *Pradeep Kumar v Union Administrator, Chandigarh* (2006) 10 SCC 608, AIR 2006 SC 2992.

87 (2006) 10 SCC 608, AIR 2006 SC 2992; see also *Pradhan @ Jitender v State of NCT of Delhi* (184) (2009) DLT 767, 2010 (1) Crimes 180.

88 *Pradeep Kumar v Union Administrator, Chandigarh* (2006) 10 SCC 608, AIR 2006 SC 2992.

89 *Priya Patel v State of Madhya Pradesh* (2006) 6 SCC 263, AIR 2006 SC 2639, (2006) Cr LJ 362(SC) ; *State of Rajasthan v Hemraj* (2009) 12 SCC 403, AIR 2009 SC 2644.

90 Three persons found guilty of committing gang rape on a photojournalist and a telephone operator in the Shakti Mill Compound in Mumbai in July 2013 and August 2013 are sentenced to death as they were repeat offenders. Confirmation of their death sentence from the Bombay High Court is awaited. See the Hindu, April 4, 2014.

91 *Omkar Prasad Verma v State of Madhya Pradesh* AIR 2007 SC 1381, (2007) 4 SCC 323, (2007) Cr LJ 1831(SC) .

92 For definition of 'public servant' see s 21, IPC.No court is allowed to take cognizance of an offence allegedly committed by a public servant of the Central or a State Government while act ing or purporting to act in discharge of his official duty without prior sanction of the Central Government or State Government, as the case may be: s 197(1) CrPC. However, no such sanction is required in case of a public servant accused of any offence alleged to have been committed, *inter alia*, under ss 375, 376, 376A, 376C, and 376D, IPC. See s 197 explanation, CrPC (added by the Criminal Law (Amendment) Act 2013, s 18).

93 The expression 'custody' implies guardianship. Custody must be a lawful custody. The same may arise within the provisions of the statute or act ual custody conferred by reason of an order of a court of law or otherwise: *Omkar Prasad Verma v State of Madhya Pradesh* AIR 2007 SC 1381, (2007) 4 SCC 323, (2007) Cr LJ 1831(SC) .

94 *Omkar Prasad Verma v State of Madhya Pradesh* AIR 2007 SC 1381, (2007) 4 SCC 323, (2007) Cr LJ 1831(SC) .

95 Section 155(4) of the Evidence Act, allowing the defence lawyer to discredit the victim's testimony by arguing that she was of 'immoral character' and questioning about her past sexual act s in the cross-examination, was deleted by the Indian Evidence (Amendment) Act, 2003 (Act 4 of 2003). Prior to omission clause (4) read: (4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character'. It also added a proviso to s 146 of the IEA. It is not permissible now for a defence lawyer to put questions in cross-examination to the prosecutrix about her general immoral character. This proviso is substituted by the Criminal Law (Amendment) Act 2013. It now reads: 'Provided that in a prosecution for an offence under section 376, section 376A, section 376B,section 376C, section 376D or section 376E of the or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent. See the Criminal Law (Amendment) Act 2013 s 28. The 2013 Amendment Acthas also inserted s 53A in the Indian Evidence Act 1872 to make evidence of character or previous sexual experience in rape cases irrelevant. It says: 'In a prosecution for an offence under --- section 376, section 376A,section 376B,section 376C, section 376D or section 376E of the or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent'. See the Criminal Law (Amendment) Act 2013 s 25.

1 *State of Chhatisgarh v Derha* AIR 2004 SC 4404, (2004) 9 SCC 699; *Dinesh Jaiswal v State of Rajasthan* (2006) Cr LJ 1679(SC), (2006) 3 SCC 771; *O M Baby (Dead) by LRs v State of Kerala* (2012) 11 SCC 362, (2012) Cr LJ 3794(SC) ; *Ganga Singh v State of Madhya Pradesh* AIR 2013 SC 3008, (2013) 7 SCC 278, (2013) Cr LJ 3966(SC) .

2 *State of Punjab v Gurmit Singh* AIR 1996 SC 1393, (1996) 2 SCC 384; *Bhupinder Sharma v State of Himachal Pradesh* AIR 2003 SC 4684, (2003) 8 SCC 551, (2004) Cr LJ 1(SC) ; *Aman Kumar v State of Haryana* AIR 2004 SC 1497, (2004) 4 SCC 379, (2004) SCC (Cr) 1266, (2004) Cr LJ 1399(SC) ; *State of Himachal Pradesh v Shree Kant Shekari* AIR 2004 SC 4404, (2004) 8 SCC 153; *State of Chhattisgarh v Derha* AIR 2004 SC 2636, (2004) 9 SCC 699, (2004) Cr LJ 2109(SC) ; *Sri Narayan Saha v State of Tripura* AIR 2005 SC 1452, (2004) 7 SCC 775; *Dinesh @ Buddha v State of Rajasthan* AIR 2006 SC 1267, (2006) 3 SCC 771.

3 *State of Maharashtra v Chandraprakash Kewalchand Jain* AIR 1990 SC 658, (1990) 1 SCC 550, (1990) SCC (Cr) 210; *State of Himachal Pradesh v Lekh Raj* AIR 1999 SC 3916, (2000) 1 SCC 247, (2000) SCC (Cr) 147, (2000) Cr LJ 44(SC) ; *Rajoo v State of Madhya Pradesh* AIR 2009 SC 858, (2008) 15 SCALE 357.

4 *Lillu @ Rajesh v State of Haryana* AIR 2013 SC 1784, (2013) 7 SCALE 17, (2013) Cr LJ 2446(SC) .

5 In the context of Indian culture, a victim of sexual assault would rather suffer in silence than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore ordinarily look for corroboration of her testimony is unnecessary and uncalled for. See *Rajinder @ Raju v State of Himachal Pradesh* (2009) 16 SCC 69, AIR 2009 SC 3022; *O M Baby (Dead) by LRs v State of Kerala* (2012) 11 SCC 362, (2012) Cr LJ 3794(SC) .

6 *Bhupinder Sharma v State of Himachal Pradesh* (2003) 8 SCC 551, AIR 2003 SC 4684; *Raju v State of Madhya Pradesh* (2008) 15 SCC 133, AIR 2009 SC 858.

7 *Bharwada Bhoginbhai v State of Gujara* AIR 1983 SC 753; *State of Maharashtra v Chandraprakash Kewalchand Jain* AIR 1990 SC 658; *State of Himachal Pradesh v Lekh Raj* (2000) 1 SCC 247, (2000) Cr LJ 44(SC) ; *Moti Lal v State of Madhya Pradesh* (2008) 11 SCC 20, (2008) Cr LJ 3543(SC) .

8 *Rajesh Patel v State of Jharkhand* AIR 2013 SC 1497, (2013) 3 SCC 791, (2013) Cr LJ 2062(SC) .

9 *State of Karnataka v Manjanna* AIR 2000 SC 2231, (2000) 6 SCC 188; *Visweswaran v State of Tamil Nadu,* (2003) Cr LJ 2548(SC), (2003) 6 SCC 73; *Sri Narayan Saha v State of Tripura* (2004) 7 SCC 775, AIR 2005 SC 1452; *Ramdas v State of Maharashtra* (2007) 2 SCC 170, AIR 2007 SC 155; *State of Karnataka v Raju* (2007) 11 SCC 490, AIR 2007 SC 3225; *Raju v State of Madhya Pradesh* (2008) 15 SCC 132, AIR 2009 SC 858; *Neku Khan v State of Rajasthan* (2009) 11 SCC 86, AIR 2009 SC 1954; *S. Ramakrishna v State* (2009) 1 SCC 133, AIR 2009 SC 885; *Wahid Khan v State of Madhya Pradesh* (2010) 2 SCC 9, AIR 2010 SC 1; *Ram Singh @ Chhaju v State of Himachal Pradesh* (2010) Cr LJ 1655(SC), (2010) 2 SCC 445.

10 *Narender Kumar v State (NCT of Delhi)* AIR 2012 SC 2281, (2012) 7 SCC 171, (2012) Cr LJ 2033(SC) .

11 *State of Punjab v Gurmit Singh* AIR 1996 SC 1393, (1996) 2 SCC 384; *State of Rajasthan v NK* AIR 2000 SC 1812, (2000) 5 SCC 30; *State of Himachal Pradesh v Gian Chand* (2001) 6 SCC 71, (2001) Cr LJ 2548(SC) ; *State of Himachal Pradesh v Shree Kant Shekari* AIR 2004 SC 4404, (2004) 8 SCC 153; *State of Chhattisgarh v Derha* AIR 2004 SC 2636, (2004) 9 SCC 699; *Vishnu @ Undrya v State of Maharashtra* (2006) 1 SCC 283, (2006) Cr LJ 303(SC) ; *Arjun Singh v State of Himachal Pradesh* (2009) 4 SCC 18, AIR 2009 SC 1568.

12 *State of Uttar Pradesh v Pappu @ Yunus* AIR 2005 SC 1248, 2005 Cri LJ 331(SC) ; *S Ramakrishna v State* AIR 2009 SC 885, (2009) 1 SCC 133; *Vijay @ Chinee v State of Madhya Pradesh* (2010) 8 SCC 191, 2010 (7) SCALE 502; *Mohd Imran Khan v State of NCT of Delhi* (2012) Cr LJ 693(SC), (2011) 10 SCC 192.

13 *S Ramkrishna v State* AIR 2009 SC 885, (2009) 1 SCC 133; *Vijay @ Chinee v State of Madhya Pradesh* (2010) 8 SCC 191, (20 1007 SCALE 502; *Mohd Imran Khan v State of NCT of Delhi* (2012) Cr LJ 693(SC), (2011) 10 SCC 192.

14 *Hemraj v State of Haryana* (2014) 2 SCC 395, (2014) 1 SCALE 48,

15 *State of Punjab v Ramdev Singh* AIR 2004 SC 1290, (2004) 1 SCC 421; *State of Chhattisgarh v Derha* AIR 2004 SC 2636, (2004) 9 SCC 699.

16 (2005) Cr LJ 4375 (SC).

17 Ibid, at 4379.

18 *Rajesh Patel v State of Jharkhand* AIR 2013 SC 1497, (2013) 3 SCC 791, (2013) Cr LJ 2062(SC) .

19 *Tameezuddin v State (NCT) of Delhi* (2009) 15 SCC 566, 2009 (12) SCALE 303.

20 *Ganga Singh v State of Madhya Pradesh* AIR 2013 SC 3008, (2013) 7 SCC 278, (2013) Cr LJ 3966(SC) .

21 *Raju v State of Madhya Pradesh* (2008) 15 SCC 132, AIR 2009 SC 858, also see, *Radha v State of Madhya Pradesh* (2007) 12 SCC 57, 2007 Cri LJ 4704; *Bbhishan v State of Maharashtra* (2007) 12 SCC 390, (2008) Cr LJ 721(SC) .

22 *Dayal Singh v State of Uttaranchal* AIR 2012 SC 3046, (2012) 8 SCC 263, (2012) Cr LJ 4323(SC) ; *Radhakrishna Nagresh v State of Andhra Pradesh* (2012) 12 SCALE 506.

23 *Lillu @ Rajesh v State of Haryana* AIR 2013 SC 1784, (2013) 7 SCALE 17, (2013) Cr LJ 2446(SC) .

24 The Supreme Court has asked to serve a notice on the additional Superintendent of Police, Mhow District, Indore, Madhya Pradesh, to show cause why an offence under s 228A of the IPC be not registered against him for disclosing identity of the two victims of gang rape in an affidavit filed before it. See *Satya Pal Anand v State of Madhya Pradesh* (2013) 10 SCALE 88.

25 *Bhupinder Sharma v State of Himachal Pradesh* AIR 2003 SC 4684, (2003) 8 SCC 551; *State of Punjab v Ramdev Singh* AIR 2004 SC 1290, (2004) 1 SCC 421; *State of Karnataka v Puttaraja* (2004) Cr LJ 579(SC) ; *State of Himachal Pradesh v Shree Kant Shekari* AIR 2004 SC 4404, (2004) 8 SCC 153; *Om Prakash v State of Uttar Pradesh* AIR 2006 SC 2214, (2006) 9 SCC 787; *Dinesh Jaiswal @ Buddha v State of Rajasthan* AIR 2006 SC 1267, (2006) Cr LJ 1679(SC), (2006) 3 SCC 771.

26 (1995) 1 SCC 14.

27 AIR 1996 SC 1393, (1996) 2 SCC 384. The Supreme Court also re-asserted these parameters in *Bodhisattwa Gautam v Miss Subhra Chakraborty* AIR 1996 SC 922.

28 *Chairman, Rly Board v Chandrima Das* (2000) 2 SCC 465.

29 *Satya Pal Anand v State of Madhya Pradesh* (2013) 10 SCALE 88.

30 Section 376D , IPC.

31 Section 357B , CrPC, inserted by the Criminal Law (Amendment) Act 2013 s 23.

32 Section 357A(6) , CrPC.

33 Section 357C , CrPC, 1973, added to the CrPC by the Criminal Law (Amendment) Act 2013, s 23.

34 Sections 166B , IPC , inserted in the IPC by the Criminal Law (Amendment) Act 2013, s 3.

35 *State of Kerala v Kundumkara Govindan* (1969) Cr LJ 818(Ker), at p 823.

36 *Brother John Antony v State* (1992) Cr LJ 1352(Mad) at 1359.

37 See, *Lohana Vasntlal Devchand v State* AIR 1968 Guj 252, (1968) Cr LJ 1277(Guj) ; *Raju v State of Haryana* (1998) Cr LJ 2587(P&H) ; *Kishan Lal v State of Rajasthan (*1998) Cr LJ 4508 (Raj); *Mihir v State of Orissa* (1992) Cr LJ 488(Ori) ; *Sukhdeo Singh v State of Rajasthan* (2002) Cr LJ 1975(Raj) ; *Mohan Ojha v State of Bihar* (2002) Cr LJ 3344(Pat) ; *Kailash @ Kala v State* (2004) Cr LJ 310(P&H) ; *Abdul Salam v State* (2005) DLT 336; *Anil @ Arikhony Anikswamy Joseph v State of Maharashtra* (2014) 2 SCALE 554.

38 (1998) Cr LJ 2428 (Del).

39 (1992) 2 Crimes 455(Ori) .

40 *Khandu v Emperor* AIR 1934 Lah 261.

41 *State of Kerala v Kurissum Moottil Antony* (2007) 1 SCC 627; *Childline India Foundation v Allan John Waters* (2011) Cr LJ 2305(SC), (2011) 6 SCC 261.

42 (2010) Cri LJ 94 (Delhi), 160 (2009) DLT 277.

43 For further comments see, K I Vibhute, 'Consensual Homosexuality and the Indian Penal Code : Some Reflections on Inter-play of Law and Morality', Journal of the Indian Law Institute, 2009, vol 51, p 3.

44 AIR 2014 SC 563, (2014) Cr LJ 784(SC), (2014) 1 SCC 1.

45 Ibid, paras 42-43.

46 Ibid, para 52.

47 Ibid, para 30.

48 See *Sakshi v Union of India* AIR 2004 SC 3566, (2004) 5 SCC 518.

49 Law Commission of India, 'One Hundred and Seventy Second Report on Review of Rape Laws', Government of India, 2000, paras 3.1.2.1; 3.3; 3.3.1, and 3.3.

50 Government of India, *Report of the Committee on Amendments to Criminal Law* (Government of India, 2013), Chap 3: Rape and Sexual Assault, paras 72-80.The Committee accordingly deleted the marital rape exception (exception2) from its proposed section 375 and inserted 'Explanation III: Consent will not be presumed in the event of existing marital relationship between the complainant and the accused' therein. See Appendix 4, para 7, at p 440.It also recommended insertion in its proposed s 376B (dealing with rape on an underage girl as a separate offence) of a proviso i.e., 'Provided that the existence of marital relation-ship between the accused and the underage person shall not be a valid defence'. See Appendix 4, para 12, at p 444.

51 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code' Government of India, 1997, para 9.51. In the light of the Criminal Law (Amendment)Act 2013 and the Protection of Children against Sexual Offences Act, 2012, s 377 becomes redundant in combating sexual abuse of children.

52 Law Commission of India, 'One Hundred and Seventy Second Report on Review of Rape Laws', Government of India, 2000, para 3.6.

53 AIR 2014 SC 563, (2014) Cr LJ 784(SC), (2014) 1 SCC 1.

CHAPTER 41

Theft and Extortion

(Indian Penal Code 1860,Sections 378 to 389)

PART A - THEFT

Section 378. Theft.--Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.--A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.--A moving effected by the same act which effects the severance may be a theft.

Explanation 3.--A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.--A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.--The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(a) *A* cuts down a tree on *Z*'*s* ground, with the intention of dishonestly taking the tree out of *Z*'*s* possession without *Z*'*s* consent. Here, as soon as *A* has severed the tree in order to such taking, he has committed theft.

(b) *A* puts a bait for dogs in his packet, and thus induces *Z*'*s* dog to follow it. Here, if *A*'*s* intention be dishonestly to take dog out of *Z*'*s* possession without *Z*'*s* consent, *A* has committed theft as soon as *Z*'*s* dog has begun to follow *A*.

(c) *A* meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, *A* has committed theft of the treasure.

(d) *A*, being *Z*'*s* servant, and entrusted by *Z* with the care of *Z*'*s* plate, dishonestly runs away with the plate, without *Z*'*s* consent. *A* has committed theft.

(e) *Z*, going on a journey, entrusts his plate to *A*, the keeper of a warehouse, till *Z* shall return. *A* carries the plate to a goldsmith and sells it. Here the plate was not in *Z*'*s* possession. It could not, therefore, be taken out of *Z*'s possession, and *A* has not committed theft, though he may have committed criminal breach of trust.

(f) *A* finds a ring belonging to *Z* on a table in the house which *Z* occupies. Here the ring is in *Z*'*s* possession, and if *A* dishonestly removes it, *A* commits theft.

(g) *A* finds a ring lying on the highroad, not in the possession of any person. *A*, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) *A* sees a ring belonging to *Z* lying on a table in *Z*'*s* house. Not venturing to misappropriate the ring immediately for fear of search and detection, *A* hides the ring in a place where it is highly improbable that it will ever be found by *Z*, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here *A*, at the time of first moving the ring, commits theft.

(i) *A* delivers his watch to *Z*, a jeweller, to be regulated. *Z* carries it to his shop. *A*, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of *Z*'*s* hand, and carries it away. Here *A*, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If *A* owes money to *Z* for repairing the watch, and if *Z* retains the watch lawfully as a security for the debt, and *A* takes the watch out of *Z*'*s* possession, with the intention of depriving *Z* of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if *A*, having pawned his watch to *Z*, takes it out of *Z*'*s* possession without *Z*'*s* consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property inasmuch as he takes it dishonestly.

(l) *A* takes an article belonging to *Z* out of *Z*'*s* possession, without *Z*'*s* consent, with the intention of keeping it until he obtains money from *Z* as a reward for its restoration. Here *A* takes dishonestly; *A* has therefore committed theft.

(m) *A*, being on friendly terms with *Z*, goes into *Z*'*s* library in *Z*'*s* absence, and takes away a book without *Z*'*s* express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that *A* may have conceived that he had *Z*'*s* implied consent to use *Z*'*s* book. If this was *A*'*s* impression, *A* has not committed theft.

(n) *A* asks charity from *Z*'*s* wife. She gives *A* money, food and clothes which *A* knows to belong to *Z* her husband. Here it is probable that *A* may conceive that *Z*'*s* wife is authorised to give away alms. If this was *A*'*s* impression, *A* has not committed theft.

(o) *A* is the paramour of *Z*'*s* wife. She gives *A* valuable property, which *A* knows to belong to her husband *Z*, and to be such property as she has no authority from *Z* to give. If *A* takes the property dishonestly, he commits theft.

(p) *A*, in good faith, believing property belonging to *Z* to be *A*'*s* own property, takes that property out of *B*'*s* possession. Here, as *A* does not take dishonestly, he does not commit theft.

INGREDIENTS

Let us now proceed to analyse the offence of theft as defined in the Indian Penal Code 1860.

The essential ingredients of the offence of theft as embodied in s 378, IPC, is well-explained by the Supreme Court in a leading decision in *KN Mehra v State of Rajasthan* .[1] The alleged theft was of an aircraft, which belonged to the Indian Air Force Academy. Two youngsters, Mehra and Phillips, were cadets on training in the Indian Air Force at Jodhpur. Phillips was discharged from the Academy on 13 May 1952 for misconduct. On 14 May 1952, he was due to leave Jodhpur by train. His friend Mehra was due for flight in a Dakota, as part of his training along with one Om Prakash, a flying cadet. The authorised time to take off flight was between 6 am and 6.30 am on the morning of 14 May. Mehra and Phillips took off, not a Dakota but a Harvard T-22, before the prescribed time at 5 am without authorisation and without observing any of the formalities, which were pre-requisites for an aircraft flight. On the forenoon of the same day, they landed at a place in Pakistan about 100 miles away from the Indo-Pakistan border. On the 16 May 1952 at 7 am, both of them met the Indian High Commissioner in Pakistan at Karachi, and informed him that they had lost their way and force-landed in a field and that they had left the plane there. They requested his help to go back to Delhi. The Indian High Commissioner arranged for both of them to be sent back to Delhi in another plane. While they were on their way to Delhi, the plane stopped at Jodhpur and they were arrested and prosecuted for the offence of theft.

One of the main contentions of the accused was that if they had the inclination to take the aircraft to Pakistan, they would not have contacted the Indian High Commissioner at Karachi later. But the prosecution succeeded in proving that this apparent innocent move did not necessarily negative their intention at the time of taking off. It may be that after reaching Pakistan only, the impracticability of their scheme to get employment in Pakistan dawned upon them and they gave it up. It was enough to constitute the offence that they had the dishonest intention at the commencement of their journey. The fact that they took off Harvard T-22 plane rather than the allotted Dakota, and left India at 5 am instead of the scheduled time of 6 am, without waiting for Om Prakash, and that they also refused to respond to the wireless messages from Indian aerodrome authorities at 11 am, showed that they had the dishonest intention to take off a Harvard T-22 plane.

The court analysed the offence of theft under s 378 thus:

> Commission of theft... consists in (1) moving a movable property of a person out of his possession without his consent; (2) the moving being in order to taking of the property with a dishonest intention. Thus: (1) the absence of the person's consent at the time of moving; and (2) the presence of dishonest intention in so taking and at the time are the essential ingredients of the offence of theft.[2]

> It was argued that since cadet Mehra had been allowed to use the aircraft for training purposes, he should be deemed to have had the consent to take off the aircraft. But the consent that had been given by the authorities was to take off Dakota at 6 am and not the costlier plane Harvard T-22 at 5 am. The trial court, the high court and the Supreme Court held that the taking off of the Harvard T-22 plane had nothing to do with their training course. Mehra had no authority to take Phillips with him. The flight was persisted on by Mehra in spite of signals to return back, when the unauthorised nature of flight was discovered. The court said that it was impossible to imply consent in such circumstances.

The court also explained the true meaning of dishonest intention with reference to its definitions in ss 23 and 24 of the IPC along with 'wrongful loss' and 'wrongful gain'.

Taking these two definitions together, a person can be said to have dishonest intention if in taking the property it is his intention to cause gain by 'unlawful means' of the property to which the person so losing is legally entitled. It is further clear from the definition that the gain or loss contemplated need not be a total acquisition or a total deprivation, but it is enough if it is temporary retention of property by the person wrongfully

gaining or a temporary 'keeping out' of property from the person legally entitled. This is clearly brought out in illustration (1) to section 378 of the Indian Penal Code and is uniformly recognised by various decisions of the High Court which point out that in this respect 'theft' under the Indian Penal Code differs from 'larceny' in English 1aw, which contemplated permanent gain or loss.[3]

The accused were held guilty of the offence of theft in these circumstances under s 378, IPC, and sentenced to undergo imprisonment by the trial court for eighteen months and a fine of seven hundred fifty rupees with simple imprisonment, in default of payment of fine for a further term of four months. In the final appeal, the Supreme Court reduced the sentence of imprisonment of the appellant KN Mehra to the period already undergone.

In order to constitute the offence of theft, the following five elements are essential: (i) it should be a movable property; (ii) in the possession of anyone; (iii) a dishonest intention to take it out of that person's possession; (iv) without his consent; and (v) a moving in order to such taking.

Movable Property

Movable property is defined in s 22 as including 'corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth'. It is expressly stated by explns 1 and 2 of s 378 that things attached to the land may become movable property by severance from the earth and that the act of severance itself will be theft. Illustration (a) shows that when *A* cuts down a tree on *Z*'*s* ground with the intention of dishonestly taking the tree out of *Z*'*s* possession without his consent, *A* is guilty of theft. It is theft to gather salt spontaneously formed on the surface in a saltpan. Any part of the earth whether it be stones,[4] or clay[5] or sand or any other component when severed from the earth is movable property and is capable of being the subject of theft. A house cannot be the subject of theft, but there may be theft of its materials.[6] It is not necessary that the taking of movable property should be of permanent character or that the accused should have derived any profit.[7]

Animals

There can be no doubt that animals can become the subject of theft, for they can be classed as movables. Illustration (b) deals with dog and illust (c) deals with bullock as the subject matter of theft.[8] But in the case of wild animals or *ferae naturae*, there can be no absolute property. But when killed upon the soil, they become the absolute property of the owner of the soil.

When animals are abandoned, they cannot be said to be in the possession of anyone. Where a man buried the carcass of a bullock suspecting it to have been poisoned and another person dug it up and carried it away, it was held that no theft was committed, because the property as well as the possession in it were abandoned.[9] A bull dedicated to an idol and allowed to roam at large remains the property of the trustees of the temple and can become the subject of theft,[10] but not a bull set at large in accordance with a religious usage.[11]

Fish

Fish in running waters, such as rivers, and canals and in the lakes and seas are *ferae naturae* and cannot be the subject of theft. So also fish in open irrigation tanks, or in tanks not enclosed on all sides,[12] but dependent on the overflow of a neighbouring channel or in a public river or creek, where even the right of fishing has been let out to a licensee[13] are considered as *ferae naturae* and not subject of theft. In *Govindha Majhi v Arobinda Kar* ,[14] where the accused had caught fish from the portion of a tidal and navigable river licensed out to the complainant, he was held not guilty of theft by the Orissa High Court. The principles involved had been well-stated by the Madras High Court in an earlier decision in *Krishna Reddy v Muniappa Reddy* [15] thus:

> ... [A]s long as the water flows in and out of the pond, thereby enabling the fishes to enter and leave it, the fishes are free and in a state of nature; and so no more belong to the owner of the pond than a bird that settles on a tree in a person's garden belonging to that person; but when once the water has fallen to such a level that fishes cannot leave it, then they are trapped and consequently in the possession of the owner of the pond. That being so, any person who takes fish from that pond without the owner's consent with the intention to cause him loss necessarily commits theft.[16]

In *Chandi Kumar Das v Abanidhar Roy* ,[17] the question before the Supreme Court was whether the removal of fishes from the tank in the actual possession of a person by the accused will amount to theft. It held that the fish in their free state are regarded as *ferae naturae*, but they are said to be in the possession of a person who has possession of any expanse of water such as a tank, where they live, but from where they cannot escape. Fishes are also regarded as being in the possession of a person who owns an exclusive right to catch them in a particular spot. There can thus be theft of fish from a tank which belongs to another and is in his possession, if the accused catches them without the consent of the owner and without any bona fide claim of right. However, when during rainy season fish escapes from one plot to another demarcated by ridges of small height and are merged under water, it cannot be said that fish is the subject-matter of theft.[18]

Human Corpse

The general rule is that there can be no larceny with regard to a corpse.[19] Sir James Stephen says that this is the only movable object known to him which is incapable of being property, but adds immediately that anatomical specimens and the like would be personal property. Mayne says that if the rule as to a corpse should be applied in India, the only punishment for such offences as were committed in stealing after burial, the dead bodies of Mr Stewart, the American millionaire and of Lord Crawford would be by framing a charge under s 297 (trespassing on burial places, etc). Shrouds and coffins are the subject of larceny and are the property of the executors of the deceased or of those who buried him.

Electricity

However, with regard to electricity, the Supreme Court of India has held in *Avtar Singh v State of Punjab* ,[20]that electricity cannot be considered to be movable property and that s 378 by itself would not include a theft of electricity. It has also held in the same case that dishonest abstraction of electricity mentioned in the Indian Electricity Act 1910, is not an offence under the IPC, though it is offence under s 39 of the Electricity Act.[21]Nevertheless, theft of electricity is deemed to be an offence under the IPC as s 39 of the Electricity Act enables punishment under s 379 of the IPC.[22]

Water

The Calcutta High Court has held that water running freely from a river through a channel made and maintained by a person is not a subject of theft.[23] On the other hand, the Madras High Court has ruled in Re *Chockalingam Pillai*[24] that running water in irrigation canals is the subject of theft. Hence, a person who diverts more water by lowering a sluice in government channel without the permission of the concerned officer can be held guilty of theft of water. The Madras High Court has distinguished the Calcutta ruling on the ground that there water was not reduced to possession. The Allahabad High Court has held that water when conveyed in pipes is reduced into possession of the person and thereby it becomes subject of theft.[25]

Cattle

The removal of animals grazing in open lands, where it had been left by the owner, is theft.[26] But leading the animals to the pound is not theft.[27] However, if a person, the owner or a stranger, removes cattle from pound where they are secured, without paying the levied fees, he is guilty of theft as he deprives the pound-keeper of his legitimate fees.[28] The Nagpur High Court has held that 'taking' for the purpose of this section must be 'dishonest' within the meaning of s 24 of the IPC. But it need not necessarily cause 'wrongful gain' to the taker, it is enough if it causes 'wrongful loss' to the owner.[29] Thus, where the accused took three cows of the complainant against her will and distributed them among her creditors, he was found guilty of stealing.[30]

In *Ram Ratan v State of Bihar* ,[31] the Supreme Court held that when a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crops and says that he was taking them to the pound, he commits no offence of theft, however mistaken he may be about his right to that land or crop. The remedy of the owner of the cattle so seized is to take action under s 20 of the Cattle Trespass

Act 1871. The apex court held that the owner of the cattle and others who went armed with sharp edged weapons and*lathis* to rescue the cattle, had no right of defence to their property as against the accused. It further held that as the accused and their men could have apprehended in the circumstances, that the owner's party was not peacefully inclined and would use force against them in order to rescue the cattle and that the force likely to be used could cause grievous hurt, the accused committed no offence in causing injuries to persons in the owner's party and in causing the death of a person in that party.

Possession

The main right of the individual that is sought to be protected under ss 378 and 379 is undoubtedly his possession of the movables. The word 'possession' is not defined in the IPC, though its nature in one aspect is indicated in s 27, wherein it is said that:

When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.--A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

The Law Commissioners in their report thought that a precise definition of 'possession' is unnecessary and impossible. They remarked thus:

> We believe it to be impossible to mark with precision by any words, the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists and about which the language of the lawyers and of the multitude be the same. It will hardly be doubted, for example, that a gentleman's watch lying on a table in his room, is in his possession, though it is not in his hand; and though he may not know whether it is on his writing table or on his dressing table. As little will it be doubted that a watch which a gentleman lost a year ago on a journey and which he never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner, his silver forks while in the hands of his guests are not in his possession; so also when he has deposited them with a pawnbroker as a pledge. But between these extreme cases lie many cases in which it is difficult to pronounce with confidence, either that property is or that it is not in a person's possession.[32]

The term 'possession' plays an important part both in civil and criminal law. It forms the basis of the civil act ion of trespass and also of the offence of theft. Possession exists in one whenever he has physical control, whether rightful or wrongful, over a corporeal thing. It is entirely distinct from property and either may exist without the other. Thus, when an article is stolen, though the thief has possession, the owner retains the property.

Possession may be de facto or de jure. The former is mere custody. A servant has only mere custody of the articles which belongs to his master. For example: *A*, the master of a house gives a dinner party; the plate and other things on the table are in his possession, though from time to time they are in the custody of his guests or servants.

As remarked by the Law Commissioners, generally possession is a simple question of fact. If I buy a motor car from a person who has the right to sell it, I obtain the right of ownership over it and it is my property. If I let it to another person, or it is stolen, the person to whom it is let or the thief has the possession but I still retain the property.

The term 'possession' is a polymorphous term, which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession', uniformly applicable to all situations in the context of all statutes. Salmond describes possession, in fact, 'as a relationship between a person and a thing... the test for determining whether a person is in possession of anything is whether he is in general control of it'.[33]In the abovesaid case, under the Arms Act 1959, it was held that when a person handed over the firearms to a repair shop for carrying out repairs, he had divested himself for the time being of the physical possession and effective control of the firearms.[34]

The property stolen must have been in the possession of someone from whom it is taken. We have already examined the general nature of possession at the beginning of this chapter. Knowledge of the existence of a thing is not essential to invest the owner of an article with possession in certain cases. If a man sends a coat to a tailor, in the pocket of which he has left his purse, or sends a table to a carpenter, in the drawer of which

there is money, he, retains both the property and the possession of the purse and money; and it makes no difference that he was not aware of the contents of the pocket or the drawer, because he was entitled to have both the coat and the table back with everything, which they contained. But if he had sold the coat or the table in ignorance of their contents, his property in the valuables would remain, but his possession would be lost. In the former case, the offence would be theft; in the latter misappropriation.[35] Where a man loses or mislays property in his own house or upon his premises, it still remains in his possession and anyone who finds the article is bound to assume that it belongs to the owner of the place where it is found. If he appropriates it to himself without making the proper enquiries, he commits theft.[36]

We have already seen that ownership of goods is quite immaterial in India. Thus, if *X* steals the goods of *A* and then *Z* steals them again from *X*, both *X* and *Z* have committed theft. In the absence of *A*, *X* can maintain a prosecution against *Z*, for the law protects even the vicious possession of *X* as against *Z*. Thus, *R v Swinson* ,[37] the complainant found a lost purse and decided to keep it, pending the offer of a reward to the finder. Meanwhile, he showed it to the accused to inspect, but the accused retained it against the complainant's wishes. This was held to be larceny.

Constructive Possession

In certain circumstances, a person who has no act ual physical control over a thing will be deemed to have possession in the eye of law, which is called constructive possession. This is also called de jure possession or possession in law. Thus, a person has constructive possession in the following cases:

(1) Whenever he has entrusted the care of a thing to his servant. In such cases, the physical control of the servant does not amount to possession as against his master, but merely to custody. As against other persons, it may amount to possession.

(2) Where it is in some place over which he exercises control, e.g. in the till of his shop, or in a pond on land of which he is in possession.[38] Stephen has defined possession thus in his *Digest of the Criminal Law*: 'A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he may be presumed to do so in case of need.'[39]

Possession gives the possessor the right to possess against everyone but the true owner. This definition of possession is consistent with the concept of larceny, which is the equivalent offence of theft under the common law of England. Larceny may be defined as the 'wilful and wrongful taking away of the goods of another against his consent and with the intent to deprive him permanently of his property'.

Joint Possession

Where there are several joint owners in joint possession and any one of them dishonestly takes exclusive possession, he will be guilty of theft.[40] A co-owner of movable property with another, whose share is defined, can be guilty of theft, if he removes the joint property without consent of the co-owner.[41] Similarly, if a coparcener dishonestly takes the separate property of another coparcener, he will be guilty of theft.[42] But the removal of even the whole of the crop by a tenant holding land from *zamindar* on a *varam* tenure without delivering it to the *zamindar* his share of the crop, does not constitute theft.[43]

Mere Custody Will Not Amount to Possession

This principle is expressly recogznised in s 27, IPC. So, where a lady who wanted a railway ticket, handed the money to a stranger, who was near to the window of the ticket office, that he might procure a ticket for her, and he ran away with the money, this was held to be theft, as she never parted with the dominion over the money and merely used his hand in place of her own.[44]

Temporary Deprivation or Dispossession is Also Theft

In *Pyare Lal Bhargawa v State of Rajasthan* ,[45] the accused was a superintendent in a government office. At the instance of somebody, he got a file from the secretariat through the clerk and took the file to his house for a day and made it available to a person to facilitate the removal of some papers and the inser-

tion of some. Thereafter, the file was replaced. The question before the Supreme Court was whether the act amounted to theft. The Supreme Court held that to commit theft, one need not take movable property permanently out of the possession of another, with the intention not to return it to him. It would satisfy the definition if he took any movable property out of the possession of another person, though he intended to return it later. When the file was unlawfully taken away from the department, he deprived the department of the possession of file and caused wrongful loss to the department. So, it was held that it amounted to an offence under s 378, IPC. The Supreme Court, in line with the *Pyare Lal* dictum, in *State of Maharashtra v Vishwanath tukaram Umale* ,[46] held that the transfer of movable property without consent of the person in possession need not be permanent or for a considerable length of time nor is it necessary that the property should be found in possession of the accused. Even a transient transfer of possession is sufficient to meet the requisites of 'theft'.

Dishonest Intention

Intention is the gist of the offence. It is the intention of the taker at the time when he removes the article that determines whether the act is theft or not. The intention to take dishonestly exists when the taker intends to cause 'wrongful gain' to one person and 'wrongful loss' to another. Wrongful gain or wrongful loss must be involved in dishonesty.[47] Where, therefore, the accused acting bona fide in the interest of his employers, finding a party of fishermen poaching on his master's fisheries, took charge of the nets, and retained possession of them, pending the orders of his employers, it was held that the accused was not guilty of theft.[48] When dishonest intention is totally absent, there is no theft.[49] Taking another man's property believing, under a mistake of fact and in ignorance of law, that he has the right to take, therefore, does not amount to theft.[50]

The intention to take dishonestly must exist at the time of the moving of the property, vide illustration (h) and (i), which are:

(h) *A* sees a ring belonging to *Z* lying on a table in *Z*'s house. Not venturing to misappropriate the ring immediately for fear of search and detection, *A* hides the ring in a place where it is highly improbable that it will ever be found by *Z*, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here *A*, at the time of first moving the ring, commits theft.

(i) *A* delivers his watch to *Z*, a jeweller, to be regulated. *Z* carries it to his shop. *A*, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of *Z*'s hand, and carries it away. Here *A*, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

If the act done is not *animo-furandi*, it will not amount to theft. Thus, where the owner is kept out of possession temporarily not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, the detention does not amount to causing wrongful loss in any sense.[51] Otherwise, a person keeping concealed for a time, a valuable thing belonging to a friend, who is a careless man, in jest, for the purpose of causing him a little anxiety, or in earnest for the purpose of teaching him the salutary lesson of being careful, will be guilty of theft, a result, which the legislature could never have intended. Where the accused found the complainant's pony at large, not within the compound or the stable of the complainant, leading to the assumption that it must have broken from its tether to which it had been tied the previous night and mounted it and took a ride on it, returning home on the following day in the evening, it was held that the accused had not committed theft.[52]Again, where a respectable person took the cycle of another, as his own cycle was missing at the time, and brought it back and there was no criminal intention and he did not intend by his act to cause 'wrongful gain' to himself, it was held that he was not guilty of theft.[53]

But when *A*, a creditor, took movable property out of his debtor's possession without his consent, with the intention of coercing him to pay his debt, *A* was held guilty of theft.[54] In *Nausha Ali Khan*,[55] the accused snatched some books from the hands of a schoolboy, as he was coming out of the school and told him that the books will be returned only if he came to the house of the accused, the object of the accused being to commit an unnatural offence upon the boy when he got him in his own house, the accused was convicted of

the offence of theft. The court held that there was 'wrongful gain' to the accused and 'wrongful loss' to the schoolboy.

A charge of theft of a bag as against the principal, vice-principal and another student of a commerce college in Bombay by an ex-student of the same college on a college day function was quashed by the Bombay High Court in *BR Rairikar v Uday Dhalchandra Wavikar* ,[56] on the ground that there was no evidence of dishonest intention. In this case, the complainant ex-student's bag was removed from him and handed over to the principal by another student. The principal and vice-principal suspecting that it contained objectionable leaflets of the kind hurled in the college hall on the college day, informed the complainant's father that the bag was in college office and the principal would like to see him to discuss matters. The principal refused to hand over the bag to the complainant, but later handed it over to the police. On a complaint by the ex- student, as against the principal and others, the Bombay High Court held that there was no dishonest intention in removing the bag and the charge of theft was quashed.

In *Mohar Singh v State of Rajasthan* ,[57] the accused had snatched the revolver from a member of the complainant's party, in order to prevent further bloodshed. Thereafter, he surrendered the revolver to the police at the earliest. Under the circumstances, it was held that the accused had no intention to commit theft.

Without Consent

The taking must be without the consent of the person in possession. There can be no theft where the owner act ually consents to or authorises the taking. Thus, where a debtor gives up property to his creditor and subsequently discovering that the debt was time-barred, charged the latter with theft, the same was held unsustainable in *Musamat Piari Oulaiya*.[58]*Explanation* 5 says that consent 'may be express or implied, may be given either by the person in possession or by any person having for that authority either express or implied'. The same can be seen in illusts (m) and (n) to s 378, which read as below:

(m) *A*, being on friendly terms with *Z*, goes into *Z*'s library in *Z*'s absence, and takes away a book without *Z*'s express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that *A* may have conceived that he had *Z*'s implied consent to use *Z*'s book. If this was *A*'s impression, *A* has not committed theft.

(n) *A* asks charity from *Z*'s wife. She gives *A* money, food and clothes which *A* knows to belong to *Z* her husband. Here it is probable that *A* may conceive that *Z*'s wife is authorised to give away alms. If this was *A*'s impression, *A* has not committed theft.

If a person takes a lorry on a hire-purchase basis from a company, which under the agreement has reserved the right to seize it in the event of default in payment of installment and default is made, then, the company is not entitled to retake its possession by force or by removing it from the hands of the purchaser's servants, who had no authority, either express or implied, to give any consent. If the company or its agents do so, they are guilty of theft. The question whether ownership had or had not passed to the purchaser is wholly immaterial, as s 378 deals with possession and not ownership. The legal possession of the lorry was vested in the purchaser and the company was not entitled to recover possession of the lorry, even though default in payment of installments had taken place, without the consent of the purchaser. Possession of the driver and cleaner was the possession of their master and they were not competent to give consent on behalf of the master.[59]

However, there seems to be ambivalence in the judicial perception of some of the high courts and the Supreme Court about hire-purchase agreement vis--vis theft. The High Courts of Bombay,[60] Delhi,[61] Karnataka,[62] Madhya Pradesh,[63] Madras,[64] and Patna,[65] have held that seizure of vehicle due to default in the payment of installments stipulated under the mutually agreed schedule for payment attached to the agreement cannot be construed as theft.[66] However, the Supreme Court, in *KA Mathai v Kora Bibbikutty* ,[67] held that the possession of a vehicle taken by the accused financer in pursuance of the hire-purchase agreement amounts to theft as such resumption of possession is tainted with the requisite dishonest intention and mens rea. However, in *Charanjit Singh Chadha v Sudhir Mehra* ,[68] the Supreme Court did not hold the financer, who took back the vehicle for default in payments in accordance with the hire-purchase agreement, guilty of theft as he lacked the element of dishonest intention.[69]The right of the owner to get back the vehicle does not get obliterated by the legal fiction 'deemed owner' created under the Motor Vehicle Act.

Moving or Taking

In addition to all the other ingredients, there must be moving of the property with an intention to take it. As the essence of the offence consists in the fraudulent taking, that taking must have commenced. The English equivalent term is asportation, which implies something more than mere moving, which alone is necessary under the IPC. For instance, where a man lifted up and set on end a package of linen, which was lying in a wagon and cut the wrapper to get at its contents, but was apprehended before he had taken anything out; and where a pick-pocket got a purse out of the owner's pocket, but was unable to carry it away, because it was attached to his pocket by a string, the judges held that there had been no larceny 'for a carrying away, in order to constitute a felony [there] must be a removal of the goods from the place where they were; and the felon must, for the instant at least, have the entire and absolute possession of them'.[70] However, in the case of a post office letter carrier, the taking out of the bag in which letters were carried during delivery, and placing it in his own pocket was deemed sufficient, the jury having found that he put the letter in his own pocket intending to steal it.[71] So it was held in *Venkataswami,*[72] where a letter-sorter instead of handing a letter out for delivery in the usual course, secreted it on his person, that he might give it to the delivery peon himself with a view to sharing the postage payable by the addressee; the high court ruled that by this act he took the letter out of the possession of the post office authorities without their consent for a fraudulent purpose and therefore committed theft.

Explanations 3 and 4 state how moving could be effected in certain cases. Illustrations (b) and (c) elucidate the meaning of expln 4.

...

Explanation 3.--A person is said to cause a thing to move by removing an obstacle which prevented it from moving, or by separating it from any other thing, as well as by actually moving it.

Explanation 4.--A person, who by any means causes any animal to move, is said to move, that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Illustrations

(b) *A* puts a bait for dogs in his pocket, and thus induces *Z*'*s* dog to follow it. Here, if *A*'*s* intention be dishonestly to take the dog out of *Z*'*s* possession without *Z*'*s* consent, *A* has committed theft as soon as *Z*'*s* dog has begun to follow *A*.

(c) *A* meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, *A* has committed theft of the treasure.

BONA FIDE DISPUTE OR CLAIM

Where property is removed in assertion of a contested claim of right, however ill-founded that claim may be, the removal thereof does not constitute theft. A bona fide claim of right postulates want of mens rea. It is a complete defence to the charge of theft.[73]

Where the accused, act ing as tenants had planted paddy crops on certain land of which possession was given under a civil court decree to the claimant, and the accused removed the crops planted by them believing that they had a right to the same, it was held that they had acted under a claim of right and were not guilty of theft.[74]

In *Suvvari Sanyasi Apparao v Boddepalli Lakshminarayana* ,[75] where the subject matter of the alleged theft was a printing press, which was removed from the declared keeper of the press, by the appellant who claimed the press under a sale deed from an ostensible owner, the Supreme Court held that the appellant was not guilty of the offence of theft of the press under s 380 (theft from the dwelling house). Justice M Hidayatullah (former Chief Justice of India) said thus:

> It is settled law that where a bona fide claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft unless there be not only no legal right, but no appearance or colour of a legal right. ... If there be in the prisoner, any fair pretence of property or right, or if it be brought into doubt at all, the Court will direct an acquittal.[76]

The court found that a nominal declared keeper of the press is not necessarily the owner thereof, so as to be able to confer title to the press upon another and the removal of the press by the appellants under a bona fide claim of right was a good defence entitling them to an acquittal.

However, dispute as to ownership must be bona fide and not a mere pretence. The mere assertion of a fair claim of property or right of the mere existence of a doubt is not enough. The claim to the property must be proved by evidence to be fair and good.[77]

Bona Fide Dispute Over Land

In *Ram Ekbal Rai v Jaldhari Pandey* ,[78] there was a prolonged litigation in respect of a piece of land. Possession of land on the part of complainant appeared to be more symbolic. Since the accused were under a bona fide belief that they were entitled to the possession there was no question of them committing theft of the standing crop. The Supreme Court held that the offence of theft was not made out.

Theft by Owner of His Own Property

Paradoxical as it would seem, there is nothing in law against an owner being held guilty of theft in respect of his own goods. Theft arises when there is dishonest removal of a thing from the possession of a person who has a rightful claim to be in possession of it. Thus, if *A* an owner of goods, delivers them to *B*, to keep for him and then steals them with intent to charge *B*, with the value of them, this would he felony in *A*. So, if *A* having delivered money to his servant to carry to some distant place, disguises himself and robs the servant on the road, with intent to charge him, this would be robbery in *A*.[79] Thus, where the accused took a bundle belonging to himself, which was in the possession of a constable and for which the constable was accountable, it was held that the constable had special property in it and the accused was therefore guilty of theft.[80] A person who removes his own cattle after attachment from the person to whom they have been entrusted without having recourse to the court under whose orders they were entrusted is guilty of theft.[81] Similarly, a person who removes his cattle from pound without paying the legitimate fees to the pound-keeper comes becomes guilty of theft.[82]

The following illustrations (j) and (k) to s 378 exemplify the same principle:

(j) If *A* owes money to *Z* for repairing the watch, and if *Z* retains the watch lawfully as a security for the debt, and *A* takes the watch out of *Z*'*s* possession, with the intention of depriving *Z* of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if *A*, having pawned his watch to *Z*, takes it out of *Z*'*s* possession without *Z*'*s* consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property inasmuch as he takes it dishonestly.

If there is a bona fide claim of right, the criminal court stays its hand whatever may be the civil rights of parties. Litigants in this country as everywhere else are always eager to cut the Gordian knot of protracted litigation by launching out a prosecution for theft.

Theft as Between Husband and Wife

There is no presumption in India (as is the position in English Common Law), that a husband and wife constitute one person and as such there can be no prosecution for theft as between them. Hence, if a wife removes her husband's property from his house with dishonest intention, she will be guilty of theft.[83] In this case, a Hindu wife, during her husband's absence, removed his property from his house to that of her paramour. On the husband's return, he charged them both with theft and they were convicted of that offence by the trial court. The conviction was upheld by the Madras High Court. The court observed thus:

> There is no presumption of law that the wife and husband constitute one person in India for the purpose of criminal law. Theft is an offence against property. And where there is no community of property, each may commit theft in regard to the property of the other. The question is one of intention. If the wife, removing the husband's property from his house, does so with dishonest intention, she is guilty of theft.

A spouse, therefore, may be guilty of theft if (s)he dishonestly removes exclusive property of the other.[84] However, a Hindu woman cannot be guilty of theft when she removes *stridhan* without consent of her husband as the property belongs to her exclusively. But her husband can be convicted for theft if he removes it without his wife's consent.[85] A spouse cannot be held guilty of theft if she removes certain moveable property jointly possessed with his wife.[86]

DIFFERENCE BETWEEN LARCENY AND THEFT

In England, the Larceny Acts of 1861 and 1961 were replaced by a consolidated new enactment of the Theft Act 1968. This new enactment is a great improvement of the past, and the dominant basic concept is that of 'dishonest appropriation'.

According to s (1)(i) of the Theft Act 1968 "A person is guilty of theft if he dishonestly appropriates property belonging to another, with the intention of permanently depriving the other of it, and 'theft' and 'steal' shall be construed accordingly". By s 7, a person guilty of theft is liable to imprisonment for 10 years.

The act us reus of theft consists of the appropriation of property belonging to another and appropriation is defined in s 3(1) of the Theft Act 1968 thus:

Any assumption by a person of the rights of an owner amounts to an appropriation and thus includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.

Under the English law of theft, there can be no theft of property, unless, it is a property with an owner. Under Indian law, it is not necessary that the property should necessarily have an owner, it will suffice if it is in someone's possession.

Secondly, under English law, larceny is taking a thing out of the possession (actual or constructive) of the owner; but in the case of theft, there need be no owner, the act constituting the offence being complete no sooner a person in possession is dispossessed.

Thirdly, under English law, larceny could only be committed in respect of personal goods. Consequently, as title deeds are regarded as sinews of the land to which they relate, there can be no larceny in respect of them,[87] though, of course, in this respect, this definition is less technical and more general, since anything severed from the earth is regarded here as movable property and, as such, it may be the subject of theft.[88]

Fourthly, it is of the essence of larceny that the property must have been taken with a view to permanent appropriation, but theft regards even temporary dispossession is sufficient, even though the thief may have intended to restore the things stolen eventually to the owner.[89]

Fifthly, larceny is not complete merely on moving the thing out of its place; to complete it, the thief must have, though even for a moment, the entire and absolute possession of it;[90] but theft under the IPC is complete merely with the moving called asportation.[91]

Lastly, larceny takes account of a claim of right, so that the mere removal of goods without the owner's consent is not larceny, unless it was without any colour of right, but it will in the same circumstance be theft, which is a removal without consent, independently of a claim of right.[92]

The provisions of IPC relating to possession of property may be divided into two classes. One group of sections is intended to protect possession and prevent its disturbance. To this group belong the offences against property such as theft, robbery, dacoity and the offence involving trespass on immovable property.

Under the second category, law punishes mere possession of certain things, such as instruments for counterfeiting coins (s 235), government stamps (s 256), trademarks (s 485), currency notes (s 489D), counterfeit coins (ss 242, 243, 252, 253) and possession of government stamps (s 259), of false weights and measures (s 266), of obscene books (s 293), of counterfeit seals (s 473), of false currency notes (s 489C) etc. There are also various special acts such as the Arms Act 1959, the OpiumAct, the Excise Act, which deal with similar matters.

PUNISHMENT FOR THEFT

Section 379. Punishment for theft.--Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

AGGRAVATED FORMS OF THEFT

Section 380. Theft in dwelling house, etc.--Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

For attracting s 380 it is necessary to prove that 'theft' was committed in a 'building', 'tent' or 'vessel' used as 'human dwelling' or for 'custody of property'.

The expression 'building' conveys a structure, whether covered or uncovered, made of any material whatsoever. The term postulates some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Therefore, a structure which does not afford such a protection, though it serves as a fencing or other means of preventing ingress or egress, cannot be a 'building' within the meaning of s 380.[93] A compound or cattle pound, an open plot of land with a boundary fence, is not a building.[94] But an entrance hall surrounded by a wall with doorways, but without doors, which is used for custody of property, is a building.[95] Thus, the term 'building' used in s 380 gives prominence to its intended use (as a dwelling or store house) rather than to the nature of its structure or of the material used for the structure. The term 'vessel', as defined under s 48 of the IPC, denotes 'anything made for the conveyance by water of human beings or of property'.

What is important for s 380 is that a building, vessel or tent is used, permanently or temporarily, for human dwelling or for custody of property (eg warehouse). The words 'human dwelling', used in s 380, mean a place in which a person lives, remains or hinges whether permanently or temporarily. A railway- waiting room is a building used as a human dwelling.[96] A building-roof used for storing articles is a building as it used for custody of property.[97]

Section 380 makes it more heinous to steal when the property is kept in a building, tent, or vessel used as a human dwelling or for the custody of property. It aims at affording greater security to property deposited in a house, etc, or kept in the abode of the owner.

Theft in a building, tent etc, which is used as a human dwelling or a place for stocking things, is considered an aggravated form of theft because it involves trespass. Further, if it is a dwelling place, it intimidates and causes fear to the people living in the house. If it is used for the custody of property, even then it is considered an aggravated form and a higher punishment is prescribed because it is intended to give greater security to property in a building.

Section 381. Theft by clerk or servant of property in possession of master.--Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

In order to bring s 381 in play it is necessary for the prosecution to prove not only all the essential elements of theft as defined under s 379 but also that the accused was a clerk or servant or employed in the capacity of a clerk or servant and he has removed the movable property out of possession of his master or employer.

The theft of property, in possession of the master, by a clerk or servant is considered an aggravated form because, generally confidence is reposed in a clerk or servant by his employer and many properties may be left exposed without constant surveillance by the employer. A servant or clerk, thus, has more easy opportunity for stealing than other persons would.

A clerk of the *tahsil* office, who took official papers out of possession of his fellow clerk without consent of the concerned *tahsildar* to show them to an advocate of one of the parties to the case, was held guilty under s 381.[1] However, despite the fact that it is considered an aggravated form of theft, the Gujarat High Court, taking into consideration the harsh circumstances under which an employee committed theft of a petty sum, took a lenient view of the matter. In *Jayantilal Purshottamadas Patel v State of Gujarat* ,[2] the accused was a poor employee who was paid Rs 125 per month. He was alleged to have committed rolls of paper worth Rs

104 from the shop. At that time, his wife was pregnant and was about to deliver. She was ill and the accused had to go to his native town to see his wife. The court held that under these circumstances, if he was tempted to steal, it could not be treated as a very serious offence. Further, the goods were restored to the owner and the accused had already lost his job. Under the circumstances, the court imposed a token fine of Re 1 on the accused.

An unpaid apprentice is a clerk or servant within the meaning of s 381 of the IPC. Any theft committed by such a person comes within the ambit of the section.[3]

Section 382. Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft.--Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) *A* commits theft on property in *Z*'s possession; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting *Z* in case *Z* should resist. *A* has committed the offence defined in this section.

(b) *A* picks *Z*'s pocket, having posted several of his companions near him, in order that they may restrain Z, if *Z* should perceive what is passing and should resist, or should attempt to apprehend *A*. *A* has committed the offence defined in this section.

Section 382 deals with a case where the thief has made preparations for causing--(i) death, or (ii) hurt, or (iii) restraint to any person in order to ensure (a) the commission of theft, or (b) his escape after committing the theft, or (c) retention of the stolen property. The aggravating factor in this section, thus, is the fact that the accused who went to steal was also prepared to cause personal injury or intimidation to the victim, if, the situation so warranted. The preparation may be in the nature of arming himself with a stick, knife or any other weapon, that is sufficient to cause harm or injury. This is explained in illust (a) to the section. The 'preparation' referred to in the section may also be in the nature of taking other confederates with him and so position, as to help, if the victim resisted or tried to raise an alarm. This is explained in illust (b).

However, it is important to note that mere preparation by a thief to cause harm indicated in the section is enough to bring him under the purview of s 382. It is neither necessary nor required under the section that hurt be caused or attempted to be caused.[4] But if he, while committing theft, causes hurt, he becomes liable for committing robbery.[5]

Section 382 has to be distinguished from that of robbery. If the accused goes beyond the preparation stage and actually causes hurt or injury, then it will amount to an offence of robbery. But, if it stops with preparation and the accused does not go beyond it, even if it was because there was no necessity to cause violence then it will be covered by this section.

In *Diwan Singh v State of Madhya Pradesh* ,[6] the complainant, a young man, was going to his mother-in-law's village. He was riding a mare. When he reached by the side of the river, the two accused with sticks fixed with iron spears forcibly took the mare away from him. They were convicted by the trial court under s 382, IPC. Before the Madhya Pradesh High Court, it was contended that the accused had not given any threat or even made any attempt to cause hurt or restraint. The court held that under s 382, it was not necessary that hurt must be caused or an attempt to cause hurt must be made. If a person kept a knife with him and committed theft, then he is liable to be convicted under s 382, even if he had no occasion to wield the knife or cause injury. What is relevant is the preparedness of the accused in such a manner that he may be able to cause hurt to others who might resist or may come in his way of escaping or taking the stolen property away.

PART B - EXTORTION

Section 383. Extortion.--Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".

Illustrations

(a) *A* threatens to publish a defamatory libel concerning *Z* unless *Z* gives him money. He thus induces *Z* to give him money. *A* has committed extortion.

(b) *A* threatens *Z* that he will keep *Z's* child in wrongful confinement, unless *Z* will sign and deliver to *A* a promissory note binding *Z* to pay certain monies to *A*. *Z* signs and delivers the note. *A* has committed extortion.

(c) *A* threatens to send club-men to plough up *Z's* field unless *Z* will sign and deliver to *B* a bond binding *Z* under a penalty to deliver certain produce to *B*, and thereby induces *Z* to sign and deliver the bond. *A* has committed extortion.

(d) *A*, by putting *Z* in fear of grievous hurt, dishonestly induces *Z* to sign or affix his seal to a blank paper and deliver it to *A*. *Z* signs and delivers the paper to *A*. Here, as the paper so signed may be converted into a valuable security, *A* has committed extortion.

Section 384. Punishment for extortion.--Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 385. Putting person in fear of injury in order to commit extortion.-- Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

INGREDIENTS

The essential ingredients of the offence of extortion are: (i) intentionally putting a person in fear of injury; (ii) the purpose of which is to dishonestly induce the person put in fear, and (iii) to deliver property or valuable security.[7]

The offence of extortion is intermediary between the offence of theft and robbery. Extortion becomes robbery, if, the offender at the time of committing the offence puts the person in fear and commits the extortion by causing fear of instant death, hurt or wrongful restraint. However, in 'robbery', the property can be removed by force without the person delivering the property.

The fear of injury contemplated under this section need not necessarily be bodily harm or hurt. It will include injuries to mind, reputation or property of the person.[8]

In *Purshottam Jethanand v State of Kutch* ,[9] the accused was a police *jamadar* working in the local investigation branch of the State of Kutch. He had visited a particular *taluk*, and checked passports of a number of persons who had returned from Africa. In the course of the check, he collected the passport of one Ananda Ratna in a village and demanded a sum of Rs 800 for its return. Accordingly, the said person paid the amount and took back the passport. The accused was convicted under s 384, IPC. It was contended before the Supreme Court that there was no fear of injury that was held out by the accused to support a conviction for extortion under s 384, IPC. The Supreme Court held that from the evidence, it was found that the accused in the course of his check of the passports had suspicion that some of the passports were not genuine. There was an implied threat for prosecution in respect of the same and withholding of the passport on that threat. Even assuming that the passports were genuine, wrongfully withholding the same was equally a fear of injury and hence, the offence was covered under s 384, IPC.[10]

In *Romesh Chandra Arora v State* ,[11] the accused had written letters to one *X*, enclosing photograph of the daughter of *X* in the nude and were of a character, which if made public, would undoubtedly compromise the reputation of the girl as well as her father *X*. The accused demanded 'hush money' from *X* and threatened *X* stating that he would circulate the photographs to the relatives of the girl, if the money was not paid. He was convicted for criminal intimidation under s 506, IPC.

In *Vishnu Shiv Ram Bhoir v State of Maharashtra* ,[12] the accused surrounded one Yakub and his party and extorted a sum of Rs 300, as a price for sparing them. The amount demanded by the accused was paid up. The accused were convicted under s 384, IPC, accused 1, 2, 4, 6, 8 and 10 were sentenced to three to six months rigorous imprisonment, and a fine of Rs 1000 was imposed on four of them and a fine of Rs 500 on two of them. The court directed that the fine amount, if realised, will be paid in equal shares to Yakub and his father, who were the victims of extortion.

In *RS Nayak v AR Antulay* ,[13] the respondent was the Chief Minister of Maharashtra at the relevant time. During this period, he formed seven trusts, one of which was the Indira Gandhi Pratibha Prathisthan (IGPP). The chief minister demanded that unless the sugar co-operatives, who had placed a charter of demands before the Government of Maharashtra, made contributions to the IGPP, their demands pending before the government would not be acceded to. The entire official machinery, particularly of the Sugar Directorate, was utilised to pressurise the sugar federation for extracting contributions. As a result of such extortion, several sugar factories had to yield and pay up. The donations were the outcome of pressure and not voluntary.

It was contended by the respondent that in order that s 383 should apply, the respondent should hold out threat to do or omit to do what he is legally bound to do in future. If all that a man does is to promise to do a thing which he is not legally bound to do, then such act would not amount to extortion. The Supreme Court accepted the contention and held that merely because the respondent was the chief minister at that time and pressure was brought on sugar co-operatives to pay up donations as a measure of reciprocating for consideration of their demands pending before the government, it cannot be said that the ingredients of the offence of extortion was made out.

The word 'injury' is defined in s 44 as denoting 'any harm whatever illegally caused to any person, in body, mind, reputation or property'. The injury contemplated must be one which the accused himself can inflict or cause to be inflicted and the threat of divine punishment will not come under it.[14]

THEFT AND EXTORTION: DISTINCTION

The offence of extortion is carried out by overpowering the will of the owner. In theft, the offender's intention is always to take without the person's consent.[15]

Besides, the property which is obtained by extortion, is not limited as in theft to movable property only. In cheating, there is removal with consent obtained by fraud, while in extortion, consent is obtained by show of fear.

Thus, extortion takes an intermediate place between theft and robbery and it is more akin to robbery than to theft.

In addition to movable property, which is the subject matter of theft, extortion also covers 'valuable security'. 'Valuable security' is defined in s 30, which runs thus:

The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

A man might commit extortion by compelling another to assign to him an estate, or to create a mortgage or an annuity in his favour.[16]

As already indicated, the radical difference between theft and extortion or robbery is that in the latter cases, the offence is carried out by overpowering the will of the owner and thereby inducing him to give up his own property. The important question therefore is what means are so illegal as to convert an innocent or actionable proceeding to a crime.

As regards extortion, these means are described as 'whoever intentionally puts any person in fear'. The question for the court will be what is the degree of fear which would justify a person of ordinary strength of mind in giving up his property, in order to escape from the injury with which he was threatened. In the English case Re *Miard*,[17] threats to expose a clergyman, who had intercourse with a woman in a house of ill fame, to his own church and village, bishop and archbishop and also to publish his shame in the newspaper, was held to be such a threat as a man of ordinary firmness could not be expected to resist. The criteria is thus stated

in another English decision in Re *Donolly s*,[18] where the prisoner was charged with robbery for having induced the prosecutor to part with money by a threat that the prisoner would take him before a Magistrate and accuse him of having attempted an unnatural offence. The judges held that the accused guilty. They remarked thus:

> On the one hand, the fear is not confined to an apprehension of bodily injury; and on the other hand, it must be of such a nature as, in reason and common experience, is likely to induce a person to part with his property against his will, and to put him as it were under a temporary suspension of the power of exercising it through influence of the terror impressed; in which case, fear implies, as well in sound reason as in legal construction, the place of force, or an act ual taking by violence or assault upon the person.

AGGRAVATED FORMS OF EXTORTION

Section 386. Extortion by putting a person in fear of death or grievous hurt.-- Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

In *Ram Chandra v State of Uttar Pradesh* ,[19] the accused had kidnapped a boy and wrote letters to the father of the boy stating that unless the money was paid, the boy would be killed. It was held that an offence under s 386, IPC, was made out, because all the ransom letters disclosed that the father of the boy was constantly under the fear that his son would be murdered.[20]

Section 387. Putting person in fear of death or of grievous hurt, in order to commit extortion.--Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

In *Ramjee Singh v State of Bihar* ,[21] the Patna High Court laid down the ingredient of the offence thus:

> In order to constitute an offence of extortion, there ought to be some visible overt act which may reflect the natural and normal inference that the wrongdoer had, in fact, put a person in fear of death or of grievous hurt. In absence of any apparent overt act leading towards the act of extortion and thus putting any person in fear of death, or of grievous hurt, there could not be said to be an offence committed for extortion by threat. ... [W]ithout any visible sign of physical act, simply use of words is not enough to constitute that offence....[22]

In *Gurudeo Singh v State of Punjab* ,[23] the accused was found demanding money from the public and also a constable, who passed by near the *Gurudwara*. It was held that it amounted to an offence under s 387, IPC.

In *Gurusharan Singh v State of Punjab* ,[24] the Supreme Court held the accused guilty of extortion for demanding money for purchase of weapons for the terrorists and threatening them due consequences if the money was not paid.

Where in broad daylight, in the presence of others, a demand of money was made by the accused by uttering some threats, that could not be said to be an act of extortion as contemplated by s 387, in absence of any physical act on the part of the accused.

Section 388. Extortion by threat of accusation of an offence punishable with death or imprisonment for life, etc.--Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with imprisonment for life, or with imprisonment for a term which may extend to ten years or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be one punishable under section 377 of this Code, may be punished with imprisonment for life.

Section 389. Putting person in fear of accusation of offence, in order to commit extortion.--Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit an offence punishable with death or

with imprisonment for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be punishable under section 377 of this Code, may be punished with imprisonment for life.

PART C - PROPOSALS FOR REFORM

THEFT

The Fifth Law Commission has recommended a couple of changes in the existing law relating to theft. They are:

(1) Theft committed in vehicle, vessel or aircraft used for transport; place of worship open to the public; in respect of government property, and theft committed when the possessor became victim of natural calamity, should be recognized as 'aggravated forms' of theft, It accordingly suggested redrafting of s 380 (theft in dwelling house) to give effect to its all recommendations except the last one and insertion of a new section (s 380A) giving effect to its last suggestion. These aggravated forms of theft should be made punishable by simple or rigorous imprisonment for a term up to seven years.

(2) The punishment of imprisonment for term up to ten years provided for the aggravated form of theft mentioned in s 382, with a view to making it at par with that provided under ss 380 and 381, be scaled down to imprisonment for a term up to seven years.

(3) Section 381, which arbitrarily picks out 'clerks' and 'servants' from a host of employees for harsher punishment, if any one of them commits theft of property in the possession of his employer, should be made more wider by incorporating in it 'a person employed in any capacity by another person'.[25]

EXTORTION

The Fifth Law Commission has recommended two major changes in the existing law relating to extortion. They are:

(1) Reference to s 377 in ss 388 and 389, in the light of its suggestion of lesser punishment for unnatural offences under s 377, should be deleted.

(2) 'Blackmail' should be brought under 'extortion' by inserting a new section (s 385A) in the Code and it should be made punishable by imprisonment for a term up to seven years.[26]

The Indian Penal Code (Amendment) Bill 1978, through its clauses 161 & 162, sought to incorporate, with very minor modifications, almost all the above-mentioned proposals for reform. The Fourteenth Law Commission not only endorsed all the proposals for reform recommended by the Fifth Law Commission but also supported both the clauses of the 1978 Bill.[27]

However, none of these reforms have not been carried out as the 1978 Bill lapsed in 1979 owing to the dissolution of *Lok Sabha*.

1 AIR 1957 SC 369, (1957) Cr LJ 552(SC) .

2 Ibid, para 9.

3 Ibid, para 11.

4 *Suri Venkatappayya Sastri v Madula Venkunna* (1904) ILR 27 Mad 531(FB) ; it overruled *Kotayya*(1887) ILR 10 Mad 255, and followed in *Shivaram*(1891) ILR 15 Bom 702.

5 *Krishna Reddy v Muniappa Reddy* AIR 1943 Mad 34.

6 *TI Francis v State of Kerala* (1982) Cr LJ 309(Ker) .

7 *Pyarelal Bhargava v State of Rajasthan* AIR 1963 SC 1094 (a person who temporarily removed a file from the office of a chief-engineer and made it available to a private person for a day or two was held of committing theft).

8 See also *Adharjir v State* AIR 1954 Nag 55, (1954) Cr LJ 280(Nag) .

9 (1869) 4 MHC Appex 30, 1 Weir 384.

10 Re *Nalla*(1887) ILR 11 Mad 145.

11 *Romesh Chunder Sannyal v Hiru Mondal* (1890) ILR 17 Cal 852.

12 *Subba Reddy v Munshoor Ali Saheb* (1900) ILR 24 Mad 81.

13 *Bhagiram Dome v Abar Dome* (1888) ILR 15 Cal 388.

14 AIR 1950 Ori 106.

15 AIR 1943 Mad 34.

16 Ibid, para 2. A similar judicial opinion is reflected in *State of Rajasthan v Pooran Singh* (1977) Cr LJ 1055(Raj) .

17 AIR 1965 SC 585.

18 *Bairagi Rout v Brahmananda Das* (1970) Cr LJ 638(Ori) .

19 1 Hawk PC 148; see also, *Ramadhin*(1902) ILR 25 All 129.

20 AIR 1965 SC 666.

21 *Ram Shankar Sinha v State* AIR 1968 Pat 131; *State v Dharam Pal* (1980) Cr LJ 1394(Del) . The Indian Electricity Act, 1910 is now repealed by the Electricity Act, 2003 (36 of 2003). S 135 of the Act deals with theft of electricity and provides for imprisonment for a term up to three years or fine or with both.

22 *Hyderabad Vanaspati v State of Andhra Pradesh* (1978) Cr LJ 1824(AP) ; *Arakhita Patnaik v State of Orissa* (1994) Cr LJ 2242(Ori) ; *Hargyan v State of Madhya Pradesh* (2003) 2003 Cri LJ 2936, 2003 (3) MPLJ 171.

23 *Sheikh Arif*(1908) ILR 35 Cal 437.

24 (1913) Cr LJ 131 (Mad).

25 *Mahadeo Prasad*(1923) ILR 45 All 680.

26 *Adharjir v State* AIR 1954 Nag 55, (1954) Cr LJ 280(Nag) ; see also *Nga Paw Din v King* AIR 1938 Rang 138; but see *Ram Bharosey v State of Uttar Pradesh* AIR 1952 All 481.

27 *Dayal v King Emperor* AIR 1943 Oudh 280.

28 Re *Veera Sami Naiken*AIR 1931 Mad 18.

29 *Madra*(1946) ILR Nag 326; see also *Mahendra Patra v State of Orissa* (1978) Cr LJ (NOC) 28(Ori) .

30 *Madaree Chowkeedar*(1865) 3 WR 2(Cri) .

31 AIR 1965 SC 926.

32 Macaulay, Macleod, Anderson and Millett, *A Penal Code Prepared by the Indian Law Commissioners*, Pelham Richardson, 1838, Note N, p 159.

33 *Superintendent and Remembrancer Legal Affairs, West Bengal v Anil Kumar* AIR 1980 SC 52.

34 *Brij Pal v State (Delhi Administration)* AIR 1996 SC 2915; *Tahir v State* AIR 1996 SC 3079.

35 See, *Cartwright v Green* 8 Ves 405 and *Merry v Green* 7 M&W 823.

36 1 Hale PC 506.

37 64 JP 73.

38 *Harris, Criminal Law*, nineteenth edn, pp 301--302.

39 Sir James Fitzjames Stephen, *A Digest of the Criminal Law*, ninth edn, art 359.

40 *Virankutty v Chiyamu* (1884) ILR 7 Mad 55; *Ponnurangam*(1887) ILR 10 Mad 186.

41 *Ramsharangat Singh v State of Bihar* (1966) Cr LJ 856.

42 *Sita Ram Rai*(1880) ILR 3 All 181.

43 *Subudhi Rantho v Balarama Pudi* (1902) ILR 26 Mad 481.

44 *R v Thompson* 1111 32 LJ (MC) 50.

45 AIR 1963 SC 1094.

46 (1979) Cr LJ 1193 (SC), AIR 1979 SC 1825.

47 *KN Mehra v State of Rajasthan* AIR 1957 SC 369, (1957) Cr LJ 552(SC) .

48 *Nobin Chandar Hoidar*(1866) W R (Cri) 79.

49 *Venkatanarayana v State of Andhra Pradesh* (1979) Cr LJ (NOC) 173(AP) ; see also, *Vithal Yedu Khalse v State of Maharashtra* (1982) Cr LJ 1873(Bom) .

50 *Queen-Empress v Nagappa* (1890) ILR 15 Bom 344.

51 *Nubi Baksh*(1897) ILR 25 Cal 416.

52 *Rup Lal Singh v Durga Prasad* (1917) 8 Cr LJ 1012.

53 *Rameshwar Singh v Emperor* (1936) 12 Luck 92.

54 *Queen Empress v Shrichurn Chungo* (1895) ILR 22 Cal 1017(FB) .

55 (1911) ILR 34 All 89.

56 (1981) Cr LJ 1613 (Bom).

57 (1980) Supp SCC 655, (1981) SCC (Cri) 552.

58 (1904) 1 ALJ 508.

59 *HJ Ramson v Triloki Nath* (1942) 17 Luck 663.

60 *Bhivraj v Ravindra* (1987) 1 Crimes 173(Bom) .

61 *Joginder Kumar v State (Delhi Administration)* (1991) Cr LJ 2897(Del) ; *Mahabir Singh v Commissioner of Police, Delhi er Ors* (2006) DLT 287.

62 *Shri Ram Transport Finance Co Ltd v Shri RK Khan* (1993) Cr LJ 1069(Kant) .

63 *Sundram Finance Ltd v Mohd Abdul Wakeel* (2001) Cr LJ 2441(MP) .

64 *Sekar v Arumugham* (2000) Cr LJ 1552(Mad) .

65 *Shiv Kumar Jalan v State of Bihar* (2005) Cr LJ 540(Pat) .

66 See also, *Ransom v Trilokinath* AIR 1942 Oudh 318.

67 (1996) 7 SCC 212.

68 AIR 2001 SC 3721, (2001) Cr LJ 4255(SC) .

69 Also see *Shriram Transport Finance Co ltd v R Khaishiulla Khan* (1993) Cr LJ 1069(Kant) ; *Sekar v Arumugham* (2000) Cr LJ 1552(Mad) ; *Sundaram Finance Ltd v Mohd Abdul Wakeel* (2001) Cr LJ 2441(MP), 2001 (3) MPHT 124.

70 *Charry*'s *case* East PC 556.

71 *R v Poynton* L and C 247.

72 (1890) ILR 14 Mad 229.

73 *Dsndi Deka v State of Assam* (1982) Cr LJ 188(Gau) (NOC) .

74 *Sit Pein v King Emperor* AIR 1924 Rang 72.

75 AIR 1962 SC 586.

76 Ibid, para 9.

77 *Chandi Kumar v Abraham* AIR 1965 SC 585; *Mahaban v Budhi* (1971) Cr LJ 1363(All) ; *Antonie Douroado v Nilkant Sinai Kontok* (1988) 3 Crimes 695(Goa) .

78 AIR 1972 SC 949, (1972) Cr LJ 584(SC) .

79 Hale PC 513.

80 *Sheikh Hussain*(1887) Cri R No 36 of 1887, unrep criminal case 323.

81 Re *Rama*AIR 1956 Raj 190.

82 Re *Veera Sami Naicken*AIR 1931 Mad 18.

83 *Butchit*(1893) ILR 17 Mad 401.

84 See *Anil Bhardwaj v State* (1985) Cr LJ 613(P&H) ; *Prativa Rani v Suraj Kumar* AIR 1985 SC 628.

85 *Natha Kalyan*(1871) 8 BHC (Cr C) 11.

86 *Harmanpreet Singh Ahluwalia v State of Punjab* (2009) 7 SCC 712, (2009) Cr LJ 3462(SC) .

87 1 Hale PC 510, 1 Hawk PCC 33; s 85.

88 Section 378, expln 2.

89 *Tribilock* 27 JMC 103, *Hollower* 1 Den 370; *Queen-Empress v Nagappa* (1890) ILR 15 Bom 344.

90 *Cherry's case* 1 Leach 236.

91 Lat Abs from and porto, to carry, a carrying away.

92 Hari Singh Gour, *Penal Law of India*, vol 4, 11th edn, Law Publishers, Allahabad, 1998, pp 3687- 3688.

93 *Kounden v Emperor* AIR 1927 Mad 343.

94 *Ghulam Jelani*(1889) PR No 16 of 1889.

95 *Dad*(1878) PR No 10 of 1879.

96 *State v Nihal Singh* (1971) 73 Punj LR 440.

97 *Satho Tanti v State of Bihar* (1973) Pat LR 367.

1 *Vallabhram v Emperor* AIR 1926 Bom 122.

2 (1975) Cr LJ 1345 (Guj).

3 *Sohanlal v King Emperor* (1906) 3 Cri LJ 70(Bom) ; *Slim Babamiya Sutar @ Jamadar v State* (2000) Cr LJ 2696(Bom) .

4 See, *Nga Shwe Bra v King* AIR 1937 Rang 542; *Lal Singh v Emperor* AIR 1923 Lah 512.

5 *Hushrut Sheikh*(1866) 6 WR (Cri) 85; *Mahadeo Tukaram v Crown* AIR 1950 Nag 214.

6 (1980) Cr LJ 760 (MP).

7 *Dhananjay @ Dhananjay Kumar Singh v State of Bihar* (2007) 14 SCC 768, (2007) Cr LJ 1440(SC) .

8 See *Abdulvahab Abdulmajid Shaikh v State of Gujarat* (2007) 4 SCC 257, 2007 Cri LJ 3529.

9 AIR 1954 SC 700, (1954) Cr LJ 1751(SC) .

10 See also *Bheru Singh v State of Rajasthan* (1988) 3 Crimes 80(Raj), wherein a police constable, who threatened a person that he would be arrested if he does not pay, was held guilty under s 384, IPC. And *Habib Khan v State of Bihar* AIR 1952 Pat 379, wherein a police constable, who threatened a person to take the complainant to police station on a charge of theft unless he makes payment of money, was held guilty under s 384.

11 AIR 1960 SC 154.

12 AIR 1979 SC 1943.

13 AIR 1986 SC 2045, (1986) Cr LJ 1922(SC) .

14 *Thannumal v Emperor* AIR 1944 Sind 203.

15 *Dhananjay v State of Bihar* (2007) 14 SCC 768, (2007) Cr LJ 1440(SC) .

16 See *Chanderkala v Ram Kishan* AIR 1985 SC 1268, (1985) Cr LJ 1490(SC) .

17 1 Cox 22.

18 1 Leach 229.

19 AIR 1957 SC 381, (1957) Cr LJ 559(SC) .

20 See also, *Ramchhod v State of Madhya Pradesh* AIR 1979 SC 1493.

21 (1987) Cr LJ 137 (Pat).

22 Ibid, para 5.

23 (1998) SCC 560 (Cri).

24 (1996) 10 SCC 190.

25 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 17.6-17.11.

26 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code', Government of India, 1972, paras 17.13, 17.15 & 17.16.

27 See Law Commission of India 'One Hundred and Fifty Sixth Report: The Indian Penal Code ', Government of India, 1997, paras 12.61 -12.64.

CHAPTER 42

Robbery and Dacoity

(Indian Penal Code 1860,Sections 390 to 402)

INTRODUCTION

The sections dealing with robbery and dacoity can be broadly categorised into the following divisions:

(1) Robbery, (and) attempt to commit robbery, punishment for robbery (ss 390, 392, 393 and 401);
(2) Aggravated forms of robbery (ss 392 and 394);

(3) Dacoity (ss 391 and 395);
(4) Aggravated form of dacoity (s 396);
(5) Offences connected with dacoity:
  (a) preparation to commit dacoity (s 399);
  (b) assembling for purposes of committing dacoity (s 402);
  (c) belonging to a gang of dacoits (s 400).

(6) Minimum sentence in certain cases of robbery and dacoity (ss 397 and 398).

PART A - ROBBERY

Section 390. Robbery.-- In all robbery there is either theft or extortion.

When theft is robbery.--Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.--Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.-- The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations

(a) *A* holds *Z* down, and fraudulently takes *Z's* money and jewels from *Z's* clothes, without *Z*'s consent. Here *A* has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to *Z*. *A* has, therefore, committed robbery.
(b) *A* meets *Z* on the high roads, shows a pistol, and demands *Z's* purse. *Z*, in consequence, surrenders his purse. Here *A* has extorted the purse from *Z* by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. *A* has, therefore, committed robbery.
(c) *A* meets *Z* and *Z's* child on the high road. *A* takes the child, and threatens to fling it down a precipice, unless *Z* delivers his purse. *Z*, in consequence, delivers his purse. Here *A* has extorted the purse from *Z* by causing *Z* to be in fear of instant hurt to the child who is there present. *A* has, therefore, committed robbery on *Z*.
(d) *A* obtains property from *Z* by saying--'Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees'. This is extortion, and punishable as such; but it is not robbery, unless *Z* is put in fear of the instant death of his child.

ESSENTIAL INGREDIENTS

Robbery is an aggravated form of either theft or extortion. The opening words of s 390, IPC, show that there cannot be any robbery, if there is no theft or extortion. Both in theft and extortion, dishonesty is an essential ingredient. So, if there is no element of dishonesty in an act, there can be no offence of theft or extortion and consequently there cannot be an offence of robbery. Similarly, removal of movable property from the possession of another is a necessary element to constitute an offence of theft. If this element is absent, then there is no theft and consequently, there will be no robbery either. Thus, in order to verify whether a particular act would amount to a robbery or not, one has to first establish that the offence has essential ingredients of theft or extortion, since robbery is nothing but an aggravated form of theft and extortion.[1] Theft or extortion or attempt to commit any one of the two is an inevitable ingredient for robbery.[2] Theft becomes robbery, if, in order to facilitate the committing of theft or in carrying away or attempting to carry away the stolen property,

the offender (i.e., the thief) voluntarily causes or attempts to cause death, hurt or wrongful restraint or fear of instant death, instant hurt or instant wrongful restraint.[3]

Extortion is robbery, if, the extortionist at the time of committing the extortion, is in the immediate presence of the victim and puts the victim in fear of instant death, of instant hurt or of instant wrongful restraint, either to that person or to some other person. If out of this fear induced in the victim by the extortionist, he is able to obtain delivery of the thing extorted, then the offence of extortion is committed. The *explanation* to s 390 states that the extortionist is said to be present, if he is sufficiently near to put the person in fear of instant death, of instant hurt or of instant wrongful restraint.

Causing Death, Hurt or Wrongful Restraint or Fear Thereof

One of the essential ingredients to constitute the offence of robbery is that the offender should have caused to any person death, hurt or wrongful restraint, or the fear of instant death or instant hurt or instant wrongful restraint. Only when such elements exist, the offence of theft would be robbery and not otherwise.

In *Harish Chandra v State of Uttar Pradesh* ,[4] the victim boarded a train at Chakarpur railway station. The accused and the co-accused along with some other persons entered the same compartment. When the train reached Thankpur railway station at about 9.30 pm, some of the passengers started getting down from the compartment and there was a great rush. At that time, the accused forcibly took away the wristwatch of the victim and when he raised an alarm, the co-accused slapped him and his other companion hit him with a stick. Both the accused jumped out of the compartment. The victim also followed them. The victim found a constable on the platform and informed him about the incident. A search was immediately made for the accused and ultimately both the accused were found near a tea stall at a short distance near the railway station. The victim identified both the accused as the persons who had robbed him of the wristwatch and the constable caught hold of them. On being questioned, the accused took out the wristwatch from a heap of ash lying behind the tea stall. Both the accused were charged for robbery. It was argued on behalf of the defence that since the slapping of the victim took place after the watch had been stolen, the hurt could not have been said to have been caused in order to commit the theft, so as to bring the offence under s 390, IPC. The Supreme Court rejected the argument stating that the co-accused slapped the victim to enable the accused to carry away the stolen property. Under the circumstances, it would clearly fall within the provision of s 390, because as per the section, theft is robbery, if, hurt is caused while carrying away or attempting to carry away the property stolen. The conviction of the accused was upheld.

In *Harinder Singh v State of Punjab* ,[5] the accused was a gunman in the Pepsu Roadways Transport Corporation at Kapurthala. He robbed an assistant cashier in the same corporation and took away a sum of Rs 32,936 and also caused injuries to the cashier. The accused confined the cashier in a room and bolted it from outside. The cashier raised a hue and cry after the accused left the place. He was noticed by somebody and thereafter information was given to the police. When the police arrived on the scene, they found the cashier confined in the room and found traces of robbery. Serious injuries were also found on the person of cashier. The accused absconded for two and a half months and thereafter he was arrested. He was convicted for committing offences under ss 390 and 397, IPC.

In *Mohinder Singh v State of Haryana* ,[6] the complainant victim was a taxi driver. When he was standing at a taxi stand, a clean shaven young man hired the complainant's car. The fare was settled at Rs 1.20 per Kilometre. A sum of Rs 400 was paid to the complainant as advance. A few minutes later, another gentleman aged about 25 years came there and both of them got into the car. A few hours later, when the car was on its way, the clean shaven man placed a revolver on the neck of the complainant and asked him to stop the car. Out of fear, the complainant stopped the car immediately. The clean shaven man then fired a shot in the air and his companion demanded the return of the sum of Rs 400 paid to him earlier as advance. After he acceded to their demand, they pushed him out of the car and drove away. The complainant driver informed the police about the incident. By evening, the accused were stopped and apprehended by the police. A revolver and Rs 400 were recovered from them. The accused were convicted under s 390, IPC.

'For That end'

Section 390 will apply only if the death, hurt or wrongful restraint or fear thereof is caused for the purpose of achieving the end object of commission of theft or carrying away the stolen property. The words 'for that

end' are thus very crucial, which distinguish a case of theft accompanied with assault, which is covered by ss 379 and 323 from that of robbery. Thus, if the death, hurt or wrongful restraint has not been caused for the end of achieving the object of theft or carrying away the stolen property, then it will not amount to an offence of robbery under s 390, IPC. The words 'for that end' mean that the hurt caused must be with the object of facilitating the committing of the theft or must be caused while the offender is committing theft or is carrying away or is attempting to carry away property obtained by theft.[7]

As seen in *Harishchandra's* case,[8] if the hurt is caused to overcome the resistance or to enable the carrying away of the movable property, then also the offence will be robbery. However, where an accused had abandoned the stolen property and was running away and was chased by others and he used violence against the pursuers, such violence was not committed for the end of committing theft or of carrying away the stolen property, and hence, it would not amount to an offence under this section.[9]

In *Trilok Singh v Satya Deo* ,[10] the complainant had purchased a truck on a hire-purchase basis from a finance corporation. The complainant paid the first two monthly instalments and defaulted on payment of the third instalment. According to the complainant, the accused in a highhanded manner came to his house and in spite of protests by his wife, forcibly, under threat of arms, removed the truck and thus were said to have committed the various offences of robbery and dacoity. The Supreme Court held that the version of the complainant was very unnatural and untrustworthy. It held that the seizure of truck was a bona fide right exercised by the accused on the failure of the complainant to pay the third instalment. Nobody was hurt on the side of the complainant. Under these circumstances, it was held that no offence of robbery or dacoity was made out.

POSSESSION OF STOLEN PROPERTY

Possession of stolen property has always been considered as sufficient presumptive evidence to prove the commission of theft and robbery. Illustration (a) to s 114 of the Indian Evidence Act provides that the court may presume that a man who is in possession of stolen goods soon after the theft, is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession.

In *Wasim Khan v State of Uttar Pradesh* ,[11] the deceased engaged the cart of the accused on the night of the occurrence for taking him to his village from the railway station. The deceased travelled with his goods with the accused on his bullock cart, along with two other persons who got down in the middle. The deceased never reached his destination, but was found murdered next morning. According to the accused, some people called the deceased while the cart was on its journey and the deceased told him to wait for him at a certain place, but did not return. The accused, however, did not inform anybody about the disappearance. He was in possession of the goods of the deceased. He was also in possession of a big bloodstained knife. The Supreme Court held that in cases where murder and robbery have been shown to form parts of one transaction, then the unexplained possession of the stolen property would be presumptive evidence against an accused in the charge of theft and any other aggravated crime connected with the theft. Accordingly, the accused was convicted under ss 392 and 302, IPC.

In *Baiju @ Bharosa v State of Madhya Pradesh* ,[12] the accused who claimed to be a sorcerer, won the confidence of the family of the deceased by promising that he will enable them to bear a child. He thereafter killed four members of the family and looted the house. The stolen articles were recovered from his house. The Supreme Court placed reliance on illustration (a) to s 114 of the Evidence Act that the presumption under this section would depend upon the facts and circumstances of each case. The nature of the stolen articles, the manner of its acquisition by the owner, the nature of evidence about its identification, the manner in which it was dealt with by the accused, are all factors to be taken into consideration. The accused was convicted.[13]

In *Lachhman Ram v State of Orissa* ,[14] the factum of recovery of articles at the instance of the accused persons in the presence of police officers and *panch* witnesses, who have deposed to the same, was held as sufficient to bring the case not only under the provisions of s 412, IPC, but also under s 395, IPC, with the aid of s 114, Evidence Act, because the recoveries were made very soon after the occurrence.[15]

However, a court, while drawing the presumption under s 114, Evidence Act, on the basis of recent possession of belongings of the victim with the accused, needs to adopt a cautious approach and to have an assurance from all angles that the accused not merely committed theft or robbery but also killed the victim.[16]

PUNISHMENT FOR ROBBERY

Section 392. Punishment for robbery.--Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Section 392 provides the punishment for robbery. It stipulates that the maximum punishment shall be rigorous imprisonment for a term which may extend to ten years and fine as well. If the robbery is committed on the highway between sunset and sunrise, it is considered an aggravating factor and the imprisonment may be extended to fourteen years.

PUNISHMENT FOR BEING A MEMBER OF GANG OF ROBBERS

Section 401. Punishment for belonging to gang of thieves.--Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Section 401 makes the fact of mere belonging to a gang of robbers (or thieves) an offence and provides for punishment of imprisonment for a term up to seven years with fine. It is not necessary to prove that either each of the individual member of the gang has habitually committed robbery (or theft) or has taken part in any robbery (or theft).[17]

ATTEMPT TO COMMIT ROBBERY

Section 393. Attempt to commit robbery.--Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Section 393 punishes an attempt to commit robbery with rigorous imprisonment which may extend to seven years and also fine.

An intention to rob coupled with some overt act short of robbery in furtherance of the intent is of paramount importance for convicting a person under section.[18]

AGGRAVATED FORM OF ROBBERY

Section 394. Voluntarily causing hurt in committing robbery.--If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Section 390 of the IPC, which defines robbery, provides that theft would amount to robbery, if, the offender voluntarily causes or attempts to cause hurt or causes the fear of instant hurt in the victim. However, for the offence to be complete, it is sufficient if the offender attempts to cause hurt while committing theft or carrying away the stolen property. The offender need not actually cause hurt to constitute the offence of robbery. So, the general provision for definition of robbery is s 390 and the general provision as to its punishment is contained in s 392. Section 394 is a special provision, which is applicable to cases where the offender has act ually caused hurt to the victim for the purpose of committing robbery or in attempt to commit robbery. The punishment provided for under s 394 is more severe than that provided under the first part of s 392. As per s 394, if the offender voluntarily causes hurt while committing robbery or while attempting robbery, he shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

It is pertinent to point out that s 392, which is a general provision providing for punishment for robbery, also provides for an enhanced punishment in certain aggravating circumstances. As per the second part of s 392, if a robbery is committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

In *Sati Prasad v State of Uttar Pradesh* ,[19] in the district of Basti, UP, in the year 1965, a large number of persons had come to Ayodhya to take a dip in the holy river Sarayu and have a *darshan* of the temples. There was a large crowd on the bridge over the river as a result of which the bridge gave way. Many persons drowned. Among the persons drowned were an advocate, his brother, clerk and others. Since the bodies could not be recovered, a search party was organised to recover the dead bodies. They received information that some bodies were seen near a village. At the village, they came to know that the dead body of a stout person wearing a white bush shirt and steel colour trousers had been found. A wristwatch, a gold ring and some money had been recovered from the body by certain boatmen. However, the accused, who was the head-constable, had taken away the wristwatch, gold ring and the money from the boatman after beating and threatening him. The accused had further directed the boatman not to disclose this fact to anybody and to throw the dead body into the current of the river. An advocate, who accompanied the search party, told the concerned police constables that he would take up the matter with the higher authorities for action. At that stage, the accused went to his house, brought the wristwatch and the gold ring and confessed what had happened before that party and said that he had spent the cash. The accused was convicted, inter alia, under s 394, IPC, since the articles were taken from the boatman after voluntarily causing hurt to him.[20]

In *Aslam v State of Rajasthan* ,[21] the Supreme Court, reiterating that offence under s 394 is more serious than that under s 392, has clarified that s 394 not only classifies the persons into two: (i) those who act ually cause hurt, and (ii) those who do not actually cause hurt but are 'jointly concerned' in the commission of the offence of robbery but also imposes liability on the latter. They become liable for the hurt caused by the former even though they did not participate in causing the hurt or had no knowledge of its likelihood or probability.

PART B - DACOITY

Section 391. Dacoity.--When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

Dacoity is nothing but robbery committed by five or more persons. The total number of persons involved at whatever level, either as the main persons or as aiders, should be five. They should be involved in either committing, attempting to commit or in aiding the commission of robbery.

ESSENTIAL INGREDIENTS

The essential ingredients of dacoity are: (i) five or more persons must act in association; (ii) such act must be robbery or attempt to commit robbery; and (iii) the five persons must consist of those who themselves commit or attempt to commit robbery or those who are present and aid the principal act ors in the commission or attempt of such robbery.[22]

Five or More Persons

The commission of robbery in association by five or more persons is an essential ingredient of the offence under this section.

In *Ram Shanker Singh v State of Uttar Pradesh* ,[23] six persons were charged with committing dacoity. Three out of the six persons were acquitted. The charges framed did not indicate that along with the six persons there were other unknown persons with them, who had committed dacoity. The charge was that the six persons, who were placed on trial, were the persons who had committed dacoity. Since three persons were acquitted, there were only three other persons left as the persons involved with the crime. Hence, it was held

that the three persons could be convicted only to the lesser offence of robbery under s 392 and not for dacoity under s 395.[24]

In *Saktu v State of Uttar Pradesh* ,[25] apart from the named seven or eight persons, there were five or six others, who had allegedly taken part in the commission of the dacoity. It was not disputed that in all, more than 13 or 14 persons had taken part in the robbery. A large number of persons were acquitted because their identity could not be established. However, there was evidence that there were more than five persons who committed robbery in the house. So, the conviction under ss 391 and 395 was sustained.

In *Om Prakash v State of Rajasthan* ,[26] the Supreme Court ruled that where the charge of dacoity is against five named persons and out of them two are acquitted, the remaining three cannot be convicted for dacoity.[27]

In *Raj Kumar @ Raju v State of Uttaranchal* ,[28] the Supreme Court has reiterated that for commission of offence of dacoity a minimum of five persons is an essential ingredient of dacoity and s 396 does not come into play if persons convicted for committing dacoity happened to be less than five. It observed:

> In a given case, however, it may happen that there may be five or more and the *factum* of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identify all the persons said to have committed the dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such a case, conviction of less than five persons -- or even one -- can stand. But in the absence of such a finding, less than five persons cannot be convicted for an offence of dacoity.

Conjointly Commit or Attempt to Commit Dacoity

To constitute the offence of dacoity, there must not only be five or more persons, but they must work conjointly to commit or attempt to commit dacoity. The word 'conjointly' means united or in association.[29]All the five persons should act in a concerted manner participating in the transaction.

A group of five persons came to a house and beat up the family who were sleeping outside. One accused broke open the door. Three of the accused went inside and the other two kept guard outside. All the accused helped to remove the boxes. Later, two of the accused carried away the boxes. It was held that the beating and the robbery were all part of the same transaction and that all the accused act ed conjointly. They were all held to be guilty of committing dacoity under ss 391 and 395, IPC.[30]

Dishonest Intention

A person present and aiding the commission or attempt to commit robbery stands on the same footing for the purposes of this section. Though the section does not use the term 'intentionally' aid, the requirement of intention can be imported into the section, as an essential element of dacoity and robbery is an aggravated form of theft and extortion and dishonest intention is an essential element of both theft and extortion. Thus, there cannot be an offence of dacoity under this section, unless an element of 'dishonest intention' on the part of the offender is present.

SENTENCE FOR DACOITY

Section 395. Punishment for dacoity.--Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Section 395 provides for punishment for dacoity. It comes into play only when the prosecution makes out an offence under s 390 and the number of assailants reaches to the statutory minimum.[31] The maximum punishment provided under this section is life imprisonment or rigorous imprisonment for a term which may extend to ten years. Fine shall also be imposed. Dacoity is considered a very grave and serious crime and hence, courts have held that in cases of dacoity, deterrent sentence is called for. In awarding punishment for an offence under this section, two things are to be considered: (i) having regard to the gravity of the offence committed, the punishment that each individual deserves; and (ii) on the facts and circumstances of a particular case, whether an unusually heavy sentence is required to protect the interests of the public at large by acting as a deterrent to others.

However, on the facts and circumstances of certain cases, the Supreme Court has in several cases imposed lighter punishments.[32]

AGGRAVATED FORM OF DACOITY

Section 396. Dacoity with murder.--If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Section 396 provides for an aggravated form of dacoity inasmuch as it deals with the situation where the offender commits murder in the course of committing dacoity. As seen earlier in s 391, the presence of five or more persons conjointly to commit or attempt to commit robbery is required to constitute the offence of dacoity. If, in the course of committing such dacoity, any of the five or more persons commit murder, then each one of them will be made vicariously liable for the act of murder, even if the individuals concerned did not participate in committing the murder. In order to bring home the offence of dacoity with murder under s 396, it is not necessary to prove that murder was committed by any particular member of the gang or that it was a common intention of the gang to commit the murder or that other members of the gang expected the murder to take place. Nor is it necessary to prove that murder was committed jointly by all the members of the gang. All that is required to be established by the prosecution is that the murder had been committed while committing a dacoity. If that is established, then all the members of the gang, who have committed dacoity, are also equally liable for the murder under this section.[33]

However, if the dacoity has failed and the offenders are running away without any booty, while others are chasing them, one of the dacoits kills someone of the persons chasing them; other members of the gang cannot be guilty under s 396 of the IPC. To attract the provisions of s 396, the offence of dacoity must be coupled with murder. The requisite number of five persons involved in the commission of dacoity, however, loses its significance when dacoity is not proved but the offence murder is proved. The court has to keep in mind the ingredients that constitute the criminal offence while determining liability for dacoity with murder or murder simplicter.[34]

In *Shyam Behari v State of Uttar Pradesh* ,[35] the accused had entered the house with the intention of committing robbery. However, their attempt was foiled because of the hue and cry raised by the residents. All the residents of the village and the neighbouring village arrived on the scene. The accused and his companions without collecting their booty ran away from the house. They were chased by the residents and when they were crossing the ditch, one of the dacoits was caught by a villager. Thereupon, another dacoit fired a pistol, which hit the villager killing him instantly. The Supreme Court, under the facts and circumstances of this case, held that the transaction of the dacoity had ended the moment the dacoits started fleeing, because this was a case where the dacoits escaped without the booty. A separate transaction took place when the accused shot dead the villager while crossing the ditch. It was, therefore, held that it was not a case of dacoity with murder under s 396. The accused was convicted under s 302, IPC.

In *Laliya v State of Rajasthan* ,[36] the Rajasthan High Court held that the decision as to whether the murder is or is not a part of the transaction of dacoity has to be taken in the backdrop of facts and circumstances of the case at hand. A court, while deciding the question, has to pay attention to: (i) whether the dacoits retreated without plunder and the murder was committed while retreating; (ii) the interval between the attempt of dacoity and the commission of the murder; (iii) the distance between the places where the attempt at dacoity was committed and the murder was committed; and (iv) whether the dacoits abandoned all the booty and the lapse of interval between the abandonment of the booty and the commission of the murder.

Murder committed in a transaction unconnected to, or different from, the transaction of dacoity does not bring s 396 in play. Only, the murder committed during the course of dacoity attracts s 396.[37]

Conviction for dacoity and murder based on merely circumstantial evidence has to satisfy that: (i) the circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; (iv) the kind of evidence

must be complete and incapable of any other hypothesis, and (v) it should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence.[38]

OFFENCES CONNECTED WITH DACOITY

Sections 399, 400 and 402 are all provisions which deal with offences connected with dacoity. Dacoity is probably the only offence in the IPC, which the legislature has made punishable at three stages. They are: (i) making preparations for commission of dacoity (a person who makes preparation is punishable under s 399); (ii) assembling for the purpose of committing dacoity (each of the person who assembles is guilty under s 402), and (iii) belonging to a gang of dacoits (s 400).

Preparation to Commit Dacoity

Section 399. Making preparation to commit dacoity.--Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Ordinarily, preparation to commit an offence is not per se punishable. Dacoity is one of the few exceptions to the general rule. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission of the crime, after the preparations are made.[39]

Dacoity has been regarded as an offence so intrinsic against the interests of the public that the legislature has made a departure from the general rule and made even preparation to commit dacoity an offence per se, even if the persons concerned do not proceed beyond the stage of preparation. An offence under this section is punishable with rigorous imprisonment, which may extend to ten years and shall also be liable to fine.

However, a mere assembly of persons, carrying with knife, chopper, etc, does not ipso facto warrant s 399 unless some act amounting to preparation is proved.[40] Some preparation for committing dacoity on the part of the accused must be proved for convicting them under the section.[41]

Assembling for Purpose of Committing Dacoity

Section 402. Assembling for purpose of committing dacoity.--Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

According to this section, the mere assembling of five or more persons for the purpose of committing dacoity is punishable with rigorous imprisonment, which may extend to seven years and shall also be liable to fine. The essential ingredients of this section are: (i) there must be an assembly of five or more persons, and (ii) they must assemble for the purpose of committing dacoity.

Both these elements have to be proved before a person can be convicted under this section. In *Chaturi Yadav v State of Bihar* ,[42] the accused had assembled at a lonely spot in the school premises when they were detected by the patrol squad. One of the accused was found to be in possession of a gun and a live cartridge, and others had merely one live cartridge in their pockets. There was absolutely no evidence to establish that the accused had assembled there for the purpose of committing dacoity. In the absence of such evidence, it was held that since one of the ingredients of the offence had not been established by the prosecution, no offence under this section was made out.

Belonging to Gangs of Dacoits

Section 400. Punishment for belonging to gang of dacoits.--Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

This section makes the fact of belonging to a gang of dacoits by itself an offence. The essential ingredients of the section are: (i) there must be a gang of persons, and (ii) the gang must be associated for the purpose of habitually committing dacoity.

For the purpose of this section, it is not necessary that the person should have done any overt act of committing robbery or dacoity. Mere association with a gang is sufficient to constitute an offence under this section. The word 'belongs' implies something more than mere casual association. A reading of the section appears to postulate that the section contemplates the existence of a gang, which has been committing dacoity. The person or the offender should have had a continuous association with this gang, so as to be identified with the gang and the common purpose for which the gang has been formed, so as to 'belong' to the gang.

In case the offender belongs to a gang of dacoits, then the punishment is imprisonment for life or rigorous imprisonment which may extend to 10 years and fine.

PART C - MINIMUM SENTENCE TO BE AWARDED IN CERTAIN CASES OF ROBBERY AND DACOITY

Section 397. Robbery, or dacoity, with attempt to cause death or grievous hurt.-- If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Section 398. Attempt to commit robbery or dacoity when armed with deadly weapon.--If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Both ss 397 and 398 do not create any substantive offence, but merely prescribe a minimum sentence for the offence of robbery and dacoity mentioned in these sections.[43] Generally, all the penal provisions provide the maximum sentence that is to be imposed in respect of a sentence. The sentence to be actually imposed is left to the discretion of the judge, depending on the facts and circumstances of the case. It is only in respect of very grave offences, that the legislature fixes a minimum sentence to be imposed on the accused. This means once the court comes to a finding on the question of facts and decides that the accused is guilty, the judge has no or very limited discretion in deciding on the quantum of punishment. Once the accused is found guilty, and a minimum sentence has been prescribed by the statute, then the judge has to necessarily impose the minimum sentence prescribed by the statute.

Under s 397, IPC, if at the time of committing robbery or dacoity, the offender uses any deadly weapons or causes grievous hurt, or attempts to cause death or grievous hurt, he shall be liable to suffer a minimum sentence of seven years imprisonment. The essential ingredients of the offence under the section are: (i) an offence of robbery or dacoity must have been committed; (ii) the offender should have taken part in the said offence, and (iii) the offender should have used a deadly weapon or caused grievous hurt or attempted to cause death or grievous hurt to any person at the time of committing the offence of robbery or dacoity.

In *Phool Kumar v Delhi Administration* ,[44] the accused had entered a petrol pump. The first accused was armed with a knife, while the second accused had a small gun in his hand. The first accused asked the employees of the petrol pump to hand over the keys. To terrorise the employees, the second accused fired three shots in the air. One shot struck the window and two hit the ground. Thereafter, they ransacked the office and decamped with the money. The question that arose for consideration was whether the first accused, who was carrying a knife with him, but did not use it for committing any overt act, would be covered under s 397. The Supreme Court held that in s 397, the words used were 'the offender uses' whereas in s 398, the expression is 'armed with deadly weapon'. Both the sections provided for a minimum sentence of seven years. So, the Supreme Court felt that this anomaly could be set right, if both the expressions were given identical meaning. The court held that the first accused was carrying a knife, which was a deadly weapon open to the view of the victims sufficient to frighten or terrorise them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it, was not necessary to bring the offender under this section.

In *Ashfaq v State (Govt of NCT of Delhi*),[45] the Supreme Court ruled that a weapon, with which the offender is armed, is a 'deadly weapon', within the meaning of this section, if it is within the vision of the victim and is capable of creating terror in the mind of the victim. It is also sufficient to satisfy the word 'uses' for the purpose of s 397, IPC.

However, the offender using the deadly weapon alone is liable to be convicted for a minimum sentence and not all the members of the gang.[46]Section 397 cannot be applied constructively. It relates only to the 'offender' who act ually uses any deadly weapon and it does not take in its ambit all the persons who have participated in robbery or dacoity.[47] Enhanced punishment, therefore, cannot be awarded to a person who even though was a member of the group but had not used any deadly weapon.[48] The provision does not provide for constructive or vicarious liability. The liability under the section is individual.[49]

Section 397, as mentioned earlier, covers the case of completed offence of robbery or dacoity with the use of deadly weapons. Section 398 covers the attempt to commit robbery or dacoity armed with any deadly weapon. Under this section, any offender who is found guilty of attempting to commit robbery or dacoity, and is also found to be armed with deadly weapons, then the minimum sentence to be awarded to such offender under s 398 is seven years.

PART D - PROPOSALS FOR REFORM

The Fifth Law Commission offered a few proposals for reform in the law relating to robbery and dacoity.

They are:

(1) Robbery accompanied by hurt should be made punishable with imprisonment for a term up to fourteen years rather than with imprisonment for life or for a term up to ten years.
(2) The principle of vicarious liability incorporated in s 396 and the punishment provided therefor should be extended to robbery when more than two persons are involved in committing robbery with murder.
(3) The existing mandatory imprisonment for a term of seven years provided for attempt to commit robbery or dacoity with deadly weapon should be scaled down to imprisonment for three years.
(4) The sentence of rigorous imprisonment for a term up to ten years provided for making preparation for committing dacoity should be scaled down to rigorous imprisonment for a term up to seven years to make it at par with that of provided for getting assembled for committing dacoity.
(5) The provisions of s 402 should be extended to cover the cases where three or more persons assemble for the purpose of committing robbery.[50]

The Indian Penal Code (Amendment) Bill 1978 sought to give effect to some of these proposals for reform by incorporating certain clauses intending the revision of ss 396, 397, 398 and 399 on the lines suggested by the Law Commission. However, the Fourteenth Law Commission did not endorse the changes proposed in ss 396 and 397.[51]

However, these proposed reforms did not materialise as the 1978 Bill lapsed in 1979 due to the dissolution of the *Lok Sabha*.

1 *Budho Saleh v Emperor* AIR 1945 Sind 38; *Venu @ Venugopal v State of Karnataka* (2008) 3 SCC 94, AIR 2008 SC 1199, (2008) Cr LJ 1634(SC) .

2 *Bishwanath Jha v State of Bihar* (2001) 10 JT 333.

3 *Shew Murar v State of Uttar Pradesh* AIR 1955 All 128; *Abdul Murasalin v State* (2005) DLT 73.

4 AIR 1976 SC 1430, (1976) Cr LJ 1168(SC) .

5 AIR 1993 SC 91.

6 (1996) 4 Crimes 11(SC) .

7 *Venu @ Venugopal v State of Karnataka* (2008) 3 SCC 94, AIR 2008 SC 1199, (2008) Cr LJ 1634(SC) .

8 AIR 1976 SC 1430, (1976) Cr LJ 1168(SC), (1976) 2 SCC 795.

9 (1970) 2 MLJ 675.

10 AIR 1979 SC 850, (1980) Cr LJ 822(SC) .

11 AIR 1956 SC 400.

12 AIR 1978 SC 522, (1978) Cr LJ 646(SC) .

13 See also *Mohan Lal v Ajit Singh* AIR 1978 SC 1183; *Mohd Abdul Hafeez v State of Andhra Pradesh* AIR 1983 SC 367.

14 AIR 1985 SC 486.

15 See also *State of Karnataka v Rajan* (1994) Cr LJ 1042(Kant) ; *Bhagwan v State of Rajasthan* (2001) Cr LJ 2925(SC) ; *George v State of Kerala* (2002) 4 SCC 475, AIR 2002 SC 1647.

16 *Limbaji v State of Maharashtra* AIR 2002 SC 491, (2001) 10 SCC 340; see also *Ezhil v State of Tamil Nadu* (2002) 9 SCC 189, AIR 2002 SC 2017.

17 *Emperor v Darya Singh* AIR 1923 Lah 666.

18 See *Mani v State of Kerala* (1989) 1 Crimes 732(Ker) ; *Sanjay v State of Maharashtra* (1996) Cr LJ 2712(Bom) .

19 AIR 1973 SC 448, (1973) Cr LJ 344(SC) .

20 See also *Lalli @ Chiranjib Bhowmick v State of West Bengal* AIR 1986 SC 990.

21 (2008) 9 SCC 227, AIR 2009 SC 363.

22 *Shyam Behari v State of Uttar Pradesh* AIR 1957 SC 320, (1957) Cr LJ 416(SC) .

23 AIR 1956 SC 441.

24 See also *Ram Lakhan v State of Uttar Pradesh* AIR 1983 SC 352, (1983) Cr LJ 691(SC) ; *Wilson Abraham v State of Maharashtra* (1995) Cr LJ 4042(Bom) .

25 AIR 1973 SC 760; see also *Mandar Behera v State of Orissa* (1988) 3 Crimes 424(Ori) .

26 AIR 1998 SC 1220, (1998) Cr LJ 1636(SC) .

27 See also *Mushu Pentu v State of Andhra Pradesh* (2005) Cr LJ 135(AP) .

28 (2008) 11 SCC 709, AIR 2008 SC 3248.

29 *Krishna Gopal Singh v State of Uttar Pradesh* AIR 2000 SC 3616.

30 Re *Muppanna Appanna*AIR 1948 Mad 96, (1949) Cr LJ 36(Mad) (DB) .

31 *Gopal Singh v State of Uttar Pradesh* (2000) SCC 93(Cri) ; *Bishwanath Jha v State of Bihar* (2001) 10 JT 333.

32 See *Kusho Mahton v State of Bihar* AIR 1980 SC 788; *Gedda Rami Naidu v State of Andhra Pradesh* AIR 1980 SC 2127; *State of Rajasthan v Sukhpal Singh* AIR 1984 SC 207.

33 *Samunder Singh v State of West Bengal* AIR 1965 Cal 598; *Digamber Singh v State of Uttar Pradesh* (1990) Cr LJ 489(All) ; *Kalika Tiwari v State of Bihar* AIR 1997 SC 2186, (1997) Cr LJ 2531(SC) ; *Anthony D'Souza v State of Karnataka* AIR 2003 SC 258, (2003) 1 SCC 259; *Rafiq Ahmed @ Rafi v State of Uttar Pradesh* AIR 2011 SC 3114, (2011) Cr LJ 4399(SC), (2011) 8 SCC 300.

34 *Rafiq Ahmed @ Rafi v State of Uttar Pradesh* AIR 2011 SC 3114, (2011) Cr LJ 4399(SC), (2011) 8 SCC 300.

35 AIR 1957 SC 320, (1957) Cr LJ 416(SC) ; see also *Rang Bahadur Singh v State of Uttar Pradesh* AIR 2000 SC 1209.

36 AIR 1967 Raj 134.

37 *Digambar Singh v State of Uttar Pradesh* (1990) Cr LJ 489(All) ; *Limbaji v State of Maharashtra* AIR 2002 SC 491, (2001) 10 SCC 340; *Sonu Sardar v State of Chhattisgarh* AIR 2012 SC 1480, (2012) Cr LJ 1759(SC), (2012) 4 SCC 97.

38 *KV Chacko v State of Kerala* (2001) Cr LJ 713(SC) .

39 *Malkiat Singh v State of Punjab* AIR 1970 SC 713, (1969) 1 SCC 157.

40 *Sadashiv @ Shiva Antappa Pujari v State of Maharashtra* (2003) Cr LJ 3661(Bom) ; *Asgar v State of Rajasthan* (2003) Cr LJ 1997(Raj) .

41 *Amar Singh v State of Uttar Pradesh* (2003) Cr LJ 1321(All) ; *State of Uttar Pradesh v Punni* (2008) 11 SCC 153, AIR 2008 SC 932.

42 AIR 1979 SC 1412.

43 *Jai Prakash v State (Delhi Administration)* (1981) Cr LJ 1340(Del) .

44 AIR 1975 SC 905, (1975) Cr LJ 778(SC) .

45 (2004) 3 SCC 116, AIR 2004 SC 1253.

46 AIR 1975 SC 905, (1975) Cr LJ 778(SC) ; see also, *Sukhwinder Singh v State of Punjab* AIR 1994 SC 764.

47 *Paramjeet Singh v State of Rajasthan* (2001) Cr LJ 757(SC) .

48 *Paramjeet Singh v State of Rajasthan* (2001) Cr LJ 757(SC) .

49 *Ashfaq v State of NCT of Delhi* (2004) 3 SCC 116, AIR 2004 SC 1253; *Dilwar Singh v State of Delhi* (2007) 12 SCC 641, AIR 2007 SC 3234, (2007) Cr LJ 4709(SC) .

50 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 17.19-17.21.

51 See Law Commission of India, 'One Hundred and Fifty Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.65-12.68.

CHAPTER 43

Criminal Misappropriation and Breach of Trust

(Indian Penal Code 1860,Sections 403 to 409)

PART A - CRIMINAL MISAPPROPRIATION

Section 403. Dishonest misappropriation of property.--Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) *A* takes property belonging to *Z* out of *Z's* possession, in good faith, believing, at the time when he takes it, that the property belongs to himself. *A* is not guilty of theft; but if *A*, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) *A*, being on friendly terms with *Z*, goes into *Z's* library in *Z*'s absence, and takes away a book without *Z's* express consent. Here, if *A* was under the impression that he had *Z's* implied consent to take the book for the purpose of reading it, *A* has not committed theft. But if *A* afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) *A* and *B*, being joint owners of a horse, *A* takes the horse out of *B*'s possession, intending to use it. Here, as *A* has a right to use the horse, he does not dishonestly misappropriate it. But, if

A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.--A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to *Z*, bearing a blank endorsement. *A*, knowing that the note belongs to *Z*, pledges it with a banker as security for a loan, intending at a future time to restore it to *Z*. *A* has committed an offence under this section.

Explanation 2.--A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property for a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations

(a) *A* finds a rupee on the high road, not knowing to whom the rupee belongs. *A* picks up the rupee. Here *A* has not committed the offence defined in this section.

(b) *A* finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) *A* finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. *A* knows that this person can direct him to the person in whose favour the cheque was drawn. *A* appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) *A* sees *Z* drop his purse with money in it. *A* picks up the purse with the intention of restoring it to *Z*, but afterwards appropriates it to his own use. *A* has committed an offence under this section.

(e) *A* finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to *Z*, and appropriates it to his own use. *A* is guilty of an offence under this section.

(f) *A* finds a valuable ring, not knowing to whom it belongs. *A* sells it immediately without attempting to discover the owner. *A* is guilty of an offence under this section.

Essential Ingredients

Section 403 defines criminal misappropriation and prescribes punishment therefor. Criminal misappropriation is a new offence carved out from theft.[1] Theft is removal of property from the possession of the owner. But in criminal misappropriation, the taking is upon finding or other coming across of the property, and not from the possession of a person. Criminal misappropriation may almost amount to theft, though it is not quite theft. This is because the initial removal is not from any person's possession and hence, does not satisfy an essential ingredient of theft. When possession has been innocently acquired but from subsequent intention or knowledge, the retention becomes wrongful and amounts to its criminal misappropriation.[2]

Misappropriation means to take possession of property and putting it to unauthorised or wrongful use. It especially applies to instances of putting somebody else's property to one's own use. Under this section, as stated earlier, the initial taking of the property may be innocent. For instance, if a person finds and picks up a watch on the road, it is an innocent act . However, the honest act of picking up the watch will change to

criminal misappropriation, if, instead of returning the watch to the owner, the person wears the watch himself and puts it to his own use. So, in criminal misappropriation, the person comes into possession in some neutral or innocent way. If the watch, which is found, is returned to the owner, then no offence is committed. However, if the person retains it and puts it to his own use, then it amounts to criminal misappropriation.

The offence consists in the dishonest misappropriation or conversion, either permanently or for a time being, of property which is already in the possession of the offender.[3] To constitute the offence of criminal misappropriation prosecution, therefore, has to prove that: (i) the property was of the complainant, (ii) the accused misappropriated the same or converted to his own use, and (iii) he did it dishonestly.[4]

Property must be of Another

The term misappropriation implies misappropriation of property in possession of someone else. No criminal misappropriation of property can take place if that property is in nobody's possession.

The essence of the offence of misappropriation is putting to own use or converting to own use another's property. There cannot be misappropriation of one's own property.

In *Velji Raghavji Patel v State of Maharashtra* ,[5] the managing partner of a partnership firm had realised certain amounts from the business, but put it to own use. He was charged for criminal appropriation. The Supreme Court held that if he as an owner of a property uses his property in whichever way he wants to use it and with whatever intention, will not be liable for misappropriation and that would be so, even if he is not the exclusive owner thereof. A partner has undefined ownership along with the other partners over all the assets of the partnership. If he chose to use any of them for his own purposes, he may be accountable civilly to the other partners; but, he does not thereby commit any misappropriation.[6]

In *Ramaswamy Nadar v State of Madras* ,[7] the accused was carrying on prize competitions as the proprietor of 'Lotus Cross Words'. Certain persons, who had paid money in connection with the prize competition no 92, complained that they were not paid the prize money by the accused, though the prizes were announced. The police investigated and charged the accused under s 403, IPC. The defence of the accused was that his business was running at a loss and hence, he was unable to meet all his obligations, because of which he was even forced to close down his business. Even after closing down, he had settled the claims of 6000 prize winners. The high court convicted the accused on the ground that he should have distributed the sum of Rs 96,548, which he collected in competition no 92, to the prize winners in that competition, but instead he used it to clear other debts incurred by him. Hence, it amounted to misappropriation. The Supreme Court reversed the judgment of the Madras High Court, observing that it was not a part of the contract that the prize money should come only from the proceeds of the collection made in that particular competition. The entry fees collected in the competition rightly belonged to the accused. There was no obligation that the money so collected should be appropriated or used in a particular manner alone. Under the circumstances, he could not be made criminally liable for running a loss in his business. The accused was acquitted.

Finding of Property

The law relating to finding of property by a stranger and his liability is well indicated in the *Explanations* and *Illustrations*in s 403. As is stated by Mayne, there can, of course, be no criminal misappropriation of things, which have act ually been abandoned, as the sacred bulls abandoned before the temple.[8] But an idol of a temple is capable of holding property apart from the *pujari* or *shebait* and the latter may be guilty of misappropriation with respect to the property in the possession of the temple.[9] Explaining the point, Mayne observed:

> The newspapers, or the remnants of food, which a traveller leaves behind him in a railway carriage being abandoned by the previous owner cannot be the subject of misappropriation. The difficulty arises in regard to articles which have been lost without being abandoned, or which have been abandoned only because they were lost. Where property has been mislaid or forgotten in the owner's house, or upon his premises, or in an article of furniture which still remains his own, the property is still in his possession, and both by English and Indian law, the misappropriation of it is theft. Where valuable articles, which cannot be supposed to have been thrown away, are left in a shop, or in a railway carriage or hackney coach or in any similar place where the owner would naturally come back to look for them, the owner's property remains, though his possession is lost for the time. A person who takes up and converts to his own use property so found, commits larceny, according to English law, and criminal misappropriation according to the Code. But if a man

> takes cattle when they were with the herd of an adjoining village, not knowing to whom they belong and thinking they were without an owner, he commits the offence of theft and not criminal misappropriation because (a) the cattle may return to their owner; and (b) the belief that the cattle were without an owner cannot be said to be a reasonable belief.[10]

As repeatedly mentioned before, under the IPC, the guilt of the accused is determined by the state of his mind at the time when he appropriates the property to his own use. Justice Chatterjee stated thus in *Phuman v R* :[11]

> The mere possession of the property is not sufficient for proving the charge without something to indicate the appropriation or conversion, though being in possession without any attempt to find the owner may amount to evidence of intention to do so. *Explanation 2* to section 403 makes the necessity of some positive proof of this sort quite clear. *Illustration (a)* shows that the picking up of a rupee whose owner is not known is not an offence. Similarly, *Illustration* (e) shows that the finding of a purse with money belonging to an unknown owner is not an offence, but the appropriation of it to the finder's own use is necessary to complete it.

In *R v Sita* ,[12] the accused found a gold *mohar* (sovereign) in an open plain, in a village near Ahmednagar and sold it next day to a shroff. The sale was on 12 October 1892, and the accused was convicted of criminal misappropriation on 12 December 1892. The appeal was heard on 9 March 1893 before the Bombay High Court, and as no one had come forward till that date to claim the gold *mohar*, the conviction was set aside. After citing this decision, Mayne adds an interesting personal anecdote thus:

> The conclusion arrived at by the High Court was by no means a necessary one. Many years ago, I was throwing stones into a mountain lake in Ireland when a much prized ring followed the stone. Next year, when the water went down, the ring was found and duly restored to me.[13]

In spite of this exceptional personal experience of Mayne, which is seldom likely to occur in the ordinary course of things, we have to recognise that the ruling given by the Bombay High Court is correct. Mayne himself admits that in such cases every presumption ought to be made in favour of the accused.

However, property of no appreciable value found on a public road and attempted sale by the accused with a view to use its sale proceeds does not amount to misappropriation of property.[14]

Converts to Own Use

The words 'convert to own use' means dealing with the property of another, as if it is one's own property. Going back to the analogy of the watch that was found on the road, if the person, who found it, instead of wearing it, sells it to somebody, else or pawns it to somebody then it would amount to converting the property for one's own use. By selling or pawning the watch, the finder of the watch is dealing with the watch, as if it was the property of the finder.[15] If the accused has not converted the property to his use, he cannot be accused of misappropriation of property.[16] There must be actual conversation of the thing misappropriated to his use. Mere retention of the property does make him guilty of misappropriation.[17]

Servant or Clerk Taking his Master's Property

It is clear that a servant cannot be convicted of theft for taking goods which belonged to the master except when the goods were in the possession of the servant unlawfully through him. For instance, where a clerk is sent out to collect money due on a bill, or a servant to buy and bring home goods, if the money or goods are misappropriated; should the offender be charged under s 403 or under s 408 (criminal breach of trust by clerk or servant)? In England, such cases would be treated as embezzlement, not breach of trust; as for instance, where a shopman sold goods over the counter and received cash, but did not enter the transaction in the accounts and instead pocketed the money.[18] But, it seems that in India such cases are considered criminal misappropriation. For example, an income tax clerk, who received money from a party, misappropriated it without crediting it and paying into the treasury, was convicted under s 403.[19] So also in the case of *Venkataswami*,[20] where the accused, a servant in the postal department, secreted two letters with the intention of handing them over to the delivery peon and sharing with him certain money payable upon them, it was held that the accused was guilty of attempt to commit dishonest misappropriation of property and theft.

Dishonest Intention

Criminal misappropriation takes place not when one has innocently come into the possession of a thing, but when by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, he keeps it, after which the retaining becomes wrongful and fraudulent.[21] All the *illustrations* appended to s 403 are non-contractual relationships between the owner and the possessor of the property. The accused acquires the possession innocently, but its retention becomes wrongful and fraudulent either from any subsequent change of intention[22] or from knowledge of some new fact with which the party was not previously acquainted. The offence is completed by a mental act . So, the section applies where more money than was due was given to the accused, who retained the balance after he found out the mistake, but not where the payment was in respect of a debt barred by the law of limitation as regards recovery by suit.[23]

In *Kesho Ram's* case,[24] the accused who was the servant of *A*, was entrusted with *A*'s money for the purpose of purchasing grain at *J*. He left for *J* with the money and went off to *H* without giving any information to *A* of his departure; subsequently, he gave false account of it. He was arrested at *H* and the entire money was found in his possession. It was contended for him that he could not be convicted for criminal misappropriation, as the money had been found intact with him and there was no evidence that he had converted it to his own use. But it was held that the first possession being lawful, the misappropriation consisted not in any actual expenditure of the money, but in the mental act or intent to deprive the master of his property without any outward or visible trespass, which was rightly inferred from the conduct of the accused.

In *Albano Dias v State* ,[25] the accused, a cashier, not only did not make payment of the amounts mentioned against the complainant's names in the appropriate rolls, but also went to the extent of writing falsely in the cash book that amounts had been paid; it could not be a case of mere negligence or carelessness, but a deliberate act on the part of the accused to commit misappropriation.

Once it is found that the accused was entrusted with certain amounts for disbursement, which he had not disbursed and instead has falsely made entries as paid, there is an unerring certainty that he converted the amount for his own use and the act was a deliberate actto commit misappropriation, which also amounted to the offence of criminal misconduct under s 5(1)(c), the Prevention of Corruption Act 1947.[26]

TEMPORARY MISAPPROPRIATION

Explanation 1 to s 403, IPC, makes it clear that even dishonest misappropriation for a time only is a misappropriation within the meaning of this section. The words 'for a time only', mean temporary misappropriation. Thus, if a person appropriates to himself the property of another, puts it to own use or unauthorised use and thereafter restores it to the owner, it will still amount to misappropriation under this section.

In *Khandu Sonu Dhobi v State of Maharashtra* ,[27] the accused was working as an agricultural assistant in the soil conservation section of the Government of Maharashtra. He was in charge of doing rectification work on some agricultural bunds. The accused made various entries and prepared documents to show that the rectification work was completed, when in fact the rectification work was not done. After complaints were made, he completed the work several months later. The Supreme Court held that the fact that the accused had subsequently used the money for the purpose for which it had been entrusted made no difference as the case fell under expln 1 to s 403 which provides that even temporary misappropriation would fall within the meaning of section.[28]

DIFFERENCE FROM ENGLISH LAW

Thus, s 403 lays down a different rule from that of English law, under which the intention of the accused at the time the property is taken by him is alone taken into account. His subsequent dishonesty is not sufficient to make him guilty for this offence. If the intention of the accused was not dishonest when possession was obtained, a subsequent change in his intention does not convert the possession into an illegal one. Explanation 2 emphasises the difference between the English law and the IPC. According to the English law, innocent taking followed by conversion owing to subsequent change of intention is civil wrong but not an offence.

The word 'misappropriates' means nothing more than improperly setting apart for one's own use to the exclusion of the owner. The word 'converts' is used *ejusdem generis* with 'misappropriates' and means nothing more than an appropriation of and dealing with the property of another, without right, as if it were one's own property.

The word 'dishonestly' qualifies the taking of property in s 378, while it qualifies misappropriation here. In theft, the initial taking is wrongful, while in criminal misappropriation, it is indifferent and may even be innocent possession which becomes wrongful by a subsequent change of intention or from knowledge of some new fact with which the party was not previously acquainted.

DISTINCTION BETWEEN THEFT AND CRIMINAL MISAPPROPRIATION

(1) We have already noted above the main difference between the two, *namely*, that while the initial taking in theft is always wrongful, in criminal misappropriation, it may be innocent and lawful. It is the subsequent change of intention that converts the lawful taking into unlawful act in criminal misappropriation.

(2) In theft, there is invasion of possession of another person by the wrongdoer, whereas in criminal misappropriation, there is no such infringement of the right of possession. The offender is already in possession of the property and it is his unlawful misappropriation of it that creates the offence.

(3) In theft, mere moving by itself is an offence. But in criminal misappropriation, the moving may not be an offence; it may even be lawful; it is the subsequent intention to convert or misappropriate the property that constitutes the offence.

(4) In theft, the property is moved without the consent of the owner. In criminal misappropriation, the person might have come into possession of the property with the consent of the owner. He commits the offence only subsequently when he converts the property to his own use.

(5) Dishonest intention is common to both. In theft, this is shown by moving of the property, while in criminal misappropriation, it is effected by act ual misappropriation or conversion. In theft, dishonest intention precedes taking, while it follows the taking in criminal misappropriation.

AGGRAVATED FORM OF CRIMINAL MISAPPROPRIATION

Section 404. Dishonest misappropriation of property possessed by deceased person at the time of his death.--Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant *A*, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. *A* has committed the offence defined in this section.

SCOPE OF THE SECTION

This section deals with dishonest misappropriation of property of a dead person. It is considered an aggravated form of the offence defined in the earlier section and that is why it provides for enhanced sentences.

The object of s 404 is to afford protection of property, when the owner of the property dies. It seeks to protect the property in the interregnum period, until the legal heir of the deceased or any other person entitled to the property is in a position to take over the property.

The section deals with misappropriation by two classes of persons, strangers and servants or clerks, who may take advantage of the death of a person and misappropriate property. In the first case, the accused is

liable to imprisonment up to three years and fine. While in the latter case, the sentence of imprisonment extends up to seven years.

The essential ingredients of s 404 are: (i) the property (in question) was in possession of the deceased at the time of his death; (ii) the accused, knowing that the property was in possession of the deceased, has misappropriated or converted for his own use; and (iii) he did so dishonestly.[29]

The removal of property from body of a person after his death, by the accused does not come within the purview of s 404, as it does not amount to taking out of the possession of a person. A dead body is not a person for the purpose of s 404.[30] However, a person who forcefully takes away property from a person, who has recovered it from a dead body, and converts it for his own use, may come within the ambit of s 404.[31] But a person, who commits murder, removes ornaments from the dead body in the same transaction and converts them for his own use, comes within the clutches of the section.[32]

PART B - CRIMINAL BREACH OF TRUST

Sections 405 to 409 deal with criminal breach of trust. Section 405 defines criminal breach of trust, while s 406 prescribes punishment for criminal breach of trust. And ss 407 to 409 deal with the cases of aggravated forms of criminal breach of trust.

Section 405. Criminal breach of trust.--Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

Explanation 1.--A person, being an employer of an establishment whether exempted under section 17of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

*Explanation*2.--A person, being an employer, who deducts the employee's contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of said contribution in violation of a direction of law as aforesaid.

Illustrations

(a) *A*, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the Will, and appropriates them to his own use. *A* has committed criminal breach of trust.

(b) *A* is a warehouse-keeper. *Z* going on a journey, entrusts his furniture to *A*, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. *A* dishonestly sells the goods. *A* has committed criminal breach of trust.

(c) *A*, residing in Calcutta, is agent for *Z*, residing at Delhi. There is an express or implied contract between *A* and *Z*, that all sums remitted by *Z* to *A* shall be invested by *A*, according to *Z's* direction. *Z* remits a lakh of rupees to *A*, with directions to *A* to invest the same in Company's paper. *A* dishonestly disobeys the directions and employs the money in his own business. *A* has committed criminal breach of trust.

(d) But if *A*, in the last illustration, not dishonestly but in good faith, believing that it will be more for *Z's* advantage to hold shares in the Bank of Bengal, disobeys *Z's* directions, and buys shares in

the Bank of Bengal, for *Z*, instead of buying Company's paper, here, though *Z* should suffer loss, and should be entitled to bring a civil action against *A*, on account of that loss, yet *A*, not having acted dishonestly, has not committed criminal breach of trust.

(e) *A*, a revenue officer, is entrusted with public money and is either directed by law or bound by a contract, express or implied, with the Government to pay into a certain treasury all the public money which he holds. *A* dishonestly appropriates the money. *A* has committed criminal breach of trust.

(f) *A*, a carrier, is entrusted by *Z* with property to be carried by land or by water. *A* dishonestly misappropriates the property. *A* has committed criminal breach of trust.

ESSENTIAL INGREDIENTS

The essential ingredients of criminal breach of trust are: (i) the accused must be entrusted with property or dominion over it, and (ii) he must have dishonestly misappropriated the property or converted it to his own use or disposed of it in violation of such trust.[33] There are two distinct parts involved in the commission of the offence of criminal breach of trust. The first consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is a misappropriation or dealing with the property dishonestly and contrary to the terms of obligation created.[34] The principal ingredients of criminal breach of trust, thus, are 'entrustment' and 'dishonest misappropriation'.

The offence of criminal breach of trust, as defined under s 405, is similar to the offence of embezzlement under the English law. A reading of the section suggests that the gist of the offence of criminal breach of trust is 'dishonest misappropriation' or 'conversion to own use' another's property, which is nothing but the offence of criminal misappropriation defined under s 403. The only difference between the two is that in respect of criminal breach of trust, the accused is entrusted with property or with dominion or control over the property.

Entrustment

As the title to the offence itself suggests, entrustment of property is an essential requirement before any offence under this section takes place. The language of the section is very wide. The words used are 'in any manner entrusted with property'. So, it extends to entrustments of all kinds--whether to clerks, servants, business partners or other persons, provided they are holding a position of 'trust'. The word 'entrust' is not a term of art. In common parlance, it embraces all cases in which a thing handed over by one person to another for specific purpose. The term 'entrusted' is wide enough to include in its ambit all cases in which property is voluntarily handed over for specific purpose and is dishonestly disposed of contrary to the terms on which possession has been handed over.[35] Entrustment need not be express, it may be implied.[36]

In *State of Gujarat v Jaswantlal Nathalal* ,[37] the government sold cement to the accused only on the condition that it will be used for construction work. However, a portion of the cement purchased was diverted to a godown. The accused was sought to be prosecuted for criminal breach of trust. The Supreme Court held that the expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further, the person handing over the property must have confidence in the person taking the property, so as to create a fiduciary relationship between them. A mere transaction of sale cannot amount to an entrustment. If the accused had violated the conditions of purchase, the only remedy is to prosecute him under law relating to cement control. But no offence of criminal breach of trust was made out.

In *Jaswant Rai Manilal Akhaney v State of Bombay* ,[38] it was held that when securities are pledged with a bank for specific purpose on specified conditions, it would amount to entrustment. Similarly, properties entrusted to directors of a company would amount to entrustment, because directors are to some extent in a position of trustee.[39] However, when money was paid as illegal gratification, there was no question of entrustment.[40]

In *State of Uttar Pradesh v Babu Ram* ,[41] the accused, a sub-inspector (SI) of Police, had gone to investigate a theft case in a village. In the evening, he saw one person, Tika Ram, coming from the side of the canal and hurriedly going towards a field. He appeared to be carrying something in his dhoti folds. The accused searched him and found a bundle containing currency notes. The accused took the bundle and later returned it. The amount returned was short by Rs 250. The Supreme Court held that the currency notes were handed

over to the SI for a particular purpose and Tika Ram had trusted the accused to return the money once the accused satisfied himself about it. If the accused had taken the currency notes, it would amount to criminal breach of trust.[42]

In *Rashmi Kumar v Mahesh Kumar Bhada* ,[43] the Supreme Court held that when the wife entrusts her *stridhana* property with the dominion over that property to her husband or any other member of the family and the husband or such other member of the family dishonestly misappropriates or converts to his own use that property, or wilfully suffers any other person to do so, he commits criminal breach of trust.[44] Even failure to handover marriage gifts and ornaments received from in-laws to the wife on being driven out amounts to criminal breach of trust.[45] Taking away such gifts and cash-offerings from her by in-laws also amounts misappropriation.[46]

In *Kundanlal v State of Maharashtra* ,[47] wherein the accused, to whom the complainant gave six gold bangles for repair, pledged the bangles with a bank to raise loan and did not return them to the complainant, was convicted for criminal breach of trust as he dishonestly misappropriated the property entrusted to him. However, the court declined to convict his son under s 406, as the bangles were not entrusted to him. It convicted him under s 403.

In *Common Cause, A Registered Society v Union of India* ,[48] the Supreme Court, while dealing with the power of the Petroleum Minister to allot outlets out of discretionary quota, ruled that a trust contemplated by s 405 arises only when there is an entrustment of property or dominion over property. Therefore, there must be property which can be entrusted to someone. However, s 405 does not contemplate the creation of a trust with all the technicalities of the law of trust. It merely contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event.[49]

Property

The definition in s 405 does not restrict the property to movables or immovables alone.

In *RK Dalmia v Delhi Administration* ,[50] the Supreme Court held that the word 'property' is used in the IPC in a much wider sense than the expression 'movable property'. There is no good reason to restrict the meaning of the word 'property' to moveable property only, when it is used without any qualification in s 405. Whether the offence defined in a particular section of IPC can be committed in respect of any particular kind of property, will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. Chose in act ion will also amount to property under this section.[51]

Dominion Over Property

The word 'dominion' connotes control over the property. In *Shivnarayan v State of Maharashtra* ,[52] it was held that a director of a company was in the position of a trustee and being a trustee of the assets, which has come into his hand, he had dominion and control over the same.

However, in respect of partnership firms, it has been held[53] that though every partner has dominion over property by virtue of being a partner, it is not a dominion which satisfies the requirement of s 405, as there is no 'entrustment of dominion', unless there is a special agreement between partners making such entrustment.

Explanations (1) and (2) to the section provide that an employer of an establishment who deducts employee's contribution from the wages payable to the employee to the credit of a provident fund or family pension fund or employees state insurance fund, shall be deemed to be entrusted with the amount of the contribution deducted and default in payment will amount to dishonest use of the amount and hence, will constitute an offence of criminal breach of trust. In *Employees State Insurance Corporation v SK Aggarwal* ,[54]the Supreme Court held that the definition of principal employer under the Employees State Insurance Act means the owner or occupier. Under the circumstances, in respect of a company, it is the company itself which owns the factory and the directors of the company will not come under the definition of 'employer'. Consequently, the order of the high court, quashing the criminal proceedings initiated under ss 405 and 406, IPC, was upheld by the Supreme Court.[55] A managing Director of a company cannot be said to have committed the of-

fence of criminal breach of trust pertaining to a property entrusted by a complainant to a company and misappropriated by it. He cannot be held vicariously liable.[56]

Misappropriation

Dishonest misappropriation is the essence of this section. Dishonesty is, as defined in s 24, IPC, causing wrongful gain or wrongful loss to a person. The meaning of wrongful gain and wrongful loss is given in s 23, IPC. In order to constitute an offence, it is not enough to establish that the money has not been accounted for or mismanaged. It has to be established that the accused has dishonestly put the property to his own use or to some unauthorised use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

Proof of intention, which is always a question of the guilty mind or mens rea of the person, is difficult to establish by way of direct evidence. In *Krishan Kumar v Union of India* ,[57] the accused was employed as an assistant storekeeper in the Central Tractor Organisation (CTO) at Delhi. Amongst other duties, his duty was the taking of delivery of consignment of goods received by rail for CTO. The accused had taken delivery of a particular wagonload of iron and steel from Tata Iron and Steel Co, Tatanagar, and the goods were removed from the railway depot but did not reach the CTO. When questioned, the accused gave a false explanation that the goods had been cleared, but later stated that he had removed the goods to another railway siding, but the goods were not there. The defence version of the accused was rejected as false. However, the prosecution was unable to establish how exactly the goods were misappropriated and what was the exact use they were put to. In this context, the Supreme Court held that it was not necessary in every case to prove in what precise manner the accused person had dealt with or appropriated the goods of his master. The question is one of intention and not direct proof of misappropriation. The offence will be proved if the prosecution establishes that the servant received the goods and that he was under a duty to account to his master, and had not done so. In this case, it was held that the prosecution established that the accused received the goods and removed it from the railway depot. That was sufficient to sustain a conviction under this section. Similarly, in *Jaikrishnadas Manohardas Desai v State of Bombay* ,[58] it was held that dishonest misappropriation or conversion may not ordinarily be a matter of direct proof, but when it is established that property is entrusted to a person or he had dominion over it and he has rendered false explanation for his failure to account for it, then an inference of misappropriation with dishonest intent may readily be made. Prosecution need not establish the precise mode of dishonest misappropriation or conversion.[59]

In *Surendra Prasad Verma v State of Bihar* ,[60] the accused was in possession of the keys to a safe. It was held that the accused was liable because he alone had the keys and nobody could have access to the safe, unless he could establish that he parted with the keys to the safe.

Offence under s 405 can be said to have been committed only when all of its essential ingredients are found to have been satisfied.[61]

As seen in the case of criminal misappropriation, even a temporary misappropriation could be sufficient to warrant conviction under this section.[62] Even if the accused intended to restore the property in future, at the time of misappropriation, it is criminal breach of trust.[63] In a case,[64] the bank official, who, contrary to statutory provisions and directives, made public money available to a private party, was held guilty of criminal breach of trust even though the money was quickly recovered and departmental act ion was initiated.

The prosecution need not prove the actual manner of misappropriation of property by the accused, once it proves entrustment of the property.[65] It is for the accused to prove, in his defence, that there was no misappropriation.[66]

The offence of criminal breach of trust, in essence, of any of the four positive act s mentioned in s 405, namely, dishonest misappropriation, user, conversion or disposal of property in violation of any direction of law. Dishonest intention is *sine qua non* of the offence.[67] The term 'direction of law' is wide enough to include in it not only statutory directions but also norms, practices and departmental directions as well as directions issued by authorities in exercise of their supervisory powers.[68]

Section 406. Punishment for criminal breach of trust.--Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

AGGRAVATED FORMS OF CRIMINAL BREACH OF TRUST

Section 407. Criminal breach of trust by carrier, etc.--Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 408. Criminal breach of trust by clerk or servant.--Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 409. Criminal breach of trust by public servant, or by banker, merchant or agent.--Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

As seen in the chapter on criminal misappropriation, acts of misappropriation or breach of trust done by strangers is treated less harshly than act s of criminal breach of trust on the part of the persons who enjoy special trust and are also in a position to be privy to a lot of information or authority or on account of the status enjoyed by them, say as in the case of a public servant. That is why ss 407 and 408 provide for enhanced punishment of imprisonment up to seven years in case of commission of offence of criminal breach of trust by persons entrusted with property[69] as a carrier or warehouse-keeper.

In respect of public servants, a much more stringent punishment of life imprisonment or imprisonment up to ten years with fine is provided. This is because of the special status and the trust which a public servant enjoys in the eyes of the public as a representative of the government or government owned enterprises. Under s 409, IPC, the entrustment of property or dominion should be in the capacity of the accused as a public servant, or in the way of his business as a banker, merchant, broker, etc. The entrustment should have nexus to the office held by the public servant as a public servant. Only then this section will apply. In *Superintendent and Remembrance of Legal Affairs v SK Roy* ,[70] the accused, a public servant in his capacity as a Superintendent of Pakistan unit of Hindustan Co-operative Insurance Society in Calcutta, which was a unit of LIC, although not authorised to do so, directly realised premiums in cash from some Pakistani policy-holders and misappropriated the amounts after making false entries in the relevant registers.

To constitute an offence of criminal breach of trust by a public servant punishable under s 409, IPC, the acquisition of dominion or control over the property must also be in the capacity of a public servant. The question before the court was whether the taking of money directly from policy-holders, which was admittedly unauthorised, would amount to acting in his capacity as a public servant. The Supreme Court held that it is the ostensible or apparent scope of a public servant's authority when receiving the property that has to be taken into consideration. The public may not be aware of the technical limitations of the powers of the public servants, under some internal rules of the department or office concerned. It is the use made by the public servant of his act ual official capacity, which determines whether there is sufficient nexus or connection between the acts complained of and the official capacity, so as to bring the act within the scope of the section. So, in this case, it was held that the accused was guilty of the offence under s 409.

An employee of the Indian Airlines, who took excess money from passengers and pocketed the same by falsifying reports, was held guilty under s under s 409 and the Prevention of Corruption Act 1947.[71]

In order to sustain conviction under s 409, it is required to prove: (i) entrustment of property of which the accused is duty bound to account for; and (ii) commission of criminal breach of trust.[72] The prosecution dealing with cases of criminal breach of trust by a public servant is required to prove not only that the accused was a public servant but also was in such a capacity entrusted with property or with domination over the same and he committed breach of trust in respect of that property.[73] It is not necessary that the property entrusted to a public servant should be of the Government. But what is important is that, the property should have been entrusted to a person in his capacity as a public servant.[74]

PART C - PROPOSALS FOR REFORM

CRIMINAL MISAPPROPRIATION OF PROPERTY

The Fifth Law Commission has suggested the following reforms in the law relating to criminal misappropriation of property:

(1) Explanation 2 of s 403, which intends to express three ideas pertaining to dishonest misappropriation of property and is 'unnecessarily lengthy' and 'somewhat incomplete', should be revised to express the three ideas mentioned therein 'more briefly and clearly',
(2) A new illustration [illustration (d)] should be added to s 403 (dishonest misappropriation of property) to bring clarity in the operation of the section vis--vis use of jointly owned property of a partnership firm by its partners.[75]

Clause 171 of the Indian Penal Code (Amendment) Bill 1978, sought to give effect to the suggested revision of the explanation 2. However, it has not paid serious attention to the Law Commission's second proposal. The Fourteenth Law Commission also lent its support to the change effected by clause 171.[76]

CRIMINAL BREACH OF TRUST

The Fifth Law Commission proposed the following reforms in the existing law relating to criminal breach of trust:

(1) Section 408 (criminal breach of trust by clerk or servant) should be brought in tune with its proposed s 381 of the IPC so that breach of trust by any employee in respect of his employer's property can be brought within purview of s 408.
(2) The maximum punishment (of life imprisonment) provided for criminal breach of trust by public servant etc, should be scaled down to rigorous imprisonment for a term up to fourteen years.[77]

Clauses 172 and 173 of the 1978 Amendment Bill sought to give effect to these proposals for reform. The Fourteenth Law Commission also endorsed these changes.[78]

However, none of these changes could take effect as the Bill lapsed in 1979.

1 Hari Singh Gour, *Penal Law of India* vol 4, 11th edn, Law Publishers, Allahabad, 1998, p 3917.

2 *State of Madhya Pradesh v Pramode Mategaonkar* (1965) 2 Cr LJ 562(MP) .

3 *R v Ramakrishna* (1888) ILR 12 Mad 49.

4 *Rama Swamy Nadar v State* AIR 1958 SC 56, (1958) Cr LJ 228(SC) ; see also *U Dhar v State Jharkhand* (2003) 2 SCC 219, (2003) Cr LJ 1224(SC) ; *Indian Oil Corporation v NEPC India Ltd* (2006) 6 SCC 736, AIR 2006 SC 2780.

5 AIR 1965 SC 1433, (1965) 2 Cr LJ 431(SC) .

6 Also see *Mahal Chand Sikwal v State of West Bengal* (1987) Cr LJ 1569(Cal) .

7 AIR 1958 SC 56, (1958) Cr LJ 228(SC) .

8 *Romesh Chunder Sannyal v Hiru Mondal* (1890) ILR 17 Cal 852.

9 *Gadgayya v Guru Siddeshvar* (1897) Unreported, Cr C 919.

10 John D Mayne, *The Criminal Law of India*, fourth edn, Higginbotham, Madras, 1896, pp 648-49.

11 (1908) 8 Cr LJ 250.

12 (1893) ILR 18 Bom 212.

13 John D Mayne, *The Criminal Law of India*, fourth edn, Higginbotham, Madras, 1896, pp 648-49.

14 *Mahadev Govind*(1930) 32 Bom LR 356.

15 Also see *Ram Bharosey v State of Uttar Pradesh* AIR 1952 All 481.

16 See *Mahabir Prasad v State of Assam* AIR 1961 Assam 132.

17 *Emperor v Phul Chand Dube* AIR 1929 All 917; *Rama Swamy Nadar v State* AIR 1958 SC 56, (1958) Cr LJ 228(SC) .

18 *R v Betts* Bell 90.

19 *R v Ramakrishna* (1888) ILR 12 Mad 49.

20 (1890) ILR 14 Mad 229.

21 *Bhagiram Dome v Abar Dome* (1888) ILR 15 Cal 388.

22 *Prakasam v State of Travancore er Cochin* AIR 1953 Tr&Coch 537.

23 John D Mayne, *The Criminal Law of India*, fourth edn, Higginbotham, Madras, 1896, pp 646-57.

24 1889 PRN No 36.

25 (1981) Cr LJ 677.

26 Now Prevention of Corruption Act, 1988 (49 of 1988).

27 AIR 1972 SC 958, (1972) Cr LJ 593(SC) .

28 See also *Lila Dhar v State of Himachal Pradesh* AIR 1959 HP 14, wherein the high court held a clerk of transport guilty of misappropriation of property even though he handed over his employer the amount collected from drivers after a lapse of time.

29 *Dhulji v Kanchan* AIR 1956 MB 49; *State of Orissa v Bishnu Charan Muduli* (1985) Cr LJ 1573(SC) ; *State of Rajasthan v Bhupinder Joshi* (1997) Cr LJ 4445(Raj) .

30 *Balla Munshi Bhoi v State of Madhya Pradesh* AIR 1958 MP 192.

31 Re *Sathi Prasad*(1973) Cr LJ 344(SC) .

32 *Turuku Budha Karkariya v State of Orissa* (1994) Cr LJ 552(Ori) ; *State of Maharashtra v Vilas Pandurang Patil* (1999) Cr LJ 1062(Bom) .

33 See *JRD Tata v Payal Kumar* (1987) Cr LJ 447(Del) ; *State of Himachal Pradesh v Ritu Raj* (1992) 1 Crimes 311(HP) ; *Manoranjan Tripathy v Ganesh Prasad Singh* (1994) Cr LJ 204(Ori) ; *SW Palanitkar v State of Bihar* (2002) SCC 129(Cri) ; *Kailash Kumar Sanwatia v State of Bihar* (2003) 7 SCC 399; *R Venkatkrishnan v CBI* (2009) 11 SCC 737, AIR 2010 SC 1812; *V P Shrivastava v Indian Explosives* (2010) 10 SCC 361, 2010 (10) SCALE 177; *Asoke Basak v State of Maharashtra* (2010) 10 SCC 660, JT 2010 (11) SC 123.

34 *Superintendent and Remembrance of Legal Affairs v S K Roy* (1974) 4 SCC 230; *Onkar Nath v State (NCT of Delhi* (2008) 2 SCC 561, 2008 Cr LJ 1391.

35 *Somnath Puri v State of Rajasthan* (1972) 1 SCC 630, AIR 1974 SC 794; *State of Punjab v Pritam Chand* (2009) Cr LJ 1742(SC), (2009) 16 SCC 769; *Harmanpreet Singh Ahluwalia v State of Punjab* (2009) Cr LJ 3462(SC), (2009) 7 SCC 712.

36 *State of Madhya Pradesh v Pramode Mategaonkar* (1965) 2 Cr LJ 562(MP) .

37 *State of Gujarat v Jaswantlal Nathalal* AIR 1968 SC 700, (1968) Cr LJ 803(SC) .

38 AIR 1956 SC 575, (1956) Cr LJ 1116(SC) .

39 *RK Dalmia v Delhi Administration* AIR 1962 SC 1821, (1962) 2 Cr LJ 805(SC) .

40 *Chelloor Mankal Narayan I Nambudri v State of Travancore* AIR 1953 SC 478, (1954) Cr LJ 102(SC) .

41 AIR 1961 SC 751, (1961) 1 Cr LJ 773(SC) .

42 See also *Dada Rao v State of Maharashtra* AIR 1974 SC 388, (1974) Cr LJ 447(SC) ; *Debabrata Gupta v SK Ghosh* (1970) 1 SCC 521.

43 (1997) 2 SCC 397, (1997) SCC (Cri) 415.

44 See also *Prathibha Rani v Suraj Kumar* AIR 1985 SC 628; *Radha Rani v Parmod Kumar Oberoi* (1995) SCC 396(Cri) ; *Vinod Goyal v Union Territory* (1991) Cr LJ 2333(Punj) ; *Renu v State of Haryana* (1991) Cr LJ 2049(P&H) ; *Dinabandhu Banerjee v NandininMukherjee* (1994) Cr LJ 422(Cal) .

45 *Madhusudan Malhotra v Kishore Chand Bhandari* (1988) SCC (Cr) 854.

46 *Bhaskar Lal Sharma v Monica* (2009) 10 SCC 604, 2009 (10) SCALE 744.

47 (2001) Cr LJ 2288 (Bom).

48 AIR 1999 SC 2979, (1999) 6 SCC 667.

49 *Indian Oil Corporation v NEPC India Ltd* (2006) 6 SCC 736, AIR 2006 SC 2780.

50 AIR 1962 SC 1821, (1962) 2 Cr LJ 805(SC) .

51 *Shivnarayan Joshi v State of Maharashtra* AIR 1980 SC 439, (1980) Cr LJ 388(SC) .

52 AIR 1980 SC 439, (1980) Cr LJ 388(SC) .

53 *Velji Raghavji Patel v State of Maharashtra* AIR 1965 SC 1433, (1965) 2 Cr LJ 431(SC) ; see also *Chandrakant Chhaganlal Shah v Laxmi Das Chhaganlal Shah* (1988) 3 Crimes 157(Bom) .

54 AIR 1998 SC 2676, (1998) 6 SCC 288.

55 It may be noted that the decisions of the Supreme Court in *RK Dalmia v Delhi Administration* AIR 1962 SC 1821, (1962) 2 Cr LJ 805(SC), was not brought to the notice of the court.

56 *S K Alagh v State of Uttar Pradesh* AIR 2008 SC 1731, (2008) Cr LJ 2256(SC), (2 0080 5 SCC 662; *Asoke Basak v State of Maharashtra* (2010) 10 SCC 660, JT 2010 (11) SC 123; *Thermax Ltd v K M Johny* (2011) 11 SCC 128, (2012) Cr LJ 438(SC) .

57 AIR 1959 SC 1390, (1959) Cr LJ 1508(SC) .

58 AIR 1960 SC 889, (1960) Cr LJ 1253(SC) .

59 *Ramnarayan Popoli v CBI* (2003) 3 SCC 641.

60 AIR 1973 SC 488, (1972) Cr LJ 1202(SC) .

61 *Harihar v Tulsidas* AIR 1981 SC 81, (1980) Cr LJ 1329(SC) ; *State of Himachal Pradesh v Ritu Raj* (1992) 1 Crimes 311(HP) ; *Common Cause, A Registered Society v Union of India* AIR 1999 SC 2979, (1999) 6 SCC 667. Also see *SW Palanitkar v State of Bihar* (2002) SCC 129(Cri) ; *Kailash Kumar Sanwatia v State of Bihar* (2003) 7 SCC 399; *State of Himachal Pradesh v Karanvir* AIR 2006 SC 2211, (2006) Cr LJ 2917(SC), (2006) 5 SCC 381.

62 *Jaswantrai Manilal Akhaney v State of Bombay* AIR 1956 SC 575, (1956) Cr LJ 1116(SC) .

63 *Ramnarayan Popoli v CBI* (2003) 3 SCC 641.

64 *R Venkatkrishnan v CBI* (2009) 11 SCC 737, AIR 2010 SC 1812.

65 *Mustafikhan v State of Maharashtra* (2007) 1 SCC 623, 2006 (13) SCALE 222.

66 *State of Himachal Pradesh v Karanvir* AIR 2006 SC 2211, (2006) Cr LJ 2917(SC), (2006) 5 SCC 381.

67 *Jagroop Singh v State* (1980) Cr LJ 68(P&H) ; *Joseph Salvaraj v State of Gujarat* AIR 2011 SC 2258, (2011) 7 SCC 59.

68 *Sidhir Shantilal Mehta v CBI* (2009) 8 SCC 1, 2009 (11) SCALE 217; *Mir Nagvi Askari v CBI* (2009) 15 SCC 643, AIR 2009 SC 528.

69 In *Nayak Prahladbhai Bhogilal v State of Gujarat* (2001) Cr LJ 1202(Guj), the Gujarat High Court convicted under s 408, a paid employee of a cooperative society, who was required to keep only Rs 1,000 as cash in hand and to deposit the excess amount in the society's account with the bank, for using the excess amount for himself.

70 AIR 1974 SC 794, (1974) Cr LJ 678(SC) .

71 *Somnath Puri v State of Rajasthan* AIR 1972 SC 1490, (1972) Cri LJ 897(SC) ; see also *Shree Kantiah Ramayya Munipalli v State of Bombay* AIR 1955 SC 287, (1955) Cr LJ 857(SC) ; *Janeshwar Das Aggarwal v State of Uttar Pradesh* (1981) 3 SCC 10; *Ved Prakash Handooja v Delhi Administration* AIR 1974 SC 2336, (1975) Cr LJ 31(SC) ; *Hari Prasad v State of Bihar* (1972) 3 SCC 89, (1972) Cr LJ 707(SC) ; *Vasant Moghe v State of Maharashtra* AIR 1979 SC 1008, (1979) Cr LJ 885(SC) ; *Kassim Pillai Abdul v State of Kerala* AIR 1978 SC 1081, (1978) Cr LJ 994(SC) ; *S Natarajan v State of My- sore* AIR 1980 SC 639, (1980) Cr LJ 447(SC) ; *Ganeshbai v State of Gujarat* AIR 1972 SC 1618, (1972) Cr LJ 1029(SC) ; *Vishnu D Mishra v State of Madhya Pradesh* AIR 1979 SC 825, (1979) Cr LJ 565(SC) ; *Bhagwan v State of Maharashtra* AIR 1979 SC 1120, (1979) Cr LJ 924(SC) ; *Mangleshwari Prasad v State of Bihar* AIR 1954 SC 715, (1954) Cr LJ 1797(SC) ; *Ranchhod Lal v State of Madhya Pradesh* AIR 1965 SC 1248, (1965) 2 Cr LJ 253(SC) ; *Ashim Kumar Roy v Bipin Bhai Vadilal Mehta* AIR 1997 SC 3976, (1998) 1 SCC 133.

72 *Kailash Kumar Sanwatia v State of Bihar* (2003) 7 SCC 399.

73 *Jiwan Das v State of Haryana* AIR 1999 SC 1301; *Mustafikhan v State of Maharashtra* (2007) 1 SCC 623, 2006 (13) SCALE 222.

74 *Sardar Singh v State of Haryana* (1977) 1 SCC 463, AIR 1977 SC 1766; *Goura Shankar Naik v State of Orissa* (1992) Cr LJ 275(Ori) .

75 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 17.27 & 17.29.

76 See, Law Commission in its 'One Hundred and Fifty Sixth Report: The Indian Penal Code', Government of India, 1997, para 12.70.

77 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 17.32 & 17.33.

78 See, Law Commission in its 'One Hundred and Fifty Sixth Report: The Indian Penal Code', Government of India, 1997, para 12.71 & 12.72.

CHAPTER 44

Receipt of Stolen Property

(Indian Penal Code 1860,Sections 410 to 414)

INTRODUCTION

A market for stolen goods is the best encouragement for theft, robbery, dacoity and similar crimes. In order to curtail such crimes, it is important that there exists no demand for such goods. However, the stolen goods being available at rates lower than the market rate of a genuine product invariably attract many buyers, thus providing a market for the articles wrongfully gained. To discourage theft, therefore, acceptance of stolen property and dealing with it has been made a punishable under the Indian Penal Code 1860.

PART A - RECEIVING STOLEN PROPERTY

Section 410. Stolen property.--Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Section 411. Dishonestly receiving stolen property.--Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

ESSENTIAL INGREDIENTS

Section 410 explains the phrase 'stolen property' and s 411 provides punishment for 'dishonestly receiving stolen property'. It is directed against receiver of stolen property and not against the thief or the perpetrator of other offences mentioned in s 410, IPC. Receiving stolen property from any person constitutes an offence. Hence, it is not necessary that the principal offender should be convicted for putting s 411 in act ion. Conviction of the principal offender, in no ways, operates as a prerequisite of s 411.[1] Mere proof of the fact that the property received by the accused was the 'stolen property' is enough to convict him.

In order to convict a person for the offence of receiving stolen property, it is necessary to establish three facts: (i) that the property in question was stolen property; (ii) that it was dishonestly received or retained; and (iii) the accused knew or had reason to believe that the property was stolen property.[2]

Stolen Property

The definition of 'stolen property' in s 410, IPC, is narrower than the similar provision of Larceny Act in England, which includes property obtained by cheating as well, whereas s 410 does not include it.

To be termed stolen property, the property must have gone out of the control of the owner and it must have been received by the accused as stolen property, and not in any other manner. The point is illustrated in the decisions of the following two cases:

(1) Four thieves stole goods from the custody of a railway company, and sent them by a parcel in the same company's line addressed to the accused. During the transit, the theft was discovered, and on the arrival of the parcel at the station for delivery, a policeman in the service of the company opened it, and then returned it to the porter, who was under the duty to deliver it, under instructions to keep it till further order. On the following day, the policeman ordered the porter to take it to its address, where it was received by the accused. The police thereafter got hold of him. The court held that the goods had reached its lawful owner, the railway company, so that it could no longer be called stolen goods and thus, the receipt of it could in no way be receipt of stolen property.[3]

(2) A parcel was handed to the prosecutors, a firm of carriers, for conveyance to the consignees. While in the prosecutors' depot, a servant of the prosecutor' removed the parcel to a different part of the premises, and placed upon it a label addressed to the accused. The superintendent of the prosecutors' business, on receipt of information as to this, and after inspection of the parcel, directed it to be sent to the addressee in a van, along with two detectives. The parcel was duly received by the accused under the belief that it was stolen. It was still held by the court that the property having come under the possession of the act ual owners before its receipt by the accused, it had ceased to be stolen property and the accused could not be convicted of receiving it knowing it to have been stolen.[4]

When there is no evidence to identify the property seized from the accused person as stolen property, conviction against the accused under s 411 does not sustain.[5]

Ownerless Property

There can be no theft in case of derelict or ownerless property also known as *res nullis*. So, when a person lets loose a bull as a part of a religious ceremony, he surrenders all his rights as the proprietor of the property and consequently its misappropriation by another person would not make him liable under this section.[6]

'Within or Without India'

The words 'whether the transfer has been made, or the misappropriation or breach of trust has been committed within or without India' were inserted by s 9 of the Indian Penal Code (Amendment) Act 1882, though the term 'India' was substituted in 1951 for the term 'the state'.

The scope of the term 'stolen property' has been enlarged and the act by which the property has been stolen, no longer need be an act punishable under the IPC. The amendment was made in consequence of *Moorga Chetty's* case,[7] which decided that the Bills of Exchange stolen in Mauritius were not stolen property, so as to make the receiver in Bombay liable under s 411, IPC.

Property Obtained Otherwise

The section is very narrow in the sense that it includes only that property as 'stolen property' which is obtained by theft, robbery, dacoity or extortion. Property, which has been obtained by means other than those, for example, by forgery or by cheating, would not fall within the meaning of 'stolen property' as defined in the section.[8]

Identity of Property

There should be substantial identity between the stolen property and the article found in the possession of the accused.[9] So long as the stolen article remains the same in substance, though altered in appearance, it does not cease to be stolen property. Thus, if a stolen golden ornament is melted into a golden piece, it is still stolen property.[10] Beaumont CJ said in the above case thus:

> It is necessary to prove that the property, which was produced, is the property but it need not necessarily be produced in the form which it possessed when it was stolen. If a gold necklace is stolen, and exchanged for another necklace or bullock, it is obvious that the second necklace or the bullock is not the stolen property. But, if the golden necklace is melted down and converted into an ingot, it does not cease to be the same golden necklace that was stolen. What was stolen was gold in the form of a necklace, and what is produced is the same necklace in the form of an ingot.

If stolen property is converted in cash, and the cash is retained by a person, he cannot be guilty of receiving stolen property as such cash cannot be termed as 'stolen property'.[11]

Dishonestly Receiving or Retaining Stolen Property

The section does not deal with mere receipt of the property, but clearly indicates the necessity of a dishonest intention.[12] It is necessary for the prosecution to establish that the accused has either dishonestly received or retained the stolen property. In either case, the accused must receive it from another. It is, therefore, necessary for the prosecution to prove that there was some other person who was in possession of the property before the accused has either received or retained it.

However, it is significant to note that dishonest 'reception' is different from dishonest 'retention'. In the latter, dishonesty supervenes after the act of acquisition of possession, while in the former dishonesty associates with the act of such acquisition. A person who retains possession of property dishonestly, therefore, possesses it dishonestly. But he who possesses it dishonestly does not necessarily retain it dishonestly. Dishonest retention, thus, implies a change in the mental element of possession from 'honest' to 'dishonest' in relation to the thing possessed.

Attention should be paid to the use of both the words 'received' and 'retained' in the section. The law makers have very cautiously imposed liability not only on those who receive stolen property, knowing it to be stolen, but also on those who receive the property honestly, but later on retain it dishonestly. Thus, the liability of a person who retains dishonestly a property that he received honestly, is no less than that of a person who receives it dishonestly.[13]

Receiving or Retaining Stolen Property with Knowledge

The essence of receiving stolen property consists in the receipt or retention of property with full knowledge or having reason to believe at the time of receipt that the property was obtained in one of the ways specified in s 410, IPC.[14] The accused must have known or must have had reason to believe the property to be stolen.

The word 'believe' is a much stronger word than 'suspect' and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property.[15] It involves subjective ascertainment.[16] He, however, is not required to make inquiries at the time of receiving certain property whether it was obtained by theft or honestly.[17] A person, who purchased nine kilo silver for paltry sum, can obviously BE presumed that he had reasons to believe that the silver was stolen. He cannot be a bona fide purchaser and thereby avoid the application of s 411, IPC.[18] It is not sufficient to show that the accused was careless, or he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain if it had been honestly acquired.[19] It is immaterial whether the receiver knows or not who stole it. Initial receipt of property may be honest but its retention becomes dishonest if he continues to possess it even after he comes to know that that the property is stolen.[20]

Possession

An accused can be said to have committed the offence of receiving stolen property in respect of only the property recovered from him. The fact that the rest of the property stolen has not been recovered from him does not affect his liability.[21]However, act ual physical possession of the goods is not essential. Thus, in a case where a consignee presented a railway receipt of certain stolen goods to a Station Master, paid the freight and received formal delivery of the package from the latter, it was held that the goods had come to be not merely in the potential possession of the consignee, but actually within his power and unrestricted control, though, he had not removed them from the station where they were lying, nor made any attempt to do so and that he had received them within the meaning of this section.[22] But of course, at the same time, mere knowledge as to the whereabouts of the stolen property will not make any person liable under this section.[23]

PART B - RECEIVING PROPERTY STOLEN IN THE COMMISSION OF A DACOITY

Section 412. Dishonestly receiving property stolen in the commission of a dacoity.--Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Section 412 seeks to impose liability on persons receiving property stolen in the commission of dacoity.

Dacoity, as defined in s 391, being an aggravated form of robbery, is dealt with more strictly than robbery itself, as is evident from a comparison between ss 392 and 395. It therefore calls for an equal strictness in dealing with receipt of property obtained through the commission of dacoity.

For conviction under this section, it is necessary that the person in possession of the articles should know that the articles were stolen in dacoity. An absence of this knowledge will render the person in possession of such articles free from any liability under s 412, and instead, he will be liable under s 411, IPC.[24] This is the basic difference between the two sections. This principle has been explained in detail Re *Moinuddin Majumdar*[25] also. In this case, properties from a dacoity were recovered from the accused. But the facts failed to show that the accused believed them to be properties of a dacoity. Therefore, the Supreme Court held him to be liable under s 411 and not s 412.

Section 412 deals with those persons other than the dacoits themselves. So, when property stolen of dacoity was obtained from the accused, and it was later discovered that the accused was a dacoit himself, he was held liable for the dacoity and not for the mere receipt of the properties of dacoity.[26] Where such recovery is immediately after the dacoity, the accused persons shall render themselves liable for conviction both for dacoity and for receipt of property of dacoity.[27] For conviction under s 412, the prosecution has to prove that the accused has dishonestly received the stolen property knowing or having reason to believe that its possession has been transferred by the commission of a dacoity.[28] When very soon after the dacoity the property looted by dacoity had been recovered from the accused, the accused is guilty under s 412, IPC.[29] Recovery

of the property looted in dacoity on the instance of one of the dacoits justifies conviction of the person under s 412, IPC.[30] Place of recovery should be under the exclusive possession of the accused to constitute an offence under s 412.[31]

PART C - HABITUALLY DEALING IN STOLEN PROPERTY

Section 413. Habitually dealing in stolen property.--Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 413 deals with those who are habitually receiving or dealing with stolen goods and provides for severe punishment for the same. A person who casually receives stolen property comes within the purview of either s 411 or s 412. 'Habitual' in the section means being in constant or continuous receipt or dealing with goods, which the person so dealing has always been aware that the property was stolen property. This does not include those persons who, at one single time, have received articles obtained through different robberies or thefts.[32]

PART D - CONCEALING AND DISPOSING OF STOLEN PROPERTY

Section 414. Assisting in concealment of stolen property.--Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 414 imposes liability on those persons who voluntarily help the offenders in concealment of stolen property and work against law. Hence, to seek conviction under s 414, it is necessary for the prosecution to prove that the accused, knowing or having reasons to believe that the property was stolen, helped in its concealment and/or disposal. It is, however, not necessary to trace conviction of the thief.[33] In fact, the Supreme Court has held that to convict a person for voluntary concealment or disposition of stolen property, it is not necessary that the primary accused of the crime need be arrested first.[34] However, a person spending money stolen by someone else does not come within the ambit of expression 'voluntarily assists in concealing or disposing of making away' and thereby cannot be convicted under s 414, IPC.[35] Their aid to the offenders makes it more difficult for the authorities to trace or identify the articles stolen.[36]

PART E - PROPOSALS FOR REFORM

The Fifth Law Commission has offered a few proposals for reform in substantive as well as penal provisions dealing with receipt of stolen property. They are:

(1) The definition of 'stolen property' should include in it property received by a person: (i) by 'cheating, and (ii) from a child (below the age of criminal responsibility) or an insane person even though such a child or a person of unsound mind, by virtue of the relevant 'General Exceptions', cannot be convicted for committing theft.[37] These proposals for reform should be incorporated by adding *explanation* and *illustration* to s 410.

(2) The maximum punishment of imprisonment for a term up to three years provided for receiving or voluntarily assisting in concealment of stolen property (under ss 411 and 414 respectively) should be enhanced to rigorous imprisonment for a term up to seven years, if such a property happens to be property of a government or of a local authority.

(3) The existing imprisonment for life or rigorous imprisonment for a term up to ten years provided for dishonestly receiving property stolen in the commission of dacoity and for habitually dealing in stolen property (under ss 412 and 413 respectively) should be reduced to rigorous imprisonment for a term up to fourteen years.[38]

Clause 175 of the Indian Penal Code (Amendment) Bill 1978 sought to give extended meaning to the expression 'stolen property' on the lines suggested by the Law Commission. While clause 176 of the Bill, which sought to bring the recommended changes in ss 411 and 414 of the IPC, stipulated severe punishment (of rigorous imprisonment for a term up to seven years) for receiving and voluntarily assisting in concealing stolen property of a government or of a local authority. Both the clauses received support and endorsement of the Fourteenth Law Commission.[39]

However, these proposals for reform could not become effective as the 1978 Bill lapsed in 1979.

1 *Mir Nagvi Askari v CBI* (2009) 15 SCC 643, AIR 2010 SC 528.

2 *Kishan Lal v State of Uttar Pradesh* (1979) Cr LJ 309(All) ; *Trimbak v State of Madhya Pradesh* AIR 1954 SC 39, (1954) Cr LJ 335(SC) ; *Mahabir Sao v State of Bihar* (1972) 1 SCC 505, AIR 1972 SC 642; *State of Manipur v LB Singh* AIR 1954 Mani 13; *Rajinder Kumar v State (Delhi Administration)* (1983) 23 Del LT 42; *Sabitri Sharma v State of Orissa* (1987) Cr LJ 956(Ori) ; *Mir Nagvi Askari v CBI* (2009) 15 SCC 643, AIR 2010 SC 528.

3 *Haughton v Smith (*1866) LR ICCR 15.

4 *Villensy*(1892) 2 QB 597.

5 *Chand Mal v State of Rajasthan* AIR 1976 SC 917, (1976) 1 SCC 621; *Narayan Das v State of Rajasthan* (1998) Cr LJ 29(Raj) ; *Manik Deorao v State of Maharashtra* (1994) SCC (Cri) 1761; .

6 *Bandhu*(1885) ILR 8 All 51; *Nihal*(1887) ILR 9 All 348.

7 (1881) ILR 5 Bom 338 (FB).

8 Re *Monmohunroy*(1875) 24 WR (Cri) 33; *Phul Chand Dube v State of Uttar Pradesh* (1929) ILR 52 All 200.

9 Re *Mahabir Sao (*1972) Cr LJ 458 (SC).

10 Re *Gaune Vithu Ghode (*1942) Cri Appeal No 187 of 1942 Unrep (Bom). In England, even mutton obtained by killing stolen sheep was held to be stolen property. See *Cowell v Green* (1796) 2 East PC 617.

11 *Ram Narain v Central bank of India Ltd Bombay* AIR 1952 Punj 178; *Public Prosecutor v India Chins Lingiah* AIR 1954 Mad 433.

12 *Rajendra Kumar v State of West Bengal* (1969) Cr LJ 243(Cal) ; *Sabitri Sharma v State of Orissa* (1987) Cr LJ 956(Ori) ; *Nazir v State of Kerala* (2002) Cr LJ 4742(Ker) .

13 *Balinath v State* (1957) ILR Cut 112.

14 *Mohan Lal v State of Maharashtra* AIR 1979 SC 1718, (1979) Cr LJ 1328(SC) .

15 *AG Edgecombe v Emperor* AIR 1928 Cal 264; *Suraj Prasad v Emperor* AIR 1929 Oudh 213; *Mohan Lal v State of Maharashtra* AIR 1979 SC 1718, (1979) Cr LJ 1328(SC) .

16 *Satnarain Sao v State of Bihar* (1972) 3 SCC 881, AIR 1972 SC 1561.

17 *Jhagru Kurmi v State* AIR 1950 All 497.

18 *Bhanwarlal v State of Rajasthan* (1995) 1 Cr LJ 625(Raj) .

19 *Gaya Prasad v Emperor* AIR 1932 Oudh 251; *State of Rajasthan v Jai Govind* AIR 1951 Raj 89; *Jogendra Singh v State of Orissa* (1991) Cr LJ 2331(Ori), 1991 (1) OLR 201.

20 *Bena Jena v State of Orissa* AIR 1958 Ori 106, (1958) Cr LJ 657(Ori) .

21 *Chhedi v State of Uttar Pradesh* AIR 1953 All 752, (1954) Cr LJ 1699(All) . See also *Trimbak v State of Madhya Pradesh* AIR 1954 SC 39, (1954) Cr LJ 335(SC) ; *State of Manipur v LB Singh* AIR 1954 Mani 13; *Badri Prasad Prajapati v State of Madhya Pradesh* (2005) Cr LJ 1856(MP) .

22 Re *Shwedhar Sukall*(1913) ILR 40 Cal 990.

23 *Maharaj v Emperor* AIR 1945 All 230.

24 *Achyut Das v State of Assam* AIR 1994 SC 968, (1994) Cr LJ 1119(SC) ; *Narayan Prasad & Ors v State of Madhya Pradesh* (2006) Cr LJ 123(SC) .

25 (1972) Cr LJ 456 (SC).

26 *State of Orissa v Venkuri* (1986) Cr LJ 439(Ori) .

27 *Lachman Ram v State of Orissa* AIR 1985 SC 486, (1985) Cri LJ 753(SC) .

28 *Adeluddin v Emperor* AIR 1945 Cal 482. See also, *Mahinder Singh v State (Delhi Administration)* (1992) 2 Crimes 763(Del) ; *Shrichand & Ors v State of Madhya Pradesh* (1996) Cr LJ 296(MP) ; *Narayan Prasad v State of Madhya Pradesh* (2006) Cr LJ 123(SC) .

29 *Amar Singh v State of Madhya Pradesh* AIR 1982 SC 129, (1982) Cr LJ 610(SC) .

30 *Pawan Yadav v State of Bihar* (2001) Cr LJ 3626(Pat) .

31 *Abdul Wahed Ankujee v State of West Bengal* (2006) CHN 331.

32 *BN Singh v State of Uttar Pradesh* AIR 1960 All 754.

33 *Hastimal v State of Gujarat* (1975) Cr LJ 983(Guj) ; *Bhanwar Lal v State of Rajasthan* (1995) Cr LJ 625(Raj) .

34 *Ajendranath v State of Madhya Pradesh* AIR 1964 SC 170, (1964) 1 Cri LJ 129(SC) .

35 *Amar Nath v Emperor* AIR 1935 Lah 587.

36 *Emperor v Abdul Gani Bahaduri* AIR 1926 Bom 71.

37 Ibid, para 17.36.

38 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India,1972, paras 17.36, 17.37 and 17.39.

39 See, Law Commission of India, 'One Hundred and Fifty Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.73 and 12.74.

CHAPTER 45

Cheating

(Indian Penal Code 1860,Sections 415 to 420)

Section 415. Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.--A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(a) *A*, by falsely pretending to be in the Civil Service, intentionally deceives *Z*, and thus dishonestly induces *Z* to let him have on credit goods for which he does not mean to pay. *A* cheats.

(b) *A*, by putting a counterfeit mark on an article, intentionally deceives *Z* into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces *Z* to buy and pay for the article. *A* cheats.

(c) *A*, by exhibiting to *Z* a false sample of an article, intentionally deceives *Z* into believing that the article corresponds with the sample, and thereby dishonestly induces *Z* to buy and pay for the article. *A* cheats.

(d) *A*, by tendering in payment for an article a bill on a house with which *A* keeps no money, and by which *A* expects that the bill will be dishonoured, intentionally deceives *Z*, and thereby dishonestly induces *Z* to deliver the article, intending not to pay for it. *A* cheats.

(e) *A*, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives *Z*, and thereby dishonestly induces *Z* to lend money. *A* cheats.

(f) *A* intentionally deceives *Z* into a belief that *A* means to repay any money that *Z* may lend to him and thereby dishonestly induces *Z* to lend him money. *A* not intending to repay it. cheats.

(g) *A* intentionally deceives *Z* into a belief that *A* means to deliver to *Z* a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces *Z* to advance money upon the faith of such delivery. *A* cheats, but if *A*, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it he does not cheat, but is liable only to a civil action for breach of contract.

(h) *A* intentionally deceives *Z* into a belief that A has performed *A*'s part of a contract made with *Z*, which he has not performed, and thereby dishonestly induces *Z* to pay money. *A* cheats.

(i) *A* sells and conveys an estate to *B*. *A*, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to *Z*, without disclosing the fact of the previous sale and conveyance to *B*, and receives the purchase or mortgage money from *Z*. *A* cheats.

SCOPE OF SECTION 415

'Cheating' is defined in s 415, which can be put in its analytical form thus:

Whoever, by deceiving any person: (1) fraudulently or dishonestly induces the person so deceived: (a) to deliver any property; or (b) to consent that any person shall retain any property; or (2) (a) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and (b) which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is said to 'cheat'.

In cheating, there should first of all be deception. By means of this deception, a man is deceived or cheated in two ways as indicated in (1) and (2) at the outset. In (1), the victim is induced to deliver property. This delivery is indeed brought about as the result of fraudulent and dishonest means used by the accused. In (2), there is no delivery of property, but the victim is intentionally induced to do or omit to do anything which he would not do or omit, if, he were not induced--in short, he is induced to do something to his own prejudice. Here, the inducement need not be fraudulent or dishonest; it is enough if it is intentional.

Thus, s 415 has two alternate parts, while in the first part the person must 'dishonestly' or 'fraudulently' induce the complainant to deliver any property, in the second part, the person should intentionally induce the complainant (the person so deceived) to do or omit to do a thing. To put in other words, in the first part, inducement must be dishonest or fraudulent. And in the second part, inducement should be intentional. 'Deception' is common element in both the parts. It is, however, not necessary that deception should be by express words but it may be by conduct or implied in the nature of transaction itself.[1]

The main ingredients of s 415 which have to be proved to obtain conviction for cheating are: (1) for the First Part: (a) the accused deceived some person; (b) by deception he induced that person; (c) the above inducement was fraudulent and dishonest, and (d) the person so induced delivered some property to or consented to the retention of some property by any person, and (2) for the Second Part: (a) the accused deceived some person; (b) the accused thereby induced him; (c) such inducement was intentional; (d) the person so induced did or omitted to do something; (e) such act or omission caused or was likely to cause damage or harm to the person induced in body, mind, reputation or property.[2]

ESSENTIAL INGREDIENTS OF CHEATING

A very succinct elaboration of the scope of the definition of cheating is to be found in the judgment of the Supreme Court in *Hari Sao v State of Bihar* .[3] In this case, the appellants were alleged to have dishonestly induced the station master of Sheonarayanpur railway station to make an endorsement in the railway receipt of false particulars. The accused had obtained allotment of an entire rail wagon for the proposed consignment of 251 bags of chillies to Calcutta. The accused themselves had loaded the wagon. A day after the wagon had been sealed and made ready for dispatch, some seals were found broken. The railway authorities checked the wagon and found only 197 bags, filled with chaff *(bhusa)*, and not chillies, as mentioned in the railway receipt, which was countersigned by the station master. The prosecution's case was that this was part of a conspiracy to later on convert the rail receipt as valuable security, thereby committing the offence punishable under s 420. The Supreme Court, while considering the case, elaborated on the essence of s 415 as follows:

> ... [A] person is said to cheat when he by deceiving another person fraudulently or dishonestly induces the person so deceived to deliver any property to him or to consent that he shall retain any property or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he was not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.[4]

In *Ram Jas v State of Uttar Pradesh* ,[5] the Supreme Court enumerated the essential ingredients required to constitute the offence of cheating as follows:

(1) There should be fraudulent or dishonest inducement of a person by deceiving him;
(2)
  (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or
  (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(3) in cases covered by (2) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.[6]

IMPORTANT INGREDIENTS OF DECEPTION AND INDUCEMENT

Deception

One of the initial ingredients which have to be proved to establish the offence of cheating is deception,[7] which must precede and thereby induce the other person to either (a) deliver or retain property; or (b) to commit the act or omission referred to in the second part of s 415.[8] Generally speaking, 'deceiving' is to lead into error by causing a person to believe what is false or to disbelieve what is true, and such deception may be by words or by conduct. A fraudulent representation can be made directly or indirectly.

Thus, in the case of *Swami Dhirendra Brahmachari v Shailendar Bhushan* ,[9] the accused, Swami Brahmachari, was held to have knowingly made false assertions to the effect that the yoga course run by him through the Vishwayatan Yogashram was recognised by the Government of India, thereby inducing unwary students to obtain admission paying Rs 1,000 by way of caution deposit, thereby cheating students. Since the allegation against the accused was prima facie held to be made out in the complaint and material collected by the investigating authority, the Delhi High Court refused to quash the criminal complaint of cheating pending against him.

As to what act constitutes deception, has been held to be a matter of evidence in each case and dependent upon the facts and circumstances of each case. However, the element of deception has been held to be the first stage of establishing the offence of cheating. Thus, where there is no evidence of deception, then the offence of cheating has been held not to be established. Similarly, deceit must have been practiced before the property is delivered.[10] The fraudulent or dishonest intention must be there at the time of making promise or representation. Misrepresentation from the very beginning is a sine qua non of the offence of cheating.[11]

By virtue of explanation to s 415, a dishonest concealment of facts is tantamount to deception. Not all concealment of material facts but dishonest concealment of facts amounts to deception. It does not necessarily deal with illegal concealment of facts but with dishonest concealment of facts.[12] Concealment can be dishonest even in the absence of legal obligation or duty to speak.[13]

Wilful Representation and Cheating

It is a moot question as to whether wilful representation will by itself amount to cheating. However, where there is wilful misrepresentation with intent to defraud, it has been held to amount to cheating. To establish the offence, however, what is important is to see whether the misrepresentation was false to the knowledge of the accused at the time when it was made.[14]

Cheating and Misappropriation

An interesting case came up in *Shankarlal Vishwakarma v State of Madhya Pradesh* .[15] Here, a man tricked another to deliver to him money, which was subsequently misappropriated. The offence did not amount to criminal breach of trust, as the money received by him could not be considered to have been entrusted to him, and had been obtained by the accused by tricking another person. In such circumstances, the offence could only be said to be one of cheating.

Cheating differs from criminal misappropriation in the fact that the perpetrator has dishonest intention with inducement (to take possession of the property) from the very beginning of his act .[16]

Deception and Cheating in Connection with False Promise of Marriage

A commonly encountered issue is deception by men who dupe young girls and women with false assurance of marriage and enter into sexual liaisons, only to subsequently refuse to honour the promise, thereby leaving the women in the lurch. The question is as to whether such deception amounts to cheating under s 415, IPC. In *Mailsami v State of Tamil Nadu* ,[17] the Madras High Court had to consider the case of an accused person who had made promises to marry a woman, and thereby got close to her and made her pregnant. Subsequently, he put an impossible condition for marriage, *namely*, that she should terminate the six months' pregnancy, and when the women did not consent for termination, he refused to marry her. The Madras High Court held that all the ingredients of s 417 were established, including inducements, which made the victim do something she would not otherwise have done. The high court, therefore, refused to quash the criminal case pending against the accused. In coming to the conclusion, the high court relied on its earlier judgment in *Ravichandran v Mariyammal* ,[18] in which false representations had been made by the accused to the women, who were taken in by the deception and consented to intercourse. Such acts were held clearly to amount to offence of cheating under s 417, IPC.

However, it is necessary to prove that the promise to marry by the accused for inducing the complainant to have sexual connection with him was false when he made it.[19] The promise to marry must be with fraudulent intention of not honoring it, and motivated with the desire to have sexual intimacy.[20]

Inducement

The second essential ingredient to the offence of cheating is the element of 'inducement' leading to either delivery of property or doing of an act or omission as pointed out earlier. Section 415 clearly shows that mere deceit is not sufficient to prove the offence. Likewise, committing something fraudulently or dishonestly is also not sufficient. The effect of the fraudulent or dishonest act must be such that it induces the person deceived to deliver property or do something (in the form of an act or omission). Thus, in either of the two situations covered by s 415, the element of inducement leads either to delivery of property or doing of an act or omission to do anything. Thus, in *Shri Bhagwan Samardha Sreepadha Vallabha Venkata Vishwanandha Maharaj v State of Andhra Pradesh* ,[21] the Supreme Court held that the representation made by the appellant-accused (Swami BSSVVV Maharaj), that he had divine healing powers through his touches, thereby making the complainant believe that he could cure his little girl of her congenital dumbness through his divine powers was fraudulent and amounted to inducement. Thus, believing the promises, the complainant was induced to believe in the divine powers and shell out money to the so-called Godman. The court elaborated on the aspect of inducement:

> If somebody offers prayers to God for healing the sick, there cannot normally be any element of fraud. But if he represents to another that he has divine powers and either directly or indirectly makes that another person believe that he has such divine powers, it is inducement referred to in Section 415 of the Penal Code. Anybody who responds to such inducement pursuant to it and gives the inducer money or any other article and does not get the desired result is a victim of the fraudulent representation. The Court can in such a situation presume that the offence of cheating falling within the ambit of Section 420 of the Penal Code has been committed. It is for the accused, in such a situation, to rebut the presumption.[22]

Effect of Absence of Dishonest Inducement

In *Dr Sharma's Nursing Home v Delhi Administration* ,[23] the prosecution case was that the complainant got his brother admitted in the nursing home on assurance that air-conditioned rooms were available. However, the room provided was not air-conditioned, though he was charged for such a room. The trial court held that offence of cheating under ss 415 & 429, IPC, was established. The Supreme Court, however, found that the complaint and other documents did not reveal dishonest inducement. It noted that while the lower courts had given findings on the issue of deception, they had not examined whether the other essential ingredient of s 420, namely, dishonest inducement had been established. 'Dishonesty' has been defined in s 24, IPC, as deliberate intention to cause wrongful gain or wrongful loss. If with such intention, deception is practiced and delivery of property is induced, then the offence under s 420 can be said to have been committed. However, in the above case, there was no material from which it could be held, even prima facie, that the appellant had been 'dishonestly induced' to part with his money. Hence, the offence of cheating could not be said to have been established.

In another case, the Supreme Court held that at the investigation stage itself, the high court should not sieve the complaint to see whether all the necessary ingredients to make out the offence of cheating are present and consequently quash the criminal proceeding. In *Rajesh Bajaj v State NCT of Delhi* ,[24] the appellant-complainant, Rajesh Bajaj, a garments manufacturer of Delhi, had made a complaint alleging that one Gagan Kishore Srivastava, Managing Director of a German company that was engaged in import of garments, had approached him for purchase of garments and induced him to believe that the said Srivastava would pay the price of the said sale on receiving the invoice. Such payment was promised to be paid within 15 days of receipt of invoice. However, he failed to do so, despite a visit of one of the complainant's representatives to Germany. The complaint filed before the police was quashed by the Delhi High Court on the grounds that: (i) there was nothing to show that the accused had dishonest or fraudulent intention at the time of the export of goods; (ii) there was nothing to show that the complainant had been induced to export, based on fraud and dishonesty on the part of the accused; and (iii) the entire transaction was civil in nature.

The Supreme Court, however, came to a different conclusion. Noting that it is not necessary that the complainant should verbatim reproduce in the complaint all the ingredients of the offence, it was also not necessary to state in so many words that the intention of the accused was dishonest or fraudulent. If factual basis for the complaint had been laid in the complaint, then the courts should not hasten to quash criminal proceedings at the investigation stage itself. On the issue of inducement the apex court stated:

> The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was the commission of an offence or not.[25]

The complainant had stated in the complaint itself that he was induced to believe that the accused would pay the amount on receipt of invoices, and only later he realised that the intentions of the accused were not clear. Further, the accused had sold the goods to others and still did not pay the money due. The Supreme Court held that such averments would prima facie make out a case for investigation by the authorities.

It must be proved that the accused had dishonest intention right from the beginning.[26] Mere failure to keep his promise by itself does not amount to cheating.[27]

CRITICAL ASPECTS RELATING TO THE OFFENCE OF CHEATING

Dishonest Intention Should be Present at the Time of Making the Promise

It is necessary to consider that for the offence of cheating to be made out, the inducement by the accused to the complainant must have been made in the initial or early part of the transaction itself. Here too, what is important is to prove that at or about the time that the person induced was made to part with money, the respondents (i.e., alleged accused persons) ought to have known that their representation was false and that the representation was made with the intention of deceiving the other person. If this is not shown, then the dispute is only civil in nature. Thus, in *Hari Prasad Chamaria v Bhisun Kumar Surekha* ,[28] the Supreme Court held that the fact that subsequent to the transaction, the respondents did not honour their promises would only create a civil liability, and criminal liability cannot be fastened on the accused.

Absence of Intention to Honour the Promise at the Time of False Representation

The second crucial aspect to be noted is that the complainant has to show that at the time the alleged false representation was made or the inducement offered by the accused, the accused had no intention of honouring the same. Otherwise, the entire transaction would only be civil in nature. However, if the accused had no intention whatsoever to pay, but merely said that he would do so in order to induce the complainant to part with the goods, then a case of cheating could be established.[29]

Dishonesty is Causing Either Wrongful Gain or Wrongful Loss

A person can be said to have done a thing dishonestly when he does so with the intention of causing wrongful gain to one person or wrongful loss to another person. Wrongful gain occurs when a person who is not entitled to property acquires it through unlawful means; conversely, wrongful loss is loss of property sustained by a person through unlawful means. Thus, there are two facets to the definition of dishonesty, and it is sufficient to establish the existence of any one of them. There is no requirement in law to establish both.[30]

False Pretence to be Inferred From Circumstances

False pretence need not be in express words for constituting offence of cheating. It can be inferred from all the circumstances, including the conduct of the accused.[31]

Mens Rea as Essential Ingredient of the Offence of Cheating

In *Anil Kumar Bose v State of Bihar* ,[32] the Supreme court held that a failure on the part of concerned employees to perform their duties or to observe rules of procedure laid down in the duty chart in a proper manner, may be an administrative lapse on their part and may at the best amount to a case of error of judgment or breach of performance of duty, which, per se, cannot be equated with dishonest intention. Mens rea is one of the essential ingredients of the offence of cheating under s 420, IPC, and where mens rea is not established no offence of cheating can be made out.[33]

ON THE ISSUE OF DAMAGES CAUSED OR LIKELY TO BE CAUSED

Damage to Body, Mind, Reputation or Property Caused or Likely to be Caused

The use of the term 'cause' in s 415 postulates a direct and proximate connection between the act or omission and the harm and damage to the victim.[34] It excludes damage occurring as a mere fortuitous sequence, unconnected with the act induced by deceit. On the other hand, the definition, as it stands, is wide enough to include all damages resulting or likely to result as a direct natural or probable consequence of the induced act .[35] The loss or damage to the victim arising from the act of cheating must be proximate and not vague or remote.[36]It must be a natural consequence of the act or omission in question and not a contingent one.[37]

The critical aspect that has to be proved for establishing the offence of cheating is the fact that some damage has been caused or that some damage is likely to be caused to body, mind, reputation or property.

When no Damage Caused to Complainant

In the case of *Hari Sao v State of Bihar* ,[38] the Supreme Court held that the false representation made by the accused to the station master leading to his making endorsement on the receipt, could not, even if established as a dishonest or fraudulent act, cause any damage or harm to the railway. Thus, no question of cheating the railway or the station master arose. On this count, the accused were acquitted.

In *Ramkrishna Babura Maske v Kisan Shivraj Shelke* ,[39] the Bombay High Court held the parents, who induced the complainant to marry their daughter by concealing the fact of her pregnancy by someone else and who delivered a baby after five months of the marriage, not guilty of cheating on the ground that there was neither wrongful loss nor wrongful gain of property as a consequence of concealment.

When no Benefit Accrued to Accused but Loss to Complainant Company

A different dimension on this issue of causing or likely to cause damage as an element of the offence of cheating was considered by the Supreme Court in *Ram Prakash Singh v State of Bihar* .[40] In this case, an employee of the Life Insurance Corporation, (LIC) was accused of having introduced fake and false insurance proposals to the Corporation. The proposals were forged in the name of non-existent persons by the accused in his own handwriting. The accused sought to take advantage of his inflated business by introducing the fake proposals to gain promotions. Although, the accused himself did not gain any benefit, there was loss to the LIC for issuance of insurance policies, even if this was only a negligible sum. According to the Supreme Court, such fake or forged proposals are bound to affect the reputation of the insurance company. Hence, his conviction for the offence of conspiracy to cheat was upheld.

Sustaining Loss not Criterion for Establishing the Offence of Cheating

In *State v Ramados Naidu* ,[41] the accused persons had obtained loans from the Land Development Bank for digging new wells in their agricultural lands and purchasing new oil engines without act ually doing any of these things. However, the bank had not suffered any loss on account of these transactions, as the loans were fully covered by the security of immovable properties and the loans had been repaid in full. Nevertheless, the accused were convicted for cheating under ss 415 and 420.

The Madras High Court observed that the following three ingredients have to be established in the offence of cheating: First, there has to be practice of deception by the offender. Secondly, on account of the deception, there must be fraudulent or dishonest inducement so as to make the person deceived to deliver any property or to do something or omit to do something, etc. Lastly, by reason of delivery of the property or the doing of a thing or the omission to do a thing, there must be the causing of, or the likelihood of the causing of, damage or harm to the person deceived in body, mind, reputation or property. Thus, as a result of the dishonest inducement of a person, there can be either wrongful loss to the person deceived or wrongful gain to another, including the person practicing the deception. Whenever any one of these results follows on account of the deception practiced by a person, then the offence of cheating would be complete.

In the above case, the accused persons obtained loans from the bank by making fraudulent representation to the bank. Therefore, even though each advancement of loan was made on the security of property and on account of it there had been no loss to the bank, yet it follows that each of the borrowers had made a wrongful gain to himself by making dishonest representation to the bank in getting the loan amount, therefore, the borrowers in each case had committed the offence of cheating.

CIVIL LIABILITY VERSUS CRIMINAL LIABILITY

The crucial aspect to be noted in the law relating to cheating is the intention of the person accused of cheating. Most often, especially in issues relating to commercial transactions, the disputes are difficult to separate in terms of their civil and criminal liabilities. As stated earlier, the crucial difference between a criminal cause of action as against a purely civil transaction is the intention of the person at the time when the cause of act ion arose or the alleged offence commenced. The important aspect is to examine whether at that stage, the accused deliberately or intentionally induced the other person to part with property or to do an act or desist from doing an act, or whether it was only subsequently that the dispute arose. No clear-cut rule can be

evolved in this regard, and the facts and circumstances of each case will determine the way in which a particular issue can be addressed by courts.

VEXATIOUS CRIMINAL PROCEEDING IN CIVIL DISPUTE: IMPOSITION OF COSTS

In *Nageshwar Prasad Singh @ Sinha v Narayan Singh* ,[42] the respondent-complainant, Narayan Singh, an advocate, had entered into an agreement of sale of certain properties with the accused in Patna city. Part of the consideration had been paid as earnest money. Possession had also been delivered to the complainant as per the sale deed. However, the complainant had not made the full payment as agreed upon, resulting in delay in completing the legal formalities of the sale. The complainant had also filed a civil suit for specific performance against the accused. Thereafter, the complainant filed a criminal complaint alleging committing of offence under s 420, IPC. The Supreme Court considered illust (g) to s 415, IPC, and stated that the latter part of the illustration showed that:

> ... [A]t the time when the agreement for sale was executed, it could have in no event been termed dishonest so as to hold that the complainant was cheated of the earnest money, which they passed to the appellants as part consideration, when possession of the total land involved in the bargain was passed over to the complainant-respondent, and which remains in their possession. Now, it is left to imagine who would be interested in delaying the matter in completing the bargain when admittedly the complainants have not performed their part in making full payment.[43]

Thus, the apex court held that the liability, if any, was only civil in nature and not criminal. It not only quashed the criminal proceeding, but also imposed compensatory cost of ten thousand rupees on the respondent-complainant for the vexatious proceeding.

PUNISHMENT FOR CHEATING

Section 417. Punishment for cheating.--Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 420. Cheating and dishonestly inducing delivery of property.--Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 415 of the defines the offence of cheating, which is made punishable by ss 417 and 420, IPC. Section 417 provides punishment for a simple case of cheating, whereby, the person cheated is injured otherwise than by being induced to part with property.[44] The second part of s 415 not involving fraud or dishonesty is thus made punishable leniently as compared with the maximum sentence provided for the offence constituted by the first part of the section.

Section 420 deals with certain aggravated forms or specified classes of cheating. It deals with cases of cheating, whereby, the deceived person is dishonestly induced: (a) to deliver any property to any person; or (b) to make, alter or destroy: (i) the whole or any part of a valuable security; or (ii) anything which is signed or sealed, and which is capable of being converted into a valuable security.[45] It is required to prove that the complainant has parted with the property due to dishonest inducement of the accused.[46] The property so delivered must have some money value to the person cheated.[47]

The terms of punishment provided for in both the provisions vary. Thus, while s 417 provides for imprisonment of a term which may extend to a year, or fine or both, an offence under s 420 becomes liable for a sentence of imprisonment for a term up to seven years with fine. It should be noted that fine is an optional punishment under s 417, whereas for offence under s 420, once conviction is recorded and sentence of imprisonment awarded, fine also has to be imposed.

Another distinction needs to be noted between ss 417 and 420. While both are penalising sections, it is said that if delivery of property is obtained fraudulently, then the offence is punishable by s 417; on the other hand, if the property delivered is due to dishonesty, then it will be covered by s 420. Hari Singh Gour provides the following situation to illustrate this difference:

> *A*, may by false representation, induce *B* to advance him a sum of money in such circumstances that *A* is aware that he is exposing *B* to risk of loss but without intention of causing him wrongful loss. *A* then would be acting fraudulently and would be punishable only under s 417, IPC. However, if he intended to cause wrongful loss, he would be act ing dishonestly and would be punishable under s 420, IPC.[48]

CHEATING BY PERSONATION

Section 416. Cheating by personation.--A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.--The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(a) *A* cheats by pretending to be a certain rich banker of the same name. *A* cheats by personation.
(b) *A* cheats by pretending to be *B*, a person who is deceased. *A* cheats by personation.

Section 419. Punishment for cheating by personation.--Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 416 defines the offence of cheating by personation and s 419 provides punishment therefor. Therefore, to convict a person under s 419, it is necessary to prove the elements of s 416.[49] However, it is not necessary to prove who was being impersonated, for the person impersonated could be an imaginary person, non-existent or unknown.[50] However, what has to be established is that the accused impersonated somebody, or else the offence is not established.[51] As to the form of impersonation, the section does not elaborate on whether it is through words spoken, or dress or by conduct.

CHEATING OUT OF FIDUCIARY RELATION

Section 418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.--Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 418 prescribes punishment for cheating by persons standing in fiduciary or financial capacity to the person cheated, as for example, the nature of relationship between banker and customer, the principal and agent, a guardian and ward, trustee, director of company, advocate and client and so on. Liability under this section arises when a person in such a fiduciary or responsible capacity makes a statement knowing it to be false at the time of making it, and making it with the dishonest intention of cheating another.[52]

However, when there was no intention to cheat, this offence cannot be established. Thus, in *S Shankarmani & Ors v Nibar Ranjan Parida* ,[53] a bank intended to take a house on hire, because of which the landlord incurred a huge expense to furnish the house. However, for reasons beyond the control of the bank officials, the house could not be taken on rent. At no stage was there any intention to deceive the landlord. Hence, it was held that the offence of cheating was not made out.

PROPOSALS FOR REFORM

The Fifth Law Commission proposed the following three major reforms. They are:

(1) The term 'harm to that person', appearing in the latter part of s 415, which enabled the courts to stretch its meaning in the situations wherein no tangible harm to the person deceived was apparent though the offender had taken some undue and unfair advantages from him, and created difficulty for them in deciding cases of 'cheating' when 'harm' was caused to somebody else other than the person deceived, should be substituted by 'harm to person'.

(2) Dishonest non-disclosure of facts by a person who is bound by law to disclose them should be brought within the definition of 'deception' and it should be expressly mentioned in the explanation to s 415 as the term 'concealment' has caused some confusion.

(3) Two new sections (ss 420A and 420B) should be inserted to respectively tackle the problem of cheating of government on a large scale by dishonest contractors while supplying goods or executing works and of increasing commercial corruption. These proposed offences should be respectively made punishable by simple or rigorous imprisonment for a term up to ten and three years.[54]

The Indian Penal Code (Amendment) Bill 1978 gave effect to most of these proposals for reform. Clause 177 of the Bill sought to revise s 415 of the IPC to redefine 'cheating' on the lines suggested by the Law Commission. Clause 178 of the Bill sought to: (i) substitute the existing s 420 by a section with the changes suggested by the Law Commission, (ii) insert s 420A (relating to cheating of public authorities in performance of certain contracts and worded on the lines suggested by the Law Commission), (iii) insert s 420B (relating to publication of false advertisements), and (iv) insert s 420C (relating to fraudulent acts of in relation to property of a company and drafted on the lines suggested by the Law Commission). The Fourteenth Law Commission has endorsed the proposed changes.[55]

However, these proposals for reform could not become effective as the 1978 Bill lapsed in 1979.

1 *Ramnarayan Popoli v CBI* (2003) 3 SCC 641; see also, *Hira Lal Hari Lal Bhagwati v CBI* (2003) SCC 1121; *Iridium India telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, (2011) 1 SCC 74.

2 *Divender Kumar Singla v Baldev Krishna Singla* AIR 2004 SC 3084, (2005) 9 SCC 15.

3 AIR 1970 SC 843, (1970) Cr LJ 849(SC) .

4 Ibid, para 6.

5 AIR 1974 SC 1811, (1974) Cr LJ 1261(SC) .

6 Ibid, para 3; see also, *Hridaya Ranjan Prasad Verma v State of Bihar* (2000) 4 SCC 168, (2000) Cr LJ 2983(SC) ; *GV Rao v LHV Prasad* AIR 2000 SC 2474, (2000) 3 SCC 693; *SW Palanitkar v State of Bihar* (2002) 1 SCC 241;, AIR 2001 SC 2960; *Kuriachan Chacko & Ors v State of Kerala* (2008) 8 SCC 708; *V P Shrivastava v Indian Explosives* (2010) 10 SCC 361, 2010 (10) SCALE 177; *Iridium India Telecom Ltd v Motorola Incorporated* AIR 2011 SC 20, (2011) 1 SCC 74.

7 *Ramantar v Hari Ram* (1982) Cr LJ 2266(Gau) ; *Gurucharan Singh v Suresh Kumar Jain* (1988) Cr LJ 823(Del) .

8 *Hatiram Nayak v Surendra Kumar Mallik* (1986) Cr LJ 1271(Ori) ; *State v Raadoss Naidu* (1977) Cr LJ 2048(Mad) ; *G Laxminarayan Naidu v Chitibonia Yerraiah* (1985) Cr LJ 1839(Ori) .

9 (1995) Cr LJ 1810 (Del).

10 *Narayan Das v State of Orissa* AIR 1952 Ori 149, (1952) Cr LJ 772(Ori) ; *Ram Nath v State of MB* AIR 1951 MB 100, (1952) Cr LJ 664(MB) .

11 *V Y Jose v State of Gujarat* (2009) 3 SCC 78, 2008 (16) SCALE 167; *Devendra v State of Uttar Pradesh* (2009) 7 SCC 495, 2009 (7) SCALE 613; *SVL Murthy v CBI* AIR 2009 SC 2717, (2 0090 6 SCC 77.

12 *Surendra Meneklal v Bai Narmada* AIR 1963 Guj 239.

13 *Banwarilal v State of Uttar Pradesh* AIR 1956 All 341, (1956) Cr LJ 664(All) .

14 *State of Manipur v LB Singh* AIR 1954 Mani 13, (1954) Cr LJ 1714(Mani) ; *G Laxminarayan Naidu v Chitiboina Yerraiah* (1985) Cr LJ 1839(Ori) ; *Radha Krishna Dalmiya v Narayan* (1989) Cr LJ 443(MP) .

15 (1991) Cr LJ 2808 (MP) (DB).

16 *KC Thomas v A Varghse* (1974) Cr LJ 207(Ker) ; *Vadivel v Packialakshmi* (1996) Cr LJ 300(Mad) .

17 (1994) Cr LJ 2238 (Mad).

18 (1992) Cr LJ 1675 (Mad).

19 *Dibesh Sarkar v State of West Bengal* (1989) Cr LJ 30(Cal) (NOC) .

20 *Hari Majhi v State of West Bengal* (1990) Cr LJ 650(Cal) ; *Jayanti Rana Panda v State* (1984) Cr LJ 1535(Cal) ; *Bipul Mehdi v State of Assam* (2008) Cr LJ 1099(Gau), 2006 (3) GLT 585.

21 AIR 1999 SC 2332.

22 Ibid, para 8.

23 (1998) 8 SCC 745.

24 AIR 1999 SC 1216, (1999) 3 SCC 259.

25 AIR 1999 SC 1216, (1999) 3 SCC 259, para 11.

26 *SW Palnitkar v State of Bihar* (2002) 1 SCC 241, AIR 2001 SC 2960; *Suryalakshmi Cotton Mills Ltd v Rajvir Industries Ltd* (2008) 13 SCC 678, AIR 2008 SC 1683.

27 *Ajay Mitra v State of Madhya Pradesh* AIR 2003 SC 1069, (2003) Cr LJ 249(SC) ; *Harmanpreet Singh Ahluwalia v State of Punjab* (2009) 7 SCC 712, (2009) Cr LJ 3462(SC) .

28 AIR 1974 SC 301, (1974) Cr LJ 352(SC) ; see also *Indian Oil Corporation v NEPC India Ltd* (2006) 6 SCC 736, AIR 2006 SC 2780.

29 *Mahadeo Prasad v State of West Bengal* AIR 1954 SC 724, (1954) Cr LJ 1806(SC) .

30 *Tulsi Ram v State of Uttar Pradesh* AIR 1963 SC 666, (1963) 1 Cr LJ 623(SC) .

31 *Shivanarayan Kabra v State of Madras* AIR 1967 SC 986, (1967) Cr LJ 946(SC) .

32 AIR 1974 SC 1560, (1974) Cr LJ 1026(SC) .

33 See also, *Med Chi Chemicals & Pharma Ltd v Biological E Ltd* (2000) 3 SCC 269, AIR 2000 SC 1869.

34 *Ramji Lakhamsi v Harshadrai* AIR 1960 Bom 268, (1960) Cr LJ 812(Bom) .

35 *Legal Remembrancer v Manmatha Bhusan Chatterjee* AIR 1924 Cal 495; *Rudrapal Singh v Rex* AIR 1950 All 609.

36 *Prem Chand v State of Uttar Pradesh* AIR 1953 All 381.

37 *Ratan Singh v Emperor* AIR 1934 Lah 833; *Harendra Nath Das v Jotish Chandra Dutta* AIR 1925 Cal 100; *Ramji Lakhamsi v Harshadrai* (1959) 61 Bom LR 1648.

38 AIR 1970 SC 843, (1970) Cr LJ 849(SC) .

39 (1975) Cr LJ 173 (Bom).

40 AIR 1998 SC 296.

41 AIR 1970 SC 843, (1970) Cr LJ 849(SC) .

42 AIR 1999 SC 1480.

43 Ibid, para 3.

44 *Anilesh Chandra v State of Assam* AIR 1951 Assam 122.

45 *Banwarilal Agarwal v A Suryanarayan* (1994) Cr LJ 370(Ori) ; *A Jayaramand v State of Andhra Pradesh* (1995) Cr LJ 3663(SC) ; *Premlata v State* (1998) Cr LJ 1430(Raj) ; *Iir Prakash Sharma v Anil Kumar Agarwal* (2007) 7 SCC 373, 2007 (9) SCALE 502; *Sharon Michael v State of Tamil Nadu* (2009) 3 SCC 375, 2009 (1) SCALE 627; *Dalip Kaur v Jagnar Singh* AIR 2009 SC 3192, (2009) 14 SCC 696.

46 *Sonbhandra Coke Products v State of Uttar Pradesh* (1994) Cr LJ 657(All) .

47 *Abhayanand Misra v State of Bihar* AIR 1961 SC 1698; *Nrisingha Murari Chakraborty v State of West Bengal* AIR 1977 SC 1174, (1977) Cr LJ 961(SC), (1977) 3 SCC 7.

48 Hari Singh Gour, *Penal Law of India*, vol 4, 11th edn, Law Publishers, Allahabad, 1998, at p 4200.

49 *Thakur Mandal v Emperor* AIR 1942 Pat 43.

50 Re *K Rama Rao* AIR 1960 Andh Pra 441.

51 *State of Madhya Pradesh v Padam Singh* (1973) MPLJ 129; *Benediet Balanathan Mahendran v State of Tamil Nadu* (1996) Cr LJ 2619(Mad) .

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

53 (1991) Cr LJ 65 (Ori).

54 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 17.41-17.45.

55 See Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code,' Government of India, 1997, paras 12.75 & 12.76.

CHAPTER 46

Mischief

(Indian Penal Code 1860,Sections 425 to 440)

LAW RELATING TO MISCHIEF: AN OVERVIEW

Sections 425 to 440 of the Penal Code lay down the law relating to 'mischief'. Section 425 defines the offence of mischief, while s 426 provides punishment therefor. The succeeding 14 sections cover the aggravated forms of mischief differing in terms of punishment, depending on the value of the wrongful loss or damage of the property. Based on this criterion (of value of damage), the IPC prescribes punishment of greater severity. It may be noted that the varying degrees of punishment has reference to the amount of loss sustained, an aspect not admitted in determining the degree of criminality in other offences. However, it is not the only circumstance of aggravation, for the Code recognises the following as equally aggravating:

(1) Value of the property destroyed (ss 427- 429);
(2) Mode of mischief, by killing, poisoning or by fire or explosives, or after preparation to cause hurt (ss 428 and 440);
(3) Utility of the subject of mischief, eg public roads, bridges, rivers, channels, or works of irrigation (ss 430 and 431), houses (s 436), ships (s 437) etc;
(4) Probable consequences of mischief--by the destruction of land-marks, light-houses, etc (ss 432 and 433).

These four aggravated offences of mischief, in turn, can be seen to be comprised of the following seven types of offences:

(a) Causing damage of property valued at fifty rupees and upwards (s 427);
(b) Mischief with regard of animals (ss 428 and 429);
(c) Mischief with regard to supply and public works (ss 430-434);
(d) Mischief by fire (ss 435 and 436);
(e) Mischief with regard of docked vessels (ss 437 and 438);
(f) Mischief with regard to any vessel with intent to steal (s 439);
(g) Mischief with preparation for causing death, hurt or wrongful restraint, or fear of such death, hurt or wrongful restraint (s 440).

With this overview, the specific provisions on the law relating to mischief can be examined in detail.

PART A - MISCHIEF

Section 425. Mischief.--Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects in injuriously, commits '*mischief* '.

Explanation 1.-- It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.-- Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(a) *A* voluntarily burns a valuable security belonging to *Z* intending to cause wrongful loss to Z. *A* has committed mischief.
(b) *A* introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to *Z*. *A* has committed mischief.
(c) *A* voluntarily throws into a river a ring belonging to *Z*, with the intention of thereby causing wrongful loss to *Z*. *A* has committed mischief.
(d) *A*, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to *Z*, destroys those effects, with the intention of thereby preventing *Z* from obtaining satisfaction of the debt, and of thus causing damage to *Z*. *A* has committed mischief.
(e) *A*, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the under-writers. *A* has committed mischief.
(f) *A* causes a ship to be cast away, intending thereby to cause damage to *Z* who has lent money on bottomry on the ship. *A* has committed mischief.
(g) *A*, having joint property with *Z* in a horse, shoots the horse, intending thereby to cause wrongful loss to *Z*. *A* has committed mischief.
(h) *A* causes cattle to enter upon a field belonging to *Z*, intending to cause and knowing that he is likely to cause damage to *Z*'s crop. *A* has committed mischief.

Section 426. Punishment for mischief.--Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

SCOPE

'Mischief' as defined in s 425 of the IPC, in fact corresponds to the offence known in English law as 'malicious injury to property',[1]in which malice is presumed from the nature of the act committed and its illegality. Section 425 of the IPC is based on the principle enunciated in the maxim *sic utre tuo ut allenum non leadas* which means, 'use your own property, so as not to injure your neighbour's (or others') property'.

Mischief, like most of the offences created under the IPC, comprises of a mental element, mens rea, and a physical element, actus reus. The former lies in the doer's intent to cause, or knowledge that he is likely to cause, 'wrongful loss' or 'damage' to the public or to any person.

The act us reus for mischief is the destruction of property or any change in its situation that destroys or diminishes its value or utility. Illustrations appended to s 425 make this aspect very clear. In illustrations (a) and (d), the actus reus is destruction by burning or otherwise. In illust (b), the act us reus is by change of the property by causing ice to be melted. Causing a ring to disappear is the wrongful act in illust (c). Casting away of a ship is the wrongful act in illusts (e) and (f). Destruction by shooting a horse and causing damage to crops through cattle, constitute the actus reus in illusts (g) and (h) respectively.

Another dimension of the offence to be noted is that it does not apply to act s which are negligent or accidental,[2] but are limited to only those damages caused by acts which are done wilfully or committed with knowledge. Thus, where the accused, while driving his bullock cart, pulled the bullock in the wrong direction, thereby causing the pole of its yoke to strike against the floorboard of the complainant's carriage and cause damage, it was held that the accused was not guilty of mischief.[3] Again, where the accused set fire to a heap of rubbish in his own field, which spread to the neighbouring forest and burnt it, the accused was held not guilty of mischief.[4]

In the case of mischief done by straying cattle, mere neglect or carelessness on the part of the owner of the cattle to keep them from straying into the field of others is not sufficient to make the owner guilty of mischief. To warrant a conviction, it must be proved that he act ually and wilfully caused the cattle to enter, knowing that by doing so, he was likely to cause damage. It cannot be a defence for the accused that his motive was to benefit himself and not to injure another, if he knew that he could only secure that benefit by causing wrongful loss or damage.[5]

Finally, with regard to the type of property covered by the offence, the provision covers both moveable as also immovable property.[6] However, with regard to movable properties, when persons are charged with the graver offences of theft, robbery, extortion, criminal misappropriation or cheating, there is little scope for the application of mischief. Mayne is quoted as having stated: 'Thus one who has stolen a sheep cannot be charged with mischief if he has changed the sheep into mutton by killing it.'

ESSENTIAL INGREDIENTS

The essential ingredients of the offence of mischief, as defined in s 425, IPC, are: (i) an intention or knowledge of likelihood to cause wrongful loss or damage to: (a) the public; or (b) any person (mens rea of mischief); (ii) causing the destruction of some property or any change in it or in its situation (actus reus of mischief), and (iii) such change must destroy or diminish its value or utility or affect it injuriously (effect of the change).[7]

No mischief can be committed, if, the act complained of is only an invasion of civil right,[8] as the necessary element of criminality by way of intention or knowledge to cause the wrongful loss or damage does not prima facie exist.

Thus, to constitute an offence under s 425, it has to be shown that the accused person intentionally or knowingly caused the destruction of any property or any such change in the property or in its situation thereof. When this is not prima facie shown, the offence cannot be made out.

Such a case arose in *Bihar State Electricity Board v Nand Kishore Tamakhuwala* .[9]The Supreme Court considered a private complaint filed before the Sub-Divisional Judicial Magistrate, Sahibganj, under s 42(b) of the Electricity Act and ss 166 and 427, IPC, for failure of power-supply to a flour mill on four days, thereby causing loss to the mill. The court stated that a perusal of the complaint itself showed clearly that there was no allegation that the acts of the alleged accused had caused destruction to the property or such change in the property or in its situation so as to bring it within the definition of mischief. Further, no act s were alleged against any of the accused persons, which could bring any of their actions within the definition of mischief. Thus, there was no prima facie allegation being made in the complaint. Ultimately, the Supreme Court quashed the criminal complaint.

We shall consider the scope of the essential ingredients of the offence of mischief, namely, intention or knowledge and causing damage.

Intention or Knowledge to Cause Wrongful Loss or Damage

Underlying the offence of mischief is the intention to cause or knowingly cause the destruction or change of property. The previous discussion made it clear that mens rea is an essential concomitant to establishing the offence. Thus, the mere fact that any loss or damage was caused to the property would, by itself, not be sufficient cause to constitute mischief, unless the intention of the offender was to cause wrongful loss or wrongful damage to the person considered.[10] Therefore, removal by a person of obstruction from property, which is not his own, but which he believed to be his right, and thereby causes loss, does not amount to mischief as he had no requisite mens rea.[11]

Even if there is no intention, but there is knowledge that a particular act will result in wrongful loss or damage, then such act will fall under the definition of mischief.[12] This is illustrated in the case of an accused person who knew that by blocking the canal through which the complainant had a right to take water to his own land, wrongful loss would be caused to the complainant.[13]

Intention or knowledge are facts that can be gauged by the act ion of the accused person in the circumstances of each case. Thus, in *Jambulingam Pillai v Ponnuswami Pillai* ,[14] where the accused believed in good faith that he had a right to do what he did, even if in law he did not have that right, it was held that he lacked the intention or knowledge that he was likely to cause wrongful loss or damage.

Wrongful Loss or Damage

The inclusion of the term 'damage' along with 'wrongful loss', makes it clear that the legislature wanted to bring within the purview of the offence of 'mischief', not just acts which result in wrongful loss, but also to cover instances of all types of damage by unlawful means,[15] which are act uated, however, with the intention or knowledge to cause the same. The term 'damage' must then involve invasion of a right, though it does not necessarily contemplate damage of destructive character, but it does require diminution of the value of the property caused by the invasion of the right which, to be punishable, must have been contemplated by the person committing it at the time when the act was committed.

The term 'wrongful loss or damage' necessarily includes within its coverage that which is caused by unlawful means. Here, it is interesting to note that the definition comprehends not just a situation when the property is destroyed. In many instances, the property may not be destroyed in such a way that it no longer can be used. There exists a possibility when the property has been changed in such a way that its use, value or utility is changed. Such situations are also sought to be covered by the definition. This is illustrated in the case of *Juggeshwar Das v Koylash Chander* ,[16] in which the complainant loaded his cart with his goods to shift his stall to another hut. At that time, the accused accosted him and pushed his cart down thereby throwing the goods of the complainant. The trial court convicted him of wrongful restraint. However, the appellate court sentenced him for the offence of mischief, because the act of the accused had diminished the value of the goods and to that extent they were injuriously affected.

Even if the accused were to have a right in any property, that does not entitle them to take law into their own hands and cause damage to the property of others. This issue came up in *Arjuna Gouda v State of Orissa* ,[17]in which the accused caused damage to the standing crops grown by the complainant on government land, which was in his cultivating possession. Thus, the act of the accused in damaging the crops with the intention and knowledge that he would be causing wrongful loss and/or damage to the complainant was held to constitute the offence of mischief. The fact that the accused had right over the land was held not to make him entitled to commit the unlawful act of forcibly destroying the crops of the complainant.

An act will not be a mischief, merely because it was the result of negligence. For, the definition itself requires mens rea as a necessary condition. An interesting case arose as to whether a person in charge of cattle, who negligently allowed the cattle to stray into another's field thereby causing damage, would be liable for mischief. It was held that the mere act of carelessness or negligence without any evidence that it was wilfully committed, or with knowledge that the cattle would cause damage, would not be covered by the definition.

The wrongful loss arising out of destruction contemplated by the section must be in reference to some other person and not to the owner himself, who destroys or damages the property.[18]However, when the complainant, who does not have any individual right over a property, wrongfully obstructs the actual owners from enjoying the property by putting up an obstruction over the property, then the act of the rightful owners in demolishing it, will not amount to an offence.[19]

Causing Destruction of Any Property or Any Change In It

The question of the value of damage was considered by the Calcutta High Court, which stated that any value, even if it was trifling, may be sufficient to find a person guilty, if the other ingredients of the offence are established.[20] There was a difference in opinion as to whether allowing cattle to graze on someone else's fields would amount to mischief. In *Raghupathi Iyer v Narayana Goundan* ,[21] the Madras High Court held that the grazers by allowing the cattle to graze were only putting the grass to its regular use; their acts may not amount to mischief, but probably may amount to theft. However, in a later case, the Madras High Court, in Re *Gurram Siddagadu*,[22] held that there was no doubt that the accused persons by grazing their cattle on the government land derived benefit from the government's property and thereby infringed the concerned government's right. Following this, in *Palaniandi Muthirian v Ramaswamy Reddi* ,[23] the Madras High Court held that a person can be convicted for the offence of mischief by sending his cattle to graze on the bunds of a tank belonging to the complainant.

The term 'change' used in s 425 means a physical change in composition or form of property. It contemplates physical injury to property from a physical cause.

Destroys or Diminishes Value or Utility, etc

Destruction or diminution in value of the property in question is one of the essentials of mischief. It does not necessarily mean change in character or composition or form of the property. In *Byomkesh Bhattacharya v Lakshmi Narayan Dutta* ,[24] the Calcutta High Court had to consider a case in which the complainant alleged that the accused persons prevented the supply of filtered water to the complainant's house by using wrench valve key, and several other similar offences. The question was whether this would amount to change in the property such that it diminishes the value or utility thereof. The high court elaborated on what constitutes change in a property such that it diminishes its value as follows:

> The expression 'change in property so as to destroy or diminish its value or utility' does not necessarily mean a change in character, composition or form. If something is done to the property contrary to its natural use and serviceability that destroys or diminishes its value or utility, it will amount to mischief.

Thus, there is no need that the object must be materially changed to be covered by the definition. Similarly, the value is not to be considered as market value or utility. The section can only mean the value or utility, which the object possesses prior to the change it was forced to undergo by the unlawful methods. Thus, in the instant case, the act of stopping water supply by turning off the valve brought about a diminution of the value of the pipe line, which existed mainly for supply of water. Thus, the stoppage of water was contrary to the usage it normally was put to. Hence, it amounted to mischief.

Thus, where the value or utility of the property has been diminished, or it has been destroyed, only in such circumstances can it be said that the offence of mischief has been established.[25]Destruction or diminution in value and utility, however, must be immediate or proximate consequence of the alleged act of the accused.[26] The utility referred to in this section is that conceived by the owner and not by the accused.

PART B - AGGRAVATED FORMS OF MISCHIEF

Aggravated forms of mischief are essentially based on: (i) the value of damage caused; (ii) the nature of property damaged; (iii) the method adopted to cause damage; and (iv) other criminal motives influencing the act . These aggravated forms are briefly discussed here below.

AGGRAVATED FORMS OF MISCHIEF BASED ON THE VALUE OF DAMAGE CAUSED

Section 427. Mischief causing damage to the amount of fifty rupees.--Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 427, which is similar to s 425, comes into play when damage caused by mischief amounts to fifty rupees or more.[27]Like in s 425, there has to be an intention on the part of the accused to cause wrongful loss or damage (of fifty rupees or more) to the public or to any person. Section 427, therefore, cannot be attracted if the accused has not committed an act 'with intent to cause, or knowing that he is likely to cause wrongful loss or damage to the public or to any person'.[28] Removal of tea-stall on the order of the Executive Engineer, it was held, does not offend s 427.[29]

AGGRAVATED FORMS OF MISCHIEF BASED ON THE NATURE OF PROPERTY DAMAGED

Mischief by Killing or Maiming Animal of the Value of Ten Rupees or More

Section 428. Mischief by killing or maiming animal of the value of ten rupees.-- Whoever commits mischief by killing, poisoning, maiming or rendering useless, any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

A simple reading of the section reveals its underlying object. It intends to prevent cruelty to animals and consequent loss to the owner. It therefore becomes necessary to prove that the accused intended or had knowledge that he was likely to cause wrongful damage or loss for convicting him under s 428. The term 'animal', as defined in s 47 of the Code, means 'any living creature other than a human being'. And the term 'maiming', used in this and the following one, signifies injuries permanently affecting the use of a limb or other member of the body. Mere wounding does not amount to maiming.[30]

Mischief by Killing or Maiming Cattle, etc

Section 429. Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees.--Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

The provisions of s 429 are similar to that s 428 with a difference that it (the latter) applies to mischief by killing or maiming etc of the animals specified therein and animals of the value of fifty rupees or more. S 429, which makes mischief by killing or maiming or poisoning of an animal mentioned therein, specifies no age of the animals (mentioned therein) killed or maimed. Hence, mischief by killing or maiming of any animal mentioned in s 429 irrespective of its age or value offends the provisions of s 429. But in respect of animals other than those specified in the section, it becomes necessary to show that its value was fifty rupees or more.[31]

Before s 429 is invoked, it is necessary to prove that s 425, dealing with mischief, is applicable to the case at hand. Once the applicability of s 425 is ruled out, s 429 becomes inapplicable.[32]

In consonance with the requirement of intent in mischief, which is as an essential ingredient of the section, it is necessary to prove the requisite intention on part of the accused to cause wrongful loss for convicting him under s 429.[33] The mischief by killing or maiming or poisoning an animal and the consequential wrongful loss or damage must be intentional or knowable. Mere negligence or carelessness on the part of the accused is not sufficient.[34]

Mischief by killing, maiming or poisoning an animal *nullis proprietas* (like a bull set at large according to religious usage or dedicated to a temple) does not come within the ambit of s 429 as the animal cannot be the subject of mischief as it ceases to be private property of its owner.[35]

S 429 provides enhanced punishment (simple or rigorous imprisonment for term up to five years, or fine or both) owing to the comparatively greater value of the animal mentioned therein.

Mischief by Injuring Works of Irrigation

Section 430. Mischief by injury to works of irrigation or by wrongfully diverting water.--Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Section 430 intends to prevent a diminution in supply of water for agriculture or for drinking purposes for human beings and animals. For convicting accused under this section, it must be shown that he has infringed some right of another.

Mischief by Injuring Public Road, Bridge, River or Channel

Section 431. Mischief by injury to public road, bridge, river or channel.--Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Section 431, obviously, punishes mischievous injury to a public road, bridge, river or channel. The word 'public' indicates the use it is put to and does not indicate ownership. Public road is a road which is used by the public generally.[36] Like in other aggravated forms of mischief, it is necessary to prove the requisite intention to cause mischief.

Mischief by Obstructing Public Drainage

Section 432. Mischief by causing inundation or obstruction to public drainage attended with damage.--Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

This section deals with mischief to any public drainage by an act that causes or is likely to cause an obstruction or inundation resulting in an injury or damage.

Mischief by Destroying, etc, of Lighthouse or Seamark

Section 433. Mischief by destroying, moving or rendering less useful a light-house or sea-mark.--Whoever commits mischief by destroying or moving any light -house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Section 433 deals with the destruction of sea-marks. Sea-marks are very important in navigation. Any tampering with, or destruction of, such marks would obviously lead to disastrous results.

Mischief by Destroying, etc, of Landmark

Section 434. Mischief by destroying or moving, etc, a landmark fixed by public authority.--Whoever commits mischief by destroying or moving any landmark fixed by the authority of a public servant, or by any act which renders such landmark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 434, which is complementary to s 433, deals with destruction or moving of landmark fixed under the authority of public servant. However, it prescribes the punishment less severe than that for mischief covered under s 433 because tampering with land-marks does not lead to disastrous results.[37]

AGGRAVATED FORMS OF MISCHIEF BASED ON THE METHOD ADOPTED TO CAUSE DAMAGE--ARSON

Sections 435 and 436 are generally referred to as the offences of arson, and cover instances when mischief is caused by way of setting fire using amongst other things, explosive substances, and causing damage to property. Section 435 covers cases of arson, where the damage is worth of one hundred rupees or more and s 436 for more aggravated forms, where it causes destruction of dwelling places, places of worship or a place for keeping properties. With regard to offences under s 436, the punishment prescribed is severe, including up to life imprisonment.

Section 435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.--Whoever commits mischief by fire or any explosive substance intending to cause or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards or (where the property is agricultural produce) ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Section 436. Mischief by fire or explosive substance with intent to destroy house, etc.--Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Scope of Section 436

Intention or the requisite knowledge, that by their act s they would cause destruction to dwelling or religious place, is an essential prerequisite for liability under this section. The section covers destruction to three types of places: (i) human dwelling; (ii) place of worship; and (iii) place to keep property.

The property need not be a fully constructed place or a completely finished structure. Several high courts have held the following structures to be buildings, falling under the definition of s 436: (i) structures made of straw and not made of bricks and mortar, but having necessary furnishing required for a building as doors, bars etc;[38](ii) a thatched shed made of mud is a building as contemplated by s 436, provided the same is used as human dwelling,[39] or for custody of property; (iii) a grass or a mat hut meant for keeping cattle;[40](iv) a hut having no doors or furnishing,[41] and (v) a *kachcha jhopra* having a thatched roof meant for dwelling.[42] However, a thatched shed with no bars, doors and resting on bamboos[43] or wooden removable cabin[44] is not a building.

It will be quite apparent that s 436 contemplates serious or aggravated form of arson, in which, apart from the threat of great damage to the properties of individuals, their lives can also be threatened, especially in instances when fire gets out of control. In a gruesome incident, 14 members of a scheduled caste marriage party were assaulted by others, when they refused to accede to the request of people from a different caste, that the bride be made to get down and pass before the temple by foot. Six of the scheduled caste persons were burnt alive, five of them after being locked up in the house of a scheduled caste person in the village. Eight others were chased and hacked to death. The Supreme Court held that there was no reason for disbelieving the eye witnesses, merely because they belonged to the same caste as the victims. The accused were sentenced to seven years' rigorous imprisonment for offence under ss 436/149, IPC, apart from other terms of sentences for other offences.[45]

However, to establish a case of arson under s 436, IPC, it has been held that it is important that there be clear evidence with regard to the identities of actual persons, who act ively set fire to the dwelling place or building, and those who abetted it or conspired in this regard. In a case of rioting, when it cannot be established as to who set the dwelling place on fire, or who instigated whom to set fire, then severe punishment cannot be imposed. Thus, in the case of *Jamuna Singh v State of Bihar* ,[46] it was held that the accused Jamuna Singh had been sentenced to eight years imprisonment for offence under s 436 read with s 109, IPC. However, the evidence did not disclose that Jamuna Singh instigated another person to set fire to the house. Therefore, his conviction was altered from one under s 436 read with s 109, IPC, to one under s 436 read with s 115, IPC. The sentence was reduced from eight years rigorous imprisonment to four years rigorous imprisonment.

In *Nagendra Nath Mondal v State of West Bengal* ,[47] the petitioner had been detained under the West Bengal (Prevention of Violent Activities) Act 1970. One of the charges against him was that he and others had

stormed into the room of the Principal of Moynaguri Higher Secondary School and set fire to books, registers, furniture, etc and also placed a bomb in the school building, thereby endangering the life of the students and teachers. The court held that the target of the arson was an educational institution and particularly the registers maintained therein. The object was vandalism, to disrupt its functioning by burning its records and to create a scare, so that neither the teaching staff nor the students would dare to attend the school for pursuing their studies. The only intention of keeping the bomb after burning the papers and records could only have been for creating a scare. Hence, the mischief was not merely mischief under the IPC, but also such that it disturbed or was likely to disturb public order.

Negligence in putting off the main switch in the shop of the accused resulting in a short circuit leading to a fire, which not only destroyed the shop of the accused, but also others, causing cumulative damage of six crore rupees was the main charge under s 436, IPC, against the first accused in *Usman v State* .[48] In this case, A-2 was the person to whom the shop had been allotted, he had given the shop in Madras to the first accused and left for Kerala. He was charged with s 436 read with s 34, IPC. In the quashing petition before the high court, the court discharged the second accused holding that there was no prima facie basis to show how he was responsible for the fire that ensued in the shopping complex. However, in the case of A-1, Usman, the court felt that there was enough material to entertain suspicion about his culpability and therefore, directed his trial to be conducted expeditiously. This was even though the court stated that there was no direct evidence against the accused.

In *Shri Cruz Pedro Pacheco v State* ,[49] the conviction of the accused for offence under s 436 was confirmed, as there was direct eyewitness account of the setting on fire by the accused, which was corroborated by other witnes ses. The relations between the complainant and accused families were strained for some time and several incidents had occurred earlier. The motive of the accused was also evident. The main incident of setting fire to the shed was preceded by an incident of shouting abuse and threats by the accused. Further, the accused was standing on the road with a knife threatening others from extending help to put off fire. However, the fine of Rs 20,000 was reduced, as it included the value of the scooter, which was burnt when the shed got completely gutted. Since the complainant did not claim the scooter to be his and there was no other evidence as to whose scooter it was, and considering the fact that the shed was only made of thatch material, the fine amount was reduced to Rs 10,000. However, the sentence of six months imprisonment was confirmed.

Mischief to Decked Vessel

Section 437. Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.--Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 437 punishes mischief committed on board a ship or boat when plying in water. It is applicable to a 'decked vessel' or a 'vessel of a burden of twenty tons or upwards', i.e. vessels of substantial size and which are capable to carry passengers. These phrases are used in s 437 to exclude small crafts, canoes or boats from its purview. The term 'vessel' as defined in s 48 of the Penal Code, denotes 'anything made for the conveyance by water of human beings or of property'.

Mischief to Decked Vessel by Fire or Explosive Substance

Section 438. Punishment for the mischief described in section 437 committed by fire or explosive substance.--Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 438, which is an extension of the offence indicated in the preceding section, comes into play when the mischief described in s 437 is committed on board by fire or an explosive substance. It imposes higher punishment owing to the dangerous nature of the means used.

AGGRAVATED FORMS OF MISCHIEF BASED ON OTHER CRIMINAL MOTIVES INFLUENCING THE ACT

Intentionally Running Vessel Aground or Ashore

Section 439. Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.--Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

This section, which provides punishment for an act akin to piracy, i.e., commission of acts of robbery and violence upon the sea, punishes for running a vessel aground or ashore with intent to commit theft or misappropriation of property contained therein.

Mischief Committed After Having Made Preparation for Causing Death or Hurt

Section 440. Mischief committed after preparation made for causing death or hurt.--Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Section 440 deals with an aggravated form of mischief. It deals with an act of mischief committed after having made preparations for causing death, hurt or wrongful restraint, or fear of death, hurt or wrongful restraint to any human being.

PART C - PROPOSALS FOR REFORM

The Fifth Law Commission, though expressed its satisfaction over the definition of 'mischief' articulated in s 425, has offered a couple of pertinent proposals for reform in the law relating to 'mischief', including revision and deletion of a few provisions as well as scaling down and enhancement of punishment for certain offences. A few of them are:

(1) The maximum sentence of imprisonment of either description for a term up to three months provided for 'mischief' should be enhanced to imprisonment for a term up to one year.
(2) Section 427 (dealing with mischief by causing damage to the amount fifty or more rupees); s 434 (dealing with mischief by causing damage to a land-mark fixed by a public authority); and s 428 (dealing with mischief by killing or maiming animal of the value of ten or more rupees) should be deleted.
(3) Section 439, providing punishment for intentionally running vessel aground or ashore, should be deleted as it does not fit into the scheme of the chapter dealing with mischief and it serves no purpose.
(4) The imprisonment for a term up to five years provided for committing mischief by killing or maiming, etc, the animals specified in s 429 and for causing mischief by injuring public road, etc (under s 431), and by causing obstruction to public drainage (under s 432) should be scaled down to the imprisonment for a term up to three years.
(5) Section 431 and s 432, keeping in view their thematic proximity, should be combined in one provision.
(6) Section 430 (dealing with mischief by causing injury to works of irrigation or diverting supply of water) should be simplified by doing away with the enumeration of acts therein leading to diminution of the supply of water.
(7) Mischief caused by fire or an explosive substance to any sacred object kept in a place of worship, a dwelling house or a building used for custody of property should be expressly mentioned in s 436 dealing with mischief by fire or an explosive substance.
(8) Mischief to aircrafts (on the lines of mischief to vessels) should be brought within the ambit of s 437.

(9) Mischief to government property and machinery, though covered under the definition of mischief and the provision stipulating therefor, should specifically be made punishable as one of the aggravated forms of mischief and it should be made punishably by imprisonment of either description for a term up to three years. With a view to giving effect to the proposal, it recommended insertion of a new section (s 427) in the IPC.[50]

The Law Commission, for giving effect these proposals for reform, (re)drafted new ss 426 - 436 in place of the existing ss 426 - 436.

The Indian Penal Code (Amendment) Bill 1978, through its clauses 179 and 180, sought to give effect to almost all the proposals for reform suggested by the Law Commission. The former clause sought to substitute the existing ss 426 to 432 of the IPC by the respective sections incorporated in the clause. While the latter clause sought to substitute the existing ss 434 to 440 of the Code.

The Fourteenth Law Commission, with minor modifications, particularly with reference to mischief to 'aircraft' in these two clauses, and the suggestion for the enhanced punishment (from imprisonment for a term up to three years to that of five years) for some of the offences mentioned in the proposed new sections, endorsed these proposals for reforms.[51]

However, the proposed changes are still in the form of mere proposals for reform as the Amendment Bill lapsed in 1979 due to the dissolution of the *Lok Sabha*.

1 Section 48, the Criminal Damage Act 1971. It repealed the Malicious Damage Act 1861, which was in force when the IPC was in the making.

2 *Nagendranath Roy v Dr Bijoy Kumar Das* (1992) Cr LJ 1871(Ori) ; *Ved Prakash v Chaman Lal* (1995) Cr LJ 3890(All) .

3 Re *Thornotti Madathil Poker*(1886) I Weir 495.

4 Re *Nandeyappagowda*(1906) 8 Bom LR 851.

5 *Public Prosecutor v Semalai Pannadi* AIR 1960 Mad 240.

6 *Ram Birich Mahato v Bishwanath Misser* (1961) 2 Cr LJ 265(Pat) .

7 *Gajadhar v State of Uttar Pradesh* (1971) Cr LJ 1361(All) ; *Indian Oil Corporation v NEPC India Ltd* (2006) 6 SCC 736, AIR 2006 SC 2780.

8 *Sailen Sardar v State of West Bengal* AIR 1958 Cal 668.

9 AIR 1986 SC 1653, (1986) Cr LJ 1246(SC) .

10 *Ram Chandra v State* AIR 1969 Bom 20, (1969) Cr LJ 112(Bom) ; see also *Fidu Husen Abdul Ali v State of Gujarat* AIR 1962 Guj 318.

11 *Sebastian Labo v Minigal D'Souza* AIR 1932 Mad 676.

12 *Ouseph v State of Kerala* (1981) Cr LJ 1362(Ker) .

13 *Kanniah Chettiar v Kuppuswami Chettiar* (1961) 2 Cr LJ 501(Mad) .

14 AIR 1939 Mad 400, (1940) Cr LJ 656(Mad) .

15 *Gopinath Nayak v Lepa Majhi* (1996) Cr LJ 3814(Ori) .

16 (1835) ILR 12 Cal 55.

17 AIR 1969 Ori 200, (1969) Cr LJ 999(Ori) .

18 *Goibardhan Malik v Rasananada* AIR 1968 Ori 18, (1968) Cr LJ 200(Ori) .

19 Re *Gollakotta Suryanarayanamurthi*AIR 1940 Mad 747, (1941) Cr LJ 807(Mad) .

20 AIR 1955 Cal 558, (1955) Cr LJ 1357(Cal) .

21 AIR 1929 Mad 5, (1930) Cr LJ 3126(Mad) .

22 1 Weir's Cri Rule 492.

23 AIR 1942 Mad 724, (1944) Cr LJ 140(Mad) .

24 (1978) Cr LJ 848 (Cal).

25 *IH Khan v VM Arathoon* (1969) Cr LJ 242(Cal) ; but see *PS Sundaram v S Vershaswami* (1983) Cr LJ 1119(Del) .

26 *Kameswar v Bhola Nath* (1969) Pat LJR 430.

27 *Narasimhulu v Nagar Sahib* AIR 1934 Mad 95; *Sripat Narayan Singh v Gahbar Ali* AIR 1927 All 724.

28 *Krishna Gopal Singh v State of Uttar Pradesh* AIR 2000 SC 3616, (2000) SCC 93(Cri) ; see also *Fakir Chand Sao v Emperor* AIR 1934 Pat 109.

29 *Jayasingh v KK Velayautham* (2006) Cr LJ 3272(SC), AIR 2006 SC 2407, (2006) 9 SCC 414.

30 *Emperor v Juman Sajan* AIR 1947 Sind 66; *Gopala Krishna v Krishna Bhatia* AIR 1960 Ker 74.

31 *Hari Mandle v Jafar* (1895) ILR 22 Cal 457.

32 *Keshub ahindra v State of Madhya Pradesh* (1996) 6 SCC 129, 1996 (6) SCALE 522.

33 *Johri v State of Rajasthan* AIR 1970 Raj 203, 1970 Cir LJ 1529(Raj) ; *Nobin Chandra Gagoi v State of Assam* AIR 1961 Assam 18.

34 *Suyambu Nadar v State of Tamil Nadu* (1999) Cr LJ 394(Mad) ; *State of Rajasthan v Nauratan Mal* (2002) Cr LJ 348(Raj) .

35 *Ramesh Chunder Sannyal v Hiru Mondal* (1890) ILR 17 Cal 852.

36 *Azamkhan v State of Andhra Pradesh* (1973) Cr LJ 508(AP) .

37 *Kannan Pillai v Ismail* (1961) KLT 656.

38 *Babu Lal v State of Uttar Pradesh* AIR 1952 All 146, (1952) Cr LJ 299(All) .

39 *State of Gujarat v VVM Naggi* (1973) Cr LJ 148(Guj) .

40 *Ponnai Goundan v Emperor* (1934) Mad VIN 687.

41 *Jaipal Singh v State of Haryana* (1979) Punj LR 697; *Mukeshwar Rai v State of Bihar* AIR 1992 SC 483, (1992) Cr LJ 518(SC) .

42 *Rajoo v State of Rajasthan* (1977) Cr LJ 837(Raj) ; *Mangi v State of Rajasthan* (1982) Cr LR (Raj) 403.

43 *Perbata v State of Uttar Pradesh* (1990) Cr LJ 1665(All) .

44 *Bherulal v State of Rajasthan* (1999) Cr LJ 617(Raj) .

45 *State of Uttar Pradesh v Dansingh* AIR 1997 SC 1654, (1997) Cr LJ 1150(SC) .

46 AIR 1967 SC 553, (1967) Cr LJ 541(SC) .

47 AIR 1972 SC 665, (1972) Cr LJ 482(SC) .

48 (1997) Cr LJ 2457 (Mad).

49 (1998) Cr LJ 4628 (Bom).

50 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 17.60-17.65 and 17.68-17.70.

51 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.77-12.78.

CHAPTER 47

Criminal Trespass

(Indian Penal Code 1860,Sections 441 to 462)

INTRODUCTION

Sections 441 to 462 of the IPC deal with the offence of criminal trespass and its aggravated forms.

However, before delving into the offence of criminal trespass and its aggravated forms, it is worth to note that 'trespass' ordinarily is a civil wrong for which the defendant can sue for damages. But when trespass is committed with a criminal intention, it is treated as an offence and is made punishable under the IPC. The object behind making trespass a criminal wrong seems to be to keep the trespasser away from the premises of dwelling houses or property of private persons and thereby to enable them to enjoy their property without any interruptions. A reading of the following explanatory note given by the authors of the IPC discloses the underlying object of making criminal trespass an offence. The drafters of the IPC observed:

> We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence, except when it is committed in order to commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then we propose to visit it with light punishment, unless it be attended with aggravating circumstances.[1]

The offence of criminal trespass is akin to the offence of forcible entry in English law. However, the Indian law is very different from the English law. The English law makes 'forcible entry' by a multitude of people by such force as to constitute a public breach of peace, an offence. But, the offence of 'criminal trespass' articulated under the IPC is quite different.

PART A - CRIMINAL TRESPASS

Section 441 of the defines 'criminal trespass', while s 447 provides the punishment thereof. They read as under:

Section 441. Criminal trespass.--Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

Section 447. Punishment for criminal trespass.--Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

The object of s 441 (as well as of the succeeding sections) is to protect possession of property. The essence of the offence of criminal trespass is entry into property under possession of another with intention to commit an offence. Section 441 is concerned with the exclusive possession, and not ownership, of the property on which an unauthorised entry was effected into.[2]

ESSENTIAL INGREDIENTS

Section 441 has two limbs. The first limb refers to an entry into property in the possession of another with intention to commit an offence or to intimidate, insult or annoy the person in possession and the second to the remaining in possession having lawfully entered into the property with the intention of intimidating, insulting or annoying the person in possession of such property, or with the intention of committing an offence. Thus, the essence of the offence of criminal trespass lies in an unauthorised entry or an unlawfully retention of the lawful entry with intention to commit an offence or to intimidate, insult or annoy the person in possession of the property.

The essential ingredients of criminal trespass are: (i) entry into or upon property in the possession of another; (ii) if such entry is lawful, then unlawfully remaining upon such property; (iii) such entry or unlawful remaining must be with intent: (a) to commit an offence; or (b) to intimidate, insult or annoy the person in possession of the property.[3]

'Whoever Enters'

The opening words of the section is 'whoever enters', meaning that in order to constitute an offence under this section, there must be an act ual personal entry upon property by the accused. Constructive entry, for instance, by a servant will not amount to entry within the meaning of the section.[4]

The entry need not necessarily be by use of force.[5] It is sufficient if the entry is unauthorised and against the will or without the consent of the person in possession of the property.

'Property'

One of the essential ingredients of this section is entry into or upon the property of another person. The section uses the general term 'property'; hence, it is wide enough to cover both movable and immovable property. The accused should enter into or upon property with the intention stated in the provision, to constitute the offence of criminal trespass. Hence, there can be criminal trespass to a motor car, aeroplane, railway carriage or a boat. In *Dhanonjoy v Provat Chandra Biswas* ,[6] a person had leased out a boat. The accused attacked the lessee of the boat, drove him away and took possession of the boat. He then plied it across the river and collected the money. The Calcutta High Court held that it would amount to committing criminal trespass.

However, the word 'property' does not include incorporeal property, such as right to collect tolls. A person had taken on lease the right to collect tolls leviable from persons entering upon a certain public road for selling their wares. The accused sold his wares in the street without paying the toll. It was held that the right to collect toll could not be a subject of an offence of criminal trespass.[7]

'Possession of Another'

For an offence of criminal trespass to be committed, the entry into or upon the property should be in respect of a property in possession of a person other than the trespasser.[8] The section contemplates actual physical possession to the exclusion of all other persons. In order to constitute criminal trespass, the legality of the possession of the property is not material. As stated earlier, the object of the provision is to protect possession and not ownership. So, if a trespasser is in settled possession of a property, then he can maintain an act ion for criminal trespass even as against the true owner.

However, it is not essential that the person who is in possession of the property should be present in the property when the trespass takes place. So, a trespass with intention to commit an offence or with intention to insult, intimidate or annoy the person in possession, is sufficient to constitute the offence of criminal trespass, even if at the time of actual entry, the person concerned was absent from the property.[9]

Intention

Entry into property of another with intention to commit an offence or intimidate, insult or annoy the person is the essence of the offence of criminal trespass. The word 'intent' by its etymology, seems to have a metaphorical allusion to archery and implies 'aim' and thus, connotes not a casual or merely possible result foreseen perhaps as a not improbable incident, but not desired, but rather connotes the one object for which the

effort is made and thus has reference to what has been called the dominant motive, without which the act ion would not have been taken.[10]

Thus, according to s 441, the dominant intention, aim or object of the trespass on the property of another should be to commit an offence, or to intimidate, insult or annoy the person in possession of the property. In *Mathri v State of Punjab* ,[11] the accused, along with others, armed with warrants for delivery of possession in execution of several decrees, entered upon the property in possession of another. At the time of the entry, warrants had ceased to be executable in law. The Supreme Court held that the accused and others had entered the property only with the intention of executing the warrants and not with the intention to commit an offence or to intimidate, insult or annoy any person. A lay person could not be expected to know that a warrant has become inexecutable in law. Under the circumstances, it was held that since the requisite intention contemplated under the section was absent, the act did not constitute an offence of criminal trespass.[12]

In *Punjab National Bank Ltd v All India Punjab National Bank Employees' Federation* ,[13] the employees of the Punjab National Bank Ltd went on strike in support of certain demands made by them. The employees of the bank entered the bank premises, sat in their places and refused to work. They refused to vacate their seats either, when they were asked to do so by their superior officers. In other words, they resorted to a pen-down strike. It was contended by the management that workers had licence to enter the bank premises, subject to the condition that the employees are willing to work. If the employees had decided not to work, they were not entitled to have licence to enter and hence, their act s amounted to trespass. Further, it was contended that the employees had trespassed with intent to insult or annoy their superior officers and hence, it amounted to committing the offence of criminal trespass. The Supreme Court rejected their argument and held that even assuming the entry of the employees in the premises was unlawful, it is difficult to accept that the said entry was made with intent to insult or annoy the superior officers. The sole intention of the strikers was to put pressure on the bank to concede their demands. Even if the strikers had knowledge that their strike might annoy the senior officers, such knowledge cannot necessarily lead to the inference of intention. Knowledge and intention are two distinct aspects, the difference of which has to be borne in mind in deciding whether a particular act was covered by s 441 or not. The court held that the act s of the employees did not amount to criminal trespass.[14]

In *Rash Behari Chatterjee v Fagu Shaw* ,[15] the complainant after prolonged litigation, obtained a decree for ejection of the respondent in respect of a particular property. When the respondent refused to give permission, the complainant along with the *nazir* of the court and the police obtained actual physical possession. The land was lying vacant after the complainant took possession. About a fortnight after taking possession, the respondent trespassed into the land and was found making preparation for construction of bamboo structures. The high court held that a complaint under s 441, IPC, was not maintainable, because the complainant was not in possession of the land at the relevant time. Reversing the judgment of the high court, the Supreme Court held that it was obvious that the intention of the respondent was to annoy the complainant, who was in possession of the property. The law does not require that the intention must be to annoy a person, who is act ually present at the time of trespass.

In order to commit an offence under this section, it is not necessary that the person concerned should actually commit an offence, or intimidate or annoy or insult the person in possession upon trespass. It is sufficient that he has the intention to do so. No overt act is required to complete the offence, though the overt act may sometimes be part of intention. However, every fraudulent act or intention will not constitute criminal trespass. For instance, if a person clandestinely enters an exhibition hall without a ticket, though the act is a fraudulent act, it will be only civil trespass, and not criminal trespass, because his intention was to evade payment for ticket, but not to insult or annoy anyone in possession.[16]

An intention to commit an offence or to intimidate, insult or annoy, thus, is sine qua non of the offence of criminal trespass. It is, therefore, necessary for the prosecution to prove the existence of such an intention on the part of the accused to record his conviction for committing criminal trespass.[17] Further, it is required to show that such an intention was actual and not just probable one.[18] The intention may be inferred from the act s of the accused, if any, expressing his intention or from the attending circumstances.[19] However, in the absence of an intention of annoying or insulting someone or of committing an offence, conviction for criminal trespass becomes impossible.[20]

'Remaining Unlawfully After Lawful Entry'

Section 441 has two constituents to it. The first part of the section deals with a person who enters into the property of another, either lawfully or unlawfully, with the intention of committing an offence or to intimidate, insult or annoy any person in possession of such property. Thus, in the first part, the entry of the person itself should be with the object stated above.

The second part of the section deals with a situation wherein the entry of a person into or upon the property is lawful, but his continuing presence there becomes unlawful. Not only should the continuing presence become unlawful, but it should be with the intent to intimidate, insult or annoy any such person or with intent to commit an offence.

In *State of Maharashtra v Tanba Sadadhio Kumbi* ,[21] the accused was a vice-chairman of a school committee. He entered the school and beat up two boys, who had quarrelled with his nephew. At that time, the headmaster was not present. Subsequently, the headmaster returned and reprimanded the accused that as a respectable person, he should not have trespassed into the school and beaten the boys. The accused was incensed, abused the headmaster and tried to manhandle him. The headmaster pushed him back and subsequently the accused left threatening physical harm to the headmaster as soon as he came out of the school. The Bombay High Court held that this case would be covered by the second part of s 441, IPC.

However, if the remaining is unlawful, but not with the requisite intention to commit an offence or to intimidate, insult or annoy the person in possession, then it will not amount to an offence under this section.[22]

Section 447 provides punishment for criminal trespass of imprisonment of either description for a term up to three months, or fine that may extend to five hundred rupees, or both.

PART B - AGGRAVATED FORMS OF CRIMINAL TRESPASS

ESSENTIAL INTRODUCTION

The aggravated forms of criminal trespass, as articulated under the IPC, are based on either the way in which criminal trespass is committed or the end for which it is committed. The authors of the IPC, referring to aggravated forms of criminal trespass, observed:

> ...[A]ggravating circumstances are of two types. Criminal trespass may be aggravated by the way in which it is committed; it may also be aggravated by the end for which it is committed.
>
> There is no sort of property which is more desirable to safeguard against unlawful intrusion as the habitations in which men reside, and the buildings in which they keep their goods. The offence of trespassing on these places we designated as house-trespass and we treat it as an aggravated form of criminal trespass.
>
> House-trespass, again, may be aggravated by being committed in a surreptitious or in a violent manner. The former aggravated form of house-trespass we designate as lurking house-trespass, the latter we designate as house-breaking. Again, house-trespass, in every form, may be aggravated by the time at which it is committed.
>
> Trespass of this sort has, for obvious reasons, always been considered as a more serious offence when committed by night than when committed by day.
>
> Thus, we have five aggravated forms of that sort of criminal trespass which we have designated as house-trespass; lurking house-trespass; house-breaking; lurking house-trespass by night; and house-breaking by night.
>
> These are aggravations arising from the way in which the criminal trespass is committed. But criminal trespass may also be aggravated by the end for which it is committed. It may be committed for a frolic. It may be committed in order

> to (commit) murder. It may also happen that a criminal trespass, which is venial, as respects the mode, may be of the greatest enormity as respects the end; and that criminal trespass committed in the most reprehensible mode may be committed for an end of no great atrocity.[23]

Against this backdrop, it is obvious that aggravated forms of criminal trespass are: (1) house-trespass (ss 442, 448-452); (2) lurking house-trespass (ss 443, 453-455, 459); (3) house-breaking (ss 445, 453-455, 459); (4) lurking house-trespass by night (ss 444, 456-458, 460); and (5) house-breaking by night (ss 446, 456-458, 460).

House-Trespass

Section 442 defines the offence of house-trespass, while s 448 stipulates the punishment thereof. Sections 449 to 452 deal with different aggravated forms of house trespass.

The first two sections run as under:

Section 442. House-trespass.--Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation.--The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

Section 448. Punishment for house-trespass.--Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

House-trespass is treated as an aggravated form of offence of criminal trespass just as s 380 makes theft in a building an aggravated form of theft. The language of this section and s 380 is almost similar.

The only difference between house-trespass, as defined in s 442, and criminal trespass, as defined in s 441, is that the offence of criminal trespass is committed when a person enters into or upon any 'property' of any one with intent to commit an offence or to intimidate or to insult or to annoy him, while house trespass can only be made in respect of a 'building, tent or vessel' used as a human dwelling or any place used for worshipping or as a place for the custody of property.

The offence of house-trespass is defined with reference to the offence of criminal trespass. Thus, the offence of house-trespass must have all the ingredients of a criminal trespass, including the intention to commit an offence, annoy, intimidate or insult the possessor of the property.[24] In addition to that, the only other essential ingredient required is that the property (building, tent or vessel) entered into or entered upon must be used as a human dwelling or a place of worship or a place for the custody of property. However, the word 'building' does not have a fixed connotation.[25] Therefore, a question whether a particular structure is a 'building' or not and whether it is used as a human dwelling or as a place for the custody of property is a question of fact.[26]

The explanation to the section states what amounts to entry, in order to constitute an offence of house-trespass. In order to remove any ambiguity as to what would amount to entry, the *Explanation* provides that 'the introduction of any part of the criminal trespasser's body' into the property amounts to entry, sufficient to constitute an offence of 'house-trespass'.

Thus, putting a hand on the hole in the wall of a house is not trespass, but putting hand through the hole is sufficient to constitute house-trespass.[27] The mere pushing in of the shutters of a door, which is not chained or locked, will be considered as house-trespass.[28]

Aggravated Forms of House-trespass

Different aggravated forms of house-trespass, dealt under ss 449 to 451, are based on the intent of the person committing house-trespass. When a person enters into any building, tent or vessel 'in order to' commit the offences specified in these sections, namely, the offences punishable by death, imprisonment for life, or imprisonment, he comes within the ambit of respective aggravated forms of house-trespass and thereby becomes amenable to the (higher) punishment indicated therein. The words 'in order to' used in these sections obviously mean 'with the purpose of'. Thus, if the purpose in committing house-trespass is

the commission of the offences mentioned in these provisions, the house-trespass becomes punishable with the punishments provided in these sections. The offence of house-trespass committed in order to the committing of an offence punishable with death (under s 449), with imprisonment for life (under s 450), and with imprisonment (under s 451), are punishable with imprisonment for life or rigorous imprisonment for a term up to ten years, simple or rigorous imprisonment for a term up to ten years, and simple or rigorous imprisonment for a term up to two years, respectively. However, it is immaterial whether or not the purpose of the offence for which the house-trespass has been committed has been achieved or not. In *Matiullah Sheikh v State of West Bengal* ,[29] the Supreme Court held that the expression 'in order to the committing of any offence' appearing in ss 449 to 451 (as well as in ss 454 and 457) does not mean actual commission of the offence (specified therein) to attract higher punishment provided under these sections.

The relevant provisions read as under:

Section 449. House-trespass in order to commit offence punishable with death.-- Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with imprisonment for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Section 450. House-trespass in order to commit offence punishable with imprisonment for life.--Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Section 451. House-trespass in order to commit offence punishable with imprisonment.--Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

Section 452, which deals with another aggravated form of house-trespass, provides for higher punishment for committing house-trespass preceded by preparation by the accused for causing hurt, assault or wrongful restraint. Mere commission of house-trespass does not bring s 452 into play. It is necessary to prove that such a house-trespass was committed after making preparation for causing hurt, etc., to any person.[30] It reads:

Section 452. House-trespass after preparation for hurt, assault or wrongful restraint.--Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Lurking House-Trespass

Lurking house-trespass is an aggravated form of house-trespass. As mentioned earlier, if criminal trespass is committed in a surreptitious manner, it is treated as lurking house-trespass. Section 443 defines lurking house-trespass, while s 453 provides the punishment thereof. These sections read:

Section 443. Lurking house-trespass.--Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass".

Section 453. Punishment for lurking house-trespass or house-breaking.--Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Lurking house-trespass means that the accused took some act ive means to conceal his presence. It requires the accused to have taken some steps to escape notice.[31]

The essential difference between house-trespass and lurking house-trespass is that the trespasser should take some active precautions or effective steps to conceal his identity or presence from the person who has a right to prevent that person from entry or who has a right to throw him out upon entry.[32]

Section 453 makes the offence of lurking house-trespass punishable by imprisonment of either description for a term up to two years with fine.

Aggravated Forms of Lurking House-trespass

Sections 454, 455 and 459 deal with aggravated forms of lurking house-trespass (and of house-breaking).

Section 454. Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.--Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

Section 454 provides for higher punishment (i.e. imprisonment of either description for a term up to three years with fine) for committing lurking house-trespass with the purpose of committing any offence punishable with imprisonment or imprisonment of either description for a term up to 10 years if the offences intended to be committed is theft. The latter part of the section (referring to the offence intended to be committed is theft) intends to cover the cases of house-trespassers and house-breakers whose intention is to commit an offence not lesser than theft.[33]

Section 455. Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.--Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 455 provides for imprisonment of either description for a term up to 10 years for committing lurking house-trespass after making preparation for causing or putting in fear of causing hurt, assault or wrongful restraint to any person.

For ensuring conviction of the accused under s 455, the prosecution, obviously, is required to prove beyond reasonable doubt that accused: (i) committed lurking house-trespass (as defined under s 443) [or house-breaking (as defined under s 445)], and (ii) he did so after making preparation for causing hurt, assaulting or wrongfully restraining a person.[34]

Section 459. Grievous hurt caused whilst committing lurking house-trespass or house-breaking.--Whoever, whilst committing lurking house-trespass or house-breaking causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 459 is another aggravated form of lurking house-trespass. As mentioned earlier, it provides for higher punishment for causing grievous hurt or attempting to cause death or grievous hurt whilst committing lurking house-trespass (or house-breaking). Causing of grievous hurt or attempt to cause death or grievous hurt must be done in the course of the commission of lurking house-trespass (or house-breaking) and not after the completion of lurking house-trespass (or house-breaking). The offence of house-breaking is complete when accused effect his entry into the house. Grievous hurt caused or attempt to cause death or grievous hurt made thereafter, therefore, does not attract s 459.[35]

House-Breaking

If criminal trespass, as mentioned earlier, is committed in a violent way, it is designated as house-breaking. Section 445, which defines the offence of house-breaking, reads as under:

Section 445. House-breaking.--A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if,

being in the house or any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say--

First.--If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.--If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.-- If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.-- If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.-- If he effects his entrance or departure by using criminal force or committing an assault or by threatening any person with assault.

Sixthly.--If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.--Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations

(a) *A* commits house-trespass by making a hole through the wall of *Z's* house, and putting his hand through the aperture. This is house-breaking.
(b) *A* commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.
(c) *A* commits house-trespass by entering *Z's* house through a window. This is house-breaking.
(d) *A* commits house-trespass by entering *Z's* house through the door, having opened a door which was fastened. This is house-breaking.
(e) *A* commits house-trespass by entering *Z's* house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.
(f) *A* finds the key of *Z's* house door, which *Z* had lost, and commits house-trespass by entering *Z's* house, having opened the door with that key. This is house-breaking.
(g) *Z* is standing in his doorway. *A* forces a passage by knocking *Z* down and commits house-trespass by entering the house. This is house-breaking.
(h) *Z*, the door-keeper of *Y*, is standing in *Y's* doorway. *A* commits house-trespass by entering the house, having deterred *Z* from opposing him by threatening to beat him. This is house-breaking.

House-breaking, as defined under s 445, implies an invasion of, or a forceful entry into, a house. It enumerates six ways by which house-trespass defined in s 442 takes the form of house-breaking. The ways described in the section of seeking entry into a house are: (1) through the passage made by the accused himself or his accomplice of the house-trespass; (2) through any passage not meant for human entrance other than himself or an abettor of the offence; (3) through any passage opened by himself or by any of the abettors of the house-trespass; (4) by opening any lock to seek entry into, or exit from, the house; (5) by using criminal force to seek entry into, or depart from, the house; and (6) by entering or quitting through any passage fastened against such entrance or exit.

However, a careful look at these six ways of breaking a house reveals the two modes of entry into a house. The first three relate to the mode of seeking entry into a house by means of a passage, which is not ordinarily meant for access; while the latter three deal with entry, which is effected by force.

Section 453, inter alia, prescribes punishment for house-breaking of simple or rigorous imprisonment for a term up to two years with fine.

Aggravated Forms of House-breaking

Sections 454, 455 and 459 deal with aggravated forms of house-breaking (along with that of lurking house-trespass). Section 454 deals with the act of committing house-breaking with the purpose of committing an offence punishable with imprisonment or theft. Sections 455 and 459 deal with the committing house-breaking after making preparation for causing or putting in fear of causing hurt, assault or wrongful restraint to any person and for causing grievous hurt or attempting to cause grievous hurt or death to any person respectively.

Lurking House-Trespass by Night

Section 444 defines the offence of lurking house-trespass by night as commission of lurking house-trespass after sunset and before sunrise. Section 456 provides for the punishment of imprisonment of either description for a term up to three years with fine. This punishment is graver than that is provided for the offence of lurking house-trespass under s 453. Therefore, lurking house-trespass by night is considered as an aggravated form of lurking house-trespass committed during daytime. These sections read as under:

Section 444. Lurking house-trespass by night.--Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night".

Section 456. Punishment for lurking house-trespass or house-breaking by night.-- Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Lurking house-trespass by night is an aggravated form of house-trespass. In order to commit an offence under this section, a person has to commit first, lurking house-trespass as defined in s 443, by taking active steps to conceal his presence from the person who has a right to 'exclude or eject' him. Such lurking house-trespass should be done at night. Merely committing house trespass or house-breaking by night will not amount to an offence of lurking house-trespass by night, on the ground that the darkness helped the accused to conceal his presence. There must be some other act ive steps and means to conceal his presence. Only then will it amount to lurking house-trespass. If such lurking house-trespass is done after sunset and before sunrise, only then will it constitute an offence under this section.[36]

Aggravated Forms of Lurking House-trespass by Night

Sections 457, 458 and 460 deal with aggravated forms of lurking house-trespass by night.

Section 457 deals with the offence of lurking house-trespass by night committed with the purpose of committing an offence punishable by imprisonment,[37] while s 458 deals with the liability of an accused who commits lurking house-trespass by night after making preparations for causing hurt, assault or wrongful restraint to any person or for putting him in fear of causing hurt, assault or wrongful restraint.[38] It provides for an imprisonment of either description for a term up to 14 years with fine.

Section 460 lays down a principle of constructive liability for causing death or grievous hurt by any one of the group involved in committing lurking house-trespass or house-breaking. It provides for the punishment of imprisonment for life or for a term up to ten years with fine for the persons who are jointly concerned in the committing of the house-trespass or house-breaking, even though they were the persons who have neither caused nor attempted to cause death or grievous hurt. It thus, merely provides for constructive liability of persons committing or concerned in house-breaking by night or lurking house-trespass in the course of which grievous hurt or death is caused or attempted by one of the offenders.[39] The section comes into play only when the prosecution proves that more than one accused committed lurking house-trespass by night and one of them caused, or attempted to cause, death or grievous hurt, whilst engaged in committing lurking house trespass by night. Therefore, provisions of s 460 can be invoked against only those who have actually committed lurking house-trespass at night and not against those who have merely accompanied their associates.[40]

Sections 457, 458 and 460 read as follows:

Section 457. Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.--Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

Section 458. Lurking house-trespass or house-breaking by night after preparation for hurt, assault, or wrongful restraint.--Whoever commits lurking house-trespass by night, or house-breaking by night, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Section 460. All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.--If, at the time of the committing of lurking house-trespass by night, or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

House-Breaking by Night

House-breaking by night, as defined under s 446, means house-breaking after sunset and before sunrise. Section 446 states:

Section 446. House-breaking by night.--Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night".

House-breaking by night is, under s 456, made punishable by imprisonment of either description for term that may be extended to three years with fine.[41]

Aggravated Forms of House-breaking by Night

Sections 457, 458 and 460 deal (along with aggravated forms of lurking house-trespass by night) with aggravated forms of house-breaking by night.[42]

PART C - DISHONESTLY BREAKING OPEN A RECEPTACLE CONTAINING PROPERTY

Sections 461 and 462 of the IPC punish the opening or unfastening of any receptacle or container, such as lockers, safes, boxes, etc, used as a storing place. These provisions, which are self-explanatory, read:

Section 461. Dishonestly breaking open receptacle containing property.-- Whoever dishonestly or with intent to commit mischief, breaks open or unfastens any closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 462. Punishment for same offence when committed by person entrusted with custody.--Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

The offence created under s 461 is complete the moment accused dishonestly (or with intent to commit mischief) breaks open or unfastens a receptacle containing (or believed to contain) property. Such an act attracts imprisonment of either description for a term up to two years, with or without fine.

Section 462 deals with an aggravated form of the offence created under its preceding section. Its essential elements are identical to that of s 461. The only additional element that s 462 stipulates is that the accused must be entrusted with the closed receptacle in question. Thus, s 462 involves the element of trust. It, therefore, prescribes comparatively graver punishment than that provided under s 461. The punishment provided under s 462 is simple or rigorous imprisonment for a term up to three years with or without fine.

PART D - PROPOSALS FOR REFORM

The Fifth Law Commission offered a set of proposals for reform in the law relating to criminal trespass. They are:

(1) Recalling the judicial ambivalence in offering meaning to the second limb of definition of 'criminal trespasses indicated in s 441, it suggested that the term 'lawfully' should be deleted from the second part of s 441.
(2) Failing to see any need to have distinction between 'lurking house-trespass' and 'lurking house-trespass by night', as drawn in ss 443 and 444, it suggested simplification of these two ideas by dropping the notions of 'lurking house-trespass' and 'house-breaking' therefrom and replacing them by the idea of 'burglary', which connotes an act of house-trespass for committing theft or any other serious offence. It, accordingly, suggested deletion of these two sections and carving a new section (s 445) incorporating in it the idea of burglary and making it punishable by rigorous imprisonment for a term not exceeding ten years.
(3) Imprisonment for term up to three months provided for criminal trespass (s 447) should be enhanced to that of for a term up to six months.
(4) The sentence of imprisonment of either description for a term up to one year provided for committing house-trespass (s 448) should be increased to a term up to three years.
(5) Rigorous imprisonment for fourteen years should be provided in lieu of existing imprisonment for life for those who are jointly concerned with burglary and when one of them causes death or grievous hurt while committing it.[43]

The Indian Penal Code (Amendment) Bill 1978 sought to give effect to almost all the proposals for reform suggested by the Fifth Law Commission. Clause 181 of the Bill sought to substitute the existing s 441 by the revised s 441 as proposed by the Law Commission. And clause 182 sought to replace the existing ss 443-460, dealing with various forms house trespass, by the sections revised on the lines suggested by the Law Commission. Clause 181 also endeavoured to give effect to the Law Commission's proposed new section (s 443), clustering together the various forms of house-trespass dealt under the existing ss 443-446 and dealing with 'burglary'.

The Fourteenth Law Commission lent its support to all the changes recommended by the Fifth Law Commission and incorporated in the cls 181 and 182 of the Amendment Bill.[44]

However, these clauses could not become effective as the Bill lapsed in the year 1979.

1 Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India*, Pelham Richardson, 1838, Note N, p 168.

2 *Sahebrao Kisan Jadhav v State of Maharashtra* (1992) Cr LJ 339(Bom) .

3 *Mathri v State of Punjab* AIR 1964 SC 986, (1964) 5 SCR 916.

4 *Shwe Kun v Emperor* (1905) Cr LJ 415; *State v Abdul Sukur* AIR 1960 Cal 189.

5 *Batakala Pattivada* ILR 26 Mad 29.

6 AIR 1934 Cal 480, (1935) Cr LJ 949(Cal) .

7 AIR 1920 All 20, (1921) Cr LJ 353(All) .

8 *Dhanna Ram v State of Rajasthan* (2000) Cr LJ 1204(Raj) ; see also, *State of Rajasthan v Daulat Singh* (2001) Cr LJ 3464(Raj) .

9 *Veerathaiah v Ramswamy Iyyengar* AIR 1964 Mys 11; *Md Sahabuddin v Sayed Monowar Hussain* (1999) Cr LJ 349(Gau) .

10 *Mathri v State of Punjab* AIR 1964 SC 986, (1964) 2 Cri LJ 57(SC) .

11 AIR 1964 SC 986, (1964) 5 SCR 916.

12 See also, *Hathi Singh v State of Rajasthan* 1979 SCC (Cri) 976.

13 AIR 1960 SC 160.

14 However, in *Sahebrao Kisan Jadhav v State of Maharashtra* (1992) Cr LJ 339(Bom), the workers of a factory, who, having no right to enter in cabins of factory officers without their permission, stormed in the office chambers of their officers were held guilty of criminal trespass.

15 AIR 1970 SC 20, (1970) Cr LJ 4(SC), (1969) 2 SCC 216.

16 *Mehervanji Bejanji* 6 BHCR.

17 *Mathura Bai v Emperor* AIR 1928 All 671.

18 *Ramzan Mistry v Emperor* AIR 1929 Pat 111.

19 *Keshar Singh v Rex* AIR 1950 All 157.

20 *Damodar Das v Emperor* AIR 1923 Pat 56.

21 AIR 1964 Bom 82, (1964) 1 Cr LJ 395(Bom) .

22 *Kanwal Sood v Nawal Kishore* (1983) Cr LJ 173(SC) .

23 Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India*, Pelham Richardson, 1838, Note N, p 168.

24 *Gopal Sahu v Raju Mishra* AIR 1965 Ori 212; *Kamalammal v Meenakshi* (1971) Cr LJ 1483(Mad) ; *Prempal Singh v Mohan Lal* (1981) Cr LJ 1208(HP) ; *Surjit Singh v State of Punjab* (2007) 15 SCC 391.

25 For deliberation on these terms see, ch 41, 'Theft and Extortion', above.

26 *Dal Chand v State of Rajasthan* (1966) Cr LJ 236(Raj) .

27 *Ghulam v Crown* AIR 1923 Lah 509, (1925) Cr LJ 398(Lah) .

28 *Ledga @ Pachhana v Emperor* AIR 1922 Nag 26, (1923) Cr LJ 278(Nag) .

29 AIR 1965 SC 132, (1965) Cr LJ 126(SC) .

30 *Pirmohammad v State of Madhya Pradesh* AIR 1960 MP 24; *Dal Chand v State of Rajasthan* (1966) Cr LJ 236(Raj) ; *T Prasanna Patra v State of Orissa* (1984) 2 Crimes 431(Ori) .

31 *Nasiruddin v State of Assam* AIR 1971 SC 1254, (1971) Cri LJ 1073(SC) .

32 *Budha v Emperor* AIR 1916 Lah 425; *Bijay Kumar Mohapatra v State of Orissa* (1982) Cr LJ 2162(Ori) .

33 *Brijmohan Lal*AIR 1947 All 152.

34 *State of Orissa v Purnabasi Rana* (2002) Cr LJ 4854(Ori) ; see also *Chonampara Chellappan v State of Kerala* AIR 1979 SC 1761.

35 *Said Ahmad v Emperor* AIR 1927 All 536; *Rohtas v State (Delhi Administration)* (1987) 1 Crimes 576(Delhi) ; but see *Bhanwarlal v Parbati* (1968) Cr LJ 130(All) .

36 *Prem Bahadur Rai v State of Sikkim (*1978) Cr LJ 945 (Sikkim).

37 See *Nasiruddin v State of Assam* AIR 1971 SC 1254, (1971) Cri LJ 1073(SC) .

38 See *Mahendra Singh v State of Madhya Pradesh* AIR 1959 MP 6.

39 *Sohan Singh Kesal Singh v State of Punjab* AIR 1964 P&H 130.

40 *Faiz Baksh v Emperor* AIR 1947 Lah 188; *Badri Prasad Prajapati v State of Madhya Pradesh* (2005) Cr LJ 1856(MP) .

41 For text of s 456, see 'Lurking House-Trespass by Night', above.

42 For details see, 'Aggravated forms of Lurking House-Trespass by Night', above.

43 Law Commission of India, 'Forty- Second Report: The Indian Penal Code ' Government of India, 1972, paras 17.76 & 17.78-17.80.

44 Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code' Government of India, 1997, paras 12.79-12.80.

CHAPTER 48

Offences Relating to Documents

(Indian Penal Code 1860,Sections 463 to 477A)

PART A - FORGERY

INTRODUCTION

Ever since the time of invention of writing, the offence of forgery was also in existence. In Roman law, it was enacted by the *lex corenelia de falsis*, that a person who falsely writes, seals, publicly reads, or foists in a forged will or other document or makes, cuts, moulds, a spurious seal wilfully and maliciously should be punished--if a freeman with deportation, and if a slave, with death. Removal of inscriptions of tombs was also severely punished in Rome.

In English Common Law, Blackstone refers to such offences, especially the forging of the seals of State, which was treated as one form of treason. In modern English Common Law: 'forgery is the making of a false instrument with intent to deceive'.[1]However, with the promulgation of the Forgery Act 1913, forgery became a statutorily defined offence. Section 1(10) of the Act defines forgery as: 'making a false document in order that it may be used as genuine'. It defines the basic concept, but offences are created by other sections which impose penalties ranging from two years' imprisonment to life, depending on the document forged and the intent with which it was forged.

However, the Forgery Act, 1913 stands repealed by the Forgery and Counterfeiting Act, 1981. Section 1 of the Act, which is premised on the idea of forgery reflected in s 1(1) of the 1913 Act, holds a person guilty of 'forgery' when he, with intent to use or induce somebody to accept a document as genuine, 'makes a false instrument'.

WHAT CONSTITUTES FORGERY?

According to English Common Law: 'every instrument which fraudulently purports to be that which it is not is forgery'. It is not necessary that the whole of the document or instrument should be a fabrication, provided that there is a falsification in any material part.

In India also, the authors of the Penal Code have adopted the above principle in laying down in s 463 of the IPC, that making a false document is the foundation of forgery, the latter being distinguished from the former in the specific criminal intent accompanying it.

Thus, it is clear that the object of forgery is normally to cheat, to cause wrongful distribution of property by means of a false document. But in cheating, as well as in forgery, deception is caused or intended to be caused by false representation. The main difference between cheating and forgery is that in cheating the deception is oral, whereas in forgery it is in writing. Forgery can thus be described as merely the means to achieve an end--the end being deception.[2] Since the mischief caused by the offence of forgery is often proportionately high in terms of value, the penalties provided are also often severe.

PART B - FORGERY--LAW IN INDIA

At the very basis of the offence of forgery is the making of a false document with the criminal intention to cause damage to any person. The making of a false document by itself is not punishable under the provisions of the ch XVIII of the IPC (dealing with 'Offences Relating to Documents'), unless the document amounts to a forgery. The chapter presents the offence in differing forms of gravity in terms of the effect caused. Thus, when the forgery results in forgery of a record of a Court of Justice or a public register, as is described by s 466, IPC, then it is made subject to higher form of punishment including imprisonment for a term up to seven years with fine.

Forgery, which is an offence under the IPC, is defined in s 463. Section 464 deals with the making of a false document or false electronic record, while s 465 prescribes punishment for forgery. These provisions read as under:

Section 463. Forgery.--Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Section 464. Making a false document.--A person is said to make a false document or false electronic record--

First.--Who dishonestly or fraudulently--

(a) makes, signs, seals or executes a document or part of a document;
(b) makes or transmits any electronic record or part of any electronic record;
(c) affixes any electronic signature on any electronic record;
(d) makes any mark denoting the execution of a document or the authenticity of the electronic signature,

with the intention of causing it to be believed that such document or part of document, electronic record or electronic signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed, or affixed; or

Secondly.--Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with electronic signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly.--Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his electronic signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

Illustrations

(a) *A* has a letter of credit upon *B* for rupees 10,000, written by *Z*. *A*, in order to defraud *B*, adds a cipher to the 10,000 and makes the sum 1, 00,000 intending that it may be believed by *B* that *Z* so wrote the letter. *A* has committed forgery.

(b) *A*, without *Z*'s authority, affixes *Z*'s seal to a document purporting to be a conveyance of an estate from *Z* to *A*, with the intention of selling the estate to *B*, and thereby of obtaining from *B*, the purchase-money. *A* has committed forgery.

(c) *A* picks up a cheque on a banker signed by *B*, payable to bearer, but without any sum having been inserted in the cheque. *A* fraudulently fills up the cheque by inserting the sum of ten thousand rupees. *A* commits forgery.

(d) *A* leaves with *B*, his agent, a cheque on a banker, signed by *A*, without inserting the sum payable and authorizes *B* to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. *B* fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. *B* commits forgery.

(e) *A* draws a bill of exchange on himself in the name of *B* without *B*'s authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as *A* draws the bill with intent to deceive the banker by leading him to suppose that he had the security of *B*, and thereby to discount the bill, *A* is guilty of forgery.

(f) *Z*'s will contains these words - "I direct that all my remaining property be equally divided between *A*, *B* and *C*". *A* dishonestly scratches out *B*'s name, intending that it may be believed that the whole was left to himself and *C*. *A* has committed forgery.

(g) *A* endorses a Government promissory note and makes it payable to *Z* or his order by writing on the bill the words "Pay to *Z* or his order" and signing the endorsement. *B* dishonestly erases the words "Pay to *Z* or his order", and thereby converts the special endorsement into a blank endorsement. *B* commits forgery.

(h) *A* sells and conveys an estate to *Z*. *A* afterwards, in order to defraud *Z* of his estate, executes a conveyance of the same estate to *B*, dated six months earlier than the date of the conveyance to *Z*, intending it to be believed that he had conveyed the estate to *B* before he conveyed it to *Z*. *A* has committed forgery.

(i) *Z* dictates his will to *A*. *A* intentionally writes down a different legatee from the legatee named by *Z*, and by representing to *Z* that he has prepared the will according to his instructions, induces *Z* to sign the will. *A* has committed forgery.

(j) *A* writes a letter and signs it with *B's* name without *B's* authority, certifying that *A* is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from *Z* and other persons. Here, as *A* made a false document in order to induce *Z* to part with property, *A* has committed forgery.

(k) *A* without *B's* authority writes a letter and signs it in *B's* name certifying to *A's* character, intending thereby to obtain employment under *Z*. *A* has committed forgery inasmuch as he intended to deceive *Z* by the forged certificate, and thereby to induce *Z* to enter into an express or implied contract for service.

Explanation 1.--A man's signature of his own name may amount to forgery.

Illustrations

(a) *A* signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. *A* has committed forgery.

(b) *A* writes the word "accepted" on a piece of paper and signs it with *Z's* name, in order that *B* may afterwards write on the paper a bill of exchange drawn by *B* upon *Z*, and negotiate the bill as though it had been accepted by *Z*. *A* is guilty of forgery; and if *B*, knowing the fact, draws the bill upon the paper pursuant to *A*'s intention, *B* is also guilty of forgery.

(c) *A* picks up a bill of exchange payable to the order of a different person of the same name. *A* endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable; here *A* has committed forgery.

(d) *A* purchases an estate sold under execution of a decree against *B*. *B*, after the seizure of the estate, in collusion with *Z*, executes a lease of the estate to *Z* at a nominal rent and for a long period and dates the lease six months prior to the seizure, with intent to defraud *A*, and to

cause it to be believed that the lease was granted before the seizure. *B*, though he executes the lease in his own name, commits forgery by antedating it.

(e) *A*, a trader, in anticipation of insolvency, lodges effects with *B* for *A's* benefit, and with intent to defraud his creditors; and in order to give a colour to the transaction, writes a promissory note binding himself to pay to *B* a sum for value received, and antedates the note, intending that it may be believed to have been made before *A* was on the point of insolvency. *A* has committed forgery under the first head of the definition.

Explanation 2.--The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. *A* commits forgery.

Explanation 3.--For the purposes of this section, the expression "affixing electronic signature" shall have the meaning assigned to it in clause (d) of sub-section (1) of Section 2 of the Information Technology Act, 2000 (21 of 2000).

Section 465. Punishment for forgery.--Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

SCOPE OF SECTIONS 463, 464 AND 465, Indian Penal Code 1860

The offence of forgery as defined in the Code is made up of two main provisions. Section 463 defines forgery as the making of a false document or false electronic record with any of the intentions noted therein. Section 464 defines the making of a false document or false electronic record sufficient to be brought it within the cover of forgery. There is one component common to both sections, that of fraud. To constitute forgery, the accused must have made a false document or an electronic record or part of such a document or an electronic record. Apart from the necessity of the prosecution having to prove this, it will also have to establish that the document or electronic record, as the case may be, was forged to achieve any of the intentions enumerated in s 463.

The essential ingredients of 'forgery' as defined in s 463 can be enumerated as as: (i) the making of a false document or false electronic record or part of it; (ii) such making should be with intent to: (a) cause damage or injury to the public, or to any person; or (b) support any claim or title; or (c) cause any person to part with property; or (d) enter into any express or implied contract; or (e) commit fraud or that fraud may be committed.[3]

or

In *Daniel Hailey Walcott v State of Madras* ,[4] the Madras High Court described the main elements of the offence of forgery thus: (i) the document or the part of the document must be false in fact; (ii) it must have been made dishonestly or fraudulently within the meaning of the words used in s 464, IPC, and (iii) it must have been made with one of the intention specified in s 463, IPC. In *Ram Narayan Popli v CBI* ,[5] the Supreme Court stressed that the first essential of the offence of forgery is the making of a false document with an intent to cause damage or injury to the public or to any class of public or to any community. Every forgery postulates a false document, either in whole or part, made dishonestly or fraudulently. In order to be fraudulent, there must be some advantage on the one side with corresponding loss on the other. The term 'fraudulent' does not imply the deprivation of property or an element of injury. Deprivation of property, actual or intended, does not constitute an essential element of intention to defraud. Intent to defraud a person has to be there. The making of a false document is a sine qua non for committing the offence of forgery.[6]

MAKING A FALSE DOCUMENT OR FALSE ELECTRONIC RECORD

What amounts to the making of a false document or false electronic record is explained in s 464, IPC. The person who makes a false document or false electronic record commits forgery. It is essential that the false document or the false electronic record, when made, must either appear on its face to be, or be in fact one,

which, if true, would possess some legal validity. In other words, the document or the electronic record must be legally capable of effectivating the fraud intended.

The term 'document' is defined in s 29, IPC, to denote 'any matter expressed or described upon any substance by means of letters, figures or marks', in a manner capable of conveying an idea to the mind of a person who is able to understand them. In s 30, the words 'valuable security' is defined as denoting 'a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right'.

It is not necessary that the document should be legal evidence in the strict sense of the word. It is sufficient, if, it is intended to be in evidence. Thus, forging a document as a 'will' alleged to be executed by a man will amount to this offence, although all the technical statutory requirement of the 'will' have not been complied with.

The term 'electronic record', by virtue of s 29A of the IPC inserted in the Code by the Information Technology Act 2000, means 'data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated microfiche'.

Section 464 explains as to what amounts to making a false document or false electronic record. It describes three ways in which a false document or false electronic record can be made:

(1) By making, sealing, signing or executing a document or a part thereof; or by making or transmitting any electronic record or a part thereof; or by affixing any electronic signature on any electronic record;
(2) By alteration of a document or an electronic record; or
(3) By causing a person, who is innocent of the contents or nature of the alteration done to a document or an electronic record, to sign, seal or execute it.

Making a false document or false electronic record means creation of a document or an electronic record or part thereof, execution of the document or the electronic record, or signing of the document or the electronic record fraudulently or dishonestly. A false document is also said to be made when the signature, seal or date is false. It covers also the cases when the document or electronic record is signed by the accused.[7] A person is said to make a false document or record if he satisfies one of the three conditions mentioned in s 464. The first condition deals with the situation wherein the document has been falsified with the intention of causing it to be believed that it has been made by a person, by whom the person falsifying the document knows that it was not made. The second situation deals with a case wherein a person without lawful authority alters a document after it has been made. And the third condition deals with a document, signed by person who due to his mental capacity does not know the contents of the document because of intoxication or unsoundness of mind or deception practiced on him.[8]

What constitutes a false document or a part of the document is not the writing of any number of words, which in themselves are innocent, but the affixing of the seal or signature of some person to the document, or part of the document, knowing that the seal or signature is not that of the act ual person and that the person signing it does not have the authority to affix it. To put it simply, the falsity consists in the document, or part of it, being signed or sealed with the name or seal of a person who did not in fact sign or seal it.[9]

Three Forms of Making False Documents

Making false documents is the soul of forgery. However, the expression 'making false document' is not to be understood in its literal sense. The manner of making the false document is clearly stipulated in s 464, which delineates false documents being created in three forms, and the document should fall at least in one of the three divisions. The three forms of creating a false document are:

(1) Making, signing, sealing or executing a document with the intention of causing it to be believed that such document was made by the authority of a person by whom the maker knows that it was not made;
(2) Dishonest or fraudulent cancellation or alteration of a document without lawful authority;

(3) Act of causing another person to execute or alter a document with the knowledge that the maker thereof does not know the contents of the document or the nature of the alteration.[10]

Making False Documents--Some Illustrations

We may now consider a few illustrative cases in which allegations of creating false documents were held either to be established or negated.

Alteration of Birth Dates

Normally, in cases when there is an allegation that the date of birth has been altered, it is to be presumed that only a person deriving consequential benefit alone will seek alteration of his birth date. Thus, the accused alone will be the person benefited if his birth certificate with the altered date of birth is accepted. So, the intention of the accused in *Galla Nageshwara Rao v State of Andhra Pradesh,* [11] was held to take advantage of the changed date of birth and thereby deprive other eligible persons.

Forged Document Comprehends Creating a New Document

The definition of false document is wide enough to cover not just the act of affixing false signatures on documents, but also to the act of creating or bringing into existence entirely new documents. Thus, in *Province of Bihar v Surendra Prasad* ,[12] it was held that in a case involving the allegation of creation of an entirely new document, the important aspect was the issue of whether the act of signing or making the document is done dishonestly or fraudulently and with the intention of causing it to be believed that the document or any part of it was made, signed or sealed or executed by the authority of a person by whom or by whose authority the maker knows that it was not made, signed, sealed or executed.

'Making' Also Covers Making Documents Through Mechanical Means

The definition of a 'document' (s 29, IPC) does not necessarily require that in every case it should be made in the handwriting or contain the signature or the facsimile of the person, but also includes what is done by way of printing. The above principle was followed in the case of *LK Siddappa v Lalithamma* ,[13]in which the accused person printed marriage invitations, announcing the marriage between him and the complainant. He then circulated the notice among friends and relatives, apart from printing it in the local newspaper, with the intention to coerce the complainant to marry him or to blackmail her for his own nefarious purposes. The complainant was act ually only 20 years old and was set to inherit property worth many thousands of rupees. Neither the complainant nor the names of person in whose name the marriage invitations had been issued had authorised the accused to print or circulate the invitations. The Mysore High Court held that the marriage invitations were forged instruments and fell within the definition of 'false document' under s 464, IPC. It held the accused guilty of forgery and punished him under s 465, IPC.

Similarly, in another case, the accused filled in the blank columns in a store issue order, knowing it to be signed not by the officer authorised to sign and issue the stores, but by another person who forged the officer's signature, and sold it to a third person. It was held that the accused was liable for conviction under ss 468 and 471, IPC.

Additions and Alterations to Documents

A document may be made false by wiping out the signature which gives it validity, as for example, the wiping out of endorsement of payment in the bond by the creditor in token of its satisfaction with intent to keep the bond alive [illust (g)]. In *Dharmendra Nath Shastri v Rex* ,[14] the accused was alleged to have made alterations to the written statement filed by him, which, when originally filed, did not contain the alleged insertions. It was held that the act of the accused was clearly covered under cl (1) of s 464, and could not be an offence under cl (2) of the same section as originally charged, as it was not an alteration of document. Mere alteration of a document does not make it a forged document. The alteration must be for some gain or for some objective.[15] Making a false statement in a document does not ipso facto make the document false. For a document to be false, it has to tell a lie about itself.[16]

PART C - NECESSARY INGREDIENTS FOR PROVING FORGERY RELATED TO PART OF DOCUMENT

The ingredients need to be proved in relation to forgery of part of documents are: (i) that the accused made, signed, sealed or executed that part of the document; (ii) that part of the document was not made, signed, sealed or executed by or by the authority of the person by whose authority it purports to have been made, signed, sealed or executed; (iii) that the accused had knowledge of (ii); (iv) that the accused had the intention of causing it to be believed that the part of the document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows it was not made, signed, sealed or executed, and (iv) that there was dishonesty or fraud on the part of the accused.[17]

WHEN ATTESTATION WOULD BE FORGERY

Of the above ingredients, the second, third and fourth ingredients would be absent in the case of attestation by a person who admits having made attestation, because the attestation is in fact by a person by whom it purports to be. Before an attestation can amount to a forgery, one of the essential requirements is that it must be made or signed by a person by whom it does not purport to be made or signed.

ANTE-DATING A DOCUMENT

A person may be guilty of forging a document by fraudulently ante-dating it, so as to give it priority over a document of a later date, or to save limitation or for any other fraudulent purpose.[18]

EXECUTION WITHOUT AUTHORITY

Making a document without the authority of another would amount to a forgery, only when it is shown that it was made dishonestly and fraudulently. In all such cases, when the allegation of lack of authority is raised, it has to be shown that the accused not only lacked the authority, but also had the criminal or dishonest intention to make the document. This rule of prudence has been formulated, because mere abuse of authority is not sufficient by itself without the element of dishonest or fraudulent intention. Abuse of authority can be in various forms and every abuse of authority is not a crime.[19]

A case involving this issue arose in *CO Verghese v MK Singh* .[20] In this case, the accused was alleged to have sent a telex message from his bank to another bank in London in respect of clearance of a certain sum of money before the sum was remitted to his bank. He was authorised to send such messages, with however, the limitation, that normally he was not to send advice as to release of funds before receipt of money in respect of bills submitted for remittance with his bank. The Bombay High Court stated that a reading of ss 463 and 464 together revealed that if a person writes a document in his own name and with intention that the person receiving the document should accept it as a document coming from himself and not from any third person, then he cannot be said to have committed forgery. Thus, in the case, the high court held that the accused had been authorised to send telex messages in his own name as part of the discharge of his duties and not in the name of his superiors or in the name of somebody else in the bank. Since, he was clearly authorised and empowered to send such a message, no offence under ss 463 and 464 could be said to have been established.

FRAUDULENT ALTERATION

A fraudulent alteration of a deed, whether it is a deed executed by himself or by another, amounts to the alterations, for instance, as are contemplated in illusts (a), (c), (d), (e), (f) and (g) of s 464, which are also clear instances of forgeries. The five material elements common to all such cases are: (i) completion of the deed before its alteration; (ii) its alteration; (iii) in a material part; (iv) the said alteration being made without lawful authority, and (v) dishonestly or fraudulently.

It is of course immaterial whether the executant of the deed was the person who altered it or another, and whether that another was then living or dead, or that the alteration had not, in fact, defrauded anyone in particular.

The alteration must be made after the deed has been completed, far before a deed is executed, there may be nothing wrong to alter any portion or clause. However, once a deed or document has been executed, if, it is altered at the instance of the accused, so as to gain some benefit by the alteration for himself or others, and which would affect the rights of the other party, then it would certainly amount to a forgery by alteration.

However, the alteration has to be of a material aspect of the deed or document. A material alteration is one which alters or attempts to alter the character of the instrument itself, which affects or may affect the contract which the instrument contains or of which it furnished the evidence. As illustration, one may cite alterations in the dates, of amount payable, time and place of payment, addition of a contracting party, alteration to consideration, or of rate of interest, or a joint or joint and severable liability or tampering with signatures, or an addition to a sum borrowed or the land mortgaged and specified in the schedules. However, any alteration which does not affect the liabilities of the parties would be deemed to be immaterial as not to wholly vitiate the deed.[21]

Forging a Document by Affixing Own Signature

Whether a person can forge a document by signing it himself, was an issue which arose in *Bharat Heeralal Sheth v Jaysin Amarsinh Sampat* .[22]In this case, the complainant had been buying and selling shares through the accused, who was running a share-brokering firm. The allegation was that the accused owed a large sum of money to the complainant. When the complainant went to the office of the accused to ask for it, the accused produced a back dated bill, signed by the accused, showing that the complainant had act ually suffered a loss due to certain transactions in a previous period amounting to Rs 30,700. According to the complainant, the above bill was false and fabricated and created by the accused in order to avoid making payments to the complainant.

It was the argument of the accused that he had not made the document with the intention of causing it to be believed that it had been made with or by the authority of some other person, as he accepted having issued the bill in dispute. The Bombay High Court, however, held that when considered in the background of illusts (h) and (e) and expln 1 of s 464, it is clear that the section was intended to cover cases even when the creator of the document was the accused himself, made by himself in his own name and under his own seal. Thus, the two illustrations made it apparent that the scope of the definition was very wide and it cannot be said that the first part of s 464 is the only provision defining words, 'making the false document'. The conviction of the accused was held proper.[23]

Intention Not Essential Component in All the Five Reasons Underlying Forgery: Intention, Dishonesty and Fraud Compared

It should be noted that intention to cause injury is not an essential ingredient of the offence of forgery. As is clear from the definition of forgery in s 463, IPC, there are five situations contemplated in s 463 (which were enumerated earlier in this chapter), out of which, intention to cause damage or injury to the public or person is only one of the five situations. The other situations being: (i) to support any claim or title; (ii) cause any person to part with property; (iii) enter into any implied or express contract; or (iv) with intent to commit fraud. Thus, the first component, namely, intention to cause damage is an intent complete in itself.

The definition in s 463 is itself subject to the definition in s 464, in which, the two essential elements are that the act should be done 'dishonestly and fraudulently'. In other words, whichever of the intents as provided in s 463 are applicable, the act itself must be done dishonestly and fraudulently to sustain the allegation of forgery. The words 'dishonestly or fraudulently' in the alternative form reveals that they are not tautological, but must be given different meanings.[24] In the case of allegation of dishonesty, there must be allegation of criminal intention to cause wrongful gain or loss to another person. It is not necessary that wrongful gain or loss should actually have been caused.[25]

INTENTION TO DEFRAUD: IS DEPRIVATION OR LOSS OF PROPERTY ESSENTIAL?

The question, whether intention to defraud is complete merely with the proof of deception and intention by itself, or whether it is also necessary to establish that there is injury or risk of injury, was settled by the Supreme Court, holding that if there was no pecuniary or other gain to the accused, then the offence of forgery is not established. This was held in the case of *Dr Vimla v Delhi Administration* .[26]

In this case, the accused, Dr Vimala, purchased a motor car with her own money in the name of her minor daughter, Nalini, aged about six months at the time and got the insurance policy transferred in the name of the minor daughter by signing the minor's name. She also received compensation for claims made by her in respect of two accidents. The claims were true claims and she received the money by signing the claim forms as also the receipts as Nalini. Thus, the entire transaction with regard to the motor car was in the name of the minor daughter, Nalini, as it was in that name for sentimental reasons of bringing luck. On facts, the court found that the accused did not obtain any pecuniary benefit or otherwise by signing the name as Nalini on any of the said documents in the name of Nalini, nor did the insurance company incur any loss, pecuniary or otherwise, because of dealing with her as Nalini. In any case, the insurance company would not have act ed differently, if, the entire paperwork had been in the doctor's real name. The question was whether the acts would be covered in the definition of forgery under ss 463 and 464, IPC, despite lack of deprivation or loss.

In the charge framed, it was alleged that the accused had defrauded the insurance company. However, the evidence given was only to the effect that if Nalini was a minor, then the insurance company may not have paid the money. But the entire transaction was that of the accused, and it was put through in the name of the minor daughter for reasons best known to her. The evidence disclosed that she had neither unduly benefited nor had the company incurred any unlawful loss. Therefore, the accused was held to be not guilty of offences under ss 467 and 468, IPC.

The expression defraud involves two elements namely, deceit and injury to a person deceived. The injury is something other than economic loss, i.e., deprivation of property, whether movable or immovable, or of money, and it would include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to be deceived, the second condition is satisfied.

Can Forgery Exist Where There is No Loss to Another Though There is Some Material or Non-economic Benefit or Advantage to the Accused?

In contrast to the above case, in which a mother was acquitted of the offence of forgery for putting her minor daughter's signature, a son was held guilty for falsely putting his deceased father's signature. Thus, in *GS Bansal v Delhi Administration* ,[27] the father of the accused had opened a ration depot for which he purchased three Post Office National Savings Certificates with the face value of Rs 250 and deposited the same as caution deposit with the Controller of Rationing, Delhi. Subsequently, he transferred the ration depot in the name of his grandson, the son of the accused. Since the grandson had given a cash deposit, the father of the accused asked for a return of the Post Office National Saving Certificates which had been deposited as caution deposit. However, before the Rationing Department replied to him, he died.

After the death of his father, the accused received the intimation from the Controller of Rationing that the certificates kept as security had been released and he (i.e., the father), could obtain them by filling up the appropriate forms. The accused affixed the signature of his father on the form for transfer of security deposit purporting the signature to be that of his father, attested the said signature and affixed the seal of his office beneath his own signature of attestation, presented the form and certificates for realising the amount and received the amount of Rs 275. He was, therefore, charged with the offence of forgery under s 467, IPC.

The argument of the accused was that he had not derived any gain or advantage for himself or caused any injury to anyone else by his act . Since this was the ratio in the *Dr Vimala's* case, he could not be said to have caused forgery. Further, he obtained only that which he was entitled to as the sole heir of his deceased father. The Supreme Court did not accept this argument and said that there were two ways by which the accused, as heir to his father's properties, could have obtained the money: (1) after obtaining the succession certificate, he could apply to the department to release the security and then apply to the postal department for encashing the certificates; and (2) if the current value of the certificate was less than Rs 5,000 at the time of the death of the holder, he could after the period of three months from the date of the death of deceased and thereafter, satisfy the Post Master General about being the sole heir of the holder and after completing formalities, recover the money.

The Supreme Court noted that in the first instance, he would have to incur expense to obtain succession certificate, and in the second, he would have had to wait for three months, to complete the formalities to obtain the money. Thus, by circumventing the process, the accused gained both financially as also by way of 'non-economic advantage'. The court clarified:

> On the said facts, we have no doubt that the appellant had made the false document with the intention to cause wrongful gain to himself, for by adopting the aforesaid device, he secured for himself a gain as otherwise he would have had to incur some expense for obtaining a succession certificate. Even on the assumption that he would have received the money after satisfying the Rationing Authority and the Post Master General, he secured an advantage by resorting to the said device as he was relieved of the trouble of satisfying the Rationing Authority and the Postal Authority that he was the sole heir of his father and avoided the risk of their refusal, which would have entailed further delay. In that event, he had secured an uneconomic advantage: in the former case, he had made the false documents dishonestly and in the latter case, fraudulently. In either case, he committed forgery within the meaning of section 463 of the Indian Penal Code .[28]

PART D - AGGRAVATED FORMS OF FORGERY

The above discussion makes it clear that not all types of forgery are penal offences. Only those acts of forgery, which are accompanied by the elements of deception and injury, can be said to be covered by the definition of forgery under ss 463 and 464, IPC. The various elements and forms of forgery are elaborated in the Code in the subsequent provisions between ss 466-471, IPC, which prescribe varying terms of punishment depending on the severity of the effects of the forgery as outlined below:

(1) For forgery of 'valuable security', 'will' and so on (s 467), punishment of imprisonment for life or imprisonment up to 10 years, and also fine;
(2) For forgery of record of court, public register and so on (s 466) and forgery for purpose of cheating (s 468), punishment of up to seven years imprisonment and fine;
(3) For forgery for purpose of harming reputation (s 469), imprisonment up to three years and fine.

FORGERY OF A RECORD OF COURT OR PUBLIC REGISTER

Section 466. Forgery of record of court or of public register, etc.--Whoever forges a document or an electronic record, purporting to be a record or proceeding of or in a Court of Justice, or a register of birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.--For the purpose of this section, "register" includes any list, data or record of any entries maintained in the electronic form as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000).

Scope of Section 466

The section deals with forgery of five types of documents. They are: (i) court records and pleadings; (ii) register of birth, death, baptism, marriage or register kept by a public servant as such; (iii) certificate or document purporting to be made by a public servant in his official capacity; or (iv) an authority to substitute or defend a suit, or to take any proceedings therein, or to confer judgment; or (v) a power of attorney.

To bring the act of the accused under the coverage of this section, the elements of fraud and dishonesty must be present in his mind. This section does not apply to a public officer or a person act ing under his control, whose duty is to make entries in a public register or book for making a false document. It only applies to a situation where some unauthorised person commits forgery with a view to make it appear that the document had been duly issued by the concerned officer.[29]

The words forged document covers not only forgery of the whole, but also forgery of a part of the document.

Forgery of a Valuable Security or Will, etc

Section 467. Forgery of valuable security, will, etc.--Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest, or dividends thereon, or to receive or deliver any money, moveable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Scope of Section 467

All the necessary elements to constitute forgery must be proved before there can be a conviction under this section. To establish this offence, the prosecution has to necessarily prove that there was intention as is implied in the term 'fraudulent' or 'dishonestly' occurring in ss 463 and 464, IPC. The main ingredients of the provision are: the forged document must: (i) purport to be (a) a valuable security; or (b) a will; or (c) an authority to adopt a son; or (ii) give authority to any person: (a) to make or transfer any valuable security; or (b) to receive the principal, interest or dividends on a valuable security; or (c) to receive or deliver any money, moveable property, or valuable security; (iii) purport to be an acquittance receipt: (a) for acknowledging the payment of money; or (b) for the delivery of any moveable property or valuable security.

In view of the valuable nature of the documents forged, the section provides for stringent punishment ranging up to life imprisonment.

Forgery for Purpose of Cheating

Section 468. Forgery for purpose of cheating.--Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Scope of Section 468[30]

The form of forgery contemplated here necessarily has to involve the intention of committing cheating. The section will not apply when the cheating is complete, and the subsequent forgery is only intended to cover that offence. In *Anicette Lobo v State* ,[31] *A-1* was a bank employee, who took a blank draft on which *A-5* had forged the signatures of the agent *A-3,* opened a new account in the name of a fictitious person and encashed the cheques. In such a context, the accused were held to be rightly convicted for offences under ss 467, 468 and 120B, IPC.

In contrast, in *Nand Kumar Singh v State of Bihar* ,[32] the accused was acquitted because there was no evidence that it was with his knowledge and consent that the co-accused had forged the documents which related to obtaining of LIC policies. The only evidence was that premium amounts were credited to his account, which by itself was not sufficient to prove his guilt.

The section does not require that the accused should commit the offence of cheating. What is material for the section is committing forgery with the intent to use the forged document for the purpose of cheating. However, if the accused has used the forged document for the purpose of cheating, he becomes liable under s 468 as well as for committing the offence of cheating.[33]

Forgery for Purpose of Harming Reputation

Section 469. Forgery for purpose of harming reputation.--Whoever commits forgery, intending that the document or electronic record forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 469 deals with forgery of document for the purpose harming the reputation of a person. The expression 'harm' used connotes hurt, injury in body, mind, reputation and property, and damage.[34]

Using a Forged Document as Genuine

Section 471. Using as genuine a forged document or electronic record.--Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record.

Section 471 deals with liability of a person who, knowingly or having reasons to believe that the document is forged, fraudulently or dishonestly uses a forged document[35] as genuine and not of the person who has forged it. It, thus, requires the accused to use the forged document as genuine which he knew or had reasons to believe that it is a forged one.[36] The provision intends to provide an alternative charge in cases where there is uncertainty about the person who has forged it.[37]

The Supreme Court, in *AS Krishnan & Anor v State of Kerala* ,[38] explaining the nature and scope of s 471, observed:

> The essential ingredients of Section 471 are: (i) fraudulent or dishonest use of document as genuine (ii) knowledge or reasonable belief on the part of person using the document that it is a forged one. ...To attract Section 471, it is not necessary that the person held guilty under the provision must have forged the document himself or that the person independently charged for forgery of the document must of necessity be convicted, before the person using the forged document, knowing it to be a forged one can be convicted, as long as the fact that the document used stood established or proved to be a forged one. The act or act s which constitute the commission of the offence of forgery are quite different from the act of making use of forged document. ...For an offence under Section 471, one of the necessary ingredients is fraudulent and dishonest use of the document as genuine. The act need not be both dishonest and fraudulent. The use of document as contemplated by Section 471 must be voluntary one. For sustaining conviction under Section 471 it is necessary for the prosecution to prove that accused knew or had reason to believe that the document to be a forged one. Whether the accused knew or had reason to believe the document in question to be a forged has to be adjudicated on the basis of materials and the finding recorded in that regard is essentially factual.[39]

CASE LAWS

'Intent to Defraud' Not Synonymous With 'Intent to Deceive'

Would production of a forged and false document or certificate in proof of qualification, when asked by the court, amount to an offence under ss 465 and 471, IPC?

In *Dr S Dutt v State of Uttar Pradesh* ,[40] the accused was examined as an expert in a sessions trial. When he was asked by the court to produce his degrees and other certificates regarding his qualification, it was found that they were forged and false and that he was using them as genuine. A criminal complaint was lodged against him under ss 465 and 471, IPC. The Supreme Court considered the fact that Dr Dutt did not intend to cause wrongful gain to one or wrongful loss to another, when he brought the diplomas to the court, whether forged or not. His intention may have been to deceive the court, as he had deceived others to give rise to an opinion that he was a forensic expert. But he did not act dishonestly. On the question of whether he had act ed fraudulently, his intention was not to cause anyone to act to his disadvantage, because he did not bring the diplomas voluntarily but under orders of the court. Thus, while he might be said to have intended deception, he did not intend defrauding.

Section 25 , IPC, defines fraudulently as when a person does a thing with intention to defraud 'but not otherwise'. Thus, the words 'intent to defraud' are not synonymous with the words 'intent to deceive', and require some act ion resulting in some disadvantage, which but for the deception, the person deceived would have avoided.[41]

The Supreme Court stated that his conduct was perhaps corrupt in the larger sense, for he intended the Sessions Judge to have an erroneous opinion about him and his testimony, as he continued to claim that his testimonies were genuine. All this leads to the conclusion that his conduct does not come under s 471, IPC, but would constitute an offence under s 196, IPC, which has its focus on the purity of administration of justice. In any case, the offence under s 196, IPC, is far more serious being punishable with imprisonment up to seven years, whereas the latter is punishable only up to two years. On this basis, the prosecution against the accused was quashed.

When No Wrongful Gain to Anyone or Wrongful Loss to Another is Caused by Delivery of Forged Letters, then Conviction for Offence Under Section 471 Read With 465, IPC , is Not Proper

In *Jibrial Diwan v State of Maharashtra* ,[42] the accused was charged with delivering forged letters of invitation to a cultural show, forged on the minister's letterhead, though not signed by the minister. The appellant was not the forgeror of the invitations, and the other accused had been acquitted by the trial court, which was confirmed by the Bombay High Court. Thus, the action of the appellant-accused was neither dishonest, for he neither caused wrongful loss or gain to anyone, or himself; it could not also be said that he had intention to defraud because his act ion resulted in no disadvantage to anyone, which, but for the deception of the person deceived, would have acted otherwise. Thus, the basic ingredients of the act done dishonestly or fraudulently being missing, the charge under s 471, read with 465 IPC was misplaced, and it was wrong on the part of the high court to have convicted the appellant.

When There is No Specific Allegation Regarding Manner in Which All the Accused Were Involved in Forgery, Then the Criminal Proceeding Against the Accused Needs to be Quashed

This was the ruling of the Supreme Court in *Ashok Chaturvedi v Shitul H Chanchani* .[43] In this case, the accused-appellants had been named as accused of offences under ss 417, 420, 467, 468 and 120-B, IPC, for alleged apportionment of share certificates based on forged letters. The court found the complaint to be a vague one and excepting the bald allegation that the shares of the complainant have been transferred on the forged signatures, there was no iota of evidence or anything stated as to how any of the accused were involved in the so-called allegation of forgery. Thus, the basic ingredients were held not to be established. Therefore, the criminal proceedings against the accused were quashed.

Fabricating Forged Bail Orders Causes Damage to Public At Large

In *State of Uttar Pradesh v Ranjit Singh* ,[44]the accused was a stenographer of a judge of the Allahabad High Court. He was alleged to have fabricated a bail order for the release of an accused person, for which offence he was convicted by the Chief Judicial Magistrate for offences under ss 417, 420, 466, 467 and 468, IPC. On appeal, the Additional Sessions Judge, Allahabad, acquitted him of the offences under ss 417, 420 and 467, IPC, but confirmed the conviction under ss 466 and 468, IPC, and sentenced him to two years' imprisonment and fine of Rs 500 for each offence. But instead of being sent to jail, the accused was given benefit of probation under the Probation of First Offenders Act, 1958, with condition to provide bond of good behaviour for two years. His revision petition filed before the high court resulted in his acquittal, on the ground that since he had not signed the false bail order, it could not be said to constitute a document and therefore, the ingredients of ss 466 and 468 could not be said to have been established. His reinstatement in service with back wages was also directed.

The Supreme Court rejected the conclusion of the Allahabad High Court that the false bail order, which was unsigned by the accused, could not be said to be a false document falling under the definition of ss 463- 465, IPC. The apex court stated that under s 464 of the Code:

> ...[A] person is said to make a false document who dishonestly or fraudulently makes, 'signs, seals or executes' a document or part of a document. The reasoning of the High Court, therefore, that the bail order without the signature cannot be said to be a document thereby not attracting the provisions of s 464 of the Indian Penal Code, is wholly unsustainable.[45]

One of the contentions of the defence was that the forged bail order did not result in any loss or gain to anyone, as the accused had been caught before the forged bail order had been signed by the high court judge. The Supreme Court, however, pointed out that by preparing a false document purporting to be a document of a court of justice, a person who is not entitled to be released on bail could be released. That clearly caused damage or injury to the public at large. Dishonesty, according to the court, means prejudicially affecting a party in some legal right and is not limited to acquisition or deprivation of property. Therefore, the accused, who is said to have authored the document, is guilty of offence under s 466, IPC.

On the question whether injury could at all be said to have been caused by the act of the accused, the court stated that injury is something other than economic loss and will include any harm whatever, caused to any

person in mind, body, or reputation. Thus, the act of forging a false bail order can be held to be fraudulent as it is meant to deceive the courts and the society at large. All this led the Supreme Court to hold that the offence under ss 466 and 468, IPC, had clearly been established. Hence, the acquittal order of the high court was set aside. But in view of the fact that almost 27 years had lapsed since the occurrence took place, and the fact that the trial court had ordered probation, and also that there were no bad precedents, the Supreme Court ordered the accused to execute a bond for good behaviour for two years and a surety of two thousand rupees.

Preparing Bogus and False Bills for Reimbursement: Effect of Bare Denial When Trap and Recovery of Tainted Money is Proved

In *Narain Lal Nirala v State of Rajasthan* ,[46] the prosecution case was that the accused used to supply bogus medical bills for government servants for payment of 30 percent of the bills and therefore obtaining illegal gratification. A proprietor of an Ayurvedic store was also a party to the criminal conspiracy. In this regard, a trap was laid and the accused were apprehended red handed. The fact of the trap and the recovery of the tainted money were sufficient to prove the guilt of the accused, particularly so, when the defence of the accused was a bare denial. The Supreme Court held that although some of the official witnesses were disbelieved with regard to the seizure, once the factum of laying of the trap and the recovery of tainted money is established, then the explanation of the accused becomes relevant. Notable in the case was that the accused did not come forward with any plausible explanation barring a general denial. This, it was held, was not sufficient, and therefore the Supreme Court upheld the conviction.

Offence Against Public Justice: Conditions for Taking Cognisance by Trial Courts

An important procedural aspect with regard to commission of offences under s 463, IPC, made punishable by ss 471, 475 and 476, IPC, containing allegations of forged documents, which are part of court proceedings, is the provision in s 195(1)(b)(ii), CrPC. According to this provision, there is a bar against any court from taking cognisance of a case alleging offences under ss 463, 471, 475 and 476 of the Penal Code, in respect of 'an offence alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court' without the written complaint of the court in which the proceedings are pending. There were conflicting opinions as to whether the scope of the bar would apply only to documents already filed before any court as part of the proceedings, or whether it would cover even circumstances when the document has not been tendered as evidence or filed in court, but the document is related to the proceedings pending before that court. The Supreme Court rendered a quietus to this controversy in *Sachidanand Singh v State of Bihar* .[47]

According to the above ruling, the bar of s 195(1)(b)(ii), CrPC, will not apply to forgery of documents committed before the document was produced in court, especially when the document is alleged to have been forged outside the precincts of the court, and long before its production in court. The effect is that if there is an allegation that a particular document is forged which is related to a pending court proceeding, then it is the prerogative of the parties concerned to launch the prosecution against the alleged forgerors. There is no need for the court to grant permission to initiate criminal proceedings.

Thus, the bar will be applicable only to cases of documents alleged to have been forged after production before the court concerned. In such a case, the complaint of the court becomes a necessary prerequisite to launch a criminal proceeding. It is submitted, however, that the above ruling gives a very narrow and restricted interpretation to s 195(1)(b)(ii), CrPC.

PART E - MAKING COUNTERFEIT SEAL, ETC, WITH INTENT TO COMMIT FORGERY

Sections 472-476 are concerned with the offence of committing forgery by means of making or creating counterfeit seals, plates or instruments, to use for creating the forged documents.

Section 472. Making or possessing counterfeit seal, etc, with intent to commit forgery punishable under section 467.--Whoever makes or counterfeits any seal, plate or other instrument for making an im-

pression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 472 punishes a person who makes or counterfeits a seal, plate or any other instrument for making an impression for committing forgery or with intent to commit forgery of valuable security, will, and other documents specified in s 467 of the Code, possess such a seal, plate or any other instrument. It provides for imprisonment for life or imprisonment of either description for a term up to seven years.

Section 473. Making or possessing counterfeit seal, etc, with intent to commit forgery punishable otherwise.--Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this Chapter other than section 467, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 473, which is almost identical with the preceding section, makes the making or counterfeiting or possessing a seal, plate or any other instrument with intention to use it for committing forgery of documents other than referred to, and made punishable under, s 472 of the IPC. It prescribes an imprisonment of either description for a term up to seven years.

Section 474. Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.--Whoever has in his possession any document or electronic record, knowing the same to be forged and intending that the same shall fraudulently or dishonestly be used as a genuine, shall, if the document or electronic record is one of the description mentioned in section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in section 467, shall be punished with imprisonment for life, or with imprisonment of either description, for a term which may extend to seven years, and shall also be liable to fine.

Section 474 makes a mere conscious possession of a forged document or an electronic record, referred to in ss 466 and 467, with intent to fraudulently or dishonestly use it as genuine, punishable. Based on the gravity of criminal possession of documents referred to in s 466 and s 467, it provides for simple or rigorous imprisonment for a term up to seven years and imprisonment for life respectively. The term 'possession' postulates exclusive control.[48]

Section 475. Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.--Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

This section is supplementary to the provisions of s 472. It makes mere preparation that is necessary for forging a document, specified in s 467 of the IPC, punishable. The punishment prescribed under the section is imprisonment of either description for a term up to seven years or for life.

Section 476. Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.--Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document or electronic record other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 476 is almost similar to s 475. The only difference is that the document, the counterfeit of which is made punishable under this section, is any document other than the documents mentioned in s 467 of the Code. The punishment provided under s 476 is, therefore, less severe than that provided under s 475.

PART F - FRAUDULENT CANCELLATION OR DESTRUCTION, ETC, OF VALUABLE SECURITY, WILL, ETC

Section 477. Fraudulent cancellation, destruction etc, of will, authority to adopt, or valuable security.--Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secrets or attempts to secret any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect of such document, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 477 criminalises fraudulent or dishonest cancellation, destruction, or defacing of valuable security, will, or an authority to adopt or attempts thereat or secreting or attempting to secret them or mischief in respect thereof. Owing to the great importance of these documents and the severe consequences of their cancellation, destruction, etc, the section provides for imprisonment for life or simple or rigorous imprisonment for a term up to seven years.

PART G - FALSIFICATION OF ACCOUNTS

Section 477A. Falsification of accounts.--Whoever, being a clerk, officer or servant, or employed or act ing in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, electronic record, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, electronic record, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.--It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.

Section 477A deals with the falsification of accounts. It speaks essentially of two offences, namely: (i) defrauding, altering, destroying, mutilating or falsifying any book or accounts or electronic record; and (ii) making or abeting the making of false entries in the same. These two offences are distinct and not interdependent.[49] The main ingredients of the section are: (1) the persons covered by the provision are, a clerk, officer, or servant, or acting in such capacity; (2) he must wilfully and with intention to defraud: (i) destroy, alter, mutilate or falsify any book, electronic record, paper, writing, valuable security; (a) which belongs to, or is in possession of, his employer; (b) has been received by him for, or on behalf of, his employer; or (ii) makes or abets the making of any false entry in or omits or alters from or in any such book, electronic record, paper, writing, valuable security or account.

Thus, the offence is established where it is shown that there was falsification of accounts with the intention to defraud by either falsifying accounts or making of false entry in any of the valuable securities mentioned in the section. The section does not require any deprivation of property.[50]

The importance of proving that the act of the accused was wilful and possessed the intention to defraud as an essential element to prove the offence under s 477A, was stated by the Supreme Court in *Harnam Singh v Delhi Administration* .[51] In this case, the accused was a goods loading clerk of the Indian Railways. He was prosecuted and convicted for committing offences under s 477A, IPC, for falsifying certain entries in the marketing-cum-loading register to show that a certain consignment of cloth from a cotton mills was received on 10 January 1967, as there were restrictions on booking of goods which became effective from the next

day, i.e., 11 January 1967. It was the contention of the accused that he had no intention to defraud, as he had made an entry about the date of receiving the goods based on the intimation given by the time-keeper. And in any case, he had put the correct date under his signature in the same register as 11 January 1967.

In accepting his contentions, the Supreme Court said that 'wilfully' as used in s 477A, meant intentionally or deliberately doing an act. By the mere fact that some entries were made wilfully, it need not necessarily imply that the accused did so with the intention to defraud within the meaning of the section.

In *Inderjit Singh v State of Punjab* ,[52] a case involving allegation of misappropriation of government funds meant for disbursement of wages to labourers involving falsification of registers, the Supreme Court held that inasmuch as the factum of non-payment of wages was proved and so also deliberate falsification of records, no case of offence under s 477A could be held to be established.

In *A Jayaram v State of Andhra Pradesh* ,[53] the Supreme Court had to consider the case of allegation of large scale fraud in the transportation of fertiliser from the port of arrival to various destinations in Andhra Pradesh by government officials in conspiracy with fertiliser dealers. Thus, while fertiliser was act ually diverted away from delivery to the government depot, false entries were made by the government officials and also by issuing false certificates of such transportation, payments had been made. Thus, a charge was laid under ss 420 and 477A, IPC.

After examining the evidence led in the case, the Supreme Court expressed its anguish about the non-availability of necessary and essential evidence to establish the offence. The court said that unfortunately no evidence has been led as to whether the fertilisers in fact had not been delivered on the relevant date at the destination by proving the stock register at the relevant time. No witness was also examined to show that no delivery had in fact been made. Thus, unless by unimpeachable and convincing evidence, the factum of non-delivery of such fertilisers with reference to actual stock position on the relevant date can be clearly established, it becomes difficult to establish that the government officials issued false certificates about receipt of goods on the date in question.

With regard to the guilt of the officials, the entire evidence was circumstantial. The prosecution was seeking to establish the offence through negative and indirect evidence that fertilisers had not been delivered. However, the nature of proof in such cases had to establish the prosecution case beyond reasonable doubt and ought to rule out any possibility of innocence of the accused. When such cannot be the level of proof, then the benefit of doubt had to be given to the accused government servants.[54] In the present case, the government officials were acquitted as they 'cannot be held to be guilty with all certainty'. However, the conviction of the fertiliser dealers was confirmed, as there was sufficient evidence to establish the prosecution case that the fertilisers had not been transported by the dealers in the manner alleged by them and as appeared in the bills.

However, it is important to note that if a government servant is accused of falsification of accounts etc, while act ing or purporting to act in the discharge of his official duty, he cannot be prosecuted under s 477A of the IPC without prior sanction of the appropriate government. Section 197 of the CrPC prohibits a court from taking cognisance of an offence allegedly committed, while acting or purporting to act in the discharge of his official duty, by a judge or magistrate or public servant not removable from his office without sanction of the government. Section 197 of the CrPC comes into play only when the accused is a public servant removable from his office only with the sanction of the state government or the Central Government and he is accused of committing an offence while acting or purporting to act in the discharge of his official duty. However, s 197 does not extend its protective cover to every act done by the authorities indicated therein but it restricts to only those act s complained of are integrally connected with the discharge of his official duty.[55] It is no part of the official duty of a public servant while discharging his official duties to commit forgery (under ss 467, 468 and 471, IPC). Want of sanction under s 197, CrPC, therefore, cannot bar prosecution of the public servant.[56]

PART H - PROPOSALS FOR REFORM

The Fifth Law Commission has recommended a couple of substantive as well as structural changes in the law relating to forgery. Most of the proposals for reform pertain to the merging of thematically akin or related

provisions in one section; while other proposals stress for the enhancement or the scaling down of the punishment provided for certain offences and revision of some of the existing sections.[57]

The Indian Penal Code (Amendment) Bill 1978 sought to give effect to some of these proposals for reform.

The Fourteenth Law Commission not only endorsed the reforms suggested in the 1978 Bill but also reiterated the need to bring these changes in the respective sections.[58]

However, none of the changes proposed under the 1978 Bill could become effective as the Bill, owing to the dissolution of the *Lok Sabha*, lapsed in 1979.

1 *R v Riley* [1896] 1 QB 321.

2 *Indian Bank v Satyam Fibres (India) Pvt Ltd* AIR 1996 SC 2592, (1996) 5 SCC 550.

3 *Sushil Suri v CBI* AIR 2011 SC 1713, (2011) Cr LJ 2939(SC), (2011) 5 SCC 708.

4 AIR 1968 Mad 349, (1968) Cr LJ 1282(Mad) .

5 (2003) 3 SCC 641, AIR 2003 SC 2478.

6 *Devendra v State of Uttar Pradesh* (2009) 7 SCC 495, 2009 (7) SCALE 613.

7 *Dr Vimla v Delhi Administration* AIR 1963 SC 1572, (1963) 2 Cr LJ 434(SC) .

8 *Mir Nagvi Askari v CBI* AIR 2010 SC 528, (2009) 15 SCC 643.

9 Re *Riasat Ali*(1881) ILR 7 Cal 352; *AK Khosla v TS Venkatesan* (1992) Cr LJ 1448(Cal) .

10 *Mathew v George* (1989) 1 Cr LJ 726(Ker) ; *Gulab Singh v State of Punjab* (1984) 2 Crimes 869(P&H) ; *Mohd Ibrahim v State of Bihar* (2009) 8 SCC 751, (2010) Cr LJ 2223(SC) .

11 (1992) Cr LJ 2601 (AP).

12 AIR 1951 Pat 86.

13 AIR 1954 Mys 119, (1954) Cr LJ 1235(Mys) .

14 AIR 1949 All 353.

15 *Parminder Kaur v State of Uttar Pradesh* AIR 2010 SC 840, (2010) 1 SCC 322, (2010) Cr LJ 895(SC) .

16 *AK khosla v TS Venkatesan,* (1992) Cri LJ 1448(Cal), (1992) 1 CALLT 77(HC) .

17 Hari Singh Gour, *Penal Law of India*, vol 4, 11th edn, Law Publishers, Allahabad, 1998, p 4455.

18 Ibid, p 4457. See also *Rao Shiv Bahadur Singh v State of Uttar Pradesh* AIR 1954 SC 322, (1954) Cr LJ 910(SC) .

19 *Mangal Singh v State* AIR 1936 Pat 154.

20 (1997) Cr LJ 3282 (Bom).

21 Hari Singh Gour *Penal Law of India*, vol 4, 11th edn, Law Publishers, Allahabad, 1998, pp 4458 -59.

22 (1997) Cr LJ 2509 (Bom).

23 (1997) Cr LJ 2509 (Bom), para 11.

24 *Emperor v Abdul Hamid* AIR 1944 Lah 380, (1944) Cr LJ 341(Lah) .

25 *Chunku v Emperor* AIR 1931 All 258, (1932) Cr LJ 559(All) .

26 AIR 1963 SC 1572, (1963) 2 Cr LJ 434(SC) .

27 AIR 1963 SC 1577, (1963) 2 Cr LJ 439(SC) .

28 Ibid, para 9.

29 *Mahesh Chandra Prasad v Emperor* AIR 1943 Pat 393.

30 For more case laws, see also discussion on s 471.

31 AIR 1994 SC 1613, (1994) Cr LJ 1582(SC) .

32 AIR 1992 SC 1939, (1992) Cr LJ 3587(SC) .

33 *Shivaji Narayan Shinde v State of Maharashtra* (1971) Bom LR 215; *Satrangi Lal v State* (1995) Cr LJ 969(P&H) ; *State v Baj Singh* (1995) Cr LJ 1311(P&H) ; *State of Orissa v Rabindra Nath Sahu* (2002) Cr LJ 2327(Ori), 93 (2002) CLT 571.

34 *Mrs Veeda Menezes v Yusuf Khan Hazi Ibrahim Khan* AIR 1966 SC 1773.

35 Section 470 of the defines the term 'forged document and electronic record'. It says: 'a false document or electronic record made wholly or in part by forgery is designated a "forged document or electronic record"'.

36 *Budhu Ram v State of Rajasthan* (1963) 2 Cr LJ 698(SC) ; *Fulchi Mondal v Rajinder Singh* (1971) Cr LJ 1799(Pat) ; *Abdul Karim Madar Sahib v State of Mysore* AIR 1979 SC 1506; *Tulsibhai Jivabhai Changani v State of Gujarat* (2001) Cr LJ 741(SC) .

37 *Ismail Panju v Emperor* AIR 1926 Nag 137; *AS Krishanan v State of Kerala* (2004) 11 SCC 576. AIR 2007 SC 3229, (2004) Cr LJ 2833.

38 AIR 2004 SC 3229, (2004) 11 SCC 576, (2004) Cr LJ 2833.

39 ibid, para 8. These propositions are re-stated in *AK Krishnan v State of Kerala* (2004) 11 SCC 576, AIR 2004 SC 3229.

40 AIR 1966 SC 523.

41 Ibid, para 13.

42 AIR 1997 SC 3424, (1997) Cr LJ 4070(SC) .

43 AIR 1998 SC 2796.

44 AIR 1999 SC 1201, (1999) Cr LJ 1830(SC) .

45 Ibid, para 3.

46 AIR 1994 SC 118.

47 (1998) 2 SCC 493, (1998) SCC (Cri) 660.

48 *Krishna Kesavan v State of Kerala* AIR 1957 Ker 78; *TC Muthuswamy v State of Tamil Nadu* (1971) Cr LJ 1811(Mad) ; *Gajjan Singh v State of Madhya Pradesh* AIR 1965 SC 1921; *Dharam Pal Singh v State (Delhi Administration)* (1985) Cr LJ 474(Del) .

49 *Prafulla Chandra v Emperor* AIR 1931 Cal 8.

50 Re *Doraiswamy Reddiar*AIR 1951 Mad 894, (1952) Cr LJ 1093(Mad) .

51 AIR 1976 SC 2140, (1976) Cr LJ 913(SC) .

52 AIR 1995 SC 2128, (1995) SCC (Cri) 864.

53 (1995) SCC 837 (Cri).

54 The Supreme Court, however, expressed its anguish thus: 'It is really unfortunate that in fertiliser scandal of such magnitude, appropriate steps at the right time had not been taken and for want of convincing and unimpeachable evidence, the accused who are government officials have been acquitted by giving them benefit of doubt. It appears to us that such large scale scandal in transporting imported fertiliser would not have occurred if larger number of government officials and others then prosecuted, were not involved. It is not unlikely superior government officials had also played a vital role in perpetrating the said fraud or concealing the same. The tardy enquiries made by the police thereby necessitating an enquiry by the CBI at a belated stage is only a sad commentary on the efficiency of the police administration. We may only hope that in future there will be proper vigilance and scandals of this type may not take place.' Ibid, at para 25.

55 *Brijlal v State of Madhya Pradesh* AIR 1966 SC 220; *Baijnath v State* AIR 1966 SC 920; *Mohandas v State of Tamil Nadu* (1998) Cr LJ 3409(Mad) ; *Mohinder Singh v State of Punjab* (2001) Cr LJ 2329(P&H) ; *K Kalimuthu v State by DSP* (2005) 4 SCC 512.

56 *State of Uttar Pradesh v MP Gupta* (2004) 2 SCC 349.

57 See, Law Commission of India, 'Forty-Second Report: The Indian Penal Code ', Government of India, 1972, paras 18.6-18.13, and 18.17-,18.20.

58 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.82 & 12.85.

CHAPTER 49

Offences Relating to Property Marks and Currency-notes

(Indian Penal Code 1860,Sections 479 to 489E)

PART A - OFFENCES RELATING TO PROPERTY MARKS

INTRODUCTION

The law on the subject, as embodied in the IPC, originally dealt with two matters, first, trademarks as defined by the amended s 478, IPC and secondly, property marks, as defined by s 479, IPC. Of these two, 'trade mark' indicates the manufacture of the goods, whereas 'property mark' refers to their owner. There is a third aspect dealing with the quantity and quality of the origin of goods, which is generally known as trade description. This matter of trade description is regulated by the Indian Merchandise Marks Act 1889, as amended by ActIX of 1891, which was replaced by the Trade and Merchandise Marks Act 1958 (Act XLIII of 1958) (Trade Marks Act). In 1984, there was another amendment to the Trade Marks Act and the Copyright Act, enhancing fine and period of imprisonment for the infringement of copyright.

The Trade Marks Act 1940 has been enacted in India to provide for the registration and more effective protection of trade marks. At the time when the IPC was enacted, there was no such a special legislation. The Madras High Court has remarked in a trade mark case[1] thus:

> ... [O]rdinarily, proceedings may require much time and expenditure to bring them to a conclusion. The Legislature, in its anxiety to protect traders, has allowed resort to the criminal courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to the criminal courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an act ion for injunction.

Since the enactment of the Trade Marks Act1958, the provisions in the IPC directly dealing with trademarks, namely, ss 478 and 480, were omitted by s 135 and the Schedule of the Trade Marks Act 1958. Hence, ch XVIII of the IPC, at present, deals only with property marks.

The following are the provisions[2] which still remain in force in the IPC and which deal with property marks:

(1) Section 479-- Defines a property mark;
(2) Section 481-- Deals with using a false property mark;
(3) Section 482-- Punishment for using a false property mark;
(4) Section 483-- Counterfeiting a property mark used by another;

(5) Section 484-- Counterfeiting a mark used by a public servant;
(6) Section 485-- Making or possession of any instrument for counterfeiting a property mark;
(7) Section 486-- Selling goods marked with a counterfeit property mark;
(8) Section 487-- Deceiving a public servant by a false mark (ss 487 and 488);
(9) Section 489-- Removing, defacing or altering any property mark.

Ingredients of these sections are given further below in this chapter.

BASIC PRINCIPLE UNDERLYING THE PROTECTION OF PROPERTY MARKS

Section 479 defines property mark as 'denoting a mark made on a movable property,' which denotes that it belongs to a particular person carrying the implication that it differentiates the right of other people to the same property. The object of such a provision is clear in that it protects one's goods from fraudulent imitation by others. The essential principle underlying this branch of law is that no one is entitled to present goods belonging to someone else as his own, and thereby give an impression that the goods he is representing, act ually belongs to him. Thus, no person is permitted to use the marks, symbols, sign or device of another without permission, thereby deceiving the potential customer or client by the false representation.

In this context, it is necessary to understand the distinction between trade mark and property mark. Trade mark refers to the mark denoting the manufacturer of a particular item or merchandise, thereby denoting ownership of a symbol. In contrast, property mark denotes right to property. However, both marks have the common purpose of protecting one's goods against fraudulent use by another and may be used by the owner, whether he be a manufacturer or not. However, a property mark can refer only to a movable property.

LIMITATIONS OF PROSECUTION

The remedy provided for in the IPC is subject to the law of limitation laid down in s 15 of the Merchandise Marks Act 1889, which says that 'no prosecution under these sections shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens'.

Again, as to prosecutions generally under these sections, it has been pointed out by the high courts in India, that if a magistrate is of the opinion that there is a bona fide dispute between the parties as to the mark in question, and if the use for that mark used by the accused is sufficiently different from that used by the complainant, he should not deal with the question criminally, but leave it to the complainant to establish the right claimed in a civil court.

PROPERTY MARK--DEFINITION AND SCOPE OF THE LAW

Before a detailed consideration of the law, it will be necessary to consider the appropriate provisions.

Section 479. Property mark.--A mark used for denoting that movable property belongs to a particular person is called a property mark.

Section 481. Using a false property mark.--Whoever marks any movable property or goods or any case, package or other receptacle containing movable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods, contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Section 482. Punishment for using a false property mark.--Whoever uses any false property mark shall, unless he proves that he act ed without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

SCOPE OF THE LAW CONCERNING PROPERTY MARKS

A mark used for denoting that any movable property belongs to a particular person is called 'property mark'. A person is said to use a false property mark:

(1) If he (i) marks any movable property or goods or any case, package, other receptacle containing movable property or goods; or (ii) uses any case, package, or other receptacle, having any mark thereon;
(2) In a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong (s 481);
(3) In such a context, the offender becomes liable for imprisonment for one year or fine or both (s 482).

DISTINCTION BETWEEN TRADE MARK AND PROPERTY MARK

The distinction between a trade mark and a property mark is that the former denotes the manufacture or quality of the goods to which it is attached, and the latter denotes the ownership in them. In other words, the former concerns the goods themselves, and the latter, the proprietor of these goods.

The Supreme Court, in *Sumant Prasad Jain v Sheojanam Prasad* ,[3] has pointed out the distinction between trade mark and property mark, as the charges under ss 482 and 485 were contested on the ground that the dispute related to trade mark and as such, the complaint under the above sections for infringement of property mark would not lie. In this case, one Sheojanam Prasad (who died during the pendency of the appeal), was the proprietor of a provisions store in a place called Arrah. He claimed to have evolved a formula for manufacturing a scent which he named as *Basant Bahar*. This scent soon became very popular attracting many customers. The scent was packed in cartons and other receptacles, which carried on them the picture of a fairy (an angel) holding a bunch of flowers in her hands and an inscription *Basant Bahar Scent Khushbuon Ka Badshah*. The cartons and the receptacles were in green colour and had on them in print, the name of the manufacturer named '*Basant Bahar Perfumery Co, Shahabad*'. In 1951, Sheojanam Prasad thereafter applied before the Registrar of Trade Marks for registration of the trade mark. The application was, however, rejected for some technical defects. Nevertheless, he continued his business and the scent manufactured by him flourished well in the market.

The accused, Sumant Prasad Jain, was also a dealer in scent in the same place. He had manufactured a scent under the name of *Pushpa Raj*, but it was not very popular. Thereafter, he started putting out for sale his said scent under the name of *Basant Bahar* in cartons and receptacles, similar to those of his rival Sheojanam Prasad in the same colour, shape and size, except for one particular, namely, the name of the manufacturer, such name being '*Basant Bahar Chemical Co Ltd, Shahabad*'. Sheojanam Prasad complained that the failure of *Pushpa Raj* led the accused to devise ways and means of destroying the business credit of *Basant Bahar* by surreptiously, fraudulently and deliberately printing trade mark label of *Basant Bahar* and packing scents in receptacles of the various varieties with inferior quality of scent, which could easily be palmed off as the genuine *Basant Bahar*. The complaint further stated that the accused used false trademarks and sold inferior quality *Basant Bahar* to defame and destroy the good name of the complainant and his scent (*Basant Bahar*) and made illegal gain for himself. Further, he alleged, that the accused by manufacturing spurious scent, defrauded the public by selling as genuine *Basant Bahar* the scent with counterfeit imitation of trade mark with the sole object of making illegal gain and of damaging the reputation of *Basant Bahar* in the hope of boosting up the sale of *Pushpa Raj*.

The trial magistrate found the accused guilty of passing off his scent, as if it was the one manufactured and marketed by the complainant and convicted him under ss 482 and 486 of the IPC and imposed a fine of two hundred fifty rupees, on each of the two counts. On appeal, the Additional Sessions Judge, Arrah, although, he agreed with the findings of fact by the learned magistrate, set aside the conviction on the ground that the complaint substantially dealt with infringement to trade mark and not the property mark, and hence, especially after the passing of the Trade Marks Act 1958, such counterfeiting of trade mark was no longer an offence under the IPC.

On appeal, the high court set aside the order of the sessions judge and restored the order of the trial magistrate on the ground that on careful scrutiny of the complaint, it substantially related to counterfeiting of property mark, although, the expressions 'trade mark' and 'counterfeiting his trade mark' were loosely used in it. In appeal, the Supreme Court upheld the judgment of the high court and pointed out the distinction between the trade mark and property mark thus:

(1) A property mark, as defined by s 479, IPC, means a mark used for denoting that a movable property belongs to a particular person. The concept of a trade mark is distinct from that of a property mark. A mark, as defined by s 2(1)(j), Trade and Merchandise Marks Act 1958, includes a device, brand, heading, label, ticket, name, signature, word, letter or numerical of any combination thereof. A trade mark means a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use that mark. The function of a trade mark is to give an indication to the purchaser or a possible purchaser as to the manufacture or quality of the goods; an indication to his eye, of the trade source from which the goods come, or the trade hands through which they pass on their way to the market.

(2) Thus, the distinction between a trade mark and a property mark is that whereas, the former denotes the manufacture or quality of the goods to which it is attached, the latter denotes the ownership in them. In other words, a trade mark concerns the goods themselves, while a property mark concerns the proprietor. A property mark attached to the movable property of a person remains, even if part of such property goes out of his hands and ceases to be his.

(3) To succeed on the charges under ss 482 and 485, the complainant has to establish that the appellant marked the goods or used packets or receptacles bearing that mark, and that he did so in a manner reasonably calculated to cause it to be believed that the goods so marked or the goods contained in the packets and receptacles so marked, belonged to the complainant. For the purpose of s 486, he had to further establish that the appellant had sold, or exposed for sale, or had in his possession for sale, goods having a mark calculated to cause it to be believed that the goods were the goods manufactured by and belonging to the complainant.

The apex court found the appellant guilty of the offences charged under ss 482 and 486 and his appeal was dismissed.

Property in a trade mark is 'the right to the exclusive use of some mark, name or symbol in connection with a particular manufacture or vendible commodity'; consequently use of the same mark in connection with a different article is not an infringement of such right of property. Thus, an iron foundry who uses a particular mark for his manufactures in iron, could not restrain the use of the same mark when impressed upon cotton or woollen goods, for the property in a trade mark consists in the exclusive right to the use of that mark as applied to a particular commodity manufactured or sold.[4]

OFFENCES RELATING TO COUNTERFEITING ANY PROPERTY MARK USED BY A PERSON

The following offences relate to counterfeiting any property mark used by a person.

Section 483. Counterfeiting a property mark used by another.--Whoever counterfeits any property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 484. Counterfeiting a mark used by a public servant.--Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Section 485. Making or possession of any instrument for counterfeiting a property mark.--Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a property mark, or has in his possession a property mark for the purpose of denoting that any goods belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

Section 486. Selling goods marked with a counterfeit property mark.--Whoever sells, or exposes, or has in possession for sale, any goods or things with a counterfeit property mark affixed to or impressed upon

the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves:

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and
(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or
(c) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 487. Making a false mark upon any receptacle containing goods.--Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he act ed without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 488. Punishment for making use of any such false mark.--Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.

Section 489. Tampering with property mark with intent to cause injury.-- Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

IMPORTANT DIMENSIONS ON THE ISSUE OF INFRINGEMENT OF PROPERTY MARK

Test of Infringement

The test of the infringement of a trade mark is whether the act s alleged are likely to mislead the public. Lord Herschell said, 'It seems to me that the eye must be that of the Judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are same, or whether the one is an obvious imitation of the other.'[5] Mere differences in detail do not prevent the two designs being essentially the same. In *Lakhan Chandra Basak v King Emperor* ,[6] the accused, an umbrella manufacturer, was held guilty under s 483, when he imitated the complainant's umbrella by putting on its cover the mark of an elephant in a circle looking towards the right with a mahout on its back holding an umbrella. In the complainant's umbrella, the elephant was facing towards left. Again in *Roshan Singh v Emperor* ,[7] where the accused imitated the complainant's famous 501 soap, by putting on his soap of exactly similar size, No 301, he was held guilty under s 482. The only difference was that in the place of digit 5 in the complainant's soap the accused had put digit 3. It was held that the trade marks on both the soaps, although not identical, was so similar that there was every likelihood of an ordinary person being induced to believe that he is purchasing the complainant's 501 soap.

Scope of Section 484 , 1860

The essential ingredients of s 484 can be stated as: (i) there must be counterfeiting of; (ii) a property mark used by a public servant or any mark used by a public servant; (iii) to denote that any property has been manufactured by a particular person or at a particular time or place; or (iv) that the property is of a particular quality; or (v) has passed through a particular office; or (vi) that it is entitled to any exemption; or (vii) using as genuine, any such mark knowing the same to be counterfeit.

If these ingredients are established, the punishment that may be imposed is imprisonment for three years and fine.

In *Emperor v Dahyabhai Chakasha* ,[8] the National Bank of India used to import bars of gold for sale in India. Each bar was of uniform size, weight and purity and had the words 'National Bank of India' inscribed on it as property mark. The gold so imported, was known in the market as *Nasrana Bak* and acquired a special value in the market. The accused placed in the market gold of their own mark with words *Nasrana Bak* inscribed on their bars. The High Court of Bombay held that the National Bank of India owned a property mark in the bars imported by it, and that the accused were guilty of counterfeiting that property mark. It further held that though some of these bars had been sold by the bank and had thus passed out of its hands, that fact did not mean that its property mark did not remain, for the function of a property mark to denote ownership is not destroyed because any part of it on which it was impressed, has ceased to be of that ownership.[9]

Making or Possessing Instrument for Counterfeiting Property Mark

Making or possessing any instrument for counterfeiting a property mark (s 485) and selling or exposing or possessing for sale goods or things with a counterfeit property mark (imprisonment for one year or fine or both, s 486), have to be read along with the definition of 'counterfeit' given in s 28, IPC, which reads thus:

Section 28. "Counterfeit".--A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1.--It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.--When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.

Although, counterfeiting ordinarily implies the idea of an exact imitation, under the expln 1 of s 28 there can be counterfeiting even though the imitation is not exact and there are differences in detail between the original and the imitation, so long as the resemblance is so close that the deception may thereby be practised. Explanation 2 lays down a rebuttable presumption that where the resemblance is such that a person might be deceived thereby, in such a case, the intention to deceive or knowledge of likelihood of deception would be presumed.

Thus, where on a comparison of the labels and wrappers used by the accused on his soaps with the genuine labels and wrappers of the Sunlight and Lifebuoy soaps of the complainant company, the court came to the conclusion that the resemblance between them was such as might deceive a person and that the difference in detail did not affect the resemblance, expln 2 to s 28 will apply and as the contrary was not proved, it must be held that the necessary intention or knowledge was there and these wrappers and labels were counterfeit of the genuine wrappers i.e., the labels of the Sunlight and Lifebuoy soaps.[10] The main ingredients of the counterfeiting as laid down in s 28 are: (i) Causing one thing to resemble another thing, and (ii) intending by means of that resemblance to practise deception; or knowing it to be likely that deception will thereby be practiced.

Thus, if one thing is made to resemble another and the intention is that by such resemblance deception would be practised, or even if there is no intention, but it is known to be likely that the resemblance is such that deception will thereby be practised, that is counterfeiting. Then comes the explanation, the scope of which we have already noticed above.

In *Shantilal Uttram Mehta v Dhanji Kanji Shah* ,[11] the Bombay High Court ruled that mens rea is not necessary to convict a person under s 486.

It is open to a person charged of the offence under this section to raise any of the following defences:

(1) He had taken all reasonable precautions against committing an offence under this section and at the time of the commission of the alleged offence, he had no reason to suspect the genuineness of the mark; and
(2) That, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or
(3) That otherwise he had acted innocently.

These defences are provided for the protection of persons who unintentionally contravene the provisions of the IPC and the Trade Marks Act.

PART B - OFFENCES RELATING TO CURRENCY-NOTES AND BANK-NOTES

INTRODUCTION

Sections 489A to 489D were added to the IPC by the Currency-Notes Forgery Act 1899, in order to protect currency-notes and bank notes from forgery. Prior to this, there were no special provisions dealing with currency-notes as the IPC was passed when paper currency was not in vogue in India. Paper currency was introduced when the IPC was just being introduced. Forgery of currency-notes and making or possessing counterfeit currency-notes earlier were governed by the provisions of the IPC dealing with forgery of valuable securities (s 467) and making or possessing counterfeit seals, plates (s 472). However, these sections proved less effective for securing convictions for counterfeiting or possessing counterfeit currency-notes as well as for making or possessing instruments for counterfeiting currency-notes.

Section 489E was inserted in the IPC by the Indian Penal Code (Amendment)Act 1943, for prohibiting and penalising the act s of bringing in circulation photo-prints or otherwise printed or reproduced or imitated currency-notes or bank-notes.

Intention to practice deception was an essential prerequisite to prove the offence. Section 28 of the IPC defines counterfeiting as an act which causes one thing to resemble another, intending by means of that resemblance to deceive. Explanation 1 to s 28 itself defines that the imitation need not be an exact copy or bear a total likeliness to the object copied or counterfeited. Thus, by the definition of counterfeit in s 28, three things, as mentioned earlier, are required. They are: (i) causing one thing to resemble another; (ii) intending by means of that resemblance to cause deception, and (iii) knowing it to be likely that deception will thereby be practiced.

A basic test to prove counterfeit currency is to see whether even an ordinary person would by a mere glance be fooled by the note fraudulently made. Thus, where the counterfeit currency-notes were such that a mere look at them would not convince even an ignorant villager, it was held that there could be no conviction under s 489A read with s 511, IPC for attempt to counterfeit currency-notes.

Sections 489A-489E are arranged on the following basis. Section 489A describes the offence of counterfeiting currency-notes, bank-notes, and other valuable notes and prescribes a [maximum] punishment of imprisonment for life or for a term up to 10 years and fine for the offence. Section 489B deals with using, selling or trafficking of counterfeit notes, which also carries the penalty of life imprisonment or imprisonment for a term up to 10 years and fine. Section 489C deals with possession of forged or counterfeit currency-notes. Section 489D deals with the implements of forging or making counterfeit currency-notes or bank-notes. Section 489E defines the offence of making or using documents resembling currency-notes. However, this section also deals with documents which are not of such a degree of likeness with a currency or bank-note, as to be called a forgery or counterfeit currency or bank-note, but which are imitations or photo reproductions etc. It also prescribes the punishment for the offence.

The object of legislature in enacting these provisions is not only to protect the economy of the country but also to provide adequate protection to currency-notes and bank-notes. A reading of these sections, produced here below, makes the thematic arrangement more clear.

Section 489A. Counterfeiting currency-notes or bank-notes.--Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--For the purposes of this section and of sections 489B, 489C, 489D and 489E, the expression "bank-note" means a promissory note or engagement for the payment of money to bearer on demand issued

by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as a substitute for money.

Section 489B. Using as genuine, forged or counterfeit currency-notes or bank-notes.--Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 489C. Possession of forged or counterfeit currency-notes or bank-notes.-- Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Section 489D. Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.--Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession, any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 489E. Making or using documents resembling currency-notes or bank-notes.--

(1) Whoever makes, or causes to be made, or uses for any purpose whatsoever, or delivers to any person, any document purporting to be, or in any way resembling, or so nearly resembling as to be calculated to deceive, any currency-note or bank-note shall be punished with fine which may extend to one hundred rupees.
(2) If any person, whose name appears on a document the making of which is an offence under sub-section (1), refuses, without lawful excuse, to disclose to a police-officer on being so required the name and address of the person by whom it was, printed or otherwise made, he shall be punished with fine which may extend to two hundred rupees.
(3) Where the name of any person appears on any document in respect of which any person is charged with an offence under sub-section (1) or on any other document used or distributed in connection with that document it may, until the contrary is proved, be presumed that the person caused the document to be made.

SCOPE OF Sections 489A TO 489E Indian Penal Code 1860

There are five offences relating to currency-notes and bank-notes. They are:

(1) Counterfeiting currency-notes or bank-notes (imprisonment for life or imprisonment for 10 years and fine) (s 489A).
(2) Selling, buying or using as genuine, forged or counterfeit currency -notes or bank-notes, knowing the same to be forged or counterfeit (imprisonment for 10 years and fine) (s 489B).
(3) Possession of forged or counterfeit currency-notes or bank-notes, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine (imprisonment for seven years or fine or both) (s 489C).
(4) Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes (imprisonment for life or imprisonment for 10 years and fine) (s 489D).
(5) (i) Making or using documents resembling currency-notes or bank-notes (fine up to Rs 100); (ii) refusal by the person whose name appears on a document to disclose to a police officer, the name and address of the person by whom the document was printed or otherwise made (fine up to Rs 200) (s 489E).

For the purpose of ss 489A--489E, the expression, 'bank-note' means a promissory note or engagement for the payment of money to the bearer on demand, issued by any person carrying on the business of banking in

any part of the world or issued by or under the authority of any state or sovereign power and intended to be used as equivalent to or a substitute for money (explanation 1 to s 489A).

In *State of Kerala v Mathai Verghese* ,[12] the Supreme Court held that the counterfeiting of currency-notes not only of India but of foreign countries as well, constitutes offence under s 489A, IPC.

The expression 'currency -note' in s 489, IPC, is wide enough to embrace currency-notes issued by India as also those issued by any other country in the world. The expression 'any currency-note' refers to 'all' currency-notes and, cannot mean only 'Indian currency-note', in the absence of such a restrictive expression in s 489A. The manifest purpose of the provision is to protect people from being deceived or cheated by ensuring that a person accepting a currency-note is given a genuine currency, which can be exchanged for goods or services and not a worthless piece of paper which will bring him nothing in return, it being a counterfeit or a forged currency-note. The legislature cannot have intended to exclude from the protection, the counterfeiting of currency-notes issued by foreign states. The word 'counterfeit' has not only been defined in s 28, IPC, in very wide terms, but a rule of evidence has also been prescribed in explanation thereto, so as to draw an adverse presumption against the maker of the counterfeit article. Further, the expression 'bank-note' employed in ss 489A to 489E, IPC, would cover a dollar bill or dollar note issued by a foreign sovereign government as well. It would, therefore, in any case, be an offence to counterfeit a dollar bill or to be in possession of a counterfeit dollar bill. Though the explanation to s 489A in terms refers to a bank-note issued 'under the authority of any state or sovereign power', there was neither any occasion, nor any reason, nor any need for addition of a similar explanation to the section in the context of the expression 'currency-note'. The definition of currency-notes contained in s 2 of the Indian Paper Currency Act 1822, is only for the purposes of that particular Act and it cannot be imported into ss 489A-489E, IPC. Therefore, ss 489A to 489E, IPC, cannot be said to be inapplicable to currency-notes other than Indian currency-notes.

LAW AGAINST COUNTERFEITING COVERS ALL CURRENCIES

An analysis of s 489A reveals that the legislative embargo against counterfeiting envelops 'currency-notes' of all countries. The embargo is not restricted to 'Indian currency-notes'. The legislature could have, but has not, employed the expression Indian currency-note. If the legislative intent was to restrict the parameters of prohibition to Indian currency only, the legislature could have said so unhesitatingly. The expression 'currency-note' is large enough in its amplitude to cover the currency-notes of any country. When the legislature does not speak of currency-notes of India, the court interpreting the relevant provision of law cannot substitute the expression 'Indian currency-note' in place of the expression 'currency-note'. The court cannot do so, for the court can merely interpret the section; it cannot rewrite, recast or redesign the section. In interpreting a provision, the exercise undertaken by the court is to make explicit, the intention of the legislature, which enacted the legislation. It is not for the court to reframe the legislation for the very good reason that the powers to legislate have not been conferred on the court. When the expression 'currency-note' is interpreted to Indian currency-note, the width of the expression is being narrowed down or cut down. Further, when the court shrinks the content of the expression 'currency-note', to make it referable to only Indian currency-note, it is defeating the intention of the legislature partly, inasmuch as the court makes it lawful to counterfeit-notes other than Indian currency-notes. The manifest purpose of the provision is that the citizens should be protected from being deceived or cheated.

The citizens deal with and transact business with each other through the medium of currency (which expression includes coins as also paper currency, that is to say, currency-notes). It is inconceivable why the legislature should be anxious to protect citizens from being deceived or cheated only in respect of Indian currency-notes and not in respect of currency-notes issued by other sovereign powers. In the modern age, a tourist from a foreign country may bring from his own country into India, currency to the extent permissible under the law in India. So also he may obtain foreign currency in exchange of Indian currency whilst in India, provided he does so to the extent permissible by the Foreign Exchange Regulation Act 1947 and operates through an authorised person known as money-changer. Would it be reasonable to assume that the legislature was totally oblivious of the need to protect them from being deceived and defrauded? It would be unwise to do so in the face of the internal evidence, which provides a clue to the legislative anxiety on this score. In fact, the framers of the IPC were so anxious to protect the general public from fraudulent acts of counterfeiters that not only have they defined the word 'counterfeit' in s 28 in very wide terms, but they have also pre-

scribed a rule of evidence in expln 2 thereof, so as to draw an adverse presumption against the maker of the counterfeit article, as is evident from the definition of the term 'counterfeit' read with explanations in s 28.[13]

BASIC TEST TO DETECT COUNTERFEIT CURRENCY

The Supreme Court, in *M Mammutti v State of Karnataka* ,[14] emphasised that the basic test when considering a case of possession of counterfeit currency is to see whether at a casual glance, the currency-notes can be recognised as fake. As the court stated that it must be shown that 'the counterfeit notes were of such a nature or description that a mere look at them would convince any person of average intelligence that it was a counterfeit note'. In that case, the defence of the accused was that he had sold some tamarind in the market for which he received Rs 390 out of which was a bundle of Rs 2 notes. When he opened it to buy a ticket for a circus, the cashier got suspicious and made a complaint to the police who found 99 similar counterfeit notes. However, the Supreme Court noted that there was no evidence to show that he had knowingly possessed the notes, and the prosecution had also not elicited such evidence from the accused. In such circumstances, the court acquitted the accused of being in possession and using counterfeit currency-notes.[15]

However, in another case, *Ponnuswamy v State* ,[16] the accused had been convicted for offences under ss 489B and 420, IPC. The accused was alleged to have purchased paddy from a farmer by paying 130 forged currency-notes of Rs100 denomination. The police also seized more forged currency-notes from his possession. He, however, did not have any explanation to offer as to how he came to possess the same. Explaining the implication of not having any explanation, the Supreme Court said: 'Silence on the part of the appellant in such circumstances would by itself be a telling circumstance which would weigh against him in the consideration of the prosecution evidence led against him'. On these considerations, the Supreme Court confirmed the conviction and the sentence awarded to him.

However, for ensuring conviction under s 489B and s 489C, dealing respectively with using as genuine a forged or counterfeit currency-note or bank-note and possessing a forged or counterfeit currency-note or bank-note, it is necessary for the prosecution to prove that the accused had either 'knowledge' or 'reasons to believe' that the currency-note or bank-note was forged or counterfeit when he sold, purchased, received, possessed or otherwise involved in trafficking in, or using as genuine, forged or counterfeit currency-note or bank-note. Mere possession of these notes or even intention to use them, in the absence of such requisite mens rea, is not sufficient to make out a case under s 489B or s 489C.[17] However, an accused found in possession of machinery, instrument or materials for the purpose of being used for counterfeiting currency-notes can be held guilty under s 489D even though it is found that the machinery, instruments or materials are not at all the materials particularly required for the purpose of counterfeiting.[18]

PART C - PROPOSALS FOR REFORM

The Fifth Law Commission offered no proposals for reform in s 479 and ss 481 to 489, the dealing with Property Marks, as there is no controversy. It suggested that ss 479 to 489E, dealing with the offences relating to currency-notes and bank-notes, should be shifted to Chapter XII of the IPC titled 'Of Offences Relating to Coin and Government Stamps' as they rightly belong thereto. As a consequence of the proposal, it suggested that the caption of the Chapter XII be altered to 'Of Offences Relating to Currency-Notes, Coins and Stamps'. It also suggested that the sections relating to currency-notes, owing to their greater importance, should be given the first place in the chapter and should accordingly be renumbered.[19] Its specific proposals for reform are:

(1) S 489A, defining 'bank-note' should be revised to offer a clear and simple definition of currency-note'
(2) The existing punishment of imprisonment for life or imprisonment of either description for a term up to ten years with fine provided for the offence of counterfeiting currency-notes should be replaced by rigorous imprisonment for a term of fourteen years with fine.
(3) The amount of fine (of Rs 100 and Rs 200) prescribed [in s 489E(1) and 489E(2) respectively] for making a document 'so nearly resembling a currency-note as to be calculated to deceive' and for refusing to disclose to a police-officer the name and address of the person who has

printed or made the resembling currency-notes of bank-notes should be enhanced (to Rs 200 and Rs 500 respectively).[20]

However, the Indian Penal Code (Amendment) Bill 1978 modeled on the Forty-second Report hardly incorporated any of these proposals for reform. Nevertheless, the 1978 Bill sought to bring three changes in the law relating to currency-notes. Clause 194 sought to make a change in the existing explanation to s 489A and to add thereto a new explanation. It sought to add the words 'and includes a traveler's cheque' at the end of the existing explanation after numbering it as 'Explanation 1'and to insert a new explanation to s 489A. Clause 196 sought to add a new section (s 489F) in the chapter to prescribe punishment for making 'preparation' for committing the offences punishable under ss 489A to 489E.

The Fourteenth Law Commission endorsed the changes proposed under both the clauses.[21]

However, none of the proposed clauses could take form of law, as the Bill lapsed in 1979 due to the dissolution of the *Lok Sabha*.

1 *Suppell v Ponnusami Tevan* (1899) ILR 22 Mad 488 at p 490.

2 The Trade and Merchandise Marks Act 1958 (Act No 43 of 1958) repealed ss 478 and 480.

3 AIR 1972 SC 2488, (1973) 1 SCC 56, (1972) Cr LJ 1707(SC) .

4 *Westbury Chancellor in Nail v Barrows* (1863) 33 LJ Ch 204 at pp 207-208.

5 *Heeja Foundry Co v Walner Hunter er Co* (1889) 14 All Cas 550.

6 AIR 1925 Cal 149.

7 AIR 1941 All 87.

8 (1904) 6 Bom LR 513.

9 See also *SK Pothilingham Pillai v NM Rowther* AIR 1969 Mad 94.

10 *State of Uttar Pradesh v Hafiz Mohd Ismail* AIR 1969 SC 669.

11 AIR 1961 Bom 203.

12 AIR 1987 SC 33, (1986) 4 SCC 746, (1987) Cr LJ 308(SC) ; see also, *K Hashim v State of Tamil Nadu* (2005) 1 SCC 237, (2005) Cr LJ 143(SC), AIR 2005 SC 128.

13 See *State of Kerala v Mathai Verghese* AIR 1987 SC 33, (1986) 4 SCC 746, (1987) Cr LJ 308(SC)*;* Re *Md Yussuff*(1986) Cr LJ 2011(Mad) .

14 AIR 1979 SC 1705, (1979) Cr LJ 1383(SC) .

15 See also *Madan Lal Sharma v State of West Bengal* (1990) Cr LJ 215(Cal) ; *Mohd Yasin v State of Uttar Pradesh* (1997) Cr LJ 3188; *Karunakaran Nadar v State of Kerala* (2000) Cr LJ 3748; *Veera Swamy Shanmugam v State of Andhra Pradesh* (2001) Cr LJ 3787(AP) .

16 (1997) SCC (Cri) 217, (1995) Cr LJ 2658(SC) .

17 *Umashankar v State of Chhattisgarh* (2002) SCC (Cri) 758.

18 *K Hashim v State of Tamil Nadu* (2005) 1 SCC 237, (2005) Cr LJ 143(SC) .

19 See, Law Commission of India, 'Forty- Second Report: The Indian Penal Code ', Government of India, 1972, paras 18.21; 12.4-12.8

20 Ibid, paras 12.5 & 12.8.

21 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, paras 12.86 & 12.87.

CHAPTER 50

Defamation

(Indian Penal Code 1860,Sections 499 to 502)

INTRODUCTION

Next to life, man cares most for his reputation. Sometimes, we find an individual giving it the foremost place, preferring death rather than living a life of ignominy and disgrace. We have heard of the stories and even historical narratives of our ancient warriors and *Rajput* ladies having committed suicide, rather than falling into the hands of their enemies and being compelled to live in shame and disgrace at the cost of their reputation. Reputation is in fact a great internal force in the mind of every man, impelling him to do things. Love of reputation inspires individuals to do great things and even face risks. On a careful analysis of the human mind, one will find this element of longing for name and reputation as the basic motive of most actions. Authors, scientists, poets and all others, who are engaged in certain act ivities, have in the innermost recesses of their hearts a longing to earn a name in their respective fields of activities. If you remove this instinct in man, he is deprived of his mainspring in life.

Rightly, law gives protection to a man's reputation, as it gives protection to his life and property. The IPC too contains provisions protecting a person's reputation.

We have already seen that defamation against the state is contained in s 124A and defamation of a class (ie, community) is contained in s 153 of the IPC.

The following is the text of the law of defamation incorporated in ch XXI of the IPC. It deals with defamation of a person.

Section 499. Defamation.--Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1.--It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.--It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.--An imputation in the form of an alternative or expressed ironically, may, amount to defamation.

Explanation 4.--No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

(a) *A* says--'*Z* is an honest man; he never stole *B's* watch'; intending to cause it to be believed that *Z* did steal *B's* watch. This is defamation, unless it falls within one of the exceptions.

(b) *A* is asked who stole *B's* watch. *A* points to *Z*, intending to cause it to be believed that *Z* stole *B's* watch. This is defamation unless it falls within one of the exceptions.

(c) *A* draws a picture of *Z* running away with *B's* watch, intending it to be believed that *Z* stole *B's* watch. This is defamation, unless it falls within one of the exceptions.

First Exception.--**Imputation of truth which public good requires to be made or published.--**It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception.--**Public conduct of public servants.--**It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception.--**Conduct of any person touching any public question.--**It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in *A* to express in good faith any opinion whatever respecting *Z*'s conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception.--**Publication of reports of proceedings of Courts.--**It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.--A Justice of the Peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception.--**Merits of a case decided in Court or conduct of witnesses and others concerned.--**It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and, no further.

Illustrations

(a) *A* says--'I think *Z's* evidence on that trial is so contradictory that he must be stupid or dishonest'. *A* is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects *Z's* character as it appears in *Z's* conduct as a witness, and no further.
(b) But if *A* says--"I do not believe what *Z* asserted at that trial because I know him to be a man without veracity"; *A* is not within this exception inasmuch as the opinion which he expresses of *Z's* character, is an opinion not founded on *Z's* conduct as a witness.

Sixth Exception.--**Merits of public performance.--**It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.--A performance may be submitted to the judgment of the public expressly or by act s on the part of the author which imply such submission to the judgement of the public.

Illustrations

(a) *A* person who publishes a book, submits that book to the judgment of the public.
(b) *A* person who makes a speech in public, submits that speech to the judgment of the public.
(c) An actor or singer who appears on a public stage, submits his act ing or singing to the judgment of the public.
(d) *A* says of a book published by *Z*--'*Z's* book is foolish; *Z* must be a weak man. *Z's* book is indecent; *Z* must be a man of impure mind'. *A* is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of *Z* respects *Z's* character only so far as it appears in *Z's* book, and no further.

(e) But if *A* says--'I am not surprised that *Z*'s book is foolish and indecent, for he is a weak man and a libertine'. *A* is not within this exception, inasmuch as the opinion which he expresses of *Z's* character is an opinion not founded on *Z's* book.

Seventh Exception.--**Censure passed in good faith by person having lawful authority over another.--**It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration

A judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a school-master, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier--are within this exception.

Eighth Exception.--**Accusation preferred in good faith to authorised person.--**It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If *A* in a good faith accuses *Z* before a Magistrate; if *A* in good faith complains of the conduct of *Z*, a servant, to *Z's* master; if *A* in good faith complains of the conduct of *Z*, a child, to *Z's* father--*A* is within this exception.

Ninth Exception.--**Imputation made in good faith by person for protection of his or other's interests.--**It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations

(a) *A*, a shopkeeper, says to *B*, who manages his business--'Sell nothing to *Z* unless he pays you ready money, for I have no opinion of his honesty'. *A* is within the exception, if he has made this imputation on *Z* in good faith for the protection of his own interests.

(b) *A*, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of *Z*. Here if the imputation is made in good faith, and for the public good, *A* is within the exception.

Tenth Exception.--**Caution intended for good of person to whom conveyed or for public good.--**It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Section 500. Punishment for defamation.--Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Section 501. Printing or engraving matter known to be defamatory.--Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Section 502. Sale of printed or engraved substance containing defamatory matter.--Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

PART A - GENERAL DISCUSSION

ANALYSIS OF THE OFFENCE OF DEFAMATION

The following are the essential ingredients of the offence:

(1) The making or publishing of an imputation concerning any person;
(2) The means of such imputation are words, writing, signs or visible representations;
(3) Such imputation must have been made with the intention of harming the reputation of the person about whom the imputation is published.[1]

REPUTATION

The subject matter of the right of the person protected is undoubtedly reputation. What is meant by reputation? A person's own opinion of himself is not his reputation.[2] It rather means the opinion of others about him. It is what neighbours and others say 'what he is'.[3] In other words, reputation is a composite hearsay and which is the opinion of the community against a person. Every individual is entitled to have a high opinion of oneself but reputation is the estimation in which a person is held by others.[4] The good opinion one bears or the esteem in which one is held in the society is one's reputation. My reputation is not what I think about myself. The latter is my self-esteem and is internal, whereas reputation is something external to me. It is what others, *X*, *Y* and *Z*, think of me. My reputation is a great asset to me in society, very often enabling me to get material wealth as well. With the good name I possess in society for solvency, I will be able to get credit from a bank and draw large sums of money from that credit institution. Law rightly protects this external esteem of a person in society. This aspect of the law of defamation is made clear in expn 4 to s 499, IPC.

PUBLICATION

Publication is one of the most essential ingredients in defamation, as it is because of publication that others get to hear or come to know about the allegedly defamatory imputations. Thus, *A's* communication of defamatory matter about *B*, directly to *B* will not be publication. On the other hand, when *A* says something or writes something disparaging about the character of *B* to *C*. *A* has published something defamatory of *B* to *C*, for which *A* is guilty both in civil and criminal law.

Reputation refers to the opinion that others have of a person. The following illustration clarifies the relations between publication and reputation.

When *A* has directly abused *B* as an unreliable and dishonest man on his face or has directly written a letter to *B* containing those defamatory expressions about *B*, *A* is not guilty of defamation for there has not been any publication to a third person, which may lower the estimation of *B*'s character. Hearing these abusive words or reading that defamatory letter about himself, by *B*, may lower his self-esteem in his mind. But that may not have affected his reputation. Reputation of *B* is what *C* and others think of *B*.

Thus, defamation is the publication of a statement which tends to lower a person in the estimation of other members of society generally. It is libel if the statement be in a permanent form and slander, if it consists insignificant words or gestures.

Distinction between English Law and Indian Law

The above basis of liability arising from publication, namely, that there should be communication at least with one person other than the defamed, is tenable only in the civil branch of the law of defamation, ie, in torts, whereas in crimes, the basis is breach of the peace and mischief to society. The gist of the offence in English criminal law is whether the words written by the defendant have a tendency to provoke the breach of the peace. Thus, in the illustrations given above, if *A's* defamatory letters are directly addressed to *B*, they will be considered defamatory in criminal prosecutions only if their contents are calculated to provoke *B* to do something, which will disturb the Queen's peace in the locality. Publication in its primary sense as communication by the defendant to a person other than the person defamed, is the basis of liability in English civil law of defamation, ie, torts. This principle, which is not accepted as the basic principle of English penal law of defamation, is accepted as the basic principle of penal liability in the IPC (s 499, expln 4). Thus, the basic principle of English civil law of defamation is made the underlying principle of the IPC in case of defamation.

Words that may have the effect of provoking another person at whom they are uttered are made punishable under s 504, IPC, which deals with intentional insults offered with intent to provoke breach of the peace. The gist of the offence in s 499, IPC, seems to lie in the tendency of the statements, verbal or written, to create that degree of pain, which is felt by a person, who is subjected to unfavourable criticisms and comments.

There is another important difference between English law and Indian law in the matter relating to spoken defamation or slander. The latter cannot be the subject matter of criminal prosecution in England, except when it happens to be seditious or blasphemous. Slanderous words are never actionable criminally, except when they happen to be utterances against the state or state religion. The IPC recognises no such distinction classifying both as punishable.

Forms of Publication

Direct Communication to the Defamed

Direct communication to the defamed was held to be no publication under the IPC, by a majority of the Full Bench of the Allahabad High Court in *Taki Hussain*.[5] The accused sent a suit notice to a policeman, claiming damages for an unjustifiable search of his house made by the latter, attributing malice and bribery to him. At the instance of the policeman, a prosecution was launched against the accused for sending this suit notice which contained highly defamatory passages about the policeman saying that he received bribes, etc. The majority of the Full Bench held that there was no publication as contemplated under the section, as there was no communication to a third person other than the defamed. A similar judicial dictum can be traced in *Sukdeo Vithal Pansare v Prabhakar Sukdeo Pansare* ,[6] wherein the Bombay High Court ruled that making a defamatory statement and communicating it to a person other than the person concerning whom it is written is said to be publication.

However, where the accused knows that his communication will be read by others or will be known to others in the usual course of business, he will be liable. Thus, in *Sukhdeo*,[7] where the accused had, in his reply to the President of a Municipality, made a defamatory imputation and the President laid the reply before the Councillors in the ordinary course of business, the accused was held guilty of publication of defamatory matter under this section. However, it is held that a letter containing defamatory imputations dictated by a lawyer to his stenographer who transcribed it and then sent it to the concerned person does not amount to publication even though a third person comes to know the defamatory matter. Such a defamatory imputation practically does not go beyond the lawyer's professional range.[8] Similarly, a letter received by a lawyer containing scurrilous allegations or imputations about his client does not tantamount to publication.[9] Similar is the case of issuing of notice by a lawyer[10] or exchange of notices containing defamatory allegations, through lawyers, by the parties to a case.[11]

A letter containing defamatory imputations when is sent not to an individual but to a firm, meant to be read by all the partners of the firm, therefore, tantamount to publication.[12] Similarly, defamatory matter written on a post-card or printed on papers distributed broadcast constitutes publication.[13] However, defamatory matter sent through post but was not published does not warrant conviction of the accused for defamation.[14]

Publication by Repetition

The term 'publication' includes repetition or republication of a libel already published. So, if a newspaper reproduces a libellous article from another, and makes the article its own, it is liable to all the consequences resulting from its publication. At best, the fact that the article was merely a reprint would help to reduce or mitigate the sentence or damages awarded. As Best CJ put it: 'Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified or even excused by wrong'.[15]

One will be held liable for circulating defamatory rumours. A rumour was current that a fall in the shares of a certain railway company was due to the failure of its chairman. The defendant repeated the rumour by saying 'You have heard what has caused the fall. I mean the rumour about the South-Eastern Chairman having failed'. The court held that the existence of the rumour afforded no defence to its publication by the defendant.[16]

This principle has been followed by the high courts in India also. In the Indian decision of *Howard*,[17] where the accused republished an extract of a defamatory article from another paper, he was held guilty. It was held that the fact that another journal had also published the same matter could not be a defence for escaping liability.

The IPC makes no exception in favour of a second or third publication as compared with the first. The publisher of a defamatory matter is responsible even though he republishes the defamatory matter.[18] He, undoubtedly, has to take utmost care to scrutinise it even he reproduces a defamatory matter published in another newspaper.[19]

Means of Publication

There are four types of publication: (1) words spoken; (2) written; (3) signs; and (4) visible representations. The distinction between written defamation and spoken defamation, ie between libel and slander, is not maintained in the Indian law.[20] The words 'visible representation' will include every possible form of defamation, which human ingenuity can devise. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel. Illustration (b) to s 499 is an instance of defamation committed by signs and illust (c) by visible representation.

Printed Matters: Liability of Editor and Others

Strictly, in the eye of law, the editor, printer, publisher and even the distributor is liable for the printing or publishing of any defamatory matter. It is not open to the publisher to contend that he had no knowledge that the paper contained any defamatory article.[21]

In *Balasubramanai Mudaliar v Rajagoplachariar* ,[22] the Madras High Court held that the editor of a journal is in no better position than an ordinary subject with regard to his liability for libel. He is bound to take due care and caution before he makes a libellous statement. However, it has been held in an earlier Madras decision, *Ramaswamy v Lokananda* ,[23] that it would be sufficient answer to a charge of defamation against the editor of a newspaper, if, he proves that the libel was published in his absence and without his knowledge, and that he had in good faith entrusted the temporary management of the paper during his absence to competent persons.

IMPUTATIONS CONCERNING 'ANY PERSON'

The word 'imputation' indicates something bad about another and implies the attribution of evil, the making of an accusation, allegation, insinuation or a charge against a person.

The words 'complained' of must contain an imputation concerning a particular person or persons whose identity can be established. Unlike in the civil law of defamation, where the intention of the person making the imputation is immaterial, as far as s 499 of the IPC is concerned, the imputation made by any person must at least be believed to harm the reputation of such person. In other words, a random statement not directed against any particular man or class of men is outside the scope of the section. Further, the words 'intending to harm' also indicate that intention is the gist of the offence under the IPC.

The element of malice or legal malice, which is all important in the civil law of defamation, is not an essential constituent element so far as the definition of defamation under the IPC is concerned. So, in the case of *Palani Asari*,[24] in which the accused gave out that the complainant should be outcast for having had intercourse with a *pariah* woman, the magistrate acquitted him on the ground, that, in the absence of actual ill-will, the imputation made by the accused must be accepted as being made bona fide. However, the high court disapproved of this finding and held that where the words were prima facie defamatory, malice may be presumed, unless a case of privilege is made out.

INTENTION TO INJURE

By s 499, the person who defames another must have done it 'intending to harm or knowing or having reason to believe that such imputation will harm the reputation'. Intention to cause harm to reputation of a person is *sine qua non* of the offence of defamation.[25] The essence of the offence of defamation is the harm caused to the reputation of a person. The commission of offence of defamation or publishing any imputations

concerning any person must be 'intending to harm or knowing or having reason to believe' that such imputation will cause harm.[26]

However, defamatory words or imputations that merely tend to injure a person in his trade or profession are insufficient to initiate an act ion for defamation. Such a statement, though likely to injure him in his business, does not reflect either on his private or in his business character or reputation. It is, therefore, not defamatory to write and publish about a trade's man that he has ceased to carry on his business, or that his business has been, or is about to be acquired by another firm.[27]

It has also been held that words of common abuse such as 'you idiot' 'you scoundrel' and others, which convey no definite imputation harmful to one's reputation do no constitute defamation.[28] The same view was taken in the *Amir Hasan* case.[29] The accused was a pleader for the defendant in the case of *Ram Ghulam v Mendailal* , then being heard before a *munsiff* and during the course of his argument while speaking of the status of the parties said. 'Why, who was Ram Ghulam's father? He died when he was scraping grass'. At this, Ram Ghulam put his head through a small door in the *munsiff*'s court and said: 'What does Amir Hasan know of pleading? Up to yesterday, he and his father were peddlers and hawked about small wares through the streets'. These expressions gave rise to mutual prosecutions and convictions, but Straight J quashed the convictions, on the ground that the words were 'no more than vulgar abuses, which did not amount to defamation'.

PART B - ANALYSIS OF PROVISIONS OF SECTIONS 499 AND 500, INDIAN PENAL CODE 1860

EXPLANATION 1: DEFAMATION OF THE DEAD

According to this explanation, the imputation must not only be defamatory of the deceased, but it must also be hurtful to the feelings of his near relatives. The question depends upon the harm caused and not the harm intended, for in the case of the deceased, the latter test is inapplicable.

EXPLANATION 2: DEFAMATION OF A COMPANY OR A COLLECTION OF PERSONS

A corporation or company cannot be defamed in respect of a charge of a murder, complaint of incest or adultery, because it cannot commit those crimes. The words complained of must attack the corporation or company in the method of conducting its affairs; must accuse it of fraud or mismanagement; or must attack its financial position.[30]

Scope of Explanation 2--The Class or Community Must Be Clearly Identifiable

The Supreme Court examined the scope of expln 2 of s 499, in *G Narasimham v TV Chokkappa* .[31] This case concerned a private complaint case under ss 500 and 501, IPC, filed by the respondent as Chairman of the Reception Committee of the *Dravida Kazhakam* (DK) against the editors and publishers of three newspapers from Madras--*The Hindu*, *Indian Express* and *Dinamani*. The complaint was regarding a news item, which was published by the three newspapers about a certain resolution passed in a conference of the DK held on 23 and 24 January 1971. It was the contention of the complainant that the resolution passed was: 'It should not be made an offence for a person's wife to desire another man'.

However, the news items reported that the conference passed a resolution requesting the government to 'take suitable steps to see that coveting another man's wife is not made an offence under the Indian Penal Code '. The complainant felt that this form of reporting was a distorted reporting, which was a travesty of the truth and highly defamatory, so as to tarnish the image of the conference.

The Supreme Court examined expln 2, s 499, and stated that a defamatory imputation against a company or a collection of persons falls within the definition of defamation. The language of the section was wide including within its fold not just a company or an association, but also any collection of persons. However, the court held:

> ...[S]uch collection of individuals must be an identifiable body so that it is possible to say that with definiteness that a group of particular persons, as distinguished from the rest of community, was defamed. Therefore, in a case where explanation (2) is resorted to, the identity of the company or the association or collection of persons must be established so as to be relatable to the defamatory words or imputations. Where a writing inveighs against mankind in general, or against a particular order of men, eg, men of gown, it is no libel. It must descend to particulars and individuals to make it a libel.[32]

The main issue was whether the conference, as distinct from the party, namely, *Dravida Kazhakam*, was a determinate and an identifiable body so that defamatory words used in relation to the resolution passed by it would be defamation of the individuals who comprised it. The court held that:

> ...[I]t is impossible to have a definite idea as to its composition, the number of persons who attended, the ideas and ideologies to which they subscribed, and whether all of them positively agreed to the resolution in question. The evidence was that the person presiding read out the resolution, and as no one got up to oppose it, it was taken as approved by all. The Conference clearly was not an identifiable or a definitive body so that all those who attended it could be said to be its constituents who, if the conference was defamed, would in turn, be said to be defamed.[33]

On the above reasoning, the Supreme Court quashed the proceedings before the magistrate's court.

It is a well-settled principle that the words or imputations complained of defamatory need to relate to some particular person(s) whose identity can be established. If such statements do not show any imputation aimed at any particular individual or individuals, but equally apply to others although belonging to the same class, it does not amount to defamation. Defamation of an unidentifiable class does not come within the ambit of the second explanation of s 499 of the IPC.[34]

Distinct Character of Body Allegedly Defamed Essential

The class referred to must not be too large to cease to be distinct from the members of a certain trade or profession, as for example, law or medicine. So, if a person were to inveigh against the lawyers as a class, calling them thieves, or medical men a class of cut-throats in disguise, or the police force as a hotbed of corruption, there would be no indictable libel because the class is too large and the generalisation too sweeping to affect any of its members. In *Narottamdas v Maganbhai* ,[35] the Gujarat High Court held that describing lawyers as dispute brokers in the editorial article of a newspaper is not defamatory.

There was an agitation of lawyers in Gujarat with respect to the appointment and transfer of Chief Justices of high courts. On account of the agitation, the lawyers ceased to participate in court proceedings and resorted to *satyagraha*. An editorial in a newspaper criticised as to whether it behooves to the lawyers as a class to resort to strike. The lawyers were, inter alia, described as *kajia dalal* or dispute brokers in the editorial. A complaint for defamation was filed by a lawyer against the editor.

The Gujarat High Court held that according to the complainant, the editorial did not refer to him personally or to any other individual, but referred to the lawyers as a class and at the most the lawyers of Gujarat. Thus, the alleged defamation could not be referred to a determinate or identifiable section or class of lawyers as distinguished from the rest of the members of the lawyers' fraternity. Further, the word *kajia dalal*, ie, brokers in disputes, is used in the editorial in relation to the lawyers as a class and is not referable to a determinate section of lawyers, namely, the lawyers who were participating in the agitation.

Defaming a Community in General--Nature of Liability

In *Dhirendra Nath Sen v Rajat Kanti Bhadra* ,[36] the complainant, a member of an *ashram* alleged that defamatory statements purported to have been published in a newspaper against the spiritual head of the *ashram* were defamatory. The complainant's contention was that the impugned publication having lowered the reputation of the head of the *ashram* in public estimation had also lowered the reputation of the complainant who was a member of the *ashram*. The Calcutta High Court rejected the complaint on the ground that the mere fact that the feelings of the complainant have been injured in consequence of a defamatory statement against the religious head, affords him no basis under the law to prosecute the accused for defamation. As a rule, defamation of a class is not actionable.

A similar allegation that an article defamed an entire community, formed the basis of the complaint in *MP Narayana Pillai v MP Chacko* ,[37] considered by the Kerala High Court. An article consisting of two parts was published by the petitioner in the newspaper under the caption 'Syrian Christians and National Integrity'. The first part contained compliments and encomiums to the Syrian Christian community as a whole. Their great and proud ancestry was referred to. The second part lamented their inaction and consequent unemployment and poverty, which forced some of their women folk to migrate abroad in search of employment and some ladies were forced to resort to prostitution to earn a living or to become nuns. At the same time, priests and nuns were praised for doing great service to mankind over and above spiritual service to the society. The article also contained statements indicating that Mother Teresa belonged to the Syrian Christian Community and was doing her missionary work for publicity alone, while nuns in many institutions were doing silent selfless service to the society without any desire for publicity.

The court held that in such cases, the article as a whole must be read and the impact and effect of the imputations has to be considered in the background of the entire facts and circumstances stated therein. If in the second part of the publication, there was something disreputable, but it was removed by the other part and the conclusions, then the disreputable part alone cannot be taken out in the process of picking and choosing in order to venture a prosecution for defamation. The circumstances under which and the portions of the article, wherein the alleged defamatory imputations occur, and their impact in the mind of the reader on reading the article as a whole has to be considered.

Defamation Cases--Only Aggrieved Party Can File Complaint

The Kerala High Court also commented on the fact that the rule of procedure in cases alleging defamation is not the same as in ordinary criminal cases; for, s 199, CrPC, provides that in contrast to the general rule that anyone can file a criminal complaint irrespective of whether the complainant is the victim or aggrieved party or not, in the case, of defamation alone, the complaint can validly be filed only by the party aggrieved or affected by the defamatory imputations. In the present case, the complaint was not even filed by the person of the community directly aggrieved, and hence, the complaint was held not to be proper and therefore liable to be quashed.

In *Swamy Aroopananda v Bagmisri Nilamadhoboa Brahma* ,[38] the Orissa High Court quashed a complaint filed by an advocate for publication of defamatory and false allegations against the Commissioner of Endowments on the ground that he was not an aggrieved person.

In *John Thomas v Dr K Jagdeesan* ,[39] the Supreme Court ruled that the Directors of the company against which defamatory imputations are made are aggrieved parties. They have, therefore, the locus standi to file the complaint.

Defaming a Government Institution--When Liable

In *Sasikumar B Menon v S Vijayan* ,[40] the Kerala High Court considered a case filed by the Regional Superintendent of the Narcotic Control Bureau, Trivandrum, against the petitioner-accused, stating that the latter had telecast an interview with some of the accused persons in a case and telecast statements without ascertaining the truth of the same from the complainant. The statements carried allegations against a policeman, who had arrested and allegedly tortured them. The complainant felt the reputation of the Kerala Police in general was affected by the publication. Hence, the accused was liable for offence under s 500 read with 34, IPC.

The high court held that the Kerala Police is not a definite and determinable body, but is an ever-changing body. Persons are constantly retiring and being recruited anew. Hence, the character of the police force keeps changing every now and then. The test being that the association or collection is such that they are ascertainable and the words or imputations can be shown to be against all the members of the association or collection, in which case any individual member could file the complaint. In this light, the complaint was held not to be maintainable, as the complainant was not a person affected by the so-called defamatory statement.

Further, no specific allegations had been made in the complaint as to the specific words which constitute defamation. The failure to extract the words constituting defamation in its entirety in the complaint was held to be a defect, which cannot be cured at a subsequent stage. On this ground, the complaint was quashed.

EXPLANATION 3: DEFAMATION BY INNUENDO

When a particular passage is prima facie non-defamatory, the complainant can show that it is really defamatory of him from the circumstances and nature of the publication. The explanation by which the passage is said to be defamatory is called innuendo. The language of irony or sarcasm very often will be more bitter, forcible and impressive than a bad statement. It is then necessary for the prosecution to establish that the words, though innocent in appearance, were intended to be used in a libellous sense. So, it may be libellous to say of an attorney that he is an honest lawyer meaning thereby he is being reverse of being honest.

EXPLANATION 4: WHAT IS HARMING REPUTATION?

This explanation specifies the various ways in which the reputation of a person may be harmed. It says that the imputation must directly or indirectly lower the moral or intellectual character of the person defamed.

This language of expln 4 is very loose. It was held to include degradation of caste and community, at feasts and so on. In a case, the complainant was made an outcaste by a *panchayat* of his caste-fellows, on the ground that there was an improper intimacy between him and a woman outside his caste. Some of his caste people circulated a letter to the other members of his caste, generally stating the fact of the complainant's excommunication and the reason therefore and requesting all caste men to refrain from dining with him or receiving him into their houses. The statements were held to be defamatory and the undue publicity given and the trivial occasion taken advantage of for that purpose were held not to save them under any of the *exception*.[41] In *Thiagaraya v Krishnasami* ,[42] the complainant, a Brahmin, who had been put out of caste was readmitted into it by the executive committee of the caste after the performance of the expiatory ceremonies. The accused, who disapproved this re-admission of the complainant, published and distributed, after an interval of six months, in the *bazaar*, to all people there, a leaflet describing the complainant as a sinner *(doshi),* which would subject one to the penalty of excommunication from society. It was held that the indiscriminate circulation of the leaflet constituted defamation.

However, where the complainant was invited by the accused to a feast at the latter's house along with large number of other people and when he sat down to dinner, he was asked by the accused to leave the place without giving any reason or making any imputation whatever, it was held that as there was no imputation calculated to harm the reputation of the complainant, the charge of defamation thus could not be established.[43] But where a Hindu complained that at the time of a feast, the accused declared that he had been outcast and was not fit to sit down, it was held that he was guilty of defamation.[44]

In the case of *Panna Lal*,[45] the accused published, at an election contest, a poster against the complainant, his rival candidate, who was a barrister, saying: 'The hollowness of Mr *X's* capacity as a Barrister has been exposed.' It was held that the accused was guilty of defamation, as the imputation was calculated to lower in the estimation of others, the intellectual qualities and the aptitude for his profession as a barrister.

An important case in which expln 4, s 499 came to be explained by the Supreme Court was the case of *Shatrughan Prasad Sinha v Rajbhau Surajmal Rathi* .[46] In this case, the complainant had filed a criminal complaint alleging offence under ss 295A and 500, IPC, against the accused-appellant and the editor and publisher of *Stardust* for having carried defamatory and damaging statements about the *Marwari* community in an interview, which were such that they outraged the religious feelings, apart from defaming the community. However, the complainant had concentrated on establishing the offence under s 295A (which had been quashed by the high court), and there was no specific allegations as to how the offence of defamation was made out. Thus, the Supreme Court held that a reading of the complaint does not reveal any of the allegations constituting the offence of defamation defined under s 499 and punishable under s 500, IPC. The contents of the interview were alleged to be defamatory against the *Marwari* community, lowering their reputation in the eyes of the general society. However, these allegations were not made in the complaint. The complaint was therefore quashed.

The ratio of the above Supreme Court ruling was relied upon by the Madras High Court in *J Jayalalitha v Arcot N Veerasamy* .[47] The private complaint alleging offence under s 500, IPC, was filed by the former Chief Minister of Tamil Nadu, J Jayalalitha, against the sitting minister of the Tamil Nadu Government, alleging that the accused had made defamatory statements against her in connection with the attack made on the former Chief Secretary of Tamil Nadu on 17 August 1996. The Madras High Court held that reading the provisions

of s 499 along with expln 4 makes it clear that in the complaint, there should be an averment to the effect that because of the imputation, the complainant's reputation has been lowered in the estimation of others. This important ingredient was, however, missing in the complaint. Thus, in the absence of specific averment in the complaint as to the reputation of the complainant being lowered in the estimation of others, it was held that there was no ground for proceeding further with the case by taking cognisance of the complaint.

EXCEPTIONS PROVIDED IN SECTION 499

The ten exceptions to s 499 state the instances in which an imputation, prima facie defamatory, may be excused. They are occasions when a man is allowed to speak out or write matters, which would ordinarily be defamatory.[48] These ten exceptions may be briefly stated thus:

(1) Imputation of truth for public good.
(2) Public conduct of public servants.
(3) Public conduct of public men other than public servants.
(4) Comment on cases and conduct of witnesses and others concerned.
(5) Merits of decisions and judicial proceedings.
(6) Merits of public performances, literary criticisms etc.
(7) Censure in good faith by one in authority.
(8) Complaint to authority.
(9) Imputation for protection of interest.
(10) Caution in good faith.

The exceptions may further be grouped thus:

(1) Exception 1 corresponds to the plea of justification being a bare statement of truth for public good.
(2) Exceptions 2, 3, 5 and 6 correspond to the plea of fair comment on a matter of public interest.
(3) Exception 4 covers the plea of a fair report of judicial proceedings.
(4) Exceptions 7 and 8 cover the case of censure by a lawful authority passed in good faith and accusation made to a lawful authority in good faith.
(5) Exceptions 9 and 10 cover the case of imputation made in good faith by a person for protection of his interest and for public good and the case of caution intended for the good of the person to whom it is conveyed for the public good.

It may be pointed out that the ninth exception states a general principle, of which exceptions 7, 8 and 10 are particular instances, so that the last four exceptions really fall under what is known as privilege, ie, communication made on a privileged occasion, which again means one made in the discharge of a duty or protection of an interest in the person who makes it. However, for our purpose, it is better that we should study these exceptions seriatum as provided in the IPC than following any other order, however logical it may be.

First Exception: Truth for Public Good

This Exception recognises the publication of truth as a sufficient justification, if it is made for public good. Truth by itself is no justification in criminal law, although it is sufficient justification in the civil law of torts. In England, according to Lord Campbell's Act 1843, it would be a good defence if the accused justified his libel on the ground that: (1) it was true; and (2) that its publication was for public benefit; but (3) such defence cannot be enquired into, unless it is expressly pleaded. In this respect, the law is the same in India also. According to s 106, the Indian Evidence Act 1872 (the Evidence Act), the burden is cast upon the person who set up similar pleas in avoiding guilt. We must remember that both under English and Indian law, truth is no justification whatsoever against the defamation of the state known as sedition and against one's religion (s 298, IPC).

The First Law Commissioners recommended that truth by itself ought to be recognised as a valid defence in all cases, but the legislature refused to accept it. As it is, the law is now definite that truth is no justification unless it is for public good. The authors of the IPC observed:

> There are undoubtedly many cases in which the spreading of true reports, prejudicial to the character of an individual, would hurt the feelings of that individual, without producing compensating advantage in any other quarter. The proclaiming to the world that a man keeps a mistress, that he is too much addicted to wine, that he is penurious in his house-keeping, that he is slovenly in his person; the raking up of ridiculous and degrading stories about the youthful indiscretions of a man, who has long lived irreproachably as a husband and a father, and who has attained some post which requires gravity and even sanctity of character, can seldom or never produce any good to the public sufficient to compensate for the pain given to the person attacked and to those who are connected with him.

The truth of an allegation need not be literally proved; it is enough if it is substantially true. So, where the accused was indicted for publishing a libel on the prosecutors contained in the following words, '*L*, *B* and *C* are a gang who live by card sharping', and the accused justified the libel giving specific instances in which persons named had been cheated by the trio in cards. The court held that it was sufficient to sustain the plea that two specific instances had been proved in substance, and that it was not necessary to prove the other instance, alleged. But where a libel was headed, 'How lawyer *B* treats his clients' followed by a particular case in which one client of lawyer *B* had been badly treated, it was held that proof of one instance did not justify the heading which suggested that *B* generally treated his clients badly.[49]

No amount of truth will justify a libel unless its publication was for the public good. The term 'public' includes any class of the public or community. Thus, public men such as generals, judges, members of the public bodies, authors, act ors, lawyers, doctors, and in fact all other professional men, whose acts concern the welfare of the public would come under it, so that the publication of truth concerning them would be protected if it is for public good.

However, giving unnecessary publicity cannot be for public good. In *Sankara*,[50] one *N* had incurred the social displeasure of his caste-people by attending a widow-marriage, which though legal, was opposed to the views of the orthodox community. The *Guru Sankara Narasimha Bharathi* published a circular proclaiming *N* as an outcaste and forbidding his disciples and the public in general to dissociate with *N* until he had duly atoned for his sin. He also sent a registered post card of similar purport to *N*. It was held that though the accused's publication to his disciples was privileged, his publication of the fact to the complainant in an open post card, which might have been read, even by those who were not his disciples, rendered his act criminal by reason of the undue publicity given to the sentence, passed on *N*. Thus, undue publicity destroys privilege.

For getting benefit of the exception, it is necessary for the accused to prove that the statement made by him was substantially true and was for public good.[51] However, a court, while deciding veracity of such a statement and the protection of public good, is not expected to weigh it in a fine scale. It has to give some allowance to the accused.[52]

Second Exception: Fair Criticism of Public Servants

The first exception deals with allegations of facts, while the second exception deals with expressions of opinion. In the second and the following exceptions, what is protected is opinion and not assertion. They are really fair comments upon public men on matters of public interest. Every citizen has a right to comment on those act s of public men, which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander. A writer in a public paper has the same right as any other person, and it is his privilege, if indeed not his duty, to comment on the acts of public men, which concern not only himself, but also concern the public and the discussing of which is for the public good. Moreover, where a person makes the public conduct of a public the subject of comment, and it is for the public good, he is not liable to an act ion if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no wilful misrepresentation of fact or any misstatement, which he must have known to be a misstatement, if he had exercised ordinary care.

Men in public positions, even though official, can claim no immunity from fair criticism. This is the essential nature of the rule of law in all democratic countries. Similarly, the authors and publishers of books have no special privileges and are in no better position than any other man.

But the person who undertakes to criticise the acts of a public man, must take care not to assert that which is not true as the basis of criticism, and he is bound not to conceal wilfully anything which would show that the criticism is not well-founded. Also the opinion expressed must be in good faith.

Element of Good Faith--Importance

The term 'good faith' appears in exceptions 2, 3, 5, 6, 7, 8, 9 and 10. Section 52 , IPC , defines 'good faith' thus: 'Nothing is said to be done or believed in good faith which is done or believed without due care and attention'.

The IPC regards honesty as immaterial and the presence of 'care and attention' as the most crucial component. Absence of good faith within the meaning of this section means simply carelessness or negligence, and want of due care and caution does not imply any idea of dishonesty. Due care and attention in arriving at any belief is exactly the same thing as reasonable and probable cause, which often depends upon the whole circumstances of the case and not upon the omission to make any specific inquiry, which might have thrown light upon it. It has been held in many cases in India that the defendants in this class of cases must show, not only that he believed the statements which he made on a privileged occasion, but that he had some reasonable ground for making the imputation, either by showing that it was true, or that, *he had reasonable ground for believing it to be true* considering the source from which information was received.[53] The absence of reasonable cause for making an imputation is evidence of the absence of good faith.

The Opinion must be Fair and Honest

No opinion can be considered fair, unless it contained some substratum of truth. In *EI Howard v M Mull* ,[54] the plaintiff EI Howard, Director of Public Instruction in the Bombay Presidency, had sued the partner of the *Times of India* for defaming him in a series of articles, in which the defendant accused the plaintiff of prostituting his official position for the purpose of securing private gain made on the sale of school books of which he had improperly appropriated the copyright. The Bombay High Court held that the defendant gave no evidence of the truth of his allegation and the fact that he was a journalist did not clothe him with greater immunity than any other member of the public. He was mulcted in damages to the sum of Rs 2500.

The right does not mean that a man can invent facts and comment upon the facts so invented in what would be a fair and bona fide manner on the supposition that the facts were true. If the facts, upon which the publication is sought to be excused, do not exist, the foundation of the plea fails. Lord Herschell in *Davis v Shepstone* ,[55] while delivering the judgment of Privy Council, stated thus:

> There is no doubt that the public act s of a public man may lawfully be made the subject of fair comment or criticism, not only by the press but by all members of the public. But the distinctions cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved act s of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.[56]

Third Exception: Fair Comment on Public Conduct of Public Men Other Than Public Servants

In fact this amounts to criticism on public questions. With the march of progress in every democratic state, citizens take an ever-increasing interest in public affairs and these publicists form vigilant guardians of the rights of the people.

The drafters of the IPC wrote thus about this exception:

> There are public men who are not public functionaries; persons who had no office may yet take very act ive part in urging or opposing the adoption of measures in which the community is deeply interested. It is clear, therefore, that every person ought to be allowed to comment in good faith on the proceedings of these volunteer servants of the public, with the same freedom with which he is allowed to comment on the proceedings of the official servants of the public.

> In order to succeed on a plea of fair criticism, the accused should prove that his expression of opinion was fair and honest and the alleged fact on which the opinion was based was true.

Rights of the Press

Media and the media persons (covering both print and electronic media), in general have no higher or lesser rights or freedoms than what the ordinary citizen enjoys. The basic premise in considering the issue of defamation *vis--vis* media was stated long back in the case of *Campbell v Spottiswood* ,[57] in which Crompton J held:

> I have always in my experience heard it laid down that although you may attack a public person for anything he has done publicly, the moment you go beyond that and impute wickedness to him, then you come with the rule with regard to all who publish a libel, which is that you must prove that the imputations are true.

However, the law is that where a matter is of public interest, the court ought not to weigh any comment on it in golden scales, and that some allowance must be made for heated passion and what the writer might consider righteous indignation. The fact that the language was exaggerated, or even grossly exaggerated, does not make the comment necessarily unfair, if, it was such as any fair man might have made in the circumstances. So where the accused published his view concerning a municipality that the members knew that there was not one among them fit to be a chairman and that the government had ordered that the chairman should be a revenue divisional officer, which was a fact, the court acquitted the accused holding that his statement did not exceed the limit of fair comment.[58]

In *Jawaharlal Darda v Manoharrao Ganpatrao Kapsikar* ,[59] the Supreme Court held the publisher of the newspaper who published a statement given by the minister on the floor of the House about misappropriation of government money not guilty of defamation. However, there cannot be a general rule governing liability of an editor of a newspaper as every case has its different set of facts and circumstances. Therefore, each case has to be decided in the light of facts and circumstances thereof.[60]

Summary of Principles Governing Rights of Press and Media

The principles relating to alleged rights, privileges, duties and responsibilities of the newspapers in respect of the publication of news items as also cases relating to the doctrine of fair comment, may be summed up as follows:

(1) That no kind of privilege attaches to the profession of the press as distinguished from the members of the public. 'The freedom of the journalist is an ordinary part of the freedom of the subject and his privilege is not higher than that of the members of the public.' The range of his assertions, criticisms or comments is as wide as, and no wider than that of any other citizen.

(2) Even so, in the context of a welfare state aiming at social and economic justice to all, one cannot afford to ignore the role of a newspaper editor as a people's agent, zealous to give outlet to public feelings, analyse public opinions and to ventilate public grievances to counteract complacency, and above all, to create and educate healthy public opinions conducive to public welfare. Hence, it will be proper to bear in mind this consideration in judging factually, the liability of the newspaper editor and its extent.

(3) The defence of fair comment applies only to expressions of opinion or imputations on character and not to assertion of facts. If the aspersions of facts are in themselves defamatory, they can be justified only by their truth and publication for the public good and with reference to exceptions, and a genuine belief in the reality of aspersions can be of no avail and no defence of fair comment can possibly arise.

(4) If the opinion or imputations on character purport to be based upon and are integrally connected with facts, the person claiming benefit of exceptions must prove those facts. It is not enough for him to say that he believed those facts. Fair comment cannot justify a defamatory statement which is untrue in fact.

In *P Ramaswamy v M Karunanidhi* ,[61] the Madras High Court held that the plea of fair comment would not be sustained, unless facts were proved which made it reasonable to make such a suggestion. Where biased and sordid motives, which are not warranted by the facts, are imputed to a person, the defence that the publisher bona fide believed that he is publishing what is true, will not be a defence in point of time.

'Good faith' means good faith and also exercise of care and attention. 'Due care and attention' means that the libeller should show that he has taken particular steps to investigate the truth and has satisfied himself from his enquiry as a reasonable man that he had come to a true conclusion. Mere subjective belief, without any objective basis is not a dependable criterion for substantiating the publication, on the ground that it was made in good faith and for public good.

In *G Chandrasekhara Pillai v G Raman Pillai* ,[62] the Kerala High Court has pointed out that the plea of good faith implies the making of a genuine effort to reach the truth and a mere belief in the truth, without there being reasonable grounds for such a plea, is not synonymous with good faith. The ninth exception, therefore, covers two matters; proof of good intention and the exercise of reasonable care and skill, having regard to the occasion and circumstances. Mere subjective belief, without any objective basis is not a dependable criterion for substantiating the ninth exception; and unnecessary aspersion is indicative of want of good faith.

In *Sahib Singh v State of Uttar Pradesh* ,[63] the Supreme Court has held that the exceptions 8 and 9 to s 499 will not afford protection to the editor of a paper *Kaliyug*, where he had published an article attributing bribery to the public prosecutors and assistant public prosecutors of UP as a whole. The defamatory passage ran as follows:

> How justice stands at a distance as a helpless spectator of the show as to the manner in which the illicit bribe money from plaintiffs and defendants enters into the pockets of Public Prosecutors and Assistant Public Prosecutors and the extent to which it reaches and to which use it is put.

The public prosecutors and assistant public prosecutors at Aligarh filed a complaint against the accused editor with the sanction of the state government. The accused contended that the complainants in a group did not constitute the 'person' referred to in s 499, who should be the object of defamation. But the court rejected that contention in the light of expln 2 of s 499, which provides that it may amount to defamation to make an imputation concerning a company or an association or collection of person as such. Hence, people responsible for publishing anything in newspapers should take good care before publishing anything which tends to harm the reputation of a person. It observed:

> The press has great power in impressing the minds of the people and it is essential that persons responsible for publishing anything in newspapers should take good care before publishing anything which tends to harm the reputation of a person. Reckless comments are to be avoided. When one is proved to have made defamatory comments with an ulterior motive and without the least justification motivated by self-interest, he deserves a deterrent sentence.[64]

In *Kartar Singh v State of Punjab* ,[65] the accused persons were members of the Amritsar District Motor Union, which was protesting against the decision of the state government to nationalise motor transport by taking out a procession. During the procession, they allegedly shouted derogatory and defamatory statements against the transport minister and the chief minister. Hence, cases came to be filed against them under s 9 of the Punjab Security of State Act 1953.

The trial court convicted the accused for offence under s 9 of the said enactment, which was confirmed by the high court. However, the Supreme Court held that while the slogans were indeed indecent and vulgar, and were directed against the transport minister and the chief minister respectively, their protest against the scheme of nationalisation of transport services could not be said to be such as would undermine decency or morality. The strata of society from which the accused hailed being one habituated to indulge freely in vulgar words without the slightest effect on the persons hearing the same.

The court quoted two English cases to point out that 'whoever fills a public position renders himself open thereto. He must first accept an attack as a necessary, though unpleasant appendage in his office'. Further, 'public men in such positions may as well think it worth their while to ignore such vulgar criticisms and abuses hurled against them rather than give an importance to the same by prosecuting the person responsible for the same'.[66] The convictions were, therefore, set aside.

In *Dogar Singh & Anor v Shobha Gupta* ,[67] the complainant, Shobha Gupta, felt that the two petitioners-accused, along with others, in order to defame her, had given a written complaint to the Deputy Commissioner, Kapurthala, alleging malpractices in the Punjab Public School, Pugwara. They complained that the building was in unsafe condition, there was indiscipline amongst students, students of both sexes were allowed to meet and the Principal, Mrs Shobha Gupta, was turning a deaf ear towards the character of the students. An enquiry was launched by the sub-divisional magistrate (SDM) who found the allegations false and bogus and the petition of the accused persons was dismissed. In the private criminal case, the complainant alleged that the false complaint against her made to the deputy commissioner was maliciously made with the purpose of defaming her and her reputation, and to cause mental agony.

The high court considered the import of s 52, IPC, which provides for 'good faith'. As one of the exceptions provided that if an accused were to seek protection from exception 3 of s 499, it should be shown that they act ed in good faith. However, looking at the allegation made in the complaint memo, it could be seen that the accused had made reckless statements without ascertaining anything. This would definitely come within the purview of s 499, IPC.

Further, the random and reckless allegation made with regard to the free mixing of sexes in the school (which was proved to be without substance by the enquiry report of the SDM), was done without 'good faith' and was done to bring the individual and the school principal into disrepute and disrespect. Such an act is not justified exposure within exception 3 of s 499, but would certainly be a defamatory act . The accusation that 'the school was a meeting place of opposite sexes' was more than an expression of suspicion. By making this type of 'poisonous propaganda', no sane parents would like to send their children to the school. The high court, therefore, refused to interfere with the order of the additional sessions judge and directed that the trial in the defamation case should proceed.

Fourth Exception: Report of Proceedings of Courts of Justice

The ground on which the privilege of accurately reporting what takes place in a court of justice is based (as was pointed out by Lord Halsbury) on the fact that judicial proceedings are public. Thus, the publication of what takes place there, even if some matters happen to be defamatory to some individuals ought to be published, because such publication enlarges the area of the court and the public has a right to know what takes place inside the court. It follows that the report must fairly represent to the reader what he would have learnt for himself if he had been present.

The report of the evidence on one side without the evidence on the other, of the examination of a witness without the cross-examination, of the summing up or judgment, where such summing up or judgment gave only a one-sided view of the case, would not be a fair report and therefore would not be privileged. So, where the defendant published in detail the opening of the case by the counsel for the prosecution, but entirely omitted the examination and cross-examination of the prosecutor, the only witness, merely saying that his testimony supported the statement of his counsel, the jury considered the report unfair and the plaintiff was awarded 10 as damages.[68]

It is not, however, necessary that the report should be complete; in the sense of being verbatim, if it is substantially fair and correct, it is immaterial whether the proceedings were ex parte or not, or even whether the court had jurisdiction or not.

The report of the proceedings should be kept distinct from comments, if there are any. The reporter ought not to mix up comments of his own. It was held to be libellous to publish a highly coloured account of criminal proceedings mixed with the reporter's own observations and conclusions upon what passed in the court, headed 'judicial delinquency' and insinuating that the plaintiff, described as 'our hero' had committed a perjury.[69]

A sensational headline to the report is a comment, and if it is not strictly justified, may constitute a libel. Thus, the paper 'Observer' published a true and correct account of some proceedings in the insolvency court, but headed it by a sensational headline 'shameful conduct of an attorney'. This was held not to be justified.[70]

In the fourth exception, nothing is said as to 'good faith'; the only requisite being that the report should be substantially true. Such a report may, however, be punishable under s 292, IPC, if it contains obscene matter.

In England, reports of debates in Parliament are privileged on the same principle as that of judicial proceedings, namely, on the public policy, which entitles everyone to know what is going on in Parliament. In India also, an Act has been passed by Parliament conferring qualified privilege on newspapers, which publish substantially true reports of the proceedings of Parliament. In India, there is Parliamentary Proceedings (Protection of Publication) Act 1956, which confers, subject to public good, qualified privilege on the publication of substantially true report of proceedings in Parliament, either in a newspaper or from a radio broadcasting station in India. Although this Act stood repealed under an Ordinance--The Prevention of Publication of Objectionable Matters Ordinance, 1975--during the 1975 emergency, it was restored in 1977 by the Repeal Act 1977 (Act 14 of 1977) by the Janata Government, which repealed the 1975 Act. But the same privilege has not been extended to the state legislatures.

In *Jatish Chandra Ghose v Dr Hari Sadan Mukherjee* ,[71] it has been held that the Fourth Exception makes no concession in respect of the proceedings of the House of Legislature or Parliament. But we must remember that arts 105 and 194 of the Indian Constitution confer absolute privilege on members of Parliament and Legislatures in India for their speeches and votes on the floor of the House.

Fifth Exception: Comment on Cases

This exception protects bona fide comments on cases adjudicated, but not when they are still sub-judice. Everyone has a right to discuss fairly and bona fide the administration of justice as evidenced before courts. Justice Fitzgerald said thus:

> It is open to one to show that error was committed on the part of the judges or jury, nay, further, for myself I will say that the judges invite discussion of their act s in the administration of the law, and it is a relief to them to see error pointed out, if it is committed, yet whilst they invite the fair discussion, it is not open to a journalist to impute corruption.[72]

But the comment must be confined to the merits of the case including the conduct of parties, their agent and witnesses since the expression of such opinion must be made in good faith. It follows that it must be fair and honest, based upon reason or discussion and not merely declamation and invective, written not with a view to advance public good, but solely to bring into contempt and hatred the administration of justice or injure the character of individuals. So, it is not fair comment to say that the prisoner was acquitted, though he was really guilty, though of course, it would be fair to give reasons showing on what points, the judge had erred and why there had been a failure, of justice. So again, the critic may lament the state of the law, the administration of which leads to such startling result, but he cannot direct his shafts personally against the judge calling him a knave or a fool or implying as such, though it is quite different to say that the judges had misunderstood or misapplied the law or omitted to consider or apply it correctly. Such criticisms are daily made in the public press, and though they have a remote tendency to bring the administration of justice into contempt they are not defamatory, because they are equally protected by this exception and the Second Exception.[73]

It has been pointed out by the Delhi High Court in *Ashok Kumar v Radha Kishan* ,[74] following the Supreme Court decision in *Basir-ul-Huq v State of West Bengal* ,[75] that s 499, IPC, confers only qualified privilege within the corners of that section.

Section 499 confers only qualified privilege on certain occasions. It is common to speak of the statement as having privilege, but it is an occasion and not the statement, which is privileged. A party to a judicial proceeding enjoys only qualified privilege, because that is what is statutorily enumerated in the ninth exception to s 499. No absolute privilege can be claimed. That is available in the common law. The law of crimes in India is not a mosaic of statute and common law. It is pure and unalloyed codified law. The court cannot engraft on the provisions of the IPC, exceptions derived from the common law of England, which are based on public policy.

Sixth Exception: Literary Criticism

The object of this exception is that the public should have the benefit of free criticism of all public performances submitted to its judgment. As Lord Ellenborough observed: 'without liberty of criticism we neither have purity of state nor of morals'. Fair discussion is essentially necessary for the truth of history and ad-

vancement of science. This exception is intended specially to refer to literary and dramatic criticism of the words of literary men and dramatists. The essential conditions are:

(1) That the author must have expressly or by implication invited public criticism, which he may do by the mere act of publication, though he may not distribute his work for review;
(2) The criticism must relate to the merits of the performance as distinct from the general capacity of the performer; and
(3) It must be made in good faith.

These principles are clear from illusts (d) and (e). The term 'author' includes a designer of a public building, an inventor, a painter, an architect, an editor or a correspondent of the press and the like.

In *Merivale v Carson* ,[76] Lord Esher stated:

> Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit, if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case.

In *Merivale's* case, the critic misdescribed Merivale's play as immoral, though there was nothing immoral in it. The court held the defendant liable on the ground that he had overstepped the bounds of fair criticism. Similarly, where the defendant wrote an article in a newspaper advising an act or to return to his old profession, that of a waiter, when in fact the actor was never a waiter in his life, the defendant was held liable.[77]

Seventh Exception: Censure by One in Authority

This exception allows a person under whose authority others have been placed, either by their own consent or by the law, to ensure in good faith, those who are so placed under his authority, as far as regards matter to which that authority relates. However, the privilege does not justify publication in excess of the purpose or object which gives rise to it. A man may in good faith complain of the conduct of a servant to the master, even though the complaint amounts to defamation, but he is not protected if he publishes the complaint in a newspaper. Excess of publication destroys the privilege. The two essential conditions for the application of this exception are: (1) that the censure must be on the conduct of the person within the scope of the critic's authority; and (2) the censure must be passed in good faith.

In the Madras case of *Sukratendra Thirtha Swamiar v Prabhu* ,[78] where a *swami* issued a temporary interdict against two members of his caste, on the ground of their alleged inter-dining with *pariahs* (member of the *dalit* or scheduled caste community), and the interdict was issued ex parte in view of the apprehension that they might take part in the temple feasts to be held shortly thereafter, there was nothing to show that the *swami* was not going to follow up the temporary interdict with his final decision after hearing the person affected. It was held that the *swami* was not guilty of defamation. Caste associations are autonomous, the powers vested in their constituted heads being, subject to any custom, those necessary for the protection of interests committed to their charge. The court's only duty is to see that those powers are exercised in accordance with the principles of natural justice, that is, after the person to be affected by their exercise has been heard and his defence has received fair consideration.

Eighth Exception: Complaint to Authority

This exception refers to a complaint made to a superior touching conduct of his subordinate. The authors of the IPC remarked thus in relation to this exception: 'We allow a person to prefer an accusation against another, in good faith, to any person who has lawful authority to restrain or punish the accused'.

The two conditions for the protection under this exception are: (1) the accusation must be made to a person who has authority over the party accused, and (2) that the accusation must be preferred in good faith.

Persons in authority would include the King, President, ministers, members of the Houses of Parliament and other officials of state, civil or military. Besides, there are the magistrates and the judges and the police to whom all persons are entitled to represent their grievances, if it is within the scope of their authority to re-

dress the same. Besides the above, persons in domestic circles such as a husband, a guardian or a father would also come under the category of persons in authority.

Lawful Authority--Defect in Presentation of the Complaint to Proper Authority

However, the complaint must have been made to a lawful authority. If a complaint about the conduct of a postal peon is made to a medical doctor, certainly that complaint is beyond the scope. The essential principle is that if the authority to whom the petition has been given has some jurisdiction in the matter, then the petition is privileged; whether such jurisdiction be immediate or ultimate. But where the authority addressed has no jurisdiction at all over the subject matter of the complaint, then it is no more privileged than if the statement had been made to any other person.[79]

Is Communication Between Wife and Husband Privileged?

The question of whether the letters written by a husband to his wife containing defamatory imputations against the wife's father would be protected by the Eighth Exception to s 499, IPC, came to be considered in the case of *MC Verghese v TJ Ponnan* .[80]In this case, Rathi, the daughter of the appellant-complainant Verghese, was married to Ponnan. In July 1964, Ponnan wrote three letters to his wife Rathi, who was then residing with her parents in Trivandrum from Bombay, in which defamatory imputations were allegedly made by Ponnan against Verghese. Therefore, Verghese filed a criminal complaint before the district magistrate, who however held that letters between a wife and her husband or spouses containing defamatory imputations about another does not in law amount to publication, since husband and wife are one in the eyes of law. Relying on a English law, the district magistrate held that the communication was privileged, and no evidence could be given in the court in relation to that communication. In revision, the sessions court reversed the above order, on the ground that the doctrine of common law relied upon by the district magistrate that the wife and husband were one, could not be applied in India and s 122 of the Evidence Act, does not prohibit proof being tendered in courts of such letters. The district magistrate was directed to proceed with the case. However, the high court reversed this order.

The Supreme Court, relying upon an earlier Full Bench ruling[81] of the Madras High Court, observed that the exceptions enumerated in s 499 were exhaustive as to the cases they cover. Additional grounds taking recourse to English law could not be permitted over and beyond the exceptions already stated in s 499. Thus:

> A person making libellous statements in his complaint filed in court is not absolutely protected in a criminal proceeding for defamation, for under the eighth exception and the illustration to section 499, the statements are privileged only when they are made in good faith. There is authority therefore for the proposition that in determining the criminality of any act under the IPC, the courts will not extend the scope of special exceptions by resorting to the rule peculiar in English common law that the husband and wife are regarded as one.

On the question of whether the letters were barred from being tendered before the court under s 122 of the Evidence Act, the Supreme Court stated that while prima facie the communications may not be permitted to be deposed to or disclosed unless the husband consents, this fact, however, could not bar any other type of evidence being given in the trial. As a result, the matter was sent back to the district magistrate for fresh trial.

Ninth Exception: Imputation for Protection of Interests

The ninth exception rests on the ground that honest communications made in the course of business and of social intercourse should be duly protected so long as the parties act in good faith. The ninth and the tenth exceptions cover the case of imputation made in good faith by a person for the protection of his interest or for the public good, and the case of caution intended for the good of the person to whom it is conveyed or for the public good. In one sense, the ninth exception states a general principle of which exceptions 7, 8 and 10 are particular instances, so that the whole series of exceptions 7-10 fall under the heading of communications made on a privileged occasion, ie, one made in the discharge of a duty of protection of an interest in the person who makes it.

The ninth exception includes the first exception. It refers to any imputation made in good faith, whereas the first exception applies only to the imputations made for public good.[82] Under the ninth exception, the accused need not establish that every word that he has spoken or written is literally true.

The Supreme Court, in *Harbhajan Singh v State of Punjab* ,[83] has explained the true scope of the ninth exception to s 499 and distinction between the First Exception and the ninth exception. The complaint was that the accused, who was then the State Secretary of the Punjab Praja Socialist Party, had published in *Blitz Weekly*, an article highly defamatory of the complainant, Surinder Singh, son of the then Chief Minister S Pratap Singh Kairon. One of the alleged defamatory statements was that he was not only a leader of the smugglers, but that he was also responsible for a large number of crimes in the State of Punjab. The statement added 'that because the culprit happens to be the Chief Minister's son, the cases are also shelved up'.

The accused pleaded that the imputation made against the complainant were made in good faith and for public good falling under exception 9 of s 499. Anyhow, he did not

press his defence under the first exception. The Supreme Court, after examining in detail the evidence, held that to establish a claim of defence under exception 9, the accused will have to prove the element of both good faith and public good. Lack of personal malice was held to be one of the indicators of good faith, which was held to be proved in the facts of the case. Similarly, both the trial court and the high court had come to a concurrent finding that the publication was for public good. Since both the elements had to be established for claiming protection under exception 9, and in the instant case, both had been proved, the Supreme Court acquitted the accused.

The dictum of the Supreme Court in *Harbhajan Singh's* case was followed in *LC Randhir v Girdhari Lal* .[84]In this case, the accused, an employee in the Indian Bureau of Mines, who was dismissed from service, addressed a letter imputing corruption and bribery against the complainant, a fellow employee in Class I, an administrative officer in the same department, to a superior officer of the complainant. In the subsequent prosecution for defamation, the accused was held entitled to protection under the ninth exception to s 499. In the letter, it was alleged that the complainant had an expensive Lambretta scooter, Godrej almirah, Godrej refrigerator etc, and had invested large amounts in his son's business. Although, the exact particulars of the scooter, almirah, and refrigerator and the exact amounts invested in business differed from those mentioned in the letter, the Bombay High Court held that since articles mentioned in the letter were act ually purchased during this period by the complainant, and the accused's son had started his business during this period, alleging source from other quarters than that of his father but from his mother, the accused acted with due care and caution, at any rate, he was not reckless and there was preponderance of probability that he act ed in good faith. The high court, following the decision of the Supreme Court in *Harbhajan Singh's* case observed:

> In deciding whether an accused person acted in good faith under the Ninth Exception, it is not possible to lay down any rigid rule or test. The question has to be considered on the facts and circumstances in which the imputation was made, the malice, the due care and attention and satisfaction as appearing in the case where defamation is alleged. In this case as there was no evidence of malice, the accused was acquitted on the ground of his 'good faith'.

In *Sewakram Sobhani v RK Karanjiya* ,[85] the Supreme Court approved the principle that journalists do not enjoy any special privilege with regard to the publication of news items in newspapers even under art 19(1)(a) of the Constitution. It asserted:

> ...[J]ournalists are in no better position than any other person. Even the truth of an allegation does not permit a justification under First Exception unless it is proved to be in public good. The question whether or not it was for public good is a question of fact like any other relevant facts in issue. If they make assertions of facts as opposed to comments on them, they must either justify these assertions, or in the limited case, specified in the Ninth Exception, show that the attack on the character of another was for the public good, or that it was made in good faith.[86]

The court sent back the matter pertaining to the publication of a news item in the *Blitz*, as also a government report regarding illicit sexual relation between the complainant and a married lady, for retrial.

In *Janab Sultan Salahuddin Owaisi v Syed Vigaruddin & Anor* ,[87] the Andhra Pradesh High Court, after referring to, and relying upon a set of judicial dicta, also ruled:

> Publishers, Editors, Journalists and Reporters forming part and parcel of freedom of speech and expression, which no doubt includes freedom of press as well, are entitled to ventilate the views only within the permissible limits, permissible by law and not beyond thereto. They are expected to be careful and cautious while proceeding with publication of the matter and they cannot claim any special privilege as far as the law relating to defamation is concerned. It may be part of their lawful duties, but at the same time they also owe a duty to be careful and diligent in verifying such statements with care and caution before publishing them. Negligent and reckless allegations constituting defamatory statements can never be protected under the guise of any of the Exceptions.[88]

Privileges of Judges and Lawyers

The privileges enjoyed by various professionals like counsels, doctors, accountants, as also judges and so on are covered by the ninth exception to s 499. However, whether it is judges or counsels, there is no absolute privilege or protection accorded to them in law. They will be covered by the principles governing the operation of the ninth exception, namely, that they will have to prove good faith. Thus, there is only qualified privilege limited by good faith.

With regard to judges, s 97, IPC, no doubt does protect them for act s done when acting judicially and the illustration to the seventh exception of the section also protects judges, censuring in good faith the conduct of a witness. But the above provision will not cover the cases of remarks made by judges or magistrates in the course of their office, so as to exempt them from liability under this section.

The position of lawyers in terms of claiming privilege for statements made by them either in the course of examination of witnesses, arguments or other court proceedings, or in the form of drafting of affidavits, is the same as outlined for judges above. Thus, they also cannot claim absolute privilege, and at best can claim limited or qualified privilege.[89]

The issue with regard to conduct of counsels is compounded by the fact that they have to balance the clients' interest and are bound by the professional requirement of following the instructions in terms of legally putting forward their cases. There is conflicting opinion from the various high courts on the issue of privilege that counsels can claim.

While generally there is a trend towards ruling that advocates do not have unqualified privilege, there is also the contrary view that prosecutions must be carefully monitored, as there is the possibility of lawyers being unable to practice their profession fearlessly.

This view was expressed in *Parameswara Kurup v Krishna Pillai* .[90] In this case, the petitioner, who was a practising advocate, was charged under s 500 read with s 36 of the IPC. The complaint was that in the counter-statement filed by the first accused in some proceedings in the court, certain allegations were made against the complainant, which were false and defamatory, that similar defamatory imputations were made, in the counter filed by accused 2 to 4 in the same matter and in both, the petitioner being their lawyer had attested the counter statements, before they were act ually put into court.

It was held that even assuming that it was the lawyer who drafted her written statements, there could be no offence against him. A counsel owes a duty to his client and he must carry out faithfully his client's instructions.[91] If the client makes serious allegations against a party in a suit, it is the counsel's duty to plead those allegations in the plaint or written statement or other pleadings. The counsel could not be expected to be a judge and it is not for him to judge the correctness or otherwise of the statement made by the client. If serious and untrue allegations are made, he brings himself open to a prosecution for defamation, but he cannot be successfully prosecuted unless it is clearly shown that he had acted in bad faith or maliciously. The counsel can rely on the ninth exception to s 499, but he would lose that defence, if he abused his position and made allegations maliciously or for his own purpose.

A similar view was followed in *Filomena Pereira v Joao Loarenco Fernandes* ,[92]in which the Bombay High Court held that no complaint against an advocate is maintainable under defamation for any defamatory statement contained in an affidavit filed by him for his party in the case which contains disparaging remarks about the character of the opposite party. The court also said that unless the presumption is made that lawyers act without malice, no lawyer can discharge his duties towards his client and it will be impossible for him to practice.

Exceptions 8 and 9 of Section 499 , Indian Penal Code 1860

In *Chaman Lal v State of Punjab* ,[93] the Supreme Court has laid down certain principles with regard to the exceptions first, eighth and ninth to s 499, IPC. In this case, the accused who was at that time President of the Municipal Committee, publicly defamed the character of a nurse at the local hospital. He also wrote a letter containing imputations of her character to the Civil Surgeon of the hospital, which were later repeated before the civil surgeon. On a complaint filed against the accused under s 499, IPC, he pleaded justification alleging that the imputations were true statements made in good faith for public good. It was also stated that the letter containing imputations were sent to the Civil Surgeon, as the lawful authority having control over the nurse. The accused also produced a resolution alleged to have been passed by the residents bearing signatures of many of them, which he failed to prove through evidence. For the communication to the Civil Surgeon, the accused claimed privilege. The Supreme Court laid down that for the purpose of establishing good faith and bona fides, the following things have to be proved, namely:

(1) The circumstances under which the letter was written or words were uttered;
(2) Whether there was any malice;
(3) Whether the accused made any enquiry before he made the allegation;
(4) Whether there are reasons to accept the version that he acted with care and caution; and
(5) Whether there is preponderance of probability that the accused act ed in good faith.[94]

On all these issues, the sessions court and the high court concurrently found the accused guilty and he was sentenced to three month's simple imprisonment and a fine of Rs 1000 and in default thereof, to a further period of three months simple imprisonment. The Supreme Court, however, reduced the three months simple imprisonment to two months. With regard to the nature of the interest, which entitles one to the protection under the ninth exception, the Supreme Court said that the 'interest of the person has to be real and legitimate when communication is made in protection of the interest of the person making it. If that be so, then good faith is automatically drawn in and good faith obviously does not require logical infallibility'.

The court found against the accused with regard to the privilege claimed for the letter sent to the Civil Surgeon. The court said that the privilege under s 126 of the Evidence Act extends only to a communication upon the subject with respect to which the privilege extends and can be claimed in exercise of the right or safeguard of the interest which creates the privilege.

The distinction between the scope of operation of the eighth and ninth exceptions were considered by the Supreme Court in *Kanwar Lal v State of Punjab* .[95] In this case, the appellant Kanwar Lal, a police officer, had been convicted for defaming his neighbour, Mst Ram Rakhi (the complainant), by writing a letter to the District Panchayat Office, Ludhiana, in which he alleged that the complainant was a woman of loose character, having illicit connections with *goondas*, that her paramours frequented her house in the night and her immoral activities reflected badly on the locality in which the appellant lived. The conviction was confirmed by the additional sessions judge and the high court. In the Supreme Court, the accused-appellant argued that he was protected from liability because of the eighth and ninth exceptions. The Supreme Court, however, disagreed with this view and stated:

> In order to establish a defence under this exception, the accused would have to prove that the person to whom the complaint was made had lawful authority over the person complained against, in respect of the subject-matter of the accusation. If the District Panchayat Officer or the Panchayat had such lawful authority, the last paragraph of the offending communication would have justified such a plea. But there is no basis for such a plea...

Regarding the scope of the ninth exception, the court elaborated:

> Even if good faith be taken to have been established, the imputation has to be made for the protection of the interest of the person making it... (further) besides the person making the imputation, the person to whom the imputation is conveyed must have a common interest with the person making it which is served by the communication.[96]

Based on the above considerations, the Supreme Court pointed out that the difference between the eighth and ninth exceptions is that while in the former, the person to whom the complaint is made has to have lawful authority to deal with the subject matter of the complaint and proceed against the person, such requirement is not there in the ninth exception. Under the latter exception, it is sufficient if a communication is made to a person for the protection of one's own interest in which the other person also has an interest. On this basis, it was held that the conviction was proper.

In *Sukra Mahto v Basdeo Kumar Mahto* ,[97] the Supreme Court considered the elements of the protection available in exception 9 of s 499. In this case, the appellant Sukra Mahto had been convicted for defaming the complainant through a statement tendered on his behalf, by his lawyer to the sub-divisional officer, that the complainant-respondent and his brother were the illegitimate sons of Faizu Ahir being born to his concubine. The Supreme Court held that for the protection under exception 9 to be used by the accused, he had to show that the imputation must be made in good faith, for protection of person making it or others or public good. Good faith and public good were matters of fact. The proof of the truth of the alleged imputation or statement was held not to be an element of exception 9 as also the first exception to s 499. However, in exception 9, the person making the imputation had to show that he had made enquiries and that his enquiry was held with due care and attention and that he was satisfied that the imputation was true. As the court stated it, 'The accent is on the enquiry, care, and objective and not subjective satisfaction'.

There was a second aspect to the operation of the ninth exception, which was on the element of protection of interest. It was clear that the person to whom the imputation had been made, must also have a corresponding interest or duty as the interest or duty of the person making the imputation. On this ground too, the court held that the accused could not say that merely because there was a proceeding under s 144, CrPC, it was open to the accused person to make imputations about the complainant and his brother. Protection of interest of the person making the imputation will have to be established by showing that the imputation was itself for the protection of interest of the person making it. This defence of the accused was also rejected and his conviction was confirmed by the Supreme Court.

In *Vedurumudi Rama Rao v Chennuri Venkat Rao* ,[1] the petitioner-accused was a Regional Manager of Andhra Bank, Visakhapatnam. A defamation case came to be filed against him on the charge that he had issued a confidential circular to all the branches of the bank in the Visakhapatnam region, informing them that the complainant had cheated the bank and cautioning them from dealing with him. It was contended that this amounted to defaming him, as it gave an impression that the complainant was a part of a team of gangsters.

The petitioner, however, stated that he had issued the circular based on a confidential circular issued by the vigilance department of the central office, which mentioned a list of four persons, including the complainant and instructing them to be careful and vigilant in dealing with them. It was his contention that the circular was a confidential one meant to protect the interests of the bank. It also relied on the protection of the exceptions 9 and 10. The Andhra Pradesh High Court held that there was no doubt that the circular was issued in good faith and also for public good and to safeguard the interest of the public at large. Truth of the imputation need not be proved for attracting exception 9 and therefore, the communication of the accused was privileged communication. On this basis, the criminal proceedings were quashed.

It is for the accused, who relies on the Eighth and Ninth Exception, to prove that the accusation was made in good faith for the protection of the interests of the person making it or any other person or for the public good.[2]

Tenth Exception: Caution in Good Faith

The Tenth Exception covers cases of imputation in the discharge of a social duty, such as, when *A* says to his intimate friend *B*, that *C* his dismissed servant, who now seeks employment under *B*, is a dishonest man and ought not to be trusted. So also a relation may confidently advise a lady not to marry a particular suitor, and may or may not assign reasons in which case the statement will be privileged.

A person cannot claim privilege by merely writing on his letter, 'Private and Confidential'. But two persons may really make a communication confidential in the large sense of the term, if there is, in fact, such a relationship between them. Such relationship exists between counsel and client, husband and wife, guardian and ward, master and servant, teacher and pupil and even between intimate friends. So, a father, guardian or an

intimate friend may warn a young man against associating with a particular individual, or a lady against marrying an objectionable suitor.

When a person seeks to get protection of the Tenth Exception, it is for him to establish that the imputation in question was in 'good faith' and for the 'public good'. A mere plea that he believed that what he had stated was in 'good faith' is not sufficient to get benefit of the exception. He, however, is not required to prove it beyond reasonable doubt. His onus gets discharged the moment he succeeds in proving a preponderance of probability.[3]

ON THE SCOPE OF SECTIONS 499 AND 500, INDIAN PENAL CODE 1860

Distinction Between Libel of Court and Contempt of Court

In *Bathina Ramakrishna Reddy v State of Madras* ,[4]the Supreme Court held that a newspaper item which contained imputations about a judicial officer's integrity, could be liable for act ion under s 499. It could also be liable for action under the Contempt of Courts Act, 1971. What is made punishable in the IPC is the offence of defamation as defamation and not as contempt of court. However, a libel attacking the integrity of a judge may not in the circumstances of a particular case amount to contempt at all, although, it may be a subject-matter of libel action.

Whether Accurate and True Report of Assembly Proceedings Published in Newspapers Would Amount to Defamation

In *Jawaharlal Darda v Manoharrao Ganpatrao Kapsikar* ,[5] the respondent-complainant Kapsikar, filed a criminal complaint under ss 499, 500, 501 and 502 read with s 34, IPC, alleging that the appellant, Jawaharlal Darda as Chief Editor of *Lokmat* and others had carried a news item of the legislative proceedings in the Maharashtra Assembly. A question was asked of the minister in the assembly about misappropriation of government funds meant for Majalgaon and Jaikwadi. The minister replied that preliminary enquiry revealed that some misappropriation had taken place, and on being asked to reveal names, had named five persons including the complainant as being involved. The news item reported this, which the complainant alleged defamed him. However, the Supreme Court stated that the newspaper had only reported an accurate and true report of the proceedings, and that in bona fide belief and good faith, the newspaper believed the version of the minister to be true and published the same. It was hence a report connected with the public conduct of public servants who were entrusted with public funds for public good. Thus, the facts and circumstances of the case revealed that the news item was published for public good and hence, the complaint case could not proceed.

In Matters Personally Defaming the Governor, His Personal Authorisation is a Must

This came to be considered in the case of *Gour Chandra Rout v Public Prosecutor, Cuttack* .[6] In this case, the Oriya daily *Mathrubhumi*carried a news item of Dr Ram Manohar Lohia, alleging that the Governor, Mr Sukthankar had a personal favour from the Congress Government of Orissa and that was the reason for the non-acceptance of the resignation of the Congress Ministry. The Governor had sent a note to the Government asking them to take such act ion as necessary. The Supreme Court held that under s 198B(3)(a), CrPC, the Governor has first to consider for himself whether the alleged defamatory statement was such that he should take personal note of and seek legal action to vindicate himself. After this, the sanction had to be obtained, which could be given by the Secretary to the Governor, on his advice. Since in this case none of these procedures were followed, the conviction of the editor and publisher of the paper were set aside and the accused acquitted of the offence of defamation.

Who Should, in a Newspaper, be Prosecuted for Making Defamatory Imputations

In *State of Maharashtra v RB Chowdhary* ,[7]the members of the editorial board of a weekly were prosecuted for publishing a defamatory article. It was seen that the printer, editor and publisher, as shown in the appropriate forms under the Press and Registration of Books Act 1867, were the same person. Hence, the prosecution against other persons of the editorial board were directed to be left out of the proceedings, as they were not the editor or publisher, and also because they had no concern with the publishing of the article.

An interesting issue arose as to whether the term 'editor' under the Press and Registration of Books Act 1867 would also include the chief editor, managing director and others. Thus, in*CB Solanki v Srikanta Parishar* ,[8] the Karnataka High Court held that the definition of the term 'editor' would not include chief editor or managing director, particularly when an allegation has been made in the complaint against them. Therefore, the acquittal of the accused persons, who were involved with the publishing of a Hindi news weekly titled, *Dakshina Deep* by the trial court was held proper.

However, to prosecute the chief-editor and the publisher of a newspaper for publishing a defamatory matter or a news item, it is necessary for the complainant to prima facie show that both of them had the knowledge of the objectionable character of the matter published or they, with others, had shared the requisite intention in publishing the matter. However, it is not necessary for him to show such knowledge on the part of the executive editor of a newspaper as he is supposed to have the requisite knowledge of the defamatory contents of the published objectionable matter.[9]

Defamation of Wife by Husband

In *Mukund Martand Chitnis v Madhuri Chitnis* ,[10] on the wedding night itself, the husband had suspected the chastity of his wife. The bitterness that soon enveloped the couple was such that there were allegations and counter-allegations between the two, who separated within a month. A complaint of theft was lodged against the wife resulting in the search of her house for gold ornaments allegedly stolen by her. Two cases of defamation came to be filed against the husband, in which the accused husband was acquitted by the trial court. However, the Bombay High Court, on appeal, set aside the acquittal and sentenced the husband to two months rigorous imprisonment and imposed on him a fine of Rs 2,000. In the Supreme Court, a compromise was reached by which the husband agreed to pay the complainant Rs One lakh along with unqualified apologies. The Supreme Court noted that but for the serious view taken by the high court, the woman would not have been able to vindicate her honour and receive compensation for the defamatory statements.

No Vicarious Liability in Absence of Specific Allegation

In a defamation complaint against a partnership firm for a letter allegedly issued in the name pad of the firm, no specific allegation was made about the role of the other partner. Neither did the complainant in his statement on oath explain the role of the other partner. In such a case, when no specific allegation was made about a person alleged to have defamed the complainant, it was held that the complaint was without basis and therefore ought to be quashed. Thus, in *Narendra Kapoor v Ramesh C Bansal* ,[11] the Delhi High Court held that there cannot be any general vicarious criminal liability on the rest of the partners of the firm, who did not sign the letter alleged to contain the defamatory imputations.

When Authorship is not Proved

In *Madhab Charan Dash v Amiya Prasad Mishra* ,[12] the Orissa High Court held that in a defamation case when there is no material to show that the accused was the author of the letter containing scurrilous remarks against the complainant, then the case could not be proved as against him and his acquittal by the trial court was therefore proper.

PART B - PROPOSALS FOR REFORM

The Fifth Law Commission, endorsing the need to have defamation as an offence even though it, to some extent, restricts the freedom of speech and expression, suggested a very few changes in the definition of 'defamation'(s 499) and in the sections (ss 500- 502) providing punishment therefor. It proposed:

(1) Explanation of the fourth exception to s 499 should be deleted.
(2) The second sentence, ie 'whether or not it is for the public good is a question of fact', in the First Exception to s 499 should be deleted as it, owing to the abolition of jury trials in India, has lost its significance.
(3) The Fourth Exception to s 499 should be confined only to the reporting of proceedings in 'open court' and of the court proceedings held *in camera*. It accordingly suggested adding of words 'in

open court' after the words 'report of the proceedings' in the Exception. In the light of the changes proposed by it in the definition of terms 'judge' and 'court of justice', it also suggested deletion of the explanation of the (fourth) exception.

(4) The existing punishment (of simple imprisonment for a term up to two years, with or without fine) provided for 'defamation' under ss 500-502 should not necessarily be 'simple'. It therefore suggested that the 'simple imprisonment' (of a term up to two years) provided for defamation (under s 500), for printing or engraving a defamatory matter (under s 501), and for selling printed or engraved defamatory substance containing defamatory matter (under s 502) should be altered to 'imprisonment of either description' (of a term up to two years). It also suggested that, where the defamatory statement has been published in a newspaper, the fact of the offender's conviction should, in addition to the awarded punishment, be similarly made published and the cost of such publication, in the form of fine, should be recovered from the offender.[13]

However, the Indian Penal Code (Amendment) Bill 1978, sought to give effect to the Law Commissions proposals for reform in ss 500, 501 and 502. It did not give any response to the changes recommended by the Commission in s 499 of the IPC.

The Fourteenth Law Commission also endorsed the changes sought by the clause 201.[14]

However, these proposals for reform could not become effective as the 1978 Bill, owing to the dissolution of the *Lok Sabha* in 1979.

1 *Sunilakhya v HM Jadwet* AIR 1968 Cal 266, (1968) Cr LJ 736(Cal) ; *Narottamdas v Maganbhai* (1984) Cr LJ 1790(Guj) ; *Jeffrey J Diermeier v State of west Bengal* (2010) 6 SCC 243, 2010 (5) SCALE 695.

2 *Perspective Publications v State of Maharashtra* AIR 1971 SC 221, (1971) Cr LJ 268(SC) ; *State of Orissa v MS Gajggi* (1989) Cr LJ 1598(Ori) .

3 *Narottamdas vs Maganbhai*(1984) Cr LJ 1790(Guj) .

4 *Valmiki Faleiro v Mrs Lauriana Fernandes* (2005) Cr LJ 2498(Bom) .

5 (1884) ILR 7 All 205.

6 (1974) Cr LJ 1435 (Bom).

7 (1932) ILR 55 All 253.

8 *Sukdeo Vithal Pansare v PrabhakarSukdeo Pansare* (1974) Cr LJ 1435; *PR Ramakrishnan v Subbaraman Sastrigal* AIR 1988 Ker 18, (1988) Cr LJ 124(Ker) .

9 *Kader v Fousia* (1990) 1 Crimes 352.

10 *Njothi v Rajamani* (1996) Cr LJ 2435(Mad) .

11 *BP Bhaskar v BP Shiva* (1993) Cr LJ 2685(Mad) ; *Gopi R Mallya v Pushpa* (1997) Cr LJ 4692(Kant) .

12 *S Mohinder Singh Saluja v Vansan Shoes Delhi* (1987) 1 Crimes 57(Del) .

13 *Thigaraya v Krishnasami* (1892) ILR 6 Mad 381.

14 *Nagarathinam (Dr) v M Kalirajan* (2001) Cr LJ 3007(Mad) .

15 *Decrespigny v Wellesley* 5 Bing 404.

16 *Watkin v Hall* LR 3 QB 396.

17 (1887) ILR 12 Bom 167.

18 *Harbhajan Singh v State of Punjab* AIR 1961 Punj 215, (1961) Cr LJ 710(P&H) .

19 *Janab Sultan Salahuddin Owaisi v Syed Vigaruddin* (2005) Cr LJ 2726(AP) .

20 *Parvathi v Mannar* (1884) ILR 8 Mad 175; see also Macaulay, Macleod, Anderson and Millett, A Penal Code prepared by the Indian Law Commissioners and Published by Command of the Governor General of India, Pelham Richardson, 1838, Note R, p 176.

21 Re *McLeod*(1880) ILR 3 All 342.

22 1944 MWN 322.

23 (1886) 9 ILR Mad 387.

24 (1882) 1 Weir 613.

25 *Sunilakhya v HM Jadwet* AIR 1968 Cal 266, (1968) Cr LJ 736(Cal) ; see also *Washid Ullah Ahari v Emperor* AIR 1935 All 743.

26 *Valmiki Faleiro v Mrs Lauriana Fernandes er Ors* (2005) Cr LJ 2498(Bom) .

27 *SP Bobati v Mahadev Virupaxappa Latti* (2005) Cr LJ 692(Kant) .

28 *Penfold v Westcote* 2 Bos & PNR 335.

29 1883 AWN 167.

30 *South Hetton Coal Co v NE News Association* [1894] 1 QB 133; see also *Maung Chit Tay v Maung Tun Nyun* (1935) 13 Rang 297.

31 AIR 1972 SC 2609, (1973) Cr LJ 52(SC) .

32 Ibid, para 14.

33 Ibid, para 21.

34 See *Asha Parekh v State of Bihar* (1977) Cr LJ 21(Pat) ; *Narrottamdas v Maganbhai* (1984) Cr LJ 1790(Guj) ; *Aruna Asafali v Purna Narayan* (1984) Cr LJ 1121(Gau) ; *Ananda Bazar Patrika Pvt Ltd v State of West Bengal* (2005) Cr LJ 1126(Cal) .

35 (1984) Cr LJ 1790 (Guj).

36 AIR 1970 Cal 216, (1970) Cr LJ 662(Cal) ; see also *Ganesh Nand Chela v Swami Divyananda* (1980) Cr LJ 1036(Del) .

37 (1986) Cr LJ 2002 (Ker).

38 (2000) Cr LJ 4296 (Ori).

39 (2001) Cr LJ 3322 (SC).

40 (1998) Cr LJ 3973 (Ker); see also *N Ram v Siby Mathew* (2000) Cr LJ 3118(Ker) .

41 Re *Ramanand*(1881) ILR 3 All 664.

42 (1892) ILR 15 Mad 214.

43 Re *Faqir*AIR 1926 Lah 893.

44 *Mohan Lal v Ramcharan* (1928) 26 ALJR 361.

45 (1935) Cr LJ 1039.

46 (1996) 6 SCC 263, (1997) Cr LJ 212(SC) .

47 (1997) Cr LJ 4585 (Mad). The principle is also reiterated in *P Karthikeyan v S Ananthanarayan* (1998) 1 Crimes 44(Mad) ; *Kalyanam v Ramesh* (2003) Cr LJ 3390(Mad) .

48 *Vivek Goenka v YR Patil* (2000) 9 SCC 87, (2000) Cr LJ 2791(SC) .

49 *Bishop v Latimer* 4 LT 775.

50 (1883) ILR 6 Mad 381.

51 *Radha Govind Datta v Saila Kumar Mukherjee* AIR 1950 Cal 343; *Damodaran Shenoi v PP Kerala* (1989) Cr LJ 2398(Mad), (1990) 1 Crimes 450(Ker) .

52 *Sanatan Daw v Dasorthi Tah* AIR 1959 Cal 677.

53 *Harbhajan Singh v State of Punjab* AIR 1966 SC 97, (1966) Cr LJ 82(SC) ; see also *Damodaran Shenoi v PP Kerala* (1989) Cr LJ 2398(Mad) .

54 (1866) 1 Bom HCR App 85, pp 86-91.

55 11 App Cas 187.

56 Ibid, p 190.

57 3 B&S 769, 32 LQB 185.

58 *Subroya v Abdul Kadar* (1914) Mad WN 351.

59 AIR 1998 SC 2117, (1998) Cr LJ 2928(SC) .

60 *Mammen Mathew v Kuniel Kumar* (2004) Cr LJ 852(Bom) .

61 (1970) LW 245 (Cri).

62 (1964) Ker LJ 317.

63 AIR 1965 SC 1451.

64 Ibid, para 15.

65 AIR 1956 SC 541.

66 Ibid, para 12.

67 (1998) Cr LJ 1541 (P&H).

68 Re *Pinero Goodlake* 13 LT 676.

69 *Stile v Nokes* 7 Enst 493.

70 *Clement v Lewis* (1821) 4 B & Ald 218.

71 AIR 1961 SC 613, (1961) 1 Cr LJ 743(SC) .

72 Re *Sullivan* 11 CSX 57.

73 Hari Singh Gour, *Penal Law of India*, vol 4, eighth edn, Law Publishers, Allahabad, p 3686.

74 (1983) Cr LJ 48 (Del).

75 AIR 1953 SC 293.

76 [1920] QBD 275, pp 289-91.

77 *Dupiani v Davis* (1886) 3 TLR 184.

78 (1945) Mad LJ 116.

79 Hari Singh Gour, *Penal Law of India*, vol 4, eighth edn, Law Publishers, Allahabad, p 3597.

80 AIR 1970 SC 1876, (1970) Cr LJ 1651(SC) .

81 *Tiruvengada Mudali v Tripurasundari Ammal* AIR 1926 Mad 906.

82 *Jinnat Ara Borbora*(1980) Cr LJ NOC 123(Gau) .

83 AIR 1966 SC 97, (1966) Cr LJ 82(SC) .

84 (1978) Cr LJ 879 (Bom).

85 AIR 1981 SC 1514, (1981) Cr LJ 894(SC) .

86 Ibid, para 11.

87 (2005) Cr LJ 2726 (AP).

88 Ibid, para 13.

89 *Munithayamma v Muddobalappa* AIR 1955 Mys 135, (1955) Cr LJ 1512(Mys) ; *Tulsidas v Billimoria* (1932) 34 Bom LR 910.

90 AIR 1966 Ker 264, (1966) Cr LJ 1269(Ker) .

91 *Ayesha Bi v Peerkhan Sahib* AIR 1955 Mad 741, (1955) Cr LJ 1239(Mad) .

92 (1981) Cr LJ 117 (Bom); see also *N Jothi v Rajamani* (1996) Cr LJ 2435(Mad) .

93 AIR 1970 SC 1372, [1970] 3 SCR 913, (1970) Cr LJ 1266(SC) ; see also *Sukra Mahato v Basudeo Kumar Mahato* AIR 1971 SC 1567, (1971) Cr LJ 1168(SC) ; *Abdurrahamin v Pradeep Menon* (1988) 3 Crimes 165(Ker) .

94 Ibid, para 10.

95 AIR 1963 SC 1317, (1963) 2 Cr LJ 345(SC) .

96 Ibid, para 4.

97 AIR 1971 SC 1567, (1971) Cr LJ 1168(SC) .

1 (1997) Cr LJ 385 (AP).

2 *M A Rumugam v Kittu @ Krishnamoorthy* (2009) 1 SCC 101, JT 2008 (11) SC 638.

3 *Jeffrey J Diermeier v State of west Bengal* (2010) 6 SCC 243, 2010 (5) SCALE 695.

4 AIR 1952 SC 149, (1952) Cr LJ 832(SC) .

5 AIR 1998 SC 2117, (1998) Cr LJ 2928.

6 AIR 1963 SC 1198.

7 AIR 1968 SC 110, (1968) Cr LJ 95(SC) .

8 (1997) Cr LJ 3050 (Kant).

9 *KM Mathew v State of Kerala* (1991) 1 SCC 217, (1992) Cr LJ 3779(SC) ; *Vijay Jawaharlalji Darda v Laxmikanth C Gupta & Anor* (2005) Cr LJ 1886(Bom) .

10 AIR 1992 SC 1804.

11 (1998) Cr LJ 1863 (Del).

12 (1997) Cr LJ 4253 (Ori).

13 See Law Commission of India, 'Forty-Second Report: The Indian Penal Code', Government of India, 1972, paras 21.3-21.6.

14 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code ', Government of India, 1997, para 12.91.

CHAPTER 51

Criminal Intimidation, Insult and Annoyance

(Indian Penal Code 1860,Sections 503 to 510)

INTRODUCTION

The IPC deals with those acts which are meant to intimidate or threaten others, or to cause annoyance or insult to others in such a way that the act in turn provokes others to break the law and cause a breach of peace in the present chapter. The chapter deals with three varieties of offences, namely, criminal intimidation, causing insult and annoyance, arranged between ss 503-510. The sections can be analysed as follows:

Section 503:	Definition of criminal intimidation.
Section 506:	Punishment for criminal intimidation.
Sections 507, 508:	Criminal intimidation through anonymous communication and criminal inducement.
Section 504:	Definition of intentional insult to provoke breach of peace.
Section 505:	Public mischief.
Section 509:	Insult to the modesty of a woman.
Section 510:	Misconduct in public place by a drunken person.

These nine sections, based on the offences dealt therein, can further be re-grouped into three clusters, namely, sections dealing with: (i) criminal intimidation (ss 503 and 506-508), (ii) intentional insult (ss 504-505 and s 509), and (iii) annoyance (s 510).

We shall consider these offences in the same sequence so as to better appreciate and understand the thrust of these sections.

PART A - CRIMINAL INTIMIDATION

DEFINITION OF CRIMINAL INTIMIDATION

Section 503 defines the offence of criminal intimidation. Section 506 prescribes punishment for criminal intimidation, while ss 507 and 508 deal with punishment for aggravated forms of criminal intimidation.

Section 503. Criminal intimidation.--Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.--A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration

A, for the purpose of inducing *B* to desist from prosecuting suit, threatens to burn *B's* house. *A* is guilty of criminal intimidation.

Essential Ingredients

Section 503, which defines the offence of criminal intimidation, describes the following essentials of the offence of criminal intimidation. These are: (1) there should be a threat of injury to a person: (i) to his person, reputation or property; or (ii) to the person, or reputation of anyone in whom that person is interested; (2) the threat must be with the intent: (i) to cause alarm to that person; or (ii) to cause that person to do an act which he is not legally bound to do as the means of avoiding the execution of such threat; or (iii) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

In simple terms, what the offence defines is that if any person threatens another with injury to his person, property or reputation, and to avoid that, the other person is made to do an act he is not legally bound to do or to omit to do something he is legally bound to do, or which caused alarm to that person, then that person is said to have committed criminal intimidation. In short, it is extending a threat to another, which results in a particular set of act ions from the other as a means of avoiding the threat. However, a mere threat does not amount to criminal intimidation. It must be made with intent to cause alarm to the person threatened.[1] It is immaterial whether it has alarmed the recipient of the threat. Intention is the soul of the definition of criminal intimidation and it needs to be gathered by surrounding circumstances.[2]

In *Amulya Kumar Behera v Nabhagana Behera* ,[3] the Orissa High Court examined the meaning of the term 'alarm'. In this case, the complainant approached the Orissa High Court against the acquittal of the accused by the trial court. It was his contention that one day in his village, he was surrounded by the accused persons who abused him in filthy language, and had the witnesses not intervened he would have suffered further injuries apart from a fist blow from the first accused of the opposite party. In his evidence, the complainant admitted that he was not alarmed by the threat given by the accused. Hence, the trial court held that since the main ingredient of threat causing alarm was absent, the case was not established and acquitted the accused persons. The court stated:

> Intention must be to cause alarm to the victim and whether he is alarmed or not is really of no consequence. But material has to be brought on record to show that intention was to cause alarm to that person. Mere expression of any words without any intention to cause alarm would not be sufficient to bring an application of section 506. The gist of the offence is the effect, which the threat is intended to have upon the mind of the person threatened. It is clear that before it can have effect on his mind it must be either made to him by the person threatening or communicated to him in some way.
>
> The court noted the fact that the section was a new provision, and originally the word 'distress' and 'terror' had been proposed for the term 'alarm' presently found.
>
> The substitution of alarm for distress and terror is intended to confine the offence only to cases where the effect thereof is to cause more harm than is covered by these words. The anxiety and mental anguish caused by an injury threatened may often be as or even greater than the actual injury...to make it indictable, the threat must be of such nature as is calculated to overcome a firm and prudent man...the law distinguishes between threats of act ual violence against the person or such other threats as a man of common firmness cannot stand against and other sorts of threats. Intention is a mental contention, which has to be gathered from the circumstances of the case. The threat must be intended to cause alarm from which it follows that ordinarily it would be sufficient for that purpose. The degree of alarm may vary in different cases, but the essential matter is that it is of a nature and extent to unsettle the mind of the person on whom it operates and take away from his acts the elements of free voluntary act ion which alone constitutes consent.[4]
>
> The court, therefore, held that the evidence did not disclose that the threat was with the intention to cause alarm, and refused to interfere with the acquittal.

It is clear from the above that the offence of criminal intimidation is akin to the offence of extortion as defined in s 383. However, there are three basic essential points of difference between the two offences. They are:

(1) In extortion, the immediate object is obtaining money or money's worth; in criminal intimidation, the immediate purpose is to induce a person threatened to do or abstain from doing something, which he was not legally bound to do or omit.

(2) Extortion is committed in the presence of the offender and the victim is through fear induced to deliver up property. In criminal intimidation, the threat need not be directly addressed to the person intended to be influenced. If it reaches anyhow, the offence is complete. Again, in criminal intimidation, the threat need not have actually produced any expected effect, still the intimidator will be liable.

(3) In extortion, delivery of property is the essence of the offence. In criminal intimidation, there is no delivery of any property from the victim to the accused.

The scope of s 503 was elaborated by the Supreme Court in *Ramesh Chandra Arora v State* .[5] In this case, the appellant-accused had been charged with criminal intimidation by threatening a person *X* and his daughter of injury to their reputation by making public a nude photograph of the daughter unless 'hush money' was paid to him. The intent was to cause alarm to them. The evidence, however, disclosed that the real intention was not to merely cause alarm but to force *X* to pay 'hush money'. The accused was convicted for offence under s 506, IPC, by the trial court, which was confirmed by the high court.[6] However, in the Supreme Court it was his contention that if at all he had committed an offence, it was not one under s 506, IPC, but one under s 384 read with s 511, IPC, and since he was not charged with this offence he ought to be acquitted. The Supreme Court, however, did not accept this contention. It clarified:

The section is in two parts: the first part refers to the act of threatening another with injury to his person, reputation or property or to the person or reputation of anyone in whom that person is interested; the second part refers to the intent with which the threatening is done and it is of two categories: one is intent to cause alarm to the person threatened, and the second is to cause that person to do any act which he is not legally bound to do or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat.[7]

Based on the above reasoning, the court stated that the aim of the accused was not just to cause alarm but to cause the father of *X* to give him 'hush money' to ensure that he did not go ahead with his threat of making public the damaging photographs. The court also considered the fact that the offence committed could also be considered to fall under the offence of extortion under s 383. There might be instances in which a particular act may be said to fall under two broad definitions of offences when two different aspects of the act are considered separately. In the instant case, however, two courts were satisfied that the offence amounted to criminal intimidation. Hence, the Supreme Court refused to interfere with the conviction and held that no prejudice had been caused to the accused on account of any defect, if any, in the charge.

Nature of Threat Extended

The threat may not be a direct threat, that is, it may not be in the presence of the complainant (as for example, in the above case referred). Whether the threat did or did not frighten any person, will not affect the question of liability of the accused person under this section. Thus, if a speaker at a public meeting threatened the members of the police force stationed in Malabar with injury to their person, reputation or property, then he was said to have committed the offence of criminal intimidation.[8] Similarly, in *Anuradha Kshirsagar v State of Maharashtra* ,[9] the accused was alleged to have threatened the lady teachers in the hall by shouting that the lady teachers should be caught by their hair, kicked in their waist and pulled out of the hall, and threatening them that he would see how they would remain in the hall. The Bombay High Court held that the offence had clearly been established.

The injury threatened to be caused could be one, which the accused can himself cause or inflict through others. However, the threat must be communicated or uttered with the intention of its being communicated to the person threatened for the purpose of influencing his mind.[10]

Nature of Injury Threatened

In order to be liable for criminal intimidation, the injury threatened to be caused must be illegal. Thus, a notice requiring a shopkeeper to agree not to import for sale in his shop, foreign cloth for a year, together with the threat that in case he continued to sell foreign cloth his shop would be picketed, was held to amount to an offence of criminal intimidation.[11] Similarly, threatening a butcher selling beef, that if he bought or sold beef, he would be sent to jail and his living in the municipality would be threatened, was considered to amount to an offence under the section.[12] Generally, the threat of social boycott would not fall under definition of criminal intimidation, unless it more directly affects a person's reputation, his character or his person. Similarly, if the person threatening is incapable of putting the threat to execution, he cannot be held liable for criminal intimidation. Hence, the threat of punishment by God cannot be indicted as criminal intimidation.[13]

PUNISHMENT FOR CRIMINAL INTIMIDATION

Section 506 provides for punishment for committing the offence of criminal intimidation.

Section 506. Punishment for criminal intimidation.--Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt, etc.--and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

A bare reading of s 506 discloses that the punishment prescribed in this section falls in two categories: (1) in simple cases of criminal intimidation, the punishment is imprisonment for a term up to two years or fine or both, and (2) if the threat be to: (i) cause death of the threatened person, or grievous hurt, or destruction of property by fire, or (ii) to cause an offence to be committed which is punishable with death or life imprisonment or with imprisonment for a term up to seven years, or (iii) to impute unchastity to a woman; then the prescribed punishment is simple or rigorous imprisonment for a term up to seven years or fine or both.

Part II, compared to Pt I, of the section deals with the punishment for graver forms of criminal intimidation. It is, however, important to note that part II of s 506 cannot come into play if there is no threat of either causing death or grievous hurt.[14] To warrant this part of the section it is necessary for the prosecution to prove that the threat to cause death or grievous hurt was accompanied with some act of the accused in pursuance of the threat.[15]

IS A PERSON ACCUSED UNDER SECTION 506 ENTITLED FOR PROBATION?

The question of whether a person accused of committing the offence of criminal intimidation and convicted under s 506, IPC, is entitled to probation, has received two different types of treatment from the Supreme Court. It is interesting to note that both the cases involved intimidation of doctors!

In *Ramnaresh Pandey v State of Madhya Pradesh* ,[16]the accused was alleged to have intimidated a lady doctor, for which he was convicted by the trial court for an offence under s 506, Pt II, IPC, and directed to be released on probation of good conduct for a year (under s 4 of the Probation of Offenders Act 1958). On appeal, the Assistant Sessions Judge altered the conviction to one under s 506, Pt I, set aside the probation ordered by the trial court and imposed a fine of fifty rupees. The high court confirmed this sentence. The Supreme Court, however, stated that the Assistant Sessions Judge and the high court had failed to see that the appellate court had partially allowed the appeal of the accused by converting the conviction from s 506, Pt II, which was more stringent carrying a punishment of up to seven years' rigorous imprisonment and/ or fine, to s 506, Pt I, which permitted sentence of only up to two years' rigorous imprisonment. Thus, having sentenced the accused to a less serious offence (ie, s 506, Pt I), the appellate court should not have set aside the probation ordered by the trial court. As the Supreme Court noted:

> The object of the Act is to prevent the conversion of youthful offenders into obdurate criminals as a result of their association with hardened criminals of mature age, in case the youthful offenders are sentenced to undergo imprisonment in jail. The above object is in consonance with the present trends in the field of penology, according to which effort should be made to bring about correction and reformation of the individual offenders and not to resort to retributive justice. Modern criminal jurisprudence recognises that no one is a born criminal and that a good many crimes are the product of socio-economic milieu. Although not much can be done about hardened criminals, considerable stress has been laid on bringing about reform of young offenders not guilty of very serious offences and of preventing their association with hardened criminals. The Act gives statutory recognition to the above objective.[17]

On this basis, the Supreme Court set aside the sentence of the appellate court, because there were no reasons put forward by the appellate court and the high court, for setting aside the probation of good conduct originally directed by the trial court.

In sharp contrast, the Supreme Court in *Siyasaran v State of Madhya Pradesh* ,[18]held that the accused who had been convicted for assaulting a doctor by punching him on his face because of which a tooth was dislocated, should not receive any condonation of his act . In this case, the accused had been dissatisfied with the doctor over the treatment given to his brother, who had been admitted in the hospital. The accused, de-

scribed to be a hot-headed young man, first insulted the doctor and then gave a fist blow. The trial court convicted him for offences under ss 333 and 506 (Pt II), IPC, and ordered him to undergo three years' and two years' rigorous imprisonment which was confirmed by the high court. The Supreme Court refused to consider the plea that the accused should be given benefit of probation of good conduct. However, the court stated that violence in hospitals against the doctors and the staff could not be permitted, as it would affect the morale of all the doctors. Doctors and staff must be unruffled and not prone to such incidents. Therefore, the court confirmed the conviction. However, because of the long lapse of time, and the fact that the accused had since obtained employment in a *Gramin Bank*, the court reduced the sentence of the period already undergone, but imposed a fine of fifty thousand rupees.

CASE LAW

(1) In *Rajinder Datt v State of Haryana* ,[19] it was held that mere outbursts of the accused at the time of assault that he will kill the injured, will not attract the s 506. This is particularly so when the injuries actually caused are not grievous and are not caused to any vital part of the body of the injured.

(2) In *Keshav Baliram Naik v State of Maharashtra* ,[20] the accused was alleged to have touched the hand of the prosecutrix, a blind girl, when she was asleep, removed the quilt and put his hand in her *midi* (dress). He threatened to kill her, if she disclosed his name. However, the prosecutrix shouted due to which her parents woke up and reprimanded the accused. The trial court had convicted the accused for offences under s 457 (with sentence of two years' rigorous imprisonment and fine of Rs 2,000), s 376 read with s 511 (sentence of five years' rigorous imprisonment and fine of Rs 5,000), s 354, (no separate sentence) and under s 506 (II), (sentenced to two years' rigorous imprisonment and fine of Rs 2,000) of the IPC. The high court, however, acquitted the accused of offences under s 376 read with s 511, IPC, but confirmed the conviction under s 354 (outraging modesty of woman), s 457 (lurking house trespass by night in order to commit offence) and s 506(II) (criminal intimidation).

(3) In a similar case involving entering a house in the night armed with a knife, and threatening the inmates with death, the conviction under s 506(II) was held applicable and proper.[21]

(4) In *Raja Sharnappa v State of Maharashtra* ,[22] the accused had been convicted for offences under s 302 read with s 34, IPC, as also with offence under s 506(II), IPC. The Bombay High Court felt that the trial judge having convicted the accused under s 302 read with s 34, IPC, should not have convicted for offence under s 506 read with s 34, IPC. Hence, the accused was acquitted of the offence.

CRIMINAL INTIMIDATION THROUGH ANONYMOUS COMMUNICATION AND CRIMINAL INDUCEMENT

Sections 507 and 508 respectively deal with criminal intimidation through anonymous communication and criminal inducement.

Section 507 , IPC, is a corollary to the previous section and is an aggravated form of intimidation. In contrast to intimidation, which is direct and by a known person, this section covers cases when the intimidator commits the offence of intimidation through an anonymous letter, signed with a false name or by concealing his address. In such a case, the person will be liable with additional punishment of two years terms, apart from the punishment provided by s 506, IPC. It reads:

Section 507. Criminal intimidation by an anonymous communication.--Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

Section 508 contemplates the voluntary causing of any person to do a thing which he is not legally bound to do, or omitting to do a thing which he is legally entitled to do, by inducing that person to believe that he or any person in whom he is interested will become an object of Divine displeasure, if he does not do the thing in the manner dictated. The section reads as under.

Section 508. Act caused by inducing person to believe that he will be rendered an object of Divine displeasure.--Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustrations

(a) *A* sits in *dhurna* at *Z's* door with the intention of causing it to be believed that, by so sitting, he renders *Z* an object of Divine displeasure. *A* has committed the offence defined in this section.

(b) *A* threatens *Z* that, unless *Z* performs a certain act, *A* will kill one of *A's* own children, under such circumstances that the killing would be believed to render *Z* an object of Divine displeasure. *A* has committed the offence defined in this section.

PART B - INTENTIONAL INSULT

INTENTIONAL INSULT WITH INTENT TO PROVOKE BREACH OF PEACE

Section 504. Intentional insult with intent to provoke a breach of the peace.--Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Essential Ingredients

The essential ingredients of the offence are: (i) the accused person must intentionally insult another person; (ii) which is such that it provokes another person; (iii) there must be the intention or knowledge that such provocation will cause that person to break the public peace or to commit any other offence.[23] In essence, the section provides that a person is liable for causing others to commit breach of peace in a manner similar to those who openly abet or incite the commission of the offence. However, what is important is that the accused must be shown to have had the intention or knowledge that by such insult, he would be provoking the commission of an offence.[24]

Nature of Intentional Insult

An act of insulting another, by itself does not amount to an offence, unless it contains the essential ingredient which makes it an offence, namely, the intention or knowledge that the insult would provoke another person to cause breach of peace or commit another offence. In *Ramesh Kumar v Sushila Srivatsava* ,[25] the Rajasthan High Court held that the way in which the accused addressed the complainant was such that per se goes to show that the person has been insulted and provocation has been caused to him (the complainant). Thus, the term 'insult' signifies 'to treat with offensive disrespect, to offer indignity to'. Such insult may be inferred not merely from the words used, but also from the tone and manner in which the words are spoken.

Further clarification of what constitutes 'intentional insult' is provided in *Abraham v State of Kerala* ,[26] in which it was clarified that mere breach of good manners does not constitute an offence. What is essential to make out an offence under the section is not just the reaction of the complainant, for that would vary depending on the sensitiveness of each individual, but the intention of the offender knowing that such provocation would likely result in the person provoked to commit an offence.

Abusive Words

In deciding whether a particular language is abusive enough to fall within the ambit of the section, the court trying the offence has to find out what in ordinary circumstances would be an effect of the abusive language

used, and not what the complainant actually did as a result of the alleged abusive language, as the response would vary from person to person depending on the personal sensitivities or idiosyncrasies of the person. This issue came to be considered in *Philip Rangel v Emperor* .[27] In this case, the accused was a shareholder of the Central Telegraph Office Credit Co-operative Bank Limited and was one of the 26 shareholders who had requisitioned for a special meeting of the shareholders. In the meeting, there was a proposal to expel the accused and other persons who had requisitioned the meeting. To this, the accused reacted by shouting 'you damn bloody bastards and cads' while leaving the meeting. The Bombay High Court had to consider whether this amounted to intentional insult. The court clarified:

> ... [W]hen the charge is an insult by words, the words must amount to something more than what in English law is called 'mere verbal abuse'. If abusive language is used in such circumstances that the court comes to the conclusion that it cannot possibly have been intended, and cannot have been understood by those to whom it was addressed to have been intended, to be taken literally, the language cannot be held to amount to intentional insult.[28]

In *Ram Chandra Singh v Nabrang Rai Barma* ,[29] it was the case of the complainant that the accused had built a boundary wall over his roof, and that when he, the complainant, had protested, he was abused with filthy language, and pushed in his neck thereby causing bodily pain. The trial court convicted the accused for offences under ss 427, 448, 504 and 352, IPC. The appellate court, however, set aside the conviction and acquitted the accused. As regards the contention that filthy language was used amounting to an offence under s 504, IPC, the Orissa High court held as follows:

> It may be observed that the law is too well-settled that mere abuse will not be sufficient without any intention to cause breach of peace or knowledge that the breach of peace is likely to occur. The question as to whether mere abuse would amount to an offence under this section would depend upon several circumstances, such as the respective status of the parties, nature of abuse and other factors. The appellate court noticed that the alleged abusive words ... are generally used in case of petty quarrels between the parties and by that it cannot be inferred that the accused intentionally expressed such abusive words so as to insult the complainant and also to give provocation to him so as to break the public peace. It appears that law has been quite rightly applied by the appellate court to the facts of the present case.[30]

Thus, when the accused persons used words like *Ghuaka* and *Mutakha*, he was held not to have intended to convey that the person so addressed actually ate faeces or drank urine.

The question of whether an insult was intentional or not, is a question of fact and not of law. The test is that it should give provocation to cause a breach of the public peace.[31]

Abuse involving aspersions on the chastity of the complainant's sister and mother were held to attract the provisions of the section.[32]

Use of Obscene Words Held to be Offence of Intentional Insult

Use of words like *sala*, *haramzada*, '*soor*', '*baperpeta*';[33] obscene words used by a landlord to a woman near a water tap;[34] use of word *sala* followed by threats of shoe beating[35] constitute an offence under this section. Calling a counsel '*badmash*' in open court also amounts to an intentional insult.[36]

Intention or Knowledge that Insult Would Cause Breach of Peace or Committing Offence

It is not essential for the section to be applied that there must act ually be a breach of peace. As the section itself stipulates, the essential component is the intention of the offender to provoke breach of peace or knowledge on his part that the provocation given by him is likely to cause the commission of any other offence.[37] In *Munuswami v Kanniappa* ,[38] the Madras High Court held that the essential aspect of the offence was the person who uttered, provoking the victim by his words to commit an immediate breach of the peace. For this to happen, he ought to have directly uttered the words in the presence of the complainant or conveyed it to him in writing or through other means. However, if the allegation was that the accused told others to convey the insulting words to the complainant, then it was questionable if that could said to be sufficient to cause breach of peace. As the court stated: 'Few sane persons will commit a breach of peace on mere hearsay evidence of abuse, and without verification'. Thus, where there was no clear evidence that the of-

fender asked persons before whom he uttered the words to convey it to the complainant, then no offence could be said to have been committed under the section. Such request was held essential to make a prima facie case under s 504, IPC.

The threat of breach of peace must also be immediately after the provocation or so soon thereafter, that it must form part of *res gestae* of the offence. In *Mohd Ibrahim v Ismail* ,[39] a father in Vellore had written to his daughter and son-in-law, a letter which was undoubtedly, very insulting. However, for the letter to be said to cause the threat of breach of peace, the offended daughter and her husband would have had to travel from their house to Vellore, wait for their father, and thereafter only the breach of peace could occur. The court held that this was not the breach of peace which the section contemplated.

In dealing with an offence under the section, the court has not to consider the reaction of the person insulted to the insult made to him. An intentional insult and the resultant provocation which, under ordinary circumstances, would lead to breach of the public peace or an offence to be committed by the person insulted, would render the offender liable under his section and he would not be protected from the consequences of his act merely because the insulted person exercised self-control or being terrified by the insult or overawed by the person of the offender, did not act ually break the peace or commit an offence.[40]

In *Laloo Prasad v State of Bihar* ,[41] a criminal case under ss 500, 501, 502 and 504, IPC was filed against Laloo Prasad and the Editor of Hindustan Times for carrying a news item in the latter's paper referring to members of the *Koeri* and *Kurmi* case as '*Kukoor*'. The complainant felt aggrieved, as the reference, in his opinion, tended to lower the social esteem of his caste in the society. The above petition in the high court was filed to quash the complaint case. The court held that prima facie there was no evidence on record which showed that the witness had direct knowledge whether the offender had actually used the term '*kukoor*' for *Koeri* and *Kurmi* caste. Since the entire evidence was based on a news item, which appeared in a newspaper, it was held that there was no basis for proceeding with the prosecution and hence the complaint was quashed.

PUBLIC MISCHIEF

Section 505. Statements conducing to public mischief.--

(1) Whoever makes, publishes, or circulates any statement, rumour or report--

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of India to mutiny or otherwise disregard or fail in his duty as such; or
(b) with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the state or against the public tranquility; or
(c) with the intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community;

shall be punished with imprisonment which may extend to three years or with fine, or with both.

(2)Statements creating or promoting enmity, hatred or ill-will between classes.-- Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or caste or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(3)Offence under sub-section (2) committed in place of worship, etc.--Whoever commits an offence specified in sub-section (2) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

Exception.--It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that

such statement, rumour or report is true and makes, publishes or circulates it in good faith and without any such intent as aforesaid.

Scope of Section 505

The section, as it stands now, was based on amendment to the IPC introduced in the year 1969. The Statement of Objects and Reasons described the reasons for the introduction of the new provision, particularly sub-cll (2) and (3) in the section as follows:

> The section does not deal specifically with rumours or alarming news which create tension or ill-will between different communities so long as they are intended to widen the scope of the section so as to include such rumours or alarming news with intent to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religions, racial, language or regional groups or castes communities, as well. It is also proposed to provide for enhanced punishment and a minimum punishment for any such offence committed in the place of worship.[42]

The section is general in character and deals with the dissemination of false and mischievous news with intent to create public disturbances. There are two essential dimensions to the section:

(1) Situations in which the publication is likely to cause mutiny amongst soldiers, army men and navy persons;
(2) Where the publication is likely to cause commotion amongst the public, inducing someone to commit an offence against the state or public tranquillity.

In a way, the section is akin to the offence of sedition, though sedition differs from this offence as it needs to be against the state, without affecting the persons enumerated in the section.

Section 505 and Freedom of Speech and Expression

In *Kalicharan Mohapatra v Srinivasa Sahu* ,[43] the Orissa High Court stated that while the section is a definite restriction on the freedom of speech and expression, nevertheless, the offence committed must be strictly construed in favour of the defense. The court clarified that legitimate ventilation of grievances by means of publication of a pamphlet, which some sections of the public may have against local authorities, must not be checked by initiating a prosecution under the section. Thus, unless the contents of the pamphlet amounts to incitement to violence, the person who published and circulated cannot be held guilty. The court went on to state that the act of recalling to mind the painful experiences of a community at the hands of those who they consider oppressed, would naturally involve generating embittered feelings against the alleged oppressors. 'But those who suffer have the right to complain, and if the complaint is made in a sober language and is free from exaggerations and incisive comments, it can be lawfully published for the consideration of public officers and others concerned with a view to their taking action to prevent a repetition of what has previously taken place'.[44] It was held that the act s did not amount to offences either under ss 153A or 505(c), IPC.

The constitutional validity of ss 505 (and 124A), IPC, as violative of the right to freedom of speech and expression was questioned in *Kedar Nath v State of Bihar* .[45] The Supreme Court held that with reference to the three clauses of the section, it would be found that the gravamen of the offence is making, publishing or circulating any statement, rumour or report:

(1) With intent to cause or which is likely to cause any member of the army, navy or air force to mutiny or otherwise disregard or fail in his duty; or
(2) To cause fear or alarm to the public or a section of the public which may induce the commission of an offence against the state or against public tranquillity; or
(3) To incite or which is likely to incite one class or community to commit an offence against any other class or community.

The Supreme Court said: 'It is manifest that each one of the constituent elements of the offence under Section 505 has reference to, and a direct effect on, the security of the State and public order'. The court thus declared that the section did not exceed the bounds of reasonable restriction on the right of freedom of speech and expression.

In *Bilal Ahamad Kaloo v State of Andhra Pradesh* ,[46] the main distinction between ss 153A and 505(2) was observed. It was held that while publication of the words or expression is not necessary for an offence under s 153A, such publication is a *sine qua non* for s 505(2), IPC. The words 'whoever makes, publishes or circulates in s 505(2) cannot be interpreted disjunctively, but only as supplementary to each other. If it is construed disjunctively, anyone who makes a statement falling within the meaning of the section would, without publication or circulation, be liable to conviction'. The above holds true for s 153A as well, and the section would have been bad for redundancy. The intention of the legislature is to provide two different sections on the same subject that would cover two different fields of similar colour. The fact that both sections were included as a package in the same amending enactment, lends further support to the said construction.[47]

The common feature in both offences being promotion of ill-feeling or enmity or ill-will, it is essential that there be at least two castes or communities involved. 'Merely inciting the feeling of one community or group without reference to any other community or group, cannot attract either of the two statements'.[48]

In *Manzar Sayeed Khan v State of Maharashtra* ,[49] the Supreme Court, reiterating that merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either s 153A or s 505(2), stressed that the effect of words must be judged from the standards of a reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds.

INSULT TO THE MODESTY OF A WOMAN

Section 509. Word, gesture or act intended to insult the modesty of a woman.-- Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman shall be punished with simple imprisonment for a term which may extend to three years, and also with fine.

Essential Ingredients

Words or gestures intended to insult the modesty of a woman falls within the ambit of the section. The essential ingredients of the section are: where an offender: (i) utters a word, makes any sound or gesture or exhibits any object; (ii) with the intention that it be heard, seen or intrudes upon the privacy of such woman; commits the offence. It is clear that the intention must be to insult the modesty of some particular woman or women, and not merely any class or section of women, however small.[50]

Even if the exact words could not be placed on record, if the court arrives at a finding that the accused had such an intention for which purpose he uttered the offending words, it can punish the accused.

An important difference between an offence under s 509 and one under s 500 is that for the latter offence, the exact words spoken or uttered by the accused must be set out right at the beginning. However, for the offence under s 509, it is sufficient if the intention can be gathered from the evidence. The exact words need not be proved.[51]

Exhibiting an Object

Where an accused sent a letter by post containing indecent overtures to an unmarried nurse having no previous acquaintance with him, it was held that the accused had intended to outrage the modesty of the woman by exhibiting the object and the fact that it was in a closed envelope before it reached the lady was immaterial. It is not necessary that the offender himself should personally exhibit the object. He may employ an agent such as the post office for this purpose.[52]

What Constitutes Insult to Modesty of a Woman?[53]

The Supreme Court in *State of Punjab v Major Singh* [54]considered the question of what modesty means, when can it be held that a particular act is said to have outraged a woman's modesty, and whether the modesty of an infant child can be outraged at all. This case involved a 7 and 1/2 month old female child. The offender was alleged to have got into the room where the child was sleeping, put off the lights, stripped himself up to his waist and gave vent to his unnatural lust thereby rupturing the hymen of the infant child and causing a tear 3/4" long inside the vagina of the child.

The trial court was of the view that there could be no offence under s 354, IPC, as an infant child was incapable of developing a sense of modesty. The accused was only sentenced for an offence under s 323, IPC, and sentenced to one year's rigorous imprisonment and a fine of one thousand rupees. On appeal to the high court, a Bench of three judges heard the case. A majority of two judges also supported this view that an infant cannot be said to have a sense of modesty and hence the offence was not punishable. However, a single judge felt that the sense in which modesty has been referred to in the IPC indicated that it referred not to a particular woman, but to accepted notions of womanly behaviour and conduct, and the use of the term 'modesty' in both ss 354 and 509 could only be taken to refer to be an attribute of a human female irrespective of whether the female concerned has developed enough understanding as to appreciate the nature of the act or to realise that it is offensive to decent female behaviour or sense of propriety concerning the relations of a female with others. Thus, the offending act was not just an offence against an individual woman, but as an affront to and against public morals and the larger society as a whole. On this basis, he concluded that the offence could be held to be established.

The state appealed against the acquittal to the Supreme Court. In the Supreme Court too, there was a division amongst the three-judge bench. A majority of two judges, R Mudholkar and RS Bachawat JJ, held that the act offended to outraging the modesty, and the third judge, AK Sarkar CJ, decided that such act s against infants cannot be held to be offences of outraging the modesty.

According to the majority view, the act of outraging the modesty of a woman was not limited by the age of the victim, and whether the victim knew or was conscious about the offensive act being committed on her. The following are the principles evolved by the two judges who delivered the majority judgment that the offender had committed an offence of outraging the modesty of the infant.

According to Bachawat J:

> Essence of a woman's modesty is her sex. A female of tender age also from birth, possesses modesty, which is the attribute of her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anesthesia, she may be sleeping, she may be unable to appreciate the significance of the act, nevertheless the offender is punishable under the section.[55]

According to Mudholkar J, the woman's reaction is not the sole test to see whether an act amounts to outraging the modesty of a woman. He stated:

> When any act is done to or in the presence of a woman is clearly suggestive of sex, according to common notions of mankind, that act must fall within the mischief of this section.[56]

Thus, in view of the judgment of the majority, the accused Major Singh was convicted for an offence of outraging the modesty of a woman under s 354, IPC, sentenced to two years rigorous imprisonment and fine of Rs 1,000, of which Rs 500 was directed to be given to the child who had suffered in his hands.

The above views of the majority were cited with approval by another Bench of the Supreme Court in *Rupan Deol Bajaj v KPS Gill* .[57] In this case, the complainant was a senior IAS officer of the Punjab Government. Her allegation was that in a party at another IAS officers' house, the accused KPS Gill, then holding the post of the Director General of Police, Punjab, had behaved indecently with her in the presence of many people assembled in the party, and had slapped her posterior. The question was whether the act of the accused could be said to be an act which outraged the modesty of the officer concerned. The trial court had refused to take cognisance of the complaint's case, and the high court had also not interfered with this refusal to take the case up for trial by the lower court. In the Supreme Court, however, the judges held that: 'the ultimate test for ascertaining whether the modesty has been outraged is, in the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman'. Keeping in view the total situation, the alleged act of Mr Gill in slapping Mrs Bajaj on her posterior, amounted to outraging her modesty for 'it was not only an affront to the normal sense of feminine decency, but also an affront to the dignity of the lady--sexual overtones or not, notwithstanding'.[58]

In this view of the matter, the case was sent back to the trial court for reconducting the trial, as prima facie the complaint in the FIR was held to disclose the fact that the accused had committed acts outraging the modesty of the woman officer.

Conviction Under Section 509 , IPC , Involves Moral Turpitude

In *J Jaishankar v Government of India* ,[59] the Supreme Court held that the conviction of the offender under s 509, IPC involved moral turpitude. Even if the fine amount was below two thousand rupees; ; that, by itself, was not sufficient to hold that the dismissal of the accused person was improper. Hence, his dismissal from service for the offence was held to be proper.

PART C - ANNOYANCE

MISCONDUCT IN PUBLIC BY A DRUNKEN PERSON

Section 510. Misconduct in public by a drunken person.--Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees or with both.

Scope of Section 510

The section covers the act s of an intoxicated person, which causes annoyance to others and the general public. It should be noted that only an intoxicated person who causes annoyance is covered, and mere intoxication is not sought to be covered by the section. The nature of the annoyance may be causing annoyance in public or refusing to leave a place where he has no right to enter without permission of the owner. It is important to note that no mens rea is required for this offence.

It is, however, significant to note that s 34 of the Police Act also provides punishment for drunken man who causes public annoyance. However, there is significant difference between s 34 of the Police Act and s 510 of the IPC. The outer limit of fine provided under the former is fifty rupees while that one under the latter is ten rupees. The maximum term of imprisonment under the former is up to eight days while the maximum imprisonment under the latter can only be of twenty-four hours.[60]

PART D - PROPOSALS FOR REFORM

After drawing legislative sketch of the ch XXII of the IPC, dealing with three offences, *namely*, 'criminal intimidation', 'insult', and 'annoyance', the Fifth Law Commission observed that the chapter is a 'heterogeneous, ill-arranged, but nonetheless useful, mixture of penal provisions'. It proposed:

(1) Sections 503 and 506-508 dealing with criminal intimidation should be re-arranged.
(2) The threat to commit suicide with intent to coerce a public servant to do or omit to do an act should be treated as a form of criminal intimidation.
(3) Mock funeral of a living person in public should be criminalized as it not only annoys such living person and the public but also poses threat to public peace. A new section (s 504A) should be inserted in the chapter to this effect.
(4) S 510 (dealing with misconduct in public by a drunken person), in the light of s 34 of the Police Act, deserves to be deleted from the IPC.[61]

The Indian Penal Code (Amendment) Bill 1978 sought to give effect to only one of the above mentioned proposals for reform. Clause 203 of the Bill, in the backdrop of its cll 52 and 58, sought to delete s 505 of the IPC. Clause 52 of the 1978 Bill sought to give effect to the proposed transposition of s 505(1) (a) as s 138A as proposed by the Law Commission. While, cl 58 of the Bill proposed to transform s 505(2) and (3), with certain modifications, as s 153C of the Code.

The Fourteenth Law Commission endorsed the changes proposed by the Fifth Law Commission and by the cll 52, 58 and 203 of the 1978 Amendment Bill.[62]

However, the 1978 Amendment Bill, owing to the dissolution of the *Lok Sabha* lapsed in 1979. Hence, the changes sought thereunder could not become effective.

1 *Amitabh Adhar v NCT of Delhi* (2000) Cr LJ 4772(Del), (2008) 85 DLT 415.

2 *Vasant Waman Pradhan v Dattatraya Vithal Salvi* (2004) 1 Mah LJ 487.

3 (1995) Cr LJ 3559 (Ori).

4 Ibid, para 7.

5 AIR 1960 SC 154, (1960) Cr LJ 177(SC) .

6 In this case, the trial court had sentenced the accused to one year rigorous imprisonment for committing the offence under s 506, IPC. The high court, however, enhanced the same to two years rigorous imprisonment.

7 AIR 1960 SC 154, para 6.

8 Re *AK Gopalan*AIR 1949 Mad 233, (1950) Cr LJ 258(Mad) .

9 (1991) Cr LJ 410 (Bom).

10 *Ganga Chandra Sen v Gour Chunder Bankiya* (1885) ILR 15 Cal 671.

11 *Ragubar Dayal v Emperor* AIR 1931 All 263, (1931) Cr LJ 465(All) .

12 *Nand Kishore v Emperor* AIR 1927 All 783, (1928) Cr LJ 589(All) .

13 *Doraswamy Ayyer*(1924) ILR 48 Mad 774.

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25 (1997) Cr LJ 282 (Raj).

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27 AIR 1932 Bom 193.

28 Ibid, para 5.

29 (1998) Cr LJ 2156 (Ori).

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31 *Gauri Shankar v Bacha Singh* AIR 1939 Pat 27.

32 *State v Kurban Ali Akbar Ali* AIR 1956 Bom 239, (1956) Cr LJ 500(Bom) .

33 *Mohan Lal Nand Lal v State of Gujarat* (1961) 2 Guj LR 196.

34 *Karumanchi Veerangiah v Katta Mark* AIR 1956 Bom 239.

35 *Phiaz Mahamad*(1903) 5 Bom LR 597.

36 *Sirajuddin Ali v State of Andhra Pradesh* (2001) Cr LJ NOC 125(AP) .

37 *Devi Ram v Mulakh Raj* (1962) 2 Cr LJ 543(HP) ; see also *Karumanchi Veerangiah v Katta Mark* (1976) Cr LJ 1690(AP) ; *Bheema v Venakata Rao* AIR 1964 Mys 285, (1964) 2 Cr LJ 692(Mys) .

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41 (1997) 2 Crimes 498(Pat) .

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49 (2007) 5 SCC 1, 2007 Cr LJ 2959.

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53 See also ch 37: Criminal Force and Assault, above.

54 AIR 1967 SC 63.

55 AIR 1967 SC 63, para 16.

56 Ibid, para 13.

57 AIR 1996 SC 309, (1996) Cr LJ 381(SC) . Also discussed elaborately in ch 13: Trivial Acts, and ch 37: Criminal Force and Assault, above.

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59 (1996) 6 SCC 204.

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62 See, Law Commission of India, 'One Hundred and Fifty-Sixth Report: The Indian Penal Code', Government of India, 1997, para 12.92.