C. Text of the Code with Cases and Materials thereon

CHAPTER I

Introduction

Preamble

Preamble.— Whereas it is expedient to provide a general Penal Code for [1][Bangladesh]; It is enacted as follows :—

Cases : Synopsis

1. *Scope and applicability of the Code.*
2. *A "general Penal Code".*
3. *Interpretation of the Code.*
4. *Marginal notes of the Code.*
5. *Headings of the Code.*
6. *Illustrations of the Code.*
7. *Explanations of the Code.*
8. *Provisos of the Code.*
9. *Punctuation marks of the Code.*

1. Scope and applicability of the Code.—(1) The preamble states that the object of the Code is to provide a general Penal Code. *AIR 1921 Cal 1.*

(2) The general *substantive law* of crimes is contained in the Penal Code. The *procedural law* as to crimes is contained in the Code of Criminal Procedure. *AIR 1968 Bom 400.*

(3) The Penal Code applies to every person without regard to his race, religion, caste or community, provided he otherwise comes within the provisions of the Code. *(1902) ILR 25 All 31.*

(4) If there exists a right to prosecute under the Penal Code such right cannot be "impliedly" taken away by the provision of another statute. *AIR 1928 Mad 1235.*

2. A "general Penal Code".—(1) Although, according to the Preamble, the object of enacting the Code was to provide a general Penal Code, it should be noted that the Code contains no specific provision repealing the penal laws which were then in force. *AIR 1914 Cal 69.*

(2) The general principle is that the essence of a Code is to consolidate the whole of the law on the subject and to be exhaustive on the matters in respect of which it declares the law. This principle also applies to the Code and hence, Courts are not at liberty to go outside the Code and stretch or limit its provisions by reference to the previous law. *AIR 1951 Madhbha 1 (FB).*

(3) The Code contains the substantive law of crimes. The general law of criminal procedure is contained in the Code of Criminal Procedure. *AIR 1922 Mad 443.*

3. Interpretation of the Code.—(1) In construing a penal statute, where there is any doubt or ambiguity, that construction should be adopted which is favourable to the accused. *AIR 1964 SC 464.*

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1. The word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule (w. e. f. 26th March 1971).

(2) If, having regard to the context in which the words are used, a construction, which is not favourable to the accused, appears to be more in consonance with the intention of the Legislature, such construction should be adopted. *AIR 1959 SC 436.*

(3) The words of a statute should not be limited so as to exclude from the operation of a penal provision persons who would otherwise fall within their scope. *AIR 1963 SC 550.*

(4) The presumption that the same word is used in the same sense in every part of a statute is not of much weight and, if sufficient reason can be assigned, the same word may be construed in different senses in the same statute and even in the same section. *AIR 1962 Guj 218.*

(5) Where two constructions are possible that construction must be adopted which avoid absurdity or unreasonability. *AIR 1963 Bom 21.*

(6) The literal meaning of the words used in a statute need not be adopted if to do so would defeat the object of the Legislature. In such case, the court may adopt a construction which will advance the remedy and suppress the mischief. *AIR 1965 SC 871.*

(7) Dictionary meanings, however helpful in understanding the general sense of the words, cannot control where the scheme of the statute considered as a whole clearly conveys a somewhat different shade of meaning. *AIR 1971 SC 1283.*

(8) The policy of the Legislature is no concern of the Courts in interpreting statute. *AIR 1933 Bom 417.*

(9) It is not permissible to construe the Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. It is legitimate to construe the Code with reference to modern conditions and needs unless there is anything in the Code or any section thereof to preclude such construction. *AIR 1957 SC 857.*

4. Marginal notes of the Code.—(1) The marginal notes to a section do not form part of the statute and cannot be referred to for the purpose of construing the section. *AIR 1947 PC 82.*

(2) In the case of an ambiguity in the wording of a section the marginal note may be referred to for interpreting the section. *AIR 1944 Sind 1.*

(3) Where the marginal note has been inserted by or under the authority of the Legislature or assented to by the Legislature, the marginal note can be referred to for the purpose of interpretation. *AIR 1933 Bom 417.*

5. Headings of the Code.—(1) In case of doubt or ambiguity in the wording of a section or group of sections the headings used in the statute can be referred to as an aid in understanding the provisions. *AIR 1933 Bom 417.*

(2) Where the meaning of the words is clear, that meaning cannot be controlled by referring to headings. *AIR 1955 Bom 82.*

6. Illustrations of the Code.—(1) Illustrations do not stand on the same footing as marginal notes but form part of the statute. *AIR 1928 Oudh 15.*

(2) Illustrations cannot override the express words of a statute. *AIR 1921 Cal 1.*

(3) Illustrations rank as cases decided upon the provisions of the Code. *(1876) ILR 1 Bom 147.*

7. Explanations of the Code.—(1) The purpose of an *Explanation* is often to explain some concept or expression or phrase occurring in the main provisions and it is not uncommon for the Legislature to accord either an extended meaning or a restricted meaning to such concept or expression or phrase by inserting appropriate *Explanation. AIR 1975 Bom 244.*

(2) An *Explanation* is at times appended to a section to explain the meaning of words contained in the section. It thus becomes a part and parcel of the enactment. *AIR 1955 SC 661.*

(3) The meaning to be given to an *Explanation* must depend upon its terms and "no theory of its purpose can be entertained unless it is to be inferred from the language used". *ILR 43 Mad 550 (PC).*

(4) On the natural reading of an *Explanation* it appears that it has widened the scope of the main section. Effect must be given to the *legislative intent* notwithstanding the fact that the legislature named that provision as an *Explanation.* In all these matters the Courts are to find out the true intention of the Legislature. *1977 Lab AC 1308.*

(5) But if the language of the *Explanation* shows a purpose and a construction consistent with that purpose can be reasonably placeed upon it, that construction will be preferred as against any other construction which does not fit in with the description or the avowed purpose.

8. Provisos of the Code.—If the language of the proviso makes it plain that it was intended to have operation more extensive than that of the provision which it immediately follows, it must be given such wider effect. Undoubtedly, the general rule is that a proviso is added to an enactment to qualify or create an exception to what is in the enactment and, ordinarily, a proviso is not interpreted as stating a general rule. *(1979) 47 CLT 244.*

9. Punctuation marks of the Code.—Punctuation cannot be read or regarded as a controlling factor. *1979 Mah LJ 555.*

Section 1

1. Title and extent of operation of the Code.—This Act shall be called the [2][Penal Code], and shall take effect [3][* * *] throughout [1][Bangladesh].

Cases

1. Extent of the Code.—It lays down that the Penal Code extends only to offences committed in Bangladesh and not to offences committed outside Bangladesh. *14 BLD (HCD) 204.*

Section 2

2. Punishment of offences committed within [1][Bangladesh].—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 [1][Bangladesh] [4][* * *].

Cases : Synopsis

1. Penal liability under general and special Acts.
2. Every person : Meaning and definition.
3. Exceptions to every person :
(i) President's immunity.
(ii) Foreign sovereigns.
(iii) Ambassadors.
(iv) Public servants.

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2. The words within square brackets were substituted for the words "Pakistan Penal Code", *Ibid.*
3. The words and figures "on and from the first day of May, 1861", were repealed by the Act XII of 1891.
4. The words and figures "on or after the said first day of May, 1861," were repealed, *Ibid.*

1. Penal liability under general and special Acts.—The Penal Code is a general penal Act and it does not affect any special penal Act. Section 2 must be read subject to section 5 which clearly makes a reservation with regard to offences specified therein. Sections 2 and 5 taken together declare that offences defined by special and local laws continue to be punishable as before. A penal provision in a special Act is no bar to prosecution under the Penal Code. Where there is a specific punishment provided in a special Act it takes precedents of the general punishment under the Penal Code. *AIR 1937 Allahabad 714.*

2. Every person : Meaning and definition.— Every person means any one irrespective of his rank, caste or creed who shall be liable to punishment for an offence under the Code for every act or omission committed within Bangladesh and of which he is found guilty. The expression "every person" includes a foreigner who has committed an offence within Bangladesh. *AIR 1957 SC 857.*

The words "every person" may be compared with section 3 and 4 of the Code where the words "any person" have been used. The word "person" is defined in sec. 11 of the Code as including a company, an association of persons whether incorporated or not. *AIR 1964 Bom 195.* But the words "every person" in Sec. 2 are used in a narrow sense and will mean only natural persons and not judicial persons.

3. Exceptions to "every person".—*(i) President's immunity.*—Article 51(2) of our Constitution provides that "during his terms of office no criminal proceedings whatsoever shall be instituted or continued against the President in, and no process for his arrest or imprisonment shall issue from, any court".

(ii) Foreign sovereigns.—In accordance with the law of Nations a sovereign of a foreign country is exempt from the jurisdiction of a criminal court on the ground that it is incompatible with legal dignity.

(iii) Ambassadors.—The rights, powers, duties and privileges of Ambassadors are determined by the Law of Nations. The immunities of diplomats are extended to the family living with them, to the secretaries and attaches, whether Civil or Military forming part of the mission. They cannot be arrested on a criminal charge. The immunities of Ambassadors do not extend to offences such as murder.

(iv) Public servants.—Some statutes confer immunity from prosecution for acts done by them in their official capacity, for example section 132, Criminal Procedure Code.

Section 3

3. Punishment of offences committed beyond, but which by law may be tried within, [1][Bangladesh].—Any person liable, by any [5][Bangladesh law], to be tried for an offence committed beyond [1][Bangladesh] shall be dealt with according to the provisions of this Code for any act committed beyond [1][Bangladesh] in the same manner as if such act had been committed within [1][Bangladesh].

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5. The original words "Law passed by the G.G. of India in-C." have successively been amended by A. O 1949, Sch, and the word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) Act. 1973 (Act VIII of 1973), Second Sch. (w.e.f. 26th March 1971) to read as above.

Cases

1. Offences committed beyond, but triable within, Bangladesh.—This section deals with offences committed beyond Bangladesh which may be tried in Bangladesh. Where a Bangladesh citizen commits an offence beyond Bangladesh and such offence does not constitute an offence at the place where it was committed, nevertheless he may be tried by the Bangladesh courts for such offence or extradited into the county where it said that he has committed the offence. *(AIR 1968 Cal 220).* Where a foreigner commits an offence in Bangladesh, he may be tried and punished for such offence regardless of his corporeal presence in Bangladesh at the time. *(AIR 1957 SC 857).* The real test for the purpose of jurisdiction for trial and punishment is the place where the offence is committed. A Bangladesh citizen shall be deemed to have committed an offence outside Bangladesh even if the act complained of does not constitute under the law prevailing in the place in which the offence had been committed. *(AIR 1964 Bom 264).* The words "liable by any Bangladesh law," would refer to the Extradition Act, 1974 and Sec. 188 of the Cr. Pro. Code. Sections 188 and 189 of the Criminal Procedure Code are only procedural sections dealing with offences committed outside Bangladesh.

Section 4

[6][**4. Extension of Code to extra-territorial offences.**—The provisions of this Code apply also to any offence committed by—

(1) any [7][citizen of Bangladesh] in any place without and beyond [8][Bangladesh] ;

[9][* * * * * * * *]

[10][* * * * * * * *]

[11][(4) any person on any ship or aircraft registered in [8][Bangladesh] wherever it may be].

Explanation.—In this section the word "*offence*" includes every act committed outside [8][Bangladesh] which, if committed in [8][Bangladesh], would be punishable under this Code.

Illustrations

(a) A, [12][a Bangladesh subject], commits a murder in Uganda. He can be tried and convicted of murder in any place in [8][Bangladesh] in which he may be found.

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6. Section 4 was substituted for the original section 4 by the Act IV of 1898, s. 2.

7. The original words "Native Indian subject of Her Majesty" have successively been amended by A.O. 1949 and A.O. 1961. Art. 2 and Sch. (with effect from the 23rd March 1956) to read as "Citizen of Pakistan" and the word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973 (with effect from 26th March 1971) to read as above.

8. Subs *ibid.* for "Pakistan."

9. Clause (2) as amended by A.O. 1949, Sch. was omitted by A.O. 1961, Art. 2 and Sch. (w.e.f. the 23rd March 1956).

10. Clause (3) was omitted by Act VIII of 1973 (with effect from 26th March 1971).

11. Clause (4) was inserted by the Offences on Ships and Aircraft Act, 1940 (Act IV of 1940), s. 2.

12. The words "a Pakistan subject" were substituted for the words "a coolie who is a Native Indian subject" were substituted by Act XXVI of 1951 and then the word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule (with effect from 26th March 1971).

(b) B, a European British subject, commits a murder in [13][Rangpur]. He can be tried and convicted of murder in any place in [8][Bangladesh] in which he may be found.

(c) C, a foreigner, who is in the service of the [14][Bangladesh] Government, commits a murder in [Khulna]. He can be tried and convicted of murder at any place in [9][Bangladesh] in which he may be found.

(d) D, a British subject living in [15][Khulna], instigates E to commit a murder in [16][Chittagong]. D is guilty of abetting murder.]

Cases and Materials*: Synopsis

1. ***General scope of the section.***
2. ***Territorial waters, economic or maritime zones—discussed.***
3. ***Fixation of territorial waters requires expert knowledge.***
4. ***Offence committed outside Bangladesh.***
5. ***Offence committed on High Seas.***
6. ***Piracy.***
7. ***This section read with section 188 Cr.P.C.***
8. ***Practice under the section :***
   - ***(1) Evidence***
   - ***(2) Charge***

1. General scope of the section.—This section shows the extent to which the Court now applies to offences committed outside or inside Bangladesh. Where an offence has been committed beyond the limits of Bangladesh but the offender is found within its limits two contingencies arise :

(a) The offender may be given up for trial in the country where the offence was committed (extradition).

(b) The offender may be tried in Bangladesh (extraterritorial or ex-territorial jurisdiction).

2. Territorial waters, economic or maritime zones—discussed.—In *Vichien Chaperon and another Vs. Bangladesh represented by the Secretary, Ministry of Finance and ors., reported in 34 DLR 315*, it is stated that the seizure report and the Government do not say whether the 16 miles west of Cox's Bazar is covered by the coast line of Bangladesh : Presumption is, seizure took place outside the territorial waters of Bangladesh. Whether the seizure has been within the contiguous zone of Bangladesh : Seizure took place within the contiguous zone as provided in section 4(1) of the Territorial Waters and Maritime Zones Act 26 of 1974. Under section 4(2) the Government may provide for punishment for contravention of any customs law in contiguous zone. It is not established that any punishment has been prescribed by the Government. Therefore seizure of the trawler is not lawful. People of Bangladesh can fish in economic zone in ordinary boats. No punishment has been prescribed by the Government for violation of the right of Bangladesh in economic zone. Sovereignty of Bangladesh does not extend to the economic zone. Punishment not provided for violation of the Republic's right of such economic zone. 16 miles west of Cox's Bazar from 12 miles beyond is territorial waters of Bangladesh.

3. Fixation of territorial waters requires expert knowledge.—In *Bangladesh Vs. Somboon Asavaham, reported in 32 DLR (AD) 194*, it is stated that Government issued notification defining territorial waters and economic zone of Bangladesh and it is not Court's function to decide what should

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13. The word "Rangpur" was substituted for the word "Kashmir" by Act VIII of 1973, s. 3 & 2nd Sch.
14. The word "Bangladesh" was substituted for the words "West Pakistan", *ibid.*
15. The word "Khulna" was substituted for the word "Junagadh". *ibid.*
16. The word "Chittagong" was substituted for the word "Lahore" *ibid.*

be the limits of Bangladesh's territorial waters—Fixing of baseline for determination of the territorial waters is a technical matter requiring expert knowledge.

4. Offence committed outside Bangladesh.—In *MG Towab Air Vice Marshal (Retd) Vs. The State, reported in 34 DLR 390*, it is stated that Court in Bangladesh has jurisdiction to try the accused. Mere fact that the accused when he committed the alleged offence was Deputy Chief Martial Law Administrator will not exempt him from prosecution under sub-paras (2) and (3) of Para 3A of the 4th Schedule of the Constitution. Resort to section 561A CrPC not permissible when the Court has before it FIR and the chargesheet.

5. Offences committed on High Seas.—The jurisdiction to try offences committed on the High Seas is called the admiralty jurisdiction. It is founded on the principle that a ship on the High Seas is a floating island belonging to the nation whose flag she is flying. It extends over all Bangladeshi vessels not only when they are sailing on the High Seas but also when they are in the rivers of a foreign territory at a place below bridges, where the tide ebbs and flows and where great ships go. It is clear that Bangladeshi ship on the High Seas is subject to the laws of Bangladesh. In order to assume jurisdiction it is sufficient to show that the ship sailed under the Bangladesh flag and the owner is Bangladeshi or Bangladesh Government. The jurisdiction to try such offences committed on the High Seas has been vested on all Courts to try offenders wherever they are found. The procedure to be followed in cases where offences are committed on the High seas is the ordinary criminal procedure *(Gunning (1894) 21 Cal 782)*. A Court of criminal justice in Bangladesh dealing with a Bangladeshi citizen for an offence alleged to have been committed on the High Seas is bound to apply the provisions of the Penal Code to the act or acts alleged against him. The phrase "within Bangladesh" towards the end of section 2 cannot be read with the phrase "every person". The plain meaning of the words "every person" is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed *(PLD 1958 SC 115 (India))*. In this connection it is to be noted that ignorance of law by a foreigner may be no legal defence but it is a matter to be taken into consideration in the matter of mitigation of punishment *(AIR 1953 Punjab 227)*.

6. Piracy.—Every one commits piracy by the law of nations who, without legal authority from any State and without any colour of right, (a) seizes or attempts to seize any ship on the high seas within the jurisdiction of the Admiralty by violence or by putting those in possession of such ship in fear ; or (b) attacks such ships and takes and carries away any of the goods thereon by violence or by putting those in possession of such ship in fear ; or (c) attacks or attempts to attack such ship with intent to take and carry away any of the goods thereon by violence or by putting those in possession of such ship in fear ; or (d) attacks such ship and offers violence to anyone on board thereof or attacks or attempts to attack such ship with intent to offer violence as aforesaid. A person is guilty of piracy who, being peaceably upon any such ship, seizes or attempts to seize her by violence or by putting those in possession of such ship in fear or takes and carries away or attempts to take and carry away any of the goods thereon by violence to those in possession of such ship or by putting them in fear. *(Stephen Dig. Crim. Law, 9th edn. 101)*. Actual robbery is not an essential element of the crime of piracy. A frustrated attempt to commit a piratical robbery is equally piracy *((1934) AC 586)*. If the subjects of the same State commit robbery upon each other, upon the high seas, it is piracy. It the subjects of different States commit robbery upon each other, upon the high seas, if their respective State are in amity, it is piracy ; if at enmity, it is not ; for it is a general rule, that enemies can never commit piracy on each other, their depredations being deemed mere acts of hostility. *(4 Coke 154 vide Archbold 32nd edn. 635)*.

7. This section read with section 188, Cr.P.C.—(1) Section 188, Criminal P.C. provides that in such cases, the offender may be dealt with at any place at which he may be found as if the offence had been committed at such place. *AIR 1968 Cal 220.*

(2) Proviso to S. 188 of the Criminal P.C. only relates to offences committed in "territory". Offences committed on the high seas beyond the territorial waters of any country will not come within the purview of the proviso and in regard to such offences, therefore, the requirement as to the sanction of the Government will not apply *(1911) 12 CrLJ 198 (FB).*

(3) Section 188 of the Criminal P.C. applies, like this section, only to offences committed outside Bangladesh. If the offence charged is one committed in Bangladesh itself, neither of the sections will apply. *AIR 1968 Cal 220 (DB).*

8. Practice under the section.—*(1) Evidence.*—Prove—

(i) that the accused has committed acts which amount to robbery (sec. 390) or to frustrate attempt to commit it,

(ii) that such acts have been committed within the jurisdiction of admiralty.

(2) Charge.— When a person is tried before a Court which would not have jurisdiction but for special circumstances, the Court should specify in the charge those circumstances.

The charge should run thus :—

I *(name and office of Magistrate)* hereby charge you as follows :—

That you, being a citizen of Bangladesh [or that you being on (*name ship)* or (*name aircraft)* registered in Bangladesh, on or about the—day of,—at—, without and beyond Bangladesh, did—and thereby committed an offence punishable under s. 4 and s....of the Penal Code, and within my cognizance (*or the cognizance of the Court of Session).*

And I hereby direct that you be tried [*by the said Court (in cases tried by Magistrate omit these words)*] on the said charge.

Or if on land : That you a citizen of India (foreign National) on or about............at..................within Bangladesh (outside the Indian Union) committed an offence (describe the offence) punishable under section............of the Code.

Section 5

5. Certain laws not to be affected by this Act.—Nothing in this Act is intended to repeal, vary, suspend, or affect [17][* * *] any of the provisions of any Act for punishing mutiny and desertion of officers, [18][soldiers, sailors or airmen] in the service of [19][the [20][Republic]], or of any special or local law.

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17. The words "any of the provisions of the Statute 3 and 4, William IV, Chapter 85, or of any Act of Parliament of the United Kingdom passed after that Statute in any way affecting the East India Company or Pakistan or the inhabitants thereof ; or" were omitted by Act VIII of 1973, 2nd Sch. (with effect from 26th March 1971).
18. The original words "and soldiers" have successively been amended by the Repealing and Amending Act, 1927 (Act X of 1927), s. 2 and Sch. I, and Amending Act, 1934 (Act XXXV of 1934), s. 2 and Sch. to read as above.
19. The original words "Her majesty or of the East India Company" have successively been amended by the Repealing Act, 1870 (Act XIV of 1870), and A.O. 1961, Art. 2 and Sch. (with effect from the 23rd March 1956) to read as "the state".
20. The word "Republic" was substituted for the word "State" by Act VIII of 1973, 2nd Sch. (w.e.f. 26 March 1971).

Cases : Synopsis

1. 'Special or local law'.
2. A person cannot be sentenced under both the P.C. and a special or local law for the same offence.
3. Accusation under special law, but conviction under the Penal Code, illegal.
4. Offences for contempt of court.

1. 'Special or local law'.—Although an offence is expressly made punishable by a special or local law, yet it will be punishable under the Penal Code, if the facts come within the definitions of the Code. *((1953) CrLJ 932)*. The distinction between a statute creating a new offence with a penalty and a statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty is well settled. In the former case the new offence is punishable by the new patenlty only, in the latter, it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included. *((1929) 31 BomLR 1151)*. The principle is that where a new offence is created and the particular manner in which proceedings should be taken is laid down, the proceedings cannot be taken in any other way. *(Ibid)*. No prosecution under the Code is admissible, if it appears upon the whole frame of the special Act that it was intended to be *complete in itself,* and to be enforced only by the penalties created by it *((1894) 22 Cal 131)*, but in the absence of anything in the special Act to exclude the operation of the Code, an intention on the part of the Legislature to exclude it should not be inferred. *(1918 AIR (M) 460)*. "The principle that where a particular set of acts or omissions constitute an offence under the general law and also under a special law the prosecution should be under the special law, is confined to cases where the offences are coincident or practically so. *((1931) 53 All 642)*. Where the offence falls strictly within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty. *(1932, AIR (A) 69)*. Where there is a conflict between a special Act be and a general Act the provisions of the special Act prevail. *(1934 AIR (B) 162)*. However, a person cannot be punished under both the Penal Code and a special law for the same offence *(1918 AIR (P) 649)*, and it is ordinarily desirable that the sentence should be passed under the special Act. *(1931 AIR (M) 18)*. For, it is presumed that the Legislature intends that the special form of punishment is appropriate to special cases. The General Clauses Act provides that "where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence." Where the accused is guilty of a specific offence under the Penal Code he should be convicted under the Code if the punishment under the special Act is not adequate. *((1874) PR No. 11 of 1874)*. It has been held that a conviction of theft under s. 379 of the Penal Code in respect of a certain amount of crude opium is no bar to a subsequent trial and conviction of the convict under s. 9 of the Opium Act, 1878 *((1926) 48 All 496)*.

2. A person cannot be sentenced under both the P.C. and a special or local law for the same offence.—"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence.".(Section 26 of the General Clauses Act X of 1897).

3. Accusation under special law, but conviction under the P.C. illegal.—In *District Council, Kushtia Vs. Abdul Gani, reported in 22 DLR 217,* it is stated that the Magistrate summoned the

accused under sections 7 and 12 of the EP Pure Food Ordinance. The accused appeared and pleaded guilty. The Magistrate examined the accused under section 242 CrPC and convicted and sentenced the accused under section 273 PC instead of convicting the accused under the aforesaid special law. *Held :* Offence covered by the special law should have been dealt with under the special law. The order of conviction and sentence under section 273 PC is, therefore, contrary to law.

4. Offences for contempt of court.—(1) Contempt of Courts Act may very well be regarded as a "special" law dealing with a "special kind" of offences and hence, as being covered by the definition of "special law" and therefore as constituting a "special law" within the meaning of this section. *AIR 1954 SC 186.*

(2) Where an act or omission constitutes an offence both under the Penal Code and under the Contempt of Courts Act, it may be dealt with under either Act. *AIR 1955 Orissa 36.*

(3) This section only means that where under the Penal Code there is already a provision for punishing an offence as a contempt of Court (S. 288), the Contempt of Courts Act shall have no application. It does not mean that even in other cases, i.e. in cases where an act is not dealt with under the Penal Code as a contempt of Court, (but still constitutes an offence under the Code), it cannot be dealt with as a contempt of Court under the Contempt of Courts Act. In such cases, under Section 26 of the General Clauses Act, the offence can be dealt with both under the Penal Code and the Contempt of Courts Act. *AIR 1933 Pat 204.*

(4) Where the act of the accused constitutes a contempt of a subordinate Court but is not an offence under the Penal Code, the High Court can deal with it under the Contempt of Courts Act and the bar under the Act will not apply. *AIR 1959 SC 102.*

(5) Besides the Contempt of Courts Act, the Supreme Court is the Court of Record and have all the powers of such Court including the power to punish contempts of themselves. *AIR 1957 Hyd 17.*

(6) This power is inherent in Courts of Record and the Constitution merely expressly recognizes the existence of such power. *AIR 1926 Lah 1.*

(7) The provisions of the Constitution being Supreme, their operation does not depend on the saving clause in this section. *AIR 1954 SC 186.*

CHAPTER II
General Explanations

***Chapter Introduction.**—This chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms are here defined and explained, and the meanings thus announced, are steadily adhered to throughout the subsequent chapters. The object of the chapter is to prevent captious Judges from wilfully misunderstanding the Code, and cunning criminals from evading its provisions. It does not provide explanations for all cases indiscriminately, but only for those cases where difficulty may arise, when it will be necessary to refer to this chapter to see what the meaning of the Code is. (Proceedings of Council, 1860, P. 1261).*

Section 6

6. Definitions in the Code to be understood subject to exceptions.—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

(a) The sections, in this Code, which contain definitions of offences, do not express that a child under seven[Sic.] 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[sic] years of age".

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

Cases

1. Definitions, penal provisions and illustrations thereof to be subject to General Exceptions.—(1) The allegation that an accused person has committed an offence under the Penal Code implies not only that he has committed an act or omission which falls under a certain definition of an offence but also that the case does not fall within any of the general exceptions laid down in Chapter IV of the Code. *AIR 1941 All 402.*

Sic. Read "nine" in place of "seven".

(2) Neither Section 6 of the Penal Code nor section 211(5) of the Criminal P.C. overrides Section 105 of the Evidence Act, under which the burden of proof is on the accused to prove that his case comes within one of the general exceptions in Chapter IV of the Penal Code. *AIR 1941 All 402.*

(3) Section 6 carves out or stands in the nature of a proviso to s. 106 of the Evidence Act and imposes an obligation on the Court as well to consider the cases of exceptions on its own in so far as it relates, burden of proving legal insanity as the essential element of "special knowledge" envisaged in S. 106 of Evidence Act is always impaired due to mental derangement. All offences under the Penal Code are subject to or governed by S. 6. S. 6 is an extraordinary provision which obligates the Court to consider whether a case is covered by an exception or not. *1981 CriLJ 1205 (DB) (Gauhati).*

(4) It is sufficient for the accused to make out a prima facie case that he is entitled to the benefit of one of the exceptions to criminal liability including the general exceptions in Chapter IV. If he makes out a prima facie case to this effect, then the burden of proof is shifted to the prosecution which has still to discharge the major onus of proving the guilt of the accused beyond reasonable doubt. *AIR 1951 Kutch 11.*

(5) The accused is not bound to adduce any "evidence" to show that he is entitled to the benefit of any of the general exceptions. He can always prove that he is entitled to the benefit of one of the general exceptions from the facts proved or admitted or from the evidence led by the prosecution itself. *1977 CriLJ (NOC) 245 (Gauhati).*

(6) The absence of a plea by the accused that his case is covered by one of the "General Exceptions" in the Penal Code is no excuse for the court not considering if the accused is entitled to the benefit of any of the exceptions that may apply to him. *1977 CriLJ (NOC) 245 (Gauhati).*

Section 7

7. Sense of expression once explained.—Every expression—which is explained in any part of this Code is used in every part of this Code in conformity with the explanation.

Cases : Synopsis

1. Inclusion or mention of one is exclusion of another.

2. General exceptions and general explanations.

1. Inclusion or mention of one is exclusion of another.—(1) This section is based on the maxims *inclusio unius est exclussio alterius* (=the inclusion of one is the exclusion of another) or *expressio unius est exclusio alterius* (=the mention of one is the exclusion of another). In 3 *M.H.C.* Appendix II Holloway J. referring to this section said 'to say that every expression shall have a particular meaning everywhere under the Code is to say that it shall have no other meaning anywhere (in the Code). The point, therefore, is to ascertain the meaning of that explanation and if the words taken grammatically have a definite, certain and unequivocal meaning and if they constitute a perfectly complete expression susceptible grammatically of that one unequivocal meaning and of that only, then, however, absurd and pernicious the consequences, that meaning is to be followed. If, however, the expression does not include the complete thought of the Legislature or if the words are equally susceptible of several meanings we are to seek in other parts of the same statute or in other statutes in *pari materia* with this, the one of several possible meanings which ought to be put upon the words". *(1916) 44 Cal 477 (FB).*

(2) It is an ordinary canon of construction that a word or expression which occurs more than once in the same Act, must be given the same meaning throughout the Act, unless some definition in the Act or the context shows that the Legislature used the word in different senses. *AIR 1931 Nag 177.*

(3) The Explanation given in this Chapter of various expressions will be applicable to the interpretation of the expressions in whatever section of the Code they may occur. *AIR 1967 SC 63.*

(4) The usual qualification found in definition clauses in statutes "unless there is anything repugnant in the subject or context" is not found in this section. But in spite of this, such a qualification must be implied as forming part of it inasmuch as little weight is to be attributed to an omission in the definition clause, of this "usual" qualification. *1974 J & KLR 101 (FB).*

(5) The definition of "election" given in section 21, *Explanation* 3, would, by its own force, apply only in deciding whether a person is a public servant or not, yet by virtue of section 7, it is applicable to the whole of Chapter dealing with election offences. *(Forty-second Report, Indian Law Commission (1971), P. 10).*

2. General exceptions and general explanations.—By virtue of Section 6, the general exceptions in Chapter IV are part of every section in the Code. Similarly, by virtue of Section 7, the general explanations contained in Chapter II are to govern the interpretation of every part of the Code.

Section 8

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

Cases

1. General interpretation.—(1) There is a similar provision in section 13 of the General Clauses Act, 1897, which provides that in all Acts and Regulations, unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females. *1983 CrLJ 412 (Ker).*

(2) "He" includes a "female". *AIR 1953 MB 147.*

(3) The pronoun "he" in the expression "or knowing it to be likely that he will thereby outrage her modesty" in s. 354 must be understood, according to the present section, as referring to "any person, whether male of female". *AIR 1967 SC 63.*

(4) S. 8 states that the pronoun 'he' and its derivatives are used of any person whether male or female. The words used in S. 125 Criminal P.C. regarding orders for maintenance of wives, children and parents being 'any person', "his" and "such person" the daughter would also be bound to maintain her father, if he has no means of livelihood. *1983 CrLJ 412.*

Section 9

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

Cases

1. General interpretation.—(1) This section is similar to section 13(2) of the General Clauses Act, 1897.

(2) Most of the sections in the Penal Code are worded in the singular number even when the offence concerned may require more than one person to commit it. *(1966) 68 BomLR 286.*

(3) Under S. 391 the offence of dacoity requires at least five persons as perpetrators of the offence. But still S. 395 which prescribes the punishment for dacoity is expressed in the singular number. *(1966) 68 BomLR 286.*

(4) Section 494 which deals with the offence of bigamy is expressed in the singular but nevertheless it will apply to a case where both the parties contracting a second marriage have a previous spouse living and both the parties will be guilty under the section. *(1966) 68 BomLR 286.*

Section 10

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

Cases

1. General interpretation.—(1) By force of the explanation in S. 10 read with S. 7 the word "worman" in S. 354 would include any female person irrespective of her age. Thus even a female child of 7 and a half months may be the victim of an assault with the intention of outraging her modesty within the meaning of S. 354. *AIR 1967 SC 63.*

(2) A girl of six years was a "woman" for the purpose of S. 354. *(1912) 13 CrLJ 858 (DB) (Bom).*

(3) For the purpose of S. 366 (kidnapping or abducting a "woman" with intent to compel her to marry any person against her will) the words "woman" will include a minor female. *1878 Pun Re (Cri) No. 8, P. 19 (DB).*

Section 11

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

Cases : Synopsis

1. Scope.
2. Corporation or company as a person.
3. Idol as a person.
4. Child in womb as a person.
5. Club as a person.
6. Government as a person.

1. Scope.—(1) The definition in this section, as that in the General Clauses Act, uses the word "includes" : which, it is well known, indicates that the definition is not intended to be exhaustive. *AIR 1966 All 590.*

(2) The use of the word "includes" also indicates that the term defined retains its ordinary meaning but is enlarged so as to include matters which the ordinary meaning would not include. *AIR 1966 All 590.*

2. Corporation or Company as a person.—(1) The definition of "person" in this section, as the definition in the General Clauses Act, includes any company or association or body of persons whether incorporated or not. Hence, the definition will clearly include an incorporated Company or Corporation, although such company is only a juridical or legal person and not a natural person. *AIR 1970 Raj 145.*

(2) The definition in this section which purports to include a company within the meaning of the word "person" would not necessarily make a company indictable in the particular circumstances of a case. *(1975) 2 Andh WR 46.*

(3) A company would not be indictable for offences which can be committed by only a human individual or for offences which must be punished with imprisonment, or for which mens rea is essential. *AIR 1964 Bom 195.*

(4) The offence of cheating under S. 420 is one for which a sentence of imprisonment is obligatory and hence a company cannot be prosecuted for such an offence. *AIR 1954 Bom 195.*

(5) The question whether a corporate body should or should not be liable for criminal action resulting from the acts of some individuals must depend on the nature of the offence disclosed by the allegations in the complaint or in the charge-sheet, the relative position of the officer or agent vis-a-vis the corporate body and the other relevant facts and circumstances which could show that the corporate body as such meant or intended to commit that act. *AIR 1964 Bom 195.*

(6) A body corporate or a firm may be prosecuted for an offence under Ss. 480 and 482. *AIR 1929 Rang 322.*

(7) Just as a company can be prosecuted under certain circumstances for a criminal offence, so also it can be treated as a "person" against whom an offence is committed within the meaning of this Code. Thus, a company may be "defamed" within the meaning of S. 499. *AIR 1952 All 114.*

(8) A company may be a "person" within the meaning of S. 415 (cheating) and may be "cheated" with in the meaning of that section. *AIR 1924 Cal 495.*

3. Idol as a person.—(1) When a person makes a document with the intention of causing it to be believed that it was made under the authority of a juristic person like an idol, he commits forgery. *AIR 1944 Mad 77.*

4. Child in womb as a person.—(1) A "person" includes a child, whether born or unborn. In other words, even if a child is unborn and in the womb of its mother it is capable of being spoken of as a "person" if its body is sufficiently developed to make it possible to call it a "child". Hence the term "person" in S. 304A, Penal Code, includes an unborn child in the mother's womb after the seventh month of pregnancy. *AIR 1966 All 590.*

5. Club as a person.—(1) The definition of "person" in this section includes "*inter alia*" a body of persons whether incorporated or not. Hence a club, even if it is not a registered body, would be covered by the expression "person" for the purpose of the Code subject to the context in which the expression occurs. The members of the executive committee of a club can be held guilty of an offence under S. 294A (keeping lottery office). *AIR 1914 Low Bur 23.*

6. Government as a person.—(1) The definition in S. 11 of the word "person" is sufficiently wide to include Government as representing the whole community so that the removal of immovable property with a dishonest intention from the possession of a public servant having custody of the property on behalf of the Government would amount to removal of the property out of the possession of a "person" within the meaning of S. 378 and would be "theft" under that section. *(1877) ILR 1 Bom 610 (DB).*

(2) A prosecution for an offence will lie against the Government in certain circumstances provided that the applicability of the law, alleged to be infringed, to the Government is not excluded impliedly. *AIR 1967 SC 997.*

Section 12

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

Cases

1. General interpretation.—(1) By virtue of S. 4(2) of the Criminal P.C., the definition of the word "public" in this section is also applicable to the Criminal Procedure Code. But that definition merely says that it includes any class of the public or any community but is otherwise inconclusive. *(1949) 51 PunLR 176.*

(2) A class or community residing in a particular locality may come within the term "public". In determining the existence of a public right within the meaning of S. 133 of the Criminal P. C., the number of persons claiming the right and the nature of the right itself will no doubt be the criteria. But the best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or a class. *AIR 1939 Pat 460.*

Section 13

13. "Queen".—*Omitted by the Central Laws (Adaptation) Order, 1961 (P.O. No. 1 of 1961 = A.O., 1961).*

Section 14

[1][**14. "Servant of the State".**—The words "servant of the State" denote all officers or servants continued, appointed or employed in [2][Bangladesh] by or under the authority of the [3][Government]].

Cases

1. General interpretation.—(1) The words "servant of the State" in this section will include employees of the Government. *AIR 1938 Bom 419.*

(2) A member of Subordinate Medical Service in charge of a grant-in-aid dispensary is a servant of the Crown within section 270 of the Government of India Act, 1935. *AIR 1938 Bom 419.*

(3) A surveyor employed by the Collector acting in the management of a Government Khas Mahal to make a survey of certain portion of a water-course is a servant of the Government or a "public servant" within the meaning of S. 21 of the Penal Code. *(1898) ILR 26 Cal 158 (DB).*

Section 15

15. "British India".—*Repealed by the Government of India (Adaptation of Acts of Parliament and Indian Laws) Order, 1937 (=A. O., 1937).*

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1. The original section 14 has successively been amended by A.O. 1937, A. O. 1949, Sch. and A. O. 1961, Art. 2 and Sch. (with effect from the 23rd March 1956) and Act VIII of 1973 (with effect from 26th March 1971), to read as above.
2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973 (w.e.f. 26 March 1971).
3. The word "Government" was substituted for the words "Central Government or any Provincial Government", *ibid.*

Section 16

16. "Government of India".—*Repealed by the Government of India (Adaptation of Acts of Parliament and Indian Laws) Order, 1937 (=A. O., 1937).*

Section 17

17. "Government".—The word "Government" denotes the person or persons authorized by law to administer executive Government in [2][Bangladesh], or in any part thereof.

Cases

1. General interpretation.—(1) Government means the system of Government and not the persons holding the offices of President or Governor. *AIR 1959 All 101 (FB).*

(2) "Government" denotes more than Governor or his advisers. It denotes person or persons authorised by law to administer executive Govtment. *AIR 1947 Nag 1.*

(3) Ministers of Provinces are not "officers subordinate" to Governor and therefore not "Government" although in popular language they may be referred to as such. *AIR 1939 Cal 529.*

(4) Collector acting in management of a Khas Mahal is "Government" within meaning of Section 17. *(1899) 26 Cal 158 (DB).*

Section 18

18. "Presidency".—*Repealed by the Government of India (Adaptation of Acts of Parliament and Indian Laws) Order, 1937 (=A.O., 1937).*

Section 19

19. "Judge".—The word "judge" denotes not only every person who is officially designated as a judge, but also every person,—

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

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

Illustrations

(a) A Collector exercising jurisdiction in a suit under Act X of 1859 is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal is a Judge.

[4][* * * * * *]

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4. Illustration (c) was repealed by the Federal Laws (Revision and Declaration) Act, 1951 (Act XXVI of 1951), s. 3 and 2nd Sch.

(d) 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.

Cases : Synopsis

1. *Scope and applicability*
2. *Power to give definitive judgment in legal proceedings.*
3. *Persons held to be judges.*
4. *Persons held not to be judges.*
5. *Panchayat or village court.*
6. *Magistrates.*
7. *Arbitrators.*
8. *Legal proceedings.*

1. Scope and applicability.—(1) According to definition the term "Judge" includes not only a person who is officially designated as a Judge but also every person who is empowered by law to give in any legal proceeding, civil or criminal, definitive judgment. By the expression "definitive judgment" is meant a judgment which, so far as the Court pronouncing it is concerned, is final. *AIR 1938 Bom 489.*

(2) The Criminal P.C. does not contain a definition of the word "Judge" but by force of S. 4(2) of that Code, even in the absence of the words "within the meaning of S. 19 of the Penal Code" in S. 197 of the Code, the word "Judge" in that section would only mean a "Judge" as defined by S. 19 of the Penal Code. *AIR 1926 Pat 214.*

(3) The definition of "Judge" in this section is for a special purpose, as for instance for the purpose of S. 197 of the Criminal P.C. and has no bearing on the question whether a particular office belongs to the revenue department or the judicial department. *AIR 1956 Mad 613.*

(4) Under S. 20, the expression "Court of Justice" has been defined as denoting a "Judge", who is empowered to act judicially alone or a member of body of Judges. The word "Judge" in S. 20 is also to be understood in the sense defined in S. 19. Similarly, S. 21 (definition of public servant). Third, refers to a "judge" and in this section also the word "Judge" is to be understood in the sense defined in S. 19. *AIR 1952 All 306.*

(5) "Judge" and "Court of Justice" are not synonymous terms. A person may be a Judge within the meaning of this section and S. 107 of the Criminal P.C. so as to require sanction for his prosecution. *AIR 1929 Mad 175.*

(6) A Judge may not be a "Court of justice" within S. 20, as S. 20 requires a judicial proceeding and a legal proceeding is not necessarily a judicial proceeding. *AIR 1956 SC 158.*

(7) The Evidence Act, S. 3, and the Criminal P.C., S. 2(i), make the power of taking evidence the test of a "Court" and "judicial proceeding" respectively. But this test is not conclusive for the purpose of this section. *AIR. 1954 SC 375.*

2. Power to give definitive judgment in legal proceeding.— (1) The term "Judge" as defined in the section includes not only a person officially designated as a Judge but also every person who is empowered by law to give, in any legal proceeding, a definitive judgment. A definitive judgment means a judgment which, so far as the Court, delivering it is concerned, is conclusive. *(1907) 5 CrLJ 255 (Bom).*

(2) The power to give judgment must be one exercised in a legal proceeding. *AIR 1929 Mad 175.*

(3) A Village Magistrate exercising jurisdiction under a certain law and trying an offender is a "Judge" within the meaning of the section. *(1900) ILR 23 Mad 540 (DB).*

(4) A Village Magistrate exercising jurisdiction under certain law while acting in the prevention of an offence would not be a "Judge". *(1900) ILR 23 Mad 540.*

(5) Magistrate who has no seisin of a criminal case is not a Judge within this section. *AIR 1926 Pat 214.*

(6) A merely fact-finding body or authority, like a Commissioner appointed under the Public Servants (Inquiries) Act (37 of 1850) would not be a "Judge" or a "Court". *AIR 1956 SC 66.*

(7) A Returning Officer scrutinising the election papers of the candidates contesting the election of the managing committee of a co-operative society is not a "Judge" as defined in this section. *AIR 1970 Punj 21.*

(8) A Village Police giving judgments of conviction or acquittal in cases under the Village Police Act is a "Judge". *AIR 1938 Bom 489.*

(9) An order of discharge under S. 253 of the Criminal P.C. is not a "judgment" within Ss. 366, 367 and 368 of that Code. *(1909) 9 CriLJ 80 (DB) (Mad).*

(10) An order of dismissal of a complaint under S. 203 of the Criminal P.C. would not be a definitive judgment as it would not be conclusive and would not bar a fresh criminal proceeding with regard to the same accused and with regard to the same matter. *(1906) 3 CrLJ 274 (FB) (Mad).*

(11) Decisions which bear upon the question whether an order amounts to a judgment for the purpose of the Criminal P.C. are only of academic interest so far as this section is concerned, inasmuch as, even though an order will not amount to a "definitive judgment" still it may be passed at a stage of the legal proceeding in which the Magistrate can pass a definitive judgment. *AIR 1914 Lah 561.*

3. Persons held to be judges.— Village police deciding cases under the Village Police Act *(AIR 1938 Bom 489)* ; Member of Panchyati Adalat (=Village Court) *(1952 CrLJ 621)* ; Member of Panchayat *(37 CrLJ 294)* ; Magistrate exercising jurisdiction in a suit or proceeding. *(1955) CrLJ 1221 ; AIR 1937 Pat 160 ; AIR 1956 Hll 134).*

4. Persons held not to be judges.—Magistrate swearing affidavits *(1955) CrLJ 1221* ; President of a Union Board *(AIR 1929 Mad 176).*

5. Panchayat or Village Court.—(1) According to Illustration (c) to the section, a member of a panchayat which has power to try and determine suits is a "Judge". *1962 (2) CrLJ 408 (All).*

(2) Various Acts provide for panchayat courts and the members of such Courts will be "Judges" when sitting for deciding cases. *1962 (2) CrLJ 408 (All) ; AIR 1959 Raj 12.*

(3) A member of a Panchayat court, when he is not sitting on the Bench for deciding cases will not be a "Judge". *1959 Raj LW 51 ; AIR 1956 All 134.*

6. Magistrates.—(1) A Magistrate, before whom no judicial proceeding is pending at the time, is not a "Judge" before whom an affidavit can be sworn.. *AIR 1954 HimPra 57.*

7. Arbitrators.—(1) An arbitrator is not a "Judge" under this section. *AIR 1940 Pesh 41.*

8. Legal proceedings.—(1) The expression "legal proceeding" in Section 19 means a proceeding regulated or prescribed by law in which a judicial decision may or must be given. A judicial proceeding is not exactly equivalent to a legal proceeding. The President of a Union Board accepting or rejecting a nomination paper after scrutiny gives a definitive judgment in a legal proceeding. *AIR 1929 Mad 175.*

Section 20

20. "Court of Justice".—The words "Court of Justice" 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 as a body, when such Judge or body of Judges is acting judicially.

[5][* * * * * * *]

Cases

1. General interpretation.—(1) A Union Chairman accepting or rejecting a nomination paper gives a "definitive judgment" in a legal proceeding and hence, is a "Judge" within the meaning of S. 19, P.C. and also within S. 197 of the Criminal Procedure Code, so as to require the sanction of the Government under the latter section, for his prosecution for a criminal offence committed by him, while acting in the discharge of his public duties. *1929 Mad 175.*

(2) A Returning Officer deciding on the validity of a nomination paper under the Representation of the People Act, (who is in a comparable position with the Union Chairman in the abovementioned example) is not a "Court" within the meaning of S. 195 of the Criminal P.C. *AIR 1956 SC 153.*

(3) A quasi-judicial authority will not be a "Court of Justice" within the meaning of this section. *AIR 1956 SC 153.*

(4) The Sea Customs Authority under the Sea Customs Act is not a judicial Tribunal and the adjudging of confiscation, increased rate of duty or penalty under that Act does not constitute judgment or order of Court or judicial Tribunal necessary for supporting a plea of double jeopardy. *AIR 1953 SC 325.*

(5) A merely administrative body will not be a "Court of Justice" within the meaning of this section. *(1892) 1 QB 431.*

(6) A mere fact-finding authority as, for instance, a Commission of Inquiry under the Public Servants (Inquiries) Act (37 of 1850), is not a "Court of Justice" within the meaning of this section or within the meaning of the Contempt of Courts Act. *AIR 1956 SC 66.*

(7) The expression "act judicially" as used in S. 20 does not connote only the legal power of taking evidence. Hence, the existence of such power will not be conclusive on the question whether a particular authority is a "Court of Justice". *(1883) ILR 12 Bom 36 (DB).*

(8) The Commissioner appointed under the Public Servants (Inquiries) Act, 1850 is not a "Court of Justice" within this section. *AIR 1954 SC 375.*

(9) 'Judicial act' is one done by competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. *(1902) 2 Ir R 373.*

(10) The expression "Court of Justice" occurs in Section 466 of the Code and should be understood in the sense defined in this section. *(1912) 13 CrLJ 588 (All).*

(11) The expression 'court' is not defined in the Criminal P.C. and is not restricted to Courts, Civil, Revenue or Criminal and includes other tribunals also. However, a mere duty to act judicially either expressly imposed or arising by necessary implication of the nature of the duties required to be performed does not of itself make a tribunal, judicial or quasi-judicial, a 'Court' within the meaning of S. 195, Criminal P.C. The definitions of 'Court' under S. 3, Evidence Act, or 'Court of Justice' under S. 20, Penal Code, do not apply to the expression 'Court' as used in the Criminal P.C. *AIR 1969 SC 724.*

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5. The original Illustration which was previously substituted, *ibid,* S. 4 and 3rd Sch. has been ommitted by A.O. 1961, Art, 2 and Sch. (with effect from the 23rd Mach 1956).

Section 21

21. "Public servant".—The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely :—

[6][* * * * * * *]

Second.—Every Commissioned Officer in the Military, [7][Naval or Air] Forces of [2][Bangladesh] ; [8][* * * *]

[9][*Third.*—Every Judge including any person empowered by any law to perform, whether by himself or as a member of any body of persons, any adjudicatory function ;]

Fourth.— Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court ; and every person specially authorized by a Court of Justice to perform any of such duties ;

Fifth.—Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant ;

Sixth.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;

Seventh.—Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

Eighth.—Every officer of [10][the Government] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

Ninth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of [10][the Government], or to make any survey, assessment or contract on behalf of [10][the Government], or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of [10][the Government], or to make, authenticate or keep any document relating to the pecuniary interests of [10][the Government], or to prevent the infraction of any law for the protection of the pecuniary interests of [10][the Government] [11][* * * * *];

6. Clause First was omitted by Ord. No. X of 1982, S. 2

7. Subs, by the Repealing and Amending Act, 1927 (Act X of 1927), S. 2 and Sch. I, for "or Naval".

8. The words "while serving under the Government" were omitted by Ord. X of 1982, S. 2.

9. Subs, *ibid,* for the former clause "Third".

10. The original word "Government" has successively been amended by A.O., 1937, and A.O., 1961, Art., 2 (with effect from the 23rd March 1956), to read as above.

11. The comma and certain words were ommited by Ord. No. X of 1982, S. 2.

Tenth.—Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district ;

[12][*Eleventh.*—Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election [13][;]

Illustration

A Municipal Commissioner is a public servant.

[14][*Twelfth.*—Every person—

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

(b) in the service or pay of a local authority or of a corporation, body or authority established by or under any law or of a firm or company in which any part of the interest or share capital is held by, or vested in, the Government.]

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

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

[15][*Explanation 3.*—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.]

Cases : Synopsis

1. Test to determine whether a person is an officer of Government.

2. Scope and applicability.

3. Who are and are not public servants :

- ***(1) Generally***
- ***(2) Clause-wise :***
  - ***(i) Clause Third***
  - ***(ii) Clause Fourth***
  - ***(iii) Clause Fifth***
  - ***(iv) Clause Sixth***
  - ***(v) Clause Seventh***
  - ***(vi) Clause Eighth***
  - ***(vii) Clause Ninth***
  - ***(viii) Clause Tenth***
  - ***(ix) Clause Eleventh***
  - ***(x) Clause Twelfth (a)***
  - ***(xi) Clause Twelfth (b)***

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12. Ins. by the Election Offences and Inquiries Act, 1920 (XXXIX of 1920), section 2.
13. The semi-colon was subs, for the full-stop at the end in clause Eleventh by Ord. No. X of 1982, S. 2.
14. Added, *ibid*, after clause Eleventh and before Explanation 1.
15. Ins. by the Election Offences and Inquiries Act, 1920 (XXXIX of 1920), section 2.

(3) Explanation-wise :

(i) Explanation 1

(ii) Explanation 2

(iii) Explanation 3

4. *Minister—Whether a public servant.*
5. *Railway servants*
6. *Apprentice*
7. *Officer under suspension*
8. *Officer on leave.*
9. *Officer on deputation to a company.*
10. *Mutawalli whether a public servant.*
11. *Principal of a prirate college is not a public servant.*
12. *Functionaries of a banking company whether public servants.*
13. *Employee of DESA if a public servant.*
14. *Labour under a government contractor whether a public servant.*

1. Test to determine whether a person is an officer of Government.—(1) This section does not define "public servant" but describe it by enumeration. The true test, in order to determine whether a person is an officer of the Government, is : (1) whether he is in the service or pay of the Government, and (2) whether he is entrusted with the performance of any public duty. If both these requirements are satisfied it matters not the least what is the nature of this office, whether the duties he is performing are of an exalted character or very humble indeed. *30 DLR (SC) 127.*

(2) The word officer was held to include only persons who had some authority vested in them and would not include persons like mere clerks, peons, etc., who had no authority of their own and merely carried out orders. *AIR 1957 SC 13.*

2. Scope and applicability.—(1) The mere fact that a person is a Government servant will not necessarily make him a "public servant". The Court cannot extend the definition of the words "public servant" beyond the enumerated descriptions. *1978 Cal HCN 765.*

(2) Under the Prevention of Corruption Act, the expression "public servant", for the purpose of that Act, means a public servant as defined in S. 21 of the Penal Code. *1979 AllLJ 922.*

(3) The material date for determining whether the accused was a "public servant" within the meaning of the Prevention of Corruption Act so as to make him guilty under that Act is the date on which the alleged offence is committed. The fact that subsequently he has retired or been removed, or has otherwise ceased to be a "public servant" is immaterial. *AIR 1977 SC 1772.*

(4) Where a public servant is an offender and as such offender is triable by a special court, the question of jurisdiction of the special court is not affected by the fact that subsequent to the commission of the offence charged, he has ceased to be a "public servant" for the purpose of the Act. *AIR 1977 SC 1772.*

(5) Where the accused officers were not public servants when the alleged offence was committed by them and at the time they were triable by ordinary Court despite the fact that by subsequent amendment of an Act, it was provided that the Officers concerned shall be deemed to be public servants within the meaning of S. 21 of the Penal Code when the amendment was not retrospective. *(1981) 1 CalHN 543 (DB).*

(6) Where an Act (like the Prevention of Corruption Act) adopts the definition of a "public servant" in this section the definition will apply as it stands at the date of the offence charged even though such definition may have been amended by the legislature after the Act under which the accused is charged. *AIR 1975 SC 1835.*

(7) The expression "every" officer in Clause (10) of the section seems rather to point to an individual than to an incorporated body. Therefore, a Municipal Corporation is not a public servant within the meaning of the section. *(1877-78) ILR 3 Cal 758.*

(8) Apart from the provisions of this section which enumerates the categories of persons who are public servants there are statutory provisions declaring that certain person shall be deemed to be public servants within the meaning of this section. *1972 Cri LJ 1583 (Raj).*

(9) While the framework of this section would indicate that it is only illustrative and not exhaustive, the wording of the different heads especially 9 and 10, is so elaborate and comprehensive that it virtually amounts to an exhaustive definition. *AIR 1954 Vindh Pra 17.*

(10) Where the prosecution was launched by secretary of a Development Authority, the Development Authority has to be treated as the complainant and not the secretary. The Development Authority not being a public servant, appeal has to be filed within 60 days from the date of order of acquittal. *(1981) 19 DelhiLT 353 (DB).*

3. Who are, and are not, public servants : *(1) Generally.*—(a) In *Sheikh Sabur vs Returning Officer, reported in 41 DLR (AD) 30,* it has been stated that District Education Officer in charge, Gopalganj, Members of Union Parishad are 'Public servants' whom the Legislature has treated as a separate class of people's representatives and provided additional disqualification for them. Exclusion of members of Parliament from the disqualification law which is undisputedly a beneficial one, is not unconstitutional, though unethical. Right to seek election to the local bodies or even to the Parliament is not a fundamental right guaranteed by the constitution. It is a statutory right. A member of Parliament is not answerable to the Court for his legislative functions. Court has no duty to offer unsolicited advice as to what the Parliament should or should not do. "Principle of equality"—does not mean every law must have universal application for all persons irrespective of whether they belong to different classes requiring separate treatment. A law cannot be struck down merely because it fails to spell out the particular objective of a provision in the legislation itself.

(b) In *Haji Md. Mohsin vs the State, reported in 40 DLR 431*, it has been stated that if it is accepted that the petitioner is not a public servant within the meaning of section 2(b) of the Criminal Law Amendment Act, 1958, then the offence under section 409 of the Penal Code cannot be tried by the Senior Special Judge but for this reason the criminal proceeding under section 409 of the Penal Code cannot be quashed.

(c) In *Majibur Rahman Khan vs the State, reported in 33 DLR 83*, it has been observed that the employees of Khulna Newsprint Mills Ltd. were charged under section 409 of the Penal Code for alleged offence committed between 5th November and 11th November 1964. The Prevention of Corruption Act was amended by Anti-Corruption Laws Amendment Act, 1965 on 31-7-65. The question is whether the law amended in 1965 could be retrospectively applied to include offences falling under section 5(2) of Act 11 of 1947. Amending enactments were not given retrospective operation and hence on the date when the offences were alleged to have been committed by accused persons, they are not public servants and as such Special Judge had no jurisdiction to try them under Criminal Law Amendment Act, 1958.

(d) In *Shafiuddin Mia vs the State, reported in 30 DLR (SC) 127*, it has been held that a mutawalli is not a public servant within the meaning of section 21 of the Penal Code. The words "any other person" in section 98 of Waqf Ordinance do not include a mutwalli.

(e) In *Abdul Ali and another vs the State, reported in 30 DLR (SC) 58*, it has been maintained that labourer working under a Government Contractor, whether public servant within the meaning of section 21 of the Penal Code. A labour working under Government Contractor—His work may be a public service but not a discharge of public duty. Labourers doing their allotted work when solely responsible to the contractor who employed them are not discharging any public duty. Contractor discharging certain functions on the basis of agreement with the Government is not a public servant under section 21.

(f) In *AKMA Halim vs the State, reported in 29 DLR 218*, it has been mentioned that the accused was not a public servant as defined in section 21 of the Penal Code when the alleged offence was committed. He became a public servant within the meaning of section 21 of the Penal Code afterwards as such he cannot be tried as a public servant. *(Ref. 26 DLR 17).*

(g) In *Alhaj Abdur Rob vs Mobarokullah reported in 20 DLR 876*, it has been stated that Managing Director of a jute mill is a not a public servant.

(h) In *Abdul Sattar and others vs the State reported in 19 DLR 862*, it has been held that a Nikah Registrar is not a public servant. The Muslim Family Laws Ordinance does not provide that the Nikah Registrar to whom licence is granted for registration of Muslim marriages by the Union Council is a public servant.

(i) In *Sheikh Muzibur Rahman vs the State, reported in 15 DLR 549*, it has been observed that a Minister is a public servant. A person who was appointed by the Governor to discharge the function of a Minister and who was paid out of the public exchequer and who was also liable to be dismissed by the Governor comes within the description as indicated in the latter part of section 21 of the Penal Code and as such a Minister cannot but be regarded as a public servant.

(j) In *Md. Halim vs the State, reported in 15 DLR 282*, it has been said that a Railway servant in respect of offence of cheating, is not a public servant. For offences falling under sections 419 and 420 of the Penal Code, a railway employee in view of section 137(1)(iv) of the Railways Act, is not a public servant within the meaning of this section.

(k) In *Md Ahad Ali vs the State reported in 14 DLR 785*, it has been averred that the poddars of a treasury are not public servants as defined in section 21, clause (10) of the Penal Code. *(Ref. 14 DLR 730).*

(l) A Union Board member is not a public servant. *Manindra Chandra Biswas vs the State, 12 DLR 84.*

(m) Others : Secretary of a District Soldiers', Sailors' and Airmen's Board is not a public servant *(12 DLR 485)* ; Collecting Agent appointed by a Liquidator (who is a public servant) for realisation of debts due to a cooperative society is a public servant *(12 DLR 105 ; 11 DLR (SC) 219 ; 9 DLR 442 ; 6 DLR 527)* ; President of a Union Board is a public servant *(7 DLR 166)* ; Government servant not appointed according to statute, held, to be public servant *(6 DLR 143 (WP)* ; Masters, Principals or teachers of privately aided schools are not public servants. By no stretch of imagination, the Head Masters, the Principals or the teachers of the privately aided schools, can be called public servant nor it can be said that the certificates issued by them is done by them in their capacities as public servants in their official capacity *(1971 All CrR 297)* ; Person appointed as invigilator—If public servant within meaning of section 21. A person appointed as invigilator by the University is definitely public servant within the meaning of section 21 of the Penal Code. *(1971 All CrR 610).*

(n) The clerk of the office of the Union Board is not a Public Servant. *Asgar Ali Vs. State (1959) 11 DLR (SC) 219 ; 1959 PLD (SC) 242.*

(o) Chowkidar of a Government godown is not a public servant within the meaning of the said clauses of the Code. *Suresh Chandra Chakma Vs. State (1962) 14 DLR 730.*

(p) The Secretary of a District Soldiers', Sailors and Airmen's Board is not a public servant. *A.K.M. Shamsul Huq Choudhury Vs. State (1960) 12 DLR 485 : 1961 PLD 753.*

(q) Dafadar or Chowkidar is a public servant and has a right under section 24 of the Village Self-Government Act to keep an arrested person in confinement. *Ahmed Kabir Vs. State (1957) 9 DLR 323.*

(r) Dafadars and Chowkidars are not public servants within the definition of section 21. They are only public servants for the limited purposes laid down in rule 45 of the Rules framed under the

Village Self-Government Act i.e, public servants for the purposes of section 68(2) of the Cr.P. Code. *Loknath Vs. Crown (1955) 7 DLR 344 ; 1 PCR 21.*

(s) The cashier of a Central Co-operative Bank is not a public servant. *Salimullah Khan Vs. Crown (1954) 6 DLR 527.*

—Neither a poddar of a Bank nor a President of a Co-operative Society is a public servant. *Salimullah Khan Vs. Crown (1954) 6 DLR 527.*

(2) *Clause-wise.*—(i) Clause Third : (a) Under Cl. (3) of the section every "Judge" is a "public servant". The word "Judge" is to be taken in the sense defined in S. 19. Under that section a member of a panchayat having power to try and determine causes is a "Judge" and hence, such a member of a panchayat will be a 'public servant' within this section. *AIR 1952 All 306.*

(b) A subordinate Judge being clearly a "Judge" within Section 19 is a public servant within this section. *AIR 1942 Cal 434.*

(c) An arbitrator has been held not to be a Judge within S. 19 as he is not empowered to give a judgment. *AIR 1940 Pesh 41.*

(d) M. L. A. is not a public servant within the meaning of the expression in Cl. (3) or Cl. (7). *AIR 1984 SC 684.*

(ii) Clause Fourth : (a) Even a person, who is not an officer of a Court whose duty it is to perform any of the enumerated functions, will be a public servant if he is specially authorised by a Court of Justice to perform any of such duties. *AIR 1933 Pat 187.*

(b) A Receiver has been expressly included in the clause as an officer of a Court of Justice who will be a "public servant". A Receiver in insolvency is thus a "public servant". *(1962) 1 CrLJ 658 (Orissa).*

(c) An Advocate-Commissioner will undoubtedly be an officer of Court. *1981 Mad LW (Cri) 123.*

(d) The Court has no power to appoint a Commissioner to seize account books in the possession of the plaintiff, upon an application by the defendant. Such a Commissioner, if appointed will not, therefore, be covered by this clause. *AIR 1961 SC 218.*

(e) A Commissioner appointed by a Court to divide properties by metes and bounds under a preliminary decree for partition is a "public servant" by virtue of this clause. *AIR 1951 Mad 773.*

(f) The Sales Officer of a Cooperative Society who is entrusted with the duties of taking property in execution of decree of the society is a "public servant". *AIR 1942 Mad 552.*

(g) An officer of Court whose duty it is to execute any judicial process is a "public servant" within the meaning of this clause. *(1868) 2 BengLR 21 (FB).*

(h) A Nazir has an authority to delegate the execution of a warrant of arrest addressed to him and a person acting under such delegation is a public servant within this clause. *(1895) ILR 22 Cal 759.*

(iii) Clause Fifth : (a) A member of a Panchayat assisting a "Court of justice", is a public servant. *AIR 1955 NUC (Pat) 1592.*

(iv) Clause Sixth : (a) To bring a case within Cl. (6), there must be some cause or matter existing in dispute or controversy in regard to which a competent public authority is desirous of a report to enable it to deal with the matter in dispute between the parties. Therefore, a conservancy inspector who is directed to make a report if somebody objected to his carrying out certain direction does not come within this clause. *1886 AllWN 295 (DB).*

(b) An arbitrator to whom a dispute under S. 145 of the Criminal P.C. has been referred by the parties and not by the Court is not a "public servant" within this clause. *(1903) ILR 30 Cal 1084.*

(v) Clause Seventh : (a) It is only a person who is empowered by virtue of his office to place or keep any person in confinement that would be covered by this clause and would be a public servant under it. Thus, this clause will not apply to villagers who assist a headman in arresting and in taking the accused to the police station. *AIR 1917 Upp Bur 8.*

(b) A warder of a jail is a public servant coming under this clause. *AIR 1929 Lah 631.*

(c) Public servant—Definition of—M. L. A. is not a public servant within meaning of either Cl. (3) or Cl. (7). *AIR 1984 SC 684.*

(vi) Clause Eight : (a) In order to come under this clause the person in question must be an officer of Government having certain duties of the kind mentioned in the clause. Thus, the clause will not include merely private persons. For instance, neither this clause nor Cl. (7) will apply to the villagers who assist a headman in arresting and taking to the police station an accused person. *AIR 1968 Pat 506.*

(b) A village choukidar is not an officer of Government and hence not covered by this clause. *AIR 1923 Lah 260.*

(c) This clause includes an officer whose duty it is to give information of offences. Thus, a mukaddam or a mukaddam gumasta under the Land Revenue Code, is a "public servant" under this clause as one of his duties is to report the commission of certain offences under the Penal Code. *AIR 1947 Nag 60.*

(d) An agent of the Society for the Prevention of Cruelty to Animals, who has been appointed in respect of offences, is a "public servant" within the meaning of this clause. *AIR 1923 Mad 188.*

(e) An officer of the Society for the Prevention of Cruelty to Animals is a "public servant". *(1906) 3 CriLJ 420 (Cal).*

(f) A Police Officer would be a public servant within the meaning of both Cls (7) and (8). *AIR 1962 Cal 410.*

(g) A Sub-Inspector of Police belonging to the Finger Print Bureau and in the service and pay of the Government is a public servant even if he is not performing the ordinary duties of a Police officer. *AIR 1924 Lah 355.*

(h) A Police Officer under suspension is not a public servant. *AIR 1945 Nag 190.*

(i) An officer of State having the same powers, privileges and protection as an officer of the Police, has the power to bring the offenders to justice and to protect the public health, safety and convenience within the meaning of Cl. (8) and is clearly a public servant. *ILR (1947) 1 Cal 409.*

(j) A "taliari" of a village, unless enrolled as a Police officer, is not a Police officer. *(1979) 1 Weir 342 (DB).*

(k) An official who assumes or discharges Police functions but has not been enrolled and has not received a certificate of enrolment, is not a Police officer. *(1879) 1 Weir 342 (DB).*

(l) A member of the Civic Guard has the same duty as a Police officer when the Civic Guard has been called out on duty under the relevant law and will be a public servant when so called out on duty. *ILR (1947) 1 Cal 409 (DB).*

(m) Under Cl. (8) every Government officer whose duty it is to protect the public health is a public servant. Thus, a Lady Health Visitor employed by the Government is a public servant. *AIR 1963 Punj 201.*

(n) A Vaccinator is a public servant within Cl. (8) read with Explanation 1 even though he has not been appointed by the Government. *(1881) 1 Wier 129.*

(o) The Sarpanch, the Mukhiya and the Gram Sevak are public servants as these persons have the power to take such measures as may be necessary for the protection of life and property including the power to arrest in an emergency. *AIR 1955 NUC (Pat) 5958.*

(p) When a police officer investigating into cognizable offence under the Essential Commodities Act submits a report in writing under S. 173, Cr. P. C. disclosing such an offence, such a police officer submitting a report would be "Public Servant" within the meaning of S. 21. *AIR 1980 SC 506.*

(q) The duties of the kotwal relate to bringing the offenders to justice, to protect the public health, safety and convenience. The post of kotwal, therefore, would fall under clause (8) or (12)(a) of S. 21 and as such the kotwal is a public servant. *1981 CriLJ 653.*

(vii) Clause Ninth : (a) A mere Babu or Clerk who only carried out the orders of his superior and had himself no authority would not be an "officer" within the meaning of the clause and would not, therefore, be a "public servant" under clause 9. *(1905) 2 CriLJ 512.*

(b) Clause 9 is intended to include officers whose business it is to care for the pecuniary interest of the Government. *(1889) ILR 26 Cal 158 (DB).*

(c) The word "officer" in this clause means some person employed to exercise to some extent and in certain circumstances a delegated function of the Government. The holding of office implies charge of a duty attached to the office. *AIR 1973 SC 333.*

(d) An Izapatdar who is a lessee of a village who has undertaken to keep an account of forest revenue and pay a certain proportion to the Government, keeping the remainder to himself, is not an 'officer' and therefore, not a "public servant". *(1875) 12 Bom HCR 1(5).*

(e) The question as to who is to be deemed to be an 'officer' within the meaning of Cl. 9 of this section is a substantial question of law. *AIR 1955 Ajmer 18(1).*

(f) The Poddar of a Bank to whom money is paid and who receives the money on behalf of the Bank does not act on behalf of the Government and is not a public servant. *(1879) ILR 4 Cal 376.*

(g) A Stamp Clerk who is appointed by a Government Treasurer and who is required to keep stamps and receive money is a 'public servant' within the meaning of this clause read with Explanation 1 to the Section. *(1963) 65 PunLR 958.*

(h) The driver of a Roadways Bus, a commercial undertaking of the Government, being responsible for the proper care and maintenance of the bus in his charge, comes within the words of this clause and is therefore a "public servant". *AIR 1965 All 478.*

(i) The word "survey" also occurs in clause 10 and under that clause it has been held to include inspection or superintendence. *AIR 1962 Raj 250.*

(j) A Cadastral Surveyor performing his legitimate functions under the rules under the Land Revenue Code is clearly a public servant. *AIR 1929 Bom 385.*

(k) A Surveyor employed by the Collector in Khas Mahal Department to make a survey of a certain portion of the watercourse is a public servant within the meaning of this clause. The Collector acting in the management of Khas Mahal, the property of the Government, is as much "Government" within the meaning of Section 17 of the Code as when he is exercising any other duties of his official position. *(1889) ILR 26 Cal 158.*

(l) Under this clause an officer whose duty it is, as such officer, to execute any revenue process is a "public servant". *AIR 1944 Mad 183.*

(m) Senior Lecturer of a Government College—Appointment by University as an Examiner—Acceptance of bribe for giving more marks to a candidate—Governemnt could have no control over him as an examiner—Accused not guilty either under Section 161, Penal Code, or under Prevention of Corruption Act. *AIR 1970 Guj 97.*

(n) The Officers of a nationalised Bank are not public servants within the meaning of clause Ninth of S. 21 of Penal Code. *1983 CriLJ (NOC) 154.*

(viii) Clause Tenth : (a) The word "Officer" has been held to mean any person who is vested with authority to carry out any part of the executive power of the Government. *1960 AllLJ 357.*

(b) The expression "every Officer" suggests an individual and not a corporate body and so a corporation cannot be a public servant within Clause 10. *(1877-78) ILR 3 Cal 758.*

(c) It is not necessary that, in order to be an officer under this clause so as to be a public servant, the person concerned should be in the employ of the Government as such if he otherwise falls within the description given in this clause. *1960 AllLJ 357.*

(d) An officer whose duty it is as such officer to take, receive, keep or expend any property is a public servant under this clause. *1960 AllLJ 357.*

(e) A person remunerated by a fee or commission for the performance of a public duty will be a public servant. *1960 AllLJ 357.*

(f) The Chairman of a Co-operative Credit Society is not a public servant within the meaning of this clause. *AIR 1970 Cal 557.*

(g) The Chairman of Co-operative Credit Society is not a public servant as the words in the clause "for any secular common purpose of any village etc." show that receipt or expenditure of money must be for a public purpose. *AIR 1935 Bom 36.*

(h) The duties of Secretary of a Co-operative Society as laid down in the Co-operative Societies Act are not such as may be covered by the definition of the public servant as laid down in clause (10) of S. 21, P.C. *1980 All Cri R 427.*

(i) A kamdar of a co-operative union was not a public servant within S. 21 when it was not his duty to receive money and issue receipt. *1981 UPLT (NOC) 53.*

(j) An Engineer employed by a municipality who pays municipal money to others is a public servant within Clause (10) although he may not have the power of sanctioning such expenditure. *(1869) 6 Bom HCR (Cr C) 64 (DB).*

(k) The word "survey" in Clause (10) is used in an extensive and not a restricted sense. It includes inspection or superintendence. *AIR 1962 Raj 250.*

(l) In so far as an Act vests the power of inspection in the members of a District Board qua members, without more, a member of the Board is a public servant within the meaning of this clause. *AIR 1962 Raj 250.*

(m) The Patwari having the duty to collect cesses is a public servant. *ILR (1964) 2 AndhPra 1237.*

(n) The "village" in the singular in this clause includes the plural and so, the authority which a Local Board has over groups of villages is covered by the word "village". *(1937) 38 CriLJ 444 (Nag).*

(o) A Port Trust Estate does not fall within the expression "village town or District", in this clause. Hence, the Chief Store Keeper and Assistant Superintendent of Machinery for the whole Port Estate are not public servants. *AIR 1941 Sind 30.*

(p) The poddars of a treasury are not public servants. *Mujibor Rahman Vs. State 14 DLR 785.*

(q) Where appointment of Cotton Inspector had been made by the Director of Agriculture without his being duly authorised and had been assigned duties, the Cotton Inspector so appointed would be a "public servant". *Tufail Md. Vs. Crown (1954) 6 DLR (WPC) 143.*

(r) The Ansars can only be held to be public servants in a certain area provided the Government by a notification has embodied them in the District Police Force. Where they were not so embodied, they were not public servants within the meaning of the Act. *Haroon Malakar Vs. Crown (1953) 5 DLR 24.*

(s) President of Union Board—a public servant. *Khabiruddin Vs. Crown (1955) 7 DLR 166.*

(t) A Union Board member is not a public servant. *Manidra Chandra Biswas Vs. State (1960) 12 DLR 84.*

(u) Secretary of a Central Co-operative Bank is not a public servant. *Abul Wahab Vs. State (1957) 9 DLR 442.*

(v) When a person gratuitously performs a duty of the nature mentioned in clause (10), he is a public servant. *Zainal Abedin Vs. State (1957) 9 DLR 640.*

(w) The head treasure is an officer whose duty, as such officer, is to take, receive or keep any property on behalf of the Crown. He could also be said to be an officer in the service or pay of the Crown. *1950 PLD 361.*—A peon in the passport office is a public servant. *1955 DLR (Lah) 1032.*

(x) "Any officer in the service or pay of the Crown.........for the performance of any public duty"—"Public duty" a necessary qualification of such officer. *1955 PLD (Sind) 230.*

(y) Managing Director of a Jute Mills not a public servant. *Al-haj Abdur Rab Vs. Mobarakullah, (1968) 20 DLR 876.*

(z) A Nikah Registrar is a public servant—The mere fact that the Nikah Registrar is remunerated by fees to be received from the parties does not prevent his becoming a public servant if he is otherwise discharging a public duty. *21 DLR (SC) 330.*

(aa) A compulsory registration of marriages provided for by the Ordinance is clearly a public duty undertaken by the Government. A Nikah Registrar is also a person charged with the duty of making and authenticating documents and registers necessary for the ascertainment of the rights of people within the meaning of the tenth clause of section 21 of the Penal Code. So, the Nikah Registrar under the Muslim Family Laws Ordinance is a public servant within the meaning of the said clause. *Muhammad Arif Vs. Kawshar Ali, (1969) 21 DLR (SC) 330.*

(bb) The Nikah Registrar to whom licence is granted for registration of Muslim marriages by the Union Council is not a public servant. A Nikah Registrar is not an appointee of the Government or of the Union Council and he is not remunerated by fees or commission by the Government. The ninth clause of section 21 of the Penal Code indicates that a public servant should be either in the service or pay of the Government or remunerated by fees or commission by the Government for the performance of his public duties. The mere fact that the Nikah Registrar registers Muslim marriages on the strength of licence issued to him by the Union Council does not clothe him with the character of a public servant. Nor shall he be deemed to be a public servant under Article 97 of the Basic Democracies Order, 1959. (Overruled by the S.C. in Md. Arif case, 21 DLR (SC) 330.) *Abdus Sattar Vs. The State, (1967) 19 DLR 862.*

(cc) A Government servant's (here an Assistant Registrar of Co-operative Societies) services were lent to the Chittaranjan Cotton Mills Ltd., a private limited company (not a statutory body formed under any statute) to look after the interests of that Company's co-operative societies formed with the shares of the Company's employees. Company's Board of Directors also appointed him as a trustee to

look after the trust fund belonging to the co-operative societies and in that capacity, the allegation is, he misappropriated some funds. When put on trial under sections 420/511 and 464 of the Penal Code he contended that he was, even when his services were lent by the Govt. to the Company, a public servant within the meaning of s. 197 Cr. P. Code and his prosecution without Govt.'s sanction was illegal. HELD : For his prosecution no sanction was necessary and s. 197 no bar, he, when discharging the function of a trustee of the trust fund was not a public servant within the meaning of section 21 of the Penal Code. *Md. Motaleb Vs. A.M. Ahmed (1974) 26 DLR 17.*

(dd) Members of Union Parishad are "Public Servants" whom the Legislature has treated as a separate class of people's representatives and provided additional disqualification for them. Above all, members of a Union Parishad are 'public servants' within the meaning of section 21 of the Penal Code. The term 'Public Servants' denotes some executive control over them and they are subject to disciplinary rules which are applicable to regular government servants. In view of these differences in respect of functions and duties, the Legislature thought it proper and expedient to treat them as a separate class of people's representatives and has provided for the additional disqualification in question. *Sheikh Abdus Sabur Vs. Returning Officer 41 DLR (AD) 30.*

(ee) Although receivers appointed by the Courts are public servants, guards appointed by them are not public servants. *Md. Jahar Ali Vs. Afrazul Islam Chowdhury and others 9 BLD (HCD) 509.*

(ix) Clause Eleventh : (a) The Head clerk of a Municipality appointed by the Chairman acting under the relevant rule to prepare electoral rolls of persons entitled to be registered as voters in each of the Wards of a municipality is covered by this clause and hence is a "public servant" under the Section. *AIR 1941 Pat 539.*

(x) Clause Twelfth (a) : (a) Each of the three categories enumerated in Cl.(a) are independent—Word 'or' is disjunctive—Expression "in the pay of the Government"—Does not import master-servant relationship. *AIR 1984 SC 684.*

(b) Even under the old Cl. (9) it was held that a Class III Officer may be a public servant under that clause. *AIR 1957 SC 13.*

(c) The true test in order to determine whether a person falls under sub-clause (a) is whether he is in the service or pay of the Government and whether he is entrusted with the performance of any public duty. If both these requirements are satisfied, it does not matter in the least what the nature of his office is and whether his duties are of an exalted or a humble character. *AIR 1973 SC 330.*

(d) The fact that a person is only an extra departmental hand does not affect the question whether he is a "public servant" within the meaning of this section where he otherwise comes within the purview of Cl. 12(a) as a person in the service or pay of the Government. *1975 CriLJ 1122 (All).*

(e) The question whether a person in the service or pay of the Government is a "civil servant" or holds a civil post for the purpose of the Constitution is irrelevant under this section. *1975 CriLJ 1122 (All).*

(f) An apprentice-trainee in the signals department of the railway is not a public servant although he may receive a stipend. *(1974) 15 GujLR 293.*

(g) It was held with reference to Clause 9 as it existed originally in this section, that even a Class III officer could be an 'officer' within the meaning of that clause and that the question whether his duties were of an exalted or of an humble nature was irrelevant in deciding the question. *AIR 1957 SC 13.*

(h) Unless a person wielded some authority on behalf of the Government, he would not be an "officer" and therefore, would not be a public servant. *AIR 1918 Lah 152.*

(i) A person might be an "Officer" under Clause 9 and as such a "public servant" under that clause irrespective of the nature of his duties. *AIR 1955 NUC (Pak) 4390.*

(j) Clause (a) requires that the person in question must be either in the pay or service of the Government or must be remunerated by fees or commission for the performance of any public duty by the Government. *AIR 1956 SC 314.*

(k) The payment of a salary is not an essential hallmark of a public servant. He may be remunerated by a commission or a fee. *(1886) ILR 8 All 201.*

(l) He must be remunerated for the performance of a public duty and he must be remunerated by the Government. *AIR 1959 SC 847.*

(m) A mere contractor will not be a public servant although his contract may be with the Government and he is paid on a commission basis. *AIR 1956 Hyd 180.*

(n) A Chartered Accountant who has been directed by the order of the Government to investigate into the affairs of an Insurance Company and to report to the Government on the investigation made by him cannot be said to be a public servant though he is to get a remuneration for his work, the reason being that he is not an employee of the Government. *AIR 1962 SC 1821.*

(o) Tracer in Soil Conservation Office is public servant—But if he takes leave for 2 years and becomes an apprentice, a Trainee in the signals section of the Railway he will cease to be "public servant" though he may be receiving a stipend as such apprentice. *(1974) 15 GujLR 293.*

(p) Khalasis in Railway Carriage Section working in office of Works Manager in connection with preparation and issue of passes are "public servants". *AIR 1976 SC 1003.*

(q) The general tenor and setting of the Auxiliary Force clearly show that a member of the Auxiliary Force is as much a public servant as an acting member of the Air Force. *AIR 1980 SC 522.*

(r) The Authorised Medical Attendant appointed under the Medical Attendance Rules was not public servant within meaning of clause 12 (a) of S. 21 as he was not in the service of the Government or in the pay of Governments or being remunerated for performance of public duty. *1982 CriLJ 255.*

(s) The Bench clerk in the office of the Labour 'Commissioner in the charge of the compensation seat would be a public servant within the meaning of S. 21, Penal Code. *1983 CriLJ (NOC) 151.*

(t) Public servant—Definition of—Historical evolution of S. 21 reveals that M.L.A. was not and is not a public servant. *AIR 1984 SC 684.*

(u) Laboratory Officer in Municipal Corporation appointed as Public Analyst for the local area comprised within the limits of Municipal Corporation—Even by virtue of his appointment by the Government as Public Analyst, he is not in Govt. service or pay and therefore he is not covered by S. 21, Twelfth(a) and therefore, he is not a Public Servant. *1984 Cri LR (Guj) 162.*

(xi) Clause Twelfth (b) : (a) The words of Clause 12 in their original form were wide enough to include a Corporation established under an Act. *1966 AllLJ 1070.*

(b) Clause 12(b) refers to persons in the service or pay of three classes of entities, (1) a Local authority, (2) a Corporation established by or under a Act, (3) a Government Company as defined in the Companies Act. *AIR 1975 SC 1835.*

(c) The illustration which is given under Clause 12 states that a Municipal Commissioner is a public servant. This illustration originally occurred under Cl. 11 of the Section. It was held with reference to that illustration that the word "Commissioner" would include a member of the Municipal Committee and not only an Officer of a Municipal Committee. *AIR 1962 Raj 250.*

(d) The illustration shows that sub-cl. (b) will include not only persons in the employment of a Local authority but also members of a Local body like a Municipality, District Board, Union Panchayat and so on, including the Chairman or President of such a body. *AIR 1961 SC 785.*

(e) A public officer in the context of the relevant Ordinance is an officer who discharges any duty the discharge of which the public are interested, more so if he is paid from public funds. Therefore, Commissioner of a Municipality is a public officer within the definition of public officer in the Prevention of Corruption Act *(1979) 1 Malayan LJ 166.*

(f) Although the members of a Municipal Corporation or similar body are public servants within the meaning of this Section, the Corporation such as a Municipal Committee is not, as a Corporation, a public servant. *AIR 1930 Nag 33.*

(g) An employee under a Municipality or other Local authority will clearly be a public servant by virtue of Cl. 12(b). *1961 (2) CriLJ 564.*

(h) In many cases there are statutory provisions making servants of local bodies "public servants" for the purpose of this section. *(1968) 9 GujLR 672.*

(i) Under sub-clause (b) a person in the service or pay of a Corporation established by or under Act is a public servant. *1979 AllLJ 922.*

(j) The words of Cl. 12(b) are wide enough to cover an employee of a Co-operative Union established by virtue of the provisions of the Co-operative Societies Act. *1966 AllLJ 1070.*

(k) The employees of the Airlines Corp. are public servants within Cl.12(b). *AIR 1966 AndhPra 35.*

(l) The person appointed as a Stall Assistant under the Coir Board, a statutory body, will also be a public servant under Cl. 12 (b). *(1963) 1 CriLJ 675 (Ker).*

(m) Under Section 43 of the Road Transport Corporation Act all members of the Corporation and all officers and servants of the Corporation that were appointed by the Government or the Corporation shall be deemed, while acting, or purporting to act, in pursuance of the provisions of the Act or any other law, to be public servants within the meaning of S. 21. *AIR 1964 SC 492.*

(n) Under Section 81 of the Electricity Supply Act, all members, officers and servants of the Electricity Board while acting or purporting to act under the Act, shall be deemed to be public servants within this section. *(1970) 2 SCJ 172.*

(o) The position of a part-timed member of an Electricity Board is clearly covered by the expression "every person in the service of" as used in sub-cl. (b) of clause 12 of Section 21 because he holds a regular office for a fixed period. *ILR (1978) 1 Punj 239.*

(p) Chairman of the Board of Film Censors is a public servant. *1977 CriLJ 21 (Pat).*

(q) Privately aided School cannot be said to be established under the Education Act—Headmaster of such School is not a "public servant". *1974 CutLR (Cri) 545.*

(r) A University established by Government.—Invigilator appointed by University is a public servant. *1971 All Cri R 610.*

(s) A person in the service or pay of a Government Company as defined in the Companies Act, has been expressly included in the definition of a public servant under Cl. 12(b). *(1972) 74 PunLR 383.*

(t) Though a person in the service or pay of a Government Company is a public servant within this clause it does not necessarily follow therefore that such person is a "civil servant" as contemplated by of the Constitution. *(1968) 72 CalWN 398.*

(u) The word "established" in S. 21 means "to create" and not "registered" or "incorporated". A Co-operative Society is not a corporation established by or under an Act, within the meaning of sub-cl. (b) of clause twelfth of S. 21. *1980 CriLJ 494.*

(v) A government employee working on deputation in a co-operative society is not a public servant within the meaning of cl. (12) of S. 21 as during his period of deputation, he was not an officer in the service or pay of the Government. *AIR 1981 SC 1395.*

(w) Assistant Civil Engineer employed by Co-operative Society, as a member of its staff is not an "officer" of the society, but a mere employee. He is, therefore, not a 'public servant'. *1981 CriLJ 17LJ 1718.*

(x) Grade II officer of the State Bank is a public servant within meaning of *1982 CriLJ 961.*

(y) A person in the service or pay of the Central Bank is a public servant within the definition of the term in S. 21 as the Bank is a body corporate under the Act. *1982 CriLJ 780.*

(3) Explanation-wise.—*(i) Explanation 1* : (a) Explanation 1 provides that persons falling within the description of any of the clauses of S. 21. will be public servants whether they were appointed to their posts by the Government or not. *1960 AllLJ 357.*

(b) A person temporarily carrying on the duties of a Branch Postmaster purely as a nominee of the latter without authority by Government by letter of appointment has been held not to be a public servant. *AIR 1955 Cal 482.*

(ii) Explanation 2 : (a) The Court has no power to appoint a Commissioner to seize account books in the possession of the plaintiff and such a Commissioner, if appointed, will not be covered by clause 4 and therefore, he will not be a public servant by virtue of clause 4 of the section. In such a case it cannot be argued that by the force of Explanation 2 the Commissioner should be treated as being a public servant under this section. *AIR 1961 SC 218.*

(b) Explanation 2 is not confined to mere technical defects but covers a defect occasioned by want of jurisdiction in the appointing person to make the appointment. *AIR 1932 Cal 462.*

(c) Where it cannot be said that a person is in actual possession of a certain situation, he cannot be deemed to come under Explanation 2. Thus members of the Civil Guard cannot be said to be in actual possession of the situation of Police Officers until they are legally called out for duty under the terms of the relevant law. *AIR 1944 Cal 79.*

(d) Khalasis in the Railway Carriage Section who are actually allowed to deal with the preparation and issue of passes in the office of the Works Manager are, in fact, performing public duties and discharging public functions auxiliary to those of the Works Manager and his office, and hence, they must be held to be in actual possession of the situation of public servants and thus would be "public servants" notwithstanding the defect in their right to hold that situation. *AIR 1976 SC 1008.*

(e) A person employed irregularly by a clerk in charge of certain criminal records to help him in his work was in de facto possession of the records during the clerk's absence on sick leave and that such person was a public servant by reason of Explanation 2. *1891 AllWN 206.*

(f) A person who is temporarily carrying on the duties of a Branch Postmater purely as a nominee of the latter without any authority being given by the Government by letter of appointment, cannot be regarded as a public servant. It was held that as there was absolutely no appointment by the Government in favour of such a person there could be no question of any legal "defect" in his right to hold the situation. Explanation 2 had therefore no application to such a case. *AIR 1955 Cal 482.*

(g) The son of an extra-departmental agent of a Post Office looking after his father's official duties without any recognition or appointment by the Postal Department, had no right to hold the post and therefore is not a public servant by virtue of Explanation 2. *AIR 1964 Orissa 202.*

(h) The person who had assumed and discharged the functions of a police officer did not become one or a "public servant" in the absence of enrolment and certificate of enrolment. *(1879) 1 Weir 342.*

(i) Where the jailor was not entitled to call for any prisoner from the sub-jail to his house for the purpose of having domestic work done by him and the accused S carried out the verbal orders of the Jailor by taking undertrial prisoner to the house of the Jailor wherefrom the prisoner managed to escape, the accused S, having duty to keep in confinement the prisoner in question at that time, would be deemed to have acted as public servant in view of Explanation II. *1982 WLN (UC) 148 (Raj).*

(iii) Explanation 3 : Election is not merely the ultimate decision or the ultimate result. "Election" at every stage from the time the notification is issued till the result is declared, and even perhaps if there is an election petition, till the decision of the Election Tribunal. It is one whole continuous integrated proceeding and every aspect of it or every stage of it or every step taken in it is a part of the election. *54 BLR 137.*

4. Minister—whether a public servant.—(1) Although a Council of Ministers as such cannot be regarded as a public servant, yet an individual Minister may be regarded as a public servant within the meaning of Cl. 12 (a). *AIR 1975 SC 1685.*

(2) A Minister was held to be a public servant. *AIR 1953 SC 394.*

(3) The Prevention of Corruption Act divides public servants into three categories and states who is to give sanction to prosecute them. A Chief Minister of a State is a public servant for whose prosecution sanction is necessary from the Governor. *ILR (1983) Bom 2098 (DB).*

(4) A person who was appointed by the Governor to discharge the functions of a Minister and who was paid out of the public exchequer and who was also liable to be dismissed by the Governor, comes within the description as indicated in the latter part of the ninth clause of section 21 of the Penal Code, and as such, a Minister cannot but be regarded as a public servant within the meaning of Act II of 1947 read with Act XL of 1958. *Sheik Mojibur Rahman Vs. State (1963) 15 DLR 549.*

(5) A Minister is public servant. *Abul Monsur Ahmed Vs. State (1961) 13 DLR 353.*

5. Railway servants.—(1) After the Railways, which were originally owned by Companies, were nationalised and became the property of the Government it is obvious that railway servants are public servants within S. 21. They will clearly fall within clause 12(a) as being persons in the service of the Government and charged in the performance of a public duty by the Government. *AIR 1959 SC 1310.*

(2) Railway servant in respect of offence of cheating, not a public servant. For offences falling under sections 419 and 420 P.C, a railway employee, in view of section 137(1)(iv) of the Railways Act is not a public servant within the meaning of this section. *Md. Halim Vs. State (1963) 15 DLR 282.*

(3) Railway servants are public servants under the Penal Code irrespective of any particular Chapter of the said Code. Besides, the Railways today being a department of the Government, all its employees are Government servants and, as such, public servants. *The State Vs. Ali Akhtar (1966) 18 DLR 684.*

6. Apprentice.—(1) Clause 12(a) only provides that in order to be a public servant a person need not be paid a salary but may be remunerated by a fee or commission. But a person who receives no

remuneration at all like an unpaid apprentice in a Government office will not be covered by the Clause and hence will not be a public servant. *AIR 1950 East Punj 167.*

(2) A trainee apprentice is not a "public servant" within Cl. 21(a) even though he may be in receipt of a stipend. *(1974) 15 Guj LR 293.*

7. Officer under suspension.—(1) A police officer under suspension is no longer such officer under the Police Act and, therefore, is not a public servant. *(1872) 17 Suth WR (Cr) 12.*

(2) A person holding the office of a Lecturer in a Government Engineering College or as an Assistant to a Public Health Engineer is a public servant. But when he is under suspension, he cannot be said to "abuse his position as a public servant". *AIR 1951 Bom 233 (DB).*

8. Officer on leave.—(1) Govt. Employee working as a tracer in Soil Conservation Office is Public Servant. But when he takes leave for 2 years and joins the Railway Department he ceases to be a public servant although he may receive a stipend as such apprentice. *(1974) 15 GujLR 293.*

9. Officer on deputation to a company.—Public Servant—The service of the Republic—Public duty—A Government servant deputed to function as an officer of a company continued to be a public servant—Offence committed by him in his deputationary capacity—Sanction for prosecution U/s. 197 of the Code of Criminal Procedure is necessary. *Mansur Ali Ahmed Vs. Bangladesh & another. (1977) 6 BLR (AD) 104 = 29 DLR (SC) 224 = 2 BSCR 7.*

10. Mutawalli whether a public servant.—A Mutawalli appointed by Administrator of waqf cannot be deemd to be a public servant within the meaning of Sec. 21 of Penal Code. *Shafiuddin Mia Vs. The State. (1977) 6 LR (AD) 91 = (1977) 1 BSCR 1 = 30 DLR (SC) 127.*

11. Principal of a private College is not a public servant.—(1) Clause 12 of section 21 of the Penal Code provides that every person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of public duty is a public servant. Public duty is one which is created and conferred by law by which an individual is vested with some portion of the sovereign function of the Government to be exercised by him for the performance of the duty for the term and tenure prescribed by law. There is no such law in the instant case and as such the petitioner cannot be said to perform public duty and called a public servant. *Md Matiur Rahman Vs. The State, 19 BLD (HCD) 607.*

(2) Although the petitioner as a Principal of a Private College gets 70% of his salary from the Government exchequer by way of subsidy but it does not fall within the purview of clause 12 of section 21 of the Penal Code as it cannot be said that the petitioner has been performing public duty acquiring a status of a public servant. *Matiur Rahman (Md) Vs. State, represented by the Deputy Commissioner (Criminal) 4 BLC 375.*

12. Functionaries of a banking company whether public servants.—Section 110 of Banking Companies Act, 1991 also provides that a Manager, Officer and other functionaries of the Bangking Company are deemed to be public servants under section 21 of the Penal Code and hence the appellant and the respondent are public servants and the case has been rightly instituted in the Court of Special Judge against the respondent. More so, section 5 of Act II of 1947 speaks of the offences as mentioned in the schedule of the Act to be tried by Special Judges and in the schedule there are sections 403 and 477A of the Penal Code with which the accused has been charged for committing misconduct as a public servant. *International Finance Investment and Commerce Bank Ltd. Vs. Abdul Quayum and another (Criminal) 4 BLC (AD) 255.*

13. Employee of DESA if public servant.—Admittedly victim Abdul Malek is an employee of the DESA. Although the petitioner is not a public servant according to the DESA Ordinance but the petitioner is a public servant within the meaning of Clause 12(b) of S. 21. *Taleb Hossain @ Abu Taleb Hossain (Md.) Vs. State (Criminal) 6 BLC (AD) 71.*

14. Labour under a government contractor whether a public servant.—From the contract it is manifest that the labourers are neither remunerated by the Government, nor are they discharging any public duty. They are solely responsible for their duty and remuneration to the contractor. They Cannot be said to be auxiliary to any Government servant. There is no statutory sanction for giving extended meaning to cl. 9 and 10 of S. 21, so as to bring the labourers of a Government carrying and handling contractor within the purview of public servant. *Abdul Ali & another Vs. The State. 2 BSCR 43 = 30 DLR (SC) 59.*

Section 22

22. "Moveable property".—The words "moveable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

Cases : Synopsis

1. *Movable property.*
2. *Corporeal property.*
3. *Land and things attached to the earth.*
4. *Attached to the earth : Meaning.*
5. *Immovable things to be movable property by severence.*
6. *Crops, when severed, become movable property.*

1. Movable Property.—The expression 'movable property' is also defined in Section 3(34), General Clauses Act as property of every description except immovable property. *See* also Section 3, Registration Act. The definition in Section 22 of 'movable property' is an inclusive definition. It informs that 'movable property' includes 'corporeal property of every description.' *AIR 1962 SC 1821.*

2. Corporeal property.—In the P.C. the words 'movable property' are intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth. Property is of two kinds—corporeal and incorporeal. Corporeal property or tangible property is property which can be perceived by the senses. Cheques and letters are movable property. *52 ALL 894 ; 40 ALL 119.* Standing crops and trees are not movable property. *AIR 1930 Mad 509 ; 8 Rang 13.* Assessment order is property. *AIR 1969 SC 40.*

3. Land and things attached to the earth.—"Earth, that is soil, and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, is movable property capable of being the subject of theft. Whoever dishonestly severes such earth from the earth commits theft. *15 Bom 702.* Salt in a swamp is actually a part of the soil, while trees are not ; yet things immovable become movable by severance, and this would apply to severed parts of the soil. *e.g.*, stone quarried; minerals, iron or salt collected, as well as to timber which has grown, or edifices which have been raised on the land. *4 Mad 228.* "Stones" when quarried and carried away are "things severed from the earth" (within the meaning of Section 378, explanation 1) and are "movable property" (within the meaning of Section 22). *27 Mad 531.*

4. Attached to the earth : Meaning.—Section 3 of T.P. Act reads : "Attached to the earth" means (a) rooted in the earth, as in the case of trees and shrubs ; (b) imbedded in the earth, as in the

case of walls or buildings ; or (c) attached to what is so imbedded for the permanent beneficial employment of that to which it is attached.

5. Immovable things to be movable things by severance.—*See* Note 3. *See* also Explanation 1 and Illustration (a) to Section 378.

6. Crops, when Severed, become movable property.—*AIR 1930 Mad 509.*

Section 23

23. "Wrongful gain".—"Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss".—"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully; Losing wrongfully.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to loss wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

Case reference

1. See case law under section 24 and see also *AIR 1960 All 103* and *AIR 1960 Pat 518.*

Section 24

24. "Dishonestly".—Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

Cases : Synopsis

1. *Dishonestly*
2. *Wrongful gain ; Wrongful loss.*
3. *Wrongful gain : To persons not entitled to it.*
4. *Wrongful loss : To someone legally entitled to the property.*
5. *By unlawful means.*
6. *Gain or loss to be material.*
7. *Deterioration is not loss.*
8. *Gain or loss has reference to a thing dishonestly taken.*
9. *Dishonest intention.*
10. *Claim of right and intention.*
11. *Section 24 if exhaustive.*

1. Dishonestly.—As 'dishonestly' involves wrongful gain or wrongful loss, obviously it does not apply where no pecuniary question arises. The definition of 'dishonestly' in Section 24 of the Code applies only to wrongful gain or wrongful loss and although there are conflicting rulings on the question of the definition of the word 'fraudulently' the consensus of opinion has been that there must be some advantage on the one side with a corresponding loss on the other. *22 Cal 1017 FB.* And a thing is said to be done dishonestly according to the definition in Section 24, not only when it is done with the intention of causing wrongful gain to one person in the first mentioned sense of the words "wrongful gain" (and this is in accordance with the ordinary popular signification of the term), but also when it is done with the intention of causing wrongful gain in the other sense, or done only with the intention of causing wrongful loss to some one, though such loss to one person may not be

accompanied by any wrongful gain to another. *25 Cal 416.* But to constitute theft there must be an intention to take the thing in question dishonestly, that is, with intent to cause wrongful gain or wrongful loss. Removing a box to put the owner to trouble is not necessarily and in every case causing "wrongful loss." *1956 Cr. LJ 664.* Deliberate and illegal concealment is not necessarily dishonest concealment so as to amount to deception. *25 IC 338.* A tenant cutting trees standing on his own land and for which he has executed a lease which gives the landlord only a claim for compensation for trees so cut cannot be said to be acting "dishonestly" within the meaning of Section 24 and is not guilty of theft. *AIR 1932 Bom 545.* Personal benefit is not necessary. *AIR 1931 Pat 337.* Fabricating receipts in lieu of genuine receipts which had been lost is not dishonesty. *7 All 459.* Purchasing rice from a famine relief officer and selling it, at a rate higher than that agreed upon is not dishonest as it does not cause wrongful loss and as it was not unlawful to sell one's own property after purchase at such prices as one thought fit. *22 WC 82.* All that is required to be proved in order to establish that the person doing the act was doing it dishonestly is that by that act he is gaining by unlawful means property to which he is not legally entitled to gain, or that any person is losing property by reason of that act which the person losing is legally entitled. If Government keeps grain with *P* for distibution in deficit areas and *Q* the partner of *P* removes it from the godown where it is kept, the removal by *Q* is dishonest under Section 403, *P.C. AIR 1964 Ori 119.*

The expression 'dishonestly' used in the P.C. should not be confused with the commonly used word 'dishonestly' which is understood to involve an element of fraud or deceit. *AIR 1959 Andh 530.*

2. Wrongful gain : Wrongful loss.—Every word in the definitions in Sections 23 and 24 is important. The expressions 'wrongful gain' and 'wrongful loss' are the main ingredients of the definitions of 'dishonesty' in Section 24. Wrongful gain includes wrongful acquisition or wrongful retention. Losing wrongfully includes wrongfully being kept out of properry or being wrongfully deprived of property. *AIR 1959 SC 1390.*

The words "gaining wrongfully" or "losing wrongfully" as defined in Section 23, need not be confined only to the actual acquisition or to the actual deprivation of property and would cover also cases of wrongful retention of property in the one case and wrongfully being kept out of property in the other. Again, the element of actual loss to any member of the community should not be conceived as essentially included in the meaning of the word "fraudulently" as defined in Section 25 it being enough that the accused has aimed at an advantage by deception which, if it would have succeeded, would have secured the same to him, such advantage being always regarded as having an equivalent in loss or risk of loss to some other member or members of the community. If the accused had substituted a fresh writing subsequently prepared for the writing which he had originally filed as his defence in the proceedings before the House Controller, his action is fraudulent and dishonest. *AIR 1949 All 353.* A person keeping concealed for a time a valuable thing belonging to a friend, who is a careless man, in just for the purpose of causing him a little anxiety, or in earnest for the purpose of teaching him the salutary lesson of being careful, would be guilty of theft, a result which the Legislature could never have intended. No doubt, the language of Section 23 which defines wrongful loss, and says a person is said to lose wrongfully when such person is wrongfully kept out of any property as well as when such person is wrongfully deprived of property, might at first sight seem to create a difficulty in the way of accepting the view taken. But the difficulty is only apparent and not real. Of course, when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But 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 ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense. *25 Cal 416.* If a postman keeps a V. P. parcel for himself, he gains wrongfully even if he pays the money of the parcel. *AIR 1959 Mys 185. See also AIR 1957 SC 369 ; AIR 1963 SC 1572; AIR 1960 All 103 ; AIR 1960 Pat 518.*

3. Wrongful gain : To persons not entitled to it.—All the immediate gain that the accused could have obtained by means of the false certificate was permission to sit for the Entrance Examination. Assuming that he passed examination and thereafterwards obtained distinction he might have eventually at some future time derived some material benefit from having done so but such material benefit would be very remote. In the present case the applicant's intention was to obtain a lucrative appointment immediately and the gain which he might have obtained through his deception, had it succeeded could have been measured in rupees. There is no doubt that it would have been wrongful gain and consequently there was dishonesty. *AIR 1925 Rang 9.* The accused in order to obtain a recognition from a Settlement Officer that they were entitled to the title of "loskur" filed a sannud before that officer purporting to grant that title. This document was found not to be genuine. Even supposing the accused had used the document knowing it not to be genuine, they could not be found guilty, as the intention of the accused was not to cause wrongful gain or wrongful loss to any one ; their intention being to produce a false belief in the mind of the Settlement Officer that they were entitled to the dignity of "Loskur". *10 Cal 584.* Accused had made no objection to the production of the document. It had been brought in by a stakeholder ; it had been used in evidence and filed. The opposite party had called a witness who spoke to a payment of Tk. 516 as made on account of, and endorsed on, the instrument. It is said the sum endorsed was Tk. 540, and in order to refresh the witness' memory, the opponent of the accused applied that the bond should be shown to the witness. The accused strenuously objected to this course, and when the arbitrator pronounced against him, he seized the amount, ran out of the house with it, and subsequently refused to produce it. It can hardly be inferred from these circumstances that the act of the accused was prompted by any desire to cause wrongful loss or wrongful gain. *3 Mad 261.*

4. Wrongful loss : To someone legally entitled to the property.—Where a bull is dedicated and set at large it ceases to be any one's property and cannot give rise to loss to any one. *8 All 51.* "*A* closed a water-course without obtaining any permission to do so, and thereby diminished the supply of water received by certain fields belonging to *B* lower down the water-course. As there was nothing on the record to show that *B* had any legal right to the water intercepted by *A*, it was not proved that *B*'s loss was wrongful, and the offence of mischef was therefore not established. *7 Cr.LJ 448.*

5. By unlawful means.—The Code does not define 'unlawful' which means the same things as 'illegal' which is defined in Section 43. The words "by unlawful means" in the definition of "wrongful gain" and "wrongful loss" are intended to refer to an act which would render the doer liable either to a civil action or to a criminal prosecution. *1 Cr.LJ 730 FB.* It is not unlawful to do something on your own land without trespassing on your neighbour's land which something necessarily causes injurious effects to the property of your neighbour. "It is the law, that at any time within 20 years after the house is built, the owner of the adjacent soil, may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground." *AIR 1921 Mad 322.* If the demolition of the walls and the terrace undertaken by the accused has no

justification in law, then the loss caused to the complainants by reason of that demolition must be deemed to be by unlawful means. Unless these accused have got a right of abating a public nuisance, the acts done by them can in no sense be deemed to be lawful." *57 Mad 351.*

6. Gain or loss to be material.—In the definition of "dishonestly" the word "gain" must be taken to mean a material gain. A recognition from a Settlement Officer that a person was entitled to the title of Loskur was not "gain", within the meaning of Section 24. *10 Cal 584.*

7. Deterioration is not loss.—There is wrongful loss of property only if person is KEPT OUT OF or DEPRIVED OF property. Therefore, if property deteriorates as a result of use by the pledgee there is no loss of the property. *3 MHCR (App) 6.*

8. Gain or Loss has reference to the thing dishonestly taken.—Section 24 says that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'. Obviously, there was no wrongful gain to the applicants in the driving of the cattle to the pound ; nor can it be said that any wrongful loss was caused to the owners of the cattle even though they would have had to incur expense in order to get the cattle released. It was held in 24 WR Cr 7 that the loss refers to the thing dishonestly taken, which, in this case, would mean the animals themselves ; and, it could not be contended that the owners were in any way deprived of them, except temporarily whilst they remained in the pound—the last words of the clause referred to (Section 23) "to which the person losing it is legally entitled," show clearly what is meant by the words "wrongful loss" as applied to the owners of the cattle. A similar view that an illegal seizure of the cattle and taking them to the pound does not constitute theft was also held in 10 CalWN ccxxviii. *AIR 1943 Oudh 280.*

9. Dishonest intention.—Intention has got to be proved. A dishonest intention may be presumed only if an unlawful act is done or if a lawful act is done by unlawful means. *AIR 1934 All 711.* The determining factor is the intention. *AIR 1915 Mad 600.* Intention must be inferred from the acts done and the circumstances. *1955 Andhra WR 239, Apx A.* It was held that the prisoner's immediate and more probable intention, which alone, and not his remoter and less probable intention, should be attributed to him was not to cause wrongful loss to the second payee by delaying payment of Tk. 500 due to her, though the act might have caused her loss, but to conceal the previous fraudulent withdrawal of the first payee's Tk. 500 ; that under these circumstances he could not be said to have acted "dishonestly" or "fraudulently" within the meaning of Section 24 or Section 25. *8 All 653.* Intention must be inferred from the acts done and the circumstances. *1955 Andhra WR 239.* The obvious and known effect of the advantage to be gained and even the intention to profit by it are insufficient to prove an intention to defraud. An intention to gain an advantage for one's self may incidentally involve loss to another. But it is not identical with an intention to cause such loss. *25 Bom 202.* "When a person takes another man's property, believing, under a mistake of fact and in ignorance of law, that he has a right to take it, he is not guilty of theft because there is no dishonest intention, even though he may cause wrongful loss within the meaning of the Code. Mere intention to deceive does not necessarily imply a dishonest intention. *28 Mad. 90.* Intention to convert an illegal or doubtful claim into an apparently legal one is dishonest. *AIR 1937 Nag 89.* Illegal seizure of the cattle and taking them to the pound is not dishonest and does not constitute theft was also held in 10 Cal W. N. ccxxviii. *AIR 1943 Oudh 280.* Sending a forged certificate or signing a certificate in a false name or giving an address which is not his may not necessarily be dishonest. *43 Cal 421; 25 Mad 726 ; 28 Mad 90.* But presenting false certificate was held to be dishonest. *15 All 210.* A person taking the fruit

of jungle trees would not necessarily know that tress belonged to some one and dishonesty cannot be presumed, but not so in the case of a person who by deceit reaps the crop of another. *AIR 1935 All 264.* A co-owner of a movable property whose share is defined can be held guilty of committing theft if he removes the joint property dishonestly without the consent of other co-owners. *1966 Cr LJ 856.* A person can be said to have dishonest intention only if in taking the property his intention is to cause gain by unlawful means of the property for which the person so gaining is not legally entitled or to cause loss by. For dishonest intention, it is not necessary that there must be wrongful gain to the thief. It is enough if the removal causes a wrongful loss to the owner. *1967 Raj 190.*

10. Claim of right and intention.—If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, but without any intention to intimidate, insult or annoy the person in possession, or to commit an offence, then although he may have no right to the land he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence. So also if a person deals injuriously with property in the *bona fide* belief that it is his own he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause wrongful loss or damage to any person. But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the Court to inquire whether the claim is *bona fide* or is a mere pretence and to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence. *AIR 1931 Pat 337.*

11. Section 24 if exhaustive.—Section 24 is not an exhaustive definition of the word "dishonestly". The section does not say that the word "dishonestly" is applicable only when there is an intention of causing wrongful gain to one person or wrongful loss to another person but properly construed means that case of intention of causing such wrongful gain or loss are to be considered as coming within the wider class of dishonest actions. The obtaining of an acquittal is very distinctly the obtaining of an advantage and brings the case within the definition of "dishonestly" in Section 24. *AIR 1929 Pat 60.*

Section 25

25. "Fraudulently".—A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

Cases : Synopsis

1. *Fraud.*
2. *Intent to defraud.*
3. *Deceit, secrecy and intention to cause injury.*
4. *Deceit plus unlawful or unfair advantage.*
5. *Deprivation of property not necessary.*
6. *Fraudulently ; Dishonestly.*
7. *Concealment of fraud is fraud.*

1. Fraud.—Where there is an intention to deceive and by means of the deceit to obtain an advantage there is a fraud and if a document is fabricated with such intent, it is a forgery. *Jahangir Hossain Vs. State. 40 DLR 545.* By fraud is meant an intention to deceive ; whether it be from any expectation of advantage to the party himself or from ill-will towards the other is immaterial. *13 Bom 515.* In the ordinary legal sense the expression "intent to defraud " implies conduct coupled with an intention to deceive and thereby to injure. The word "defraud" involves two conceptions, *viz.*, deceit

and injury to the person deceived, that is an infringement of some legal right possessed by him, but not necessarily deprivation of property. *38 Cal 75.* The word 'fraud' or 'fraudulently' must be understood in the general and popular sense. It involves two elements, *viz.*, (1) deceit and (2) injury caused or likely to be caused to the person deceived or someone else in consequence of the deception. *AIR 1968 Mad 349.*

Q purchased a motor car with her own money in the name of her minor daughter *N*, had the insurance policy transferred in the name of her minor daughter by signing her (minor's) name and also received compensation for the claims made by her in regard to the two accidents to the car. The claims were true claims and she received the moneys by signing in the claim forms and also in the receipts as *N*. The accused in fact and in substance put through her transactions in connection with the said motor car in the name of her minor daughter. *N* was in fact either a benamidar for *Q*, or her name was used for luck or other sentimental considerations. On the facts found, neither *Q* got any advantage either pecuniary or otherwise by signing the name of *N* in any of the said documents nor the Insurance Company incurred any loss, pecuniary or otherwise, by dealing with *Q* in the name of *N*. The Insurance Company would not have acted differently even if the car had stood in the name of *Q* and she had made the claims and received the amounts from the insurance company in her name. On these facts, the question that arose was whether *Q* was guilty of offences under Sections 463 and 464. It was *held* that *Q* was guilty of deceit, for though her name was *Q* she signed in all the relevant papers as *N* and made the insurance company believe that her name was *N*, but the said deceit did not either secure to her advantage or cause any non-economic loss or injury to the insurance company. The charge did not disclose any such advantage or injury, nor was there any evidence to prove the same. In the charge framed, she was alleged to have defrauded the insurance company and the only evidence given was that if it was disclosed that *N* was a minor, the insurance company might not have paid the money. But the entire transaction was that of *Q* and it was only put through in the name of her minor daughter *N* for reasons best known to herself. On the evidence as disclosed, neither was she benefited nor the insurance company incurred loss in any sense of the term. *Q* was not guilty of the offences under Sections 467 and 468. *AIR 1963 SC 1572.*

2. Intent to defraud.—Intention to defraud is another essential ingredient. Unless there is an intention to defraud, no act can be fraudulent. Intent to defraud does not mean an intention to deceive. It means an intent to cause a person to do or omit to do something as a result of deception. *AIR 1966 SC 523.* There may be intention to defraud without the power or the opportunity to defraud.........It is not necessary that any person should be in a situation to be defrauded. There may be an intention to defraud although no person could be defrauded. A general intention to defraud without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction. *AIR 1926 Mad 1072.* In construing Sections 24 and 25 of the Code the primary and not the more remote intention of the accused must be looked at. *19 Cal 380.* Intention, *ex necessitate rei*, relates to some future occurrence and not to the past. It cannot be said when wrongful loss or wrongful gain has already been caused, or a person has already defrauded, anything can be subsequently done which could be dictated with the intention to cause that which has already occurred. He intended by those falsifications to escape the punishment and disgrace which the expected discovery of the deficit and criminal breach of trust would involve. Such an intention does not, in the eye of the law, render the case one of forgery. *5 All 221.* In a trial upon a charge, under Section 471 of fraudulently or dishonestly using as genuine documents known to be forged, it was found that the forged receipts for the payment of rent, used by the prisoner, had been fabricated in lieu of genuine

receipts which had been lost. With reference to the definitions of the terms "dishonestly" and "fraudulently" in Section 24 and 25 the prisoner, upon the facts as found, had not committed the offence punishable under Section 471. *7 All 459.* Whether or not there is an intent to defraud in any particular case depends on the circumstances of the case. *36 Cal 955.*

3. Deceit, secrecy and intention to cause injury.—The word "fraudulently" in the Code ordinarily connotes firstly, an element of deceit or secrecy and secondly, an intention to cause injury. The accused having so recently given an undertaking must have known that the transfer in breach of the undertaking would have the effect of impending the execution of the decree and he must have intended that it would have that effect. It is quite immaterial whether it would be possible for the decree-holder by taking other proceedings to defeat that attempt. If there was an intention to prevent this property being taken in execution of the decree and if that intention had as its motive the object of injuring the creditor, it does not matter whether the object was likely to be achieved or not. *AIR 1940 Mad 271.* The words 'dishonestly' and 'fraudulently' do not mean exactly the same thing. A dishonest act is not necessarily a fraudulent act. The elements which make an act fraudulent are deceit or intention to deceive and in some cases even mere secrecy. Where there is neither the intention to deceive nor secrecy, the act though dishonest is not fraudulent. *AIR 1934 Hyd 56.* The accused in order to obtain a recognition from a Settlement Officer that they were entitled to the title of "Loskur", filed a sunnud before the officer purporting to grant that title. This document was found not to be genuine. The intention was to produce a false belief in the mind of the Settlement Officer that they are entitled to the dignity of "Loskur" and in order to produce this belief they produced the sunnud which has been found to be not genuine. It cannot be held in this case that the sunnud was produced to "defraud" the Settlement Officer and therefore it cannot be said that they used the document "fraudulently", as defined in Section 25. *10 Cal 584.* 'Fraudulently' implies something more than a deception intended to secure an advantage to the receiver. The advantage sought to be gained by the deception should make it fraudulent, involve some distinct loss or detriment to another or the likelihood of such loss or detriment though, no doubt, it would ordinarily be so when an advantage would accrue to the deceiver. A mere intention to deceive does not necessarily imply an intention to defraud or to cause wrongful loss to one person or wrongful gain to another. A person to be defrauded must suffer some harm or damage or injury. Where a person gave a false application to the University his intention was to subject himself to examination, which could not be deemed a thing of value ; if he failed, it ended in nothing ; if he passed, he became entitled to a certificate not in consequence of the false writing but on his own merits. There was no fraud. *28 Mad 10. S* held a Matriculation certificate which had been issued to him by a University. *C* had failed to pass the Matriculation examination. The Registrar of the University received a letter purporting to be signed by S, stating that his certificate had been lost and requesting that a duplicate might be issued. Enclosed with the letter was what purported to be a certificate by the headmaster of a local school, corroborating the statement as to the loss and supporting the application for the issue of a duplicate. This document had not, in fact, been written by the head-master and *S* had not in fact lost his Marticulation certificate. It was held that no offence was committed. *25 Mad 726. Q* inserted his name as an attesting witness. The insertion of his name as an attesting witness may have increased the apparent evidence of the genuineness of the instrument. But the insertion of the name by itself could not have been intended to cause wrongful gain to one person or wrongful loss to another person. The insertion of the name of the appellant as a witness could not have been with intent to defraud. In popular phraseology his conduct may be described as dishonest and fraudulent, but his act does not fall within the scope of the definitions given in Sections 24 and 25 of

the Code. The essence of the matter is that, although he might have intended that it should be believed that he was an attesting witness, he could not have thereby intended to cause wrongful gain to one person or wrongful loss to another person or to defraud any person by his act. *38 Cal 75. Q* made a prevaricatory statement in respect to his place of residence, in order to facilitate his recruitment in the Police force. The element of "fraud or dishonesty" is absent from these circumstances ; and there is no attempt to show that the act "caused or was likely to cause damage or harm in body, mind, or reputation" to the person when he is supposed to have misinformed as to his ordinary place of residence. *6 All 97.*

4. Deceit plus unlawful or unfair advantage.—An intent to defraud implies something more than mere deceit. The object for which the deceit is practised has to be considered. The advantage intended to be secured or the harm intended to be caused need not have relation to property or be such as is implied in the term "dishonestly" ; but it must be something to which the party perpetrating the deceit is not entitled either legally or equitably. As Mr. Mayne puts it, "of course there can be no intention to defraud where no wrongful result was intented or could have arisen from the act of accused" (Criminal Law, 3rd Edn, p. 817). There must be some advantage on the one side with a corresponding loss on the other. Two employees of a bank which was financially unsound and likely to fail at any moment falsified the books of the bank by enetering therein certain totally fictitious tranasactions, not with any intention to defraud the bank or its preditors, but simply in order to secure repayment of the security which had been deposited by one of them on his appointment and which was then about to become due for refund. *47 All 948.* Altering the age in a certificate of passing an examination is fraudulent even if it is not dishonest. *13 Bom 513.* It is fraudulent to use a false certificate to obtain a situation. *22 Bom 768.*

5. Deprivation of property not necessary.—The word "fraudulently" should not be confined to transactions of which deprivation of property forms a part. *25 Cal 512 FB.*

6. Fraudulently ; dishonestly.—The difference between an act done dishonestly and an act done fraudulently is that if there is the intention by the deceit practiced to cause wrongful loss that is dishonestly, but even in the absence of such an intention, if the deceitful act wilfully exposes anyone to risk of loss, there is fraud. *AIR 1938 Pat 165.* An act may be dishonest and yet not fraudulently. *AIR 1954 Hyd 56.* A person lawfully entitled to possess arms and ammunition signing the prescribed certificate of purchase of the same in the name of another with an address not his own, and thereby deceiving the gunsmith and the Government and defeating the object of the certificate commits forgery : his act having been done "fraudulently" if not "dishonestly". The question is whether the signing of the certificate in a false name and giving in each case an address, which was not his, amounts to forgery on the part of the appellant. It may be that the action of the appellant was not "dishonest" taking that word in the sense ascribed to it by Sections 23 and 24. There can, however,, be no doubt he acted "fraudulently". His intention was undoubtedly to deceive both the firms, who sold him these revolvers and ammunition and also the Government, which has prescribed the formalities to be observed in such sales. He must be taken to have known that the certificate was required for the identification of the purchaser and the weapons purchased. This purpose he deliberately defeated by his action in making out false certificates. *43 Cal 421.* In order to do a think dishonestly there must be intention to cause wrongful loss or wrongful gain of property, but in order to do a thing fraudulently it is not necessary the there should be the intention to cause wrongful loss or wrongful gain of property. The Legislature advisedly uses the terms "dishonestly" and "fraudulently". To say that to do a thing fraudulently there

must be the intention to cause wrongful loss or wrongful gain would be attributing to the Legislature redundancy. On the other hand, the words "dishonestly" and "fraudulently" are used to denote two different things. *AIR 1926 Mad 1072.* The term "defraud" denotes some form of dishonestly. An 'intention to defraud' has to be inferred from the conduct of the accused and must necessarily involve something in the nature of cheating. A *bona fide* allegation that is a tax is not payable, which allegation is subsequently proved to be ill-founded, does not justify a finding that there was an intention to defraud. *AIR 1935 Bom 162.* "Dishonest intention" is something different from "fraudulent intention". It was the appellants' intention that the share-holders and the public should, as a result of deception exercised by them by placing before them false figures about the position of the Bank, deposit their money in the Bank and purchase a larger number of shares which otherwise they would not have done. This constitutes an intent to defraud. "Intent to defraud" implies deceit and consequent injury or intended injury, *i.e.*, the infringement or intended infringement of some legal right possessed by the person deceived. It does not necessarily imply that the person deceived should be deprived of property. It includes deceit which causes or is likely to cause any damage or harm to the person deceived in respect of his property or otherwise. The conduct of the appellants in issuing the false statutory report was calculated to deceive the public and was intended to induce them to invest their money in the Bank which they would not otherwise have invested. Any persons who might invest their money in the Bank as a result of the appellants' deceptions must be deemed to have been defrauded by them. *AIR 1926 Lah 385.* "Let a person's title to property be ever so good yet if, in the course of an action brought against him to gain possession of the property, he uses by way of supporting his title, though there may be no necessity for the use of it, a forged document, he uses if fraudulently. *9 Cal 53. R* was authorised to draw the money, due to the members of the family, it follows that he was legally entitled to the money and that the money was not property to which the Collector was legally entitled, for he could have been compelled, on proof of the authority, to pay it over to *R*, and no doubt, had he realised that he would have been justified in paying it to *R* on his sole receipt, he would have paid it. Therefore, it cannot be said that the Collector was dishonestly induced to part with the money. The word "fraudulently" is not confined to transactions in which there is wrongful gain on the one hand, or wrongful loss on the other, either, actual or intended. The word "defraud", which is not defined in the Code, may or may not imply deprivation, actual or intended. The Collector was undoubtedly deceived. He had refused to pay upon the receipt of *R* and would not have paid but for the fact that the receipt purported to be, though in fact it was not, signed by all the persons entitled to the money ; but in the general acceptation of the word he was not defrauded. One *K*, who had agreed to sell land, set out to register the conveyance, but fell ill on the way and sent on the defendant who, by personating her, had the deed registered in her name, it was held that the defendant had committed an offence under the Registration Act, but that he was not guilty of cheating by personation under Section 419, P.C. It was considered that there was nothing to show that the prisoner intended to defraud or injure any one in personating *K* and doing an act which *K*, doubtless, would have done, had she not been prevented, by illness from going to the office of the Registrar in person. *32 Cal 775.*

7. Concealment of fraud is frand : *One view.*—A man who deliberately makes a false document with false signatures in order to shield and conceal an already perpetrated fraud is himself acting with intent to commit fraud. It is a fraud to take deliberate measures in order to prevent persons already defrauded from ascertaining the fraud practised on them and thus to secure the culprit who practised the fraud in the illicit gains which he secured by the fraud. *37 Bom 666.* The making of false

entries in a book or register by any person in order to conceal a previous fraudulent or dishonest act falls within the purview of Section 477A of the Code, inasmuch as the intention is to defraud. *35 Cal 450.*

Contrary view.—The alternative of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation, is not an offence either under Section 465 or Section 477A, there being no intent to commit fraud. *36 Cal 955.* A clerk who had committed criminal breach of trust, subsequently made false entries in an account book with the intention of concealing such offence, did not intend to cause wrongful loss or wrongful gain to any person, or intent to defraud any one. *5 All 221.*

Section 26

26. "Reason to believe".—A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing but not otherwise.

Cases : Synopsis

1. *Reason to believe.*
2. *Knowledge and reason to believe.*
3. *Reason to believe and suspect.*

1. Reason to believe. —If the circumstances are such that a reasonable man would be led by a chain of probable reasoning to conclude that the articles found were stolen, he must be held to have the reason to believe. *1972 Cri LJ 217 ; AIR 1969 Delhi 91.*

2. Knowledge and reason to believe.—A person can be supposed to "know" where there is a direct appeal to his senses. A person "has reason to believe" under Section 26 if he has sufficient cause to believe the thing but not otherwise. *AIR 1930 All 33.*

3. Reason to believe and suspect.—The word "believe" in Section 414, is a very mush 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. *6 Bom 402, AIR 1917 Mad 418 ; AIR 1961 Tri 46 ; AIR 1969 Delhi 91.*

Section 27

27. Property in possession of wife, clerk or servant.—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.

Cases : Synopsis

1. *Possession of wife.*
2. *Possession of clerk or servant.*
3. *Temporary clerk or servant.*
4. *On account of that person.*
5. *Possession of the head of a family.*
6. *Pointing out is not possession.*
7. *Possession must be with knowledge and exclusive.*

1. Possession of wife.—While a permanent mistress may be regarded as a "wife" for the purpose of Section 27, it would still be necessary to prove that the possession by the mistress was on account of her protector before it could be held that the latter was in possession of articles of which the actual

physical possession was with the mistress. In the ordinary course of things when a man furnishes a house for his mistress' occupation he may reasonably be presumed to be in possession of all articles therein which can reasonably be inferred to belong to him or to be in the possession of his mistress on his behalf. *AIR 1914 Lah 455.* "The possession of the husband does not necessarily connote that the wife was also liable. It cannot be presumed that the wife was also jointly in possession with him. Section 27, also, lays down that the temporary possession of the wife should always be attributed to the husband. *AIR 1935 Pesh 68.* Husband is not responsible if the key of the box is produced by the wife. *AIR 1961 Punj 30.*

2. Possession of Clerk or Servant.—Where there is nothing to show that a pistol is a sort of article that one can reasonably expect to be for sale in the shop of the accused, possession by servant of the accused of the pistol is not possession on account of master. *AIR 1923 All 33.* Possession of the driver and the cleaner was possession of their master. The driver and the cleaner, therefore, had no power whatever to execute the two receipts and give any consent on behalf of their master. Possession of wood by a forest inspector, who is a servant of Government, is possession of the Government itself ; and a dishonest removal of it without payment of the necessary fess, from his possession, *albeit* with his actual consent, constitutes theft, if that consent was unauthorised or fraudulent. *AIR 1942 Oudh 318.*

3. Temporary clerk or servant.—*See* Explanation to the Section.

4. On account of that person.—If the clerk or servant is in possession of property on his own account and not on account of his master, the property is not deemed to be in the possession of the master. Possession of the staff quarters lawfully obtained by a Railway employee, while under the service of the Railway is that of the Railway through him as its servant, but it can be lawfully determined only by steps taken under Section 138 of the Railways Act, and the fact of his dismissal does not, by itself, put an end to his right of possession. In order to render such possession unlawful, there must be an interruption of possession and a re-entry after such interruption, it cannot be said that a true owner may, at all times, enter his own premises and use force and violence to eject a trespasser ; such an act though not tortuous and actionable, may still give rise to criminal liability if attended with force and violence. *23IC 177 ; AIR 1923 All 33.* "Where, in *K's* absence from home, the accused entered his house with wife's consent in order to commit adultery with her ; the house being in the wife's possession on account of her husband it was in his possession within the meaning of Section 27 and the consent of the wife to the entry of the accused could not save him. *59IC 550.*

5. Possession of the head of a family.—Where proceedings under the Arms Act, 1878, in respect of the unlawful possession of arms are taken against a member of a joint family not being the head of such joint family and arms are found in a common room of the joint family house, it is incumbent upon the prosecution to give good evidence that such arms are in the exclusive possession and control of the particular member of the joint family who is sought to be charged with this possession. *15 All 129.* There is no general presumption that head of the family is in possession. *AIR 1933 All 437.* The mere fact that an article is found in a house belonging to a joint family does not *per se* render every member of the family liable for its possession ; and where, the article is found in a portion of the house, not in the exclusive possession of any particular member, but used by, or accessible to, all the members of the family, there is no presumption that it is in the possession or control of any person other than the head of the family. Although *D* as the head of the family must be *prima facie* presumed to be in possession, this presumption was rebuttable and in the absence of any

evidence to the contrary had been sufficiently rebutted by the fact of his absence at the time of recovery and for two days previously from the village. Possession to be punishable under the criminal law must be possession with knowledge and neither knowledge, nor intention as to the use of an object can be imputed to a person who is not conscious of its existence. *AIR 1928 Lah 272 ; AIR 1961 Mad 162.* Where the meaning of possession is explained at length as conscious possession and not merely physical possession of the accused.

6. Mere pointing out is not possession.—*See 47 All 2511 ; 17 All 577 ; AIR 1948 Lah 69 ; AIR 1944 Mad 117 ;* and Section 114 in the Evidence Act.

7. Possession must be with knowledge and exclusive.—*See* Section 114 in the Evidence Act.

Section 28

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.

[16][*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.]

Cases : Synopsis

1. *Counterfeit ingredients.*
2. *"Causes one thing to resemble another".*
3. *"Intending by means of that resemblance to practise deception".*
4. *Imitation need not be exact (Explanation 1).*
5. *Intention presumed (Explanation 2)*
6. *Altering used stamps.*
7. *Mere palming off is not counterfeiting.*
8. *Onus of proof.*

1. Counterfeit ingredients.—In Section 28, the word, "counterfeit" does not connote an exact reproduction of the original counterfeited *(1971 Mad LJ (Cri) 400)* and it follows that the difference between the counterfeit and original is not limited to a difference existing only by reason of faulty reproduction. A person, for instance convicted of counterfeiting the King's coin would not be able to avoid conviction on the ground that he had deliberately made a small alternation in the design or omitted a letter from the superscription surrounding the Monarch's head. The same principle would apply in the counterfeiting of a trade mark. *1938 Nag 192.* Although the resemblance need not be exact, it is essential that the counterfeit must be of such a character that it would be possible to pass it off as a genuine coin and unless that is so, it would not be possible to practise deception which is one of the ingredients of the definition of counterfeit in Section 28. Therefore, where the evidence of the expert was that is was not possible to pass off the alleged counterfeit coins as genuine coins the accused could not be said to have committed an offence within Section 243. *AIR 1956 Bom 511.*

16. Subs. by the Metal Tokens Act, 1889 (1 of 1889), s. 9, for the original *Explanations.*

Ordinarily, counterfeiting implies the idea of the exact imitation ; but for the purpose of the Penal Code 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 deception may thereby be practised. Explanation 2 to Section 28 lays down rebuttable presumption 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. *See* also Explanation 1.

Where on a comparison of the labels and wrappers used by the accused on his soaps with the genuine labels and the wrapper 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 differences in details did not affect the resemblance. Explanation 2 to Section 28 will apply and as the contrary was not proved it must be held that necessary intention or knowledge was there and these wrappers and labels are counterfeit of the genuine wrappers and labels of the Sunlight and Lifebuoy soaps of the company. *AIR 1960 SC 669.*

2. Causes one thing to resemble another thing.—Causing resemblance is an important ingredient but mere causing resemblance does not amount to counterfeiting unless it is coupled with an intention to practise deception or knowledge of its likelihood. However, if resemblance is such that a person might be deceived thereby, an intention, or knowledge is to be presumed unless contrary is proved.

3. Intending by means of that resemblance to practise deception.—If coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies those coins do not come within the definition of counterfeit coins. *AIR 1937 Mad 711.*

4. Imitation need not be exact.—*See* Explanation 1 and *AIR 1960 SC 669.*

5 Intention presumed.—*See* Explanation 2.

Where the coins manufactured by the accused are very good imitations of a genuine coin and persons might be deceived by the resemblance, the presumption referred to in the Explanation arises, and it is for the accused to prove that their intention was innocent or that they did not know that it was likely that deception would be practised. *AIR 1931 Cal 445.*

6. Altering used stamps.—Section 28 applies where middle part stamps are altered to resemble first part stamps in order to deceive the licensees, who were in first deceived. They were sold to the licensees, as genuine first part stamps, though they were in reality second part stamps altered to resemble first stamps. *AIR 1921 Nag 86.*

7. Mere palming off or passing one thing as another.—Without causing it resemble another is not counterfeiting. *See 2 WR 65.*

8. Onus of proof.—The onus of making out the elements of the offence rests upon the prosecution and can be discharged by paying in aid the presumption which arises under Explanation 2 to Section 28. It is to be observed, however, that the prosecution must call relevant evidence to lay the foundation for a presumption under Explanation 2 as the presumption, whereby an intention to practise deception can be established, is rebuttable. *AIR 1954 Cal 277.*

Section 29

29. "Document".—The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than

one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations

A writing expressing the terms of a contract which may be used as evidence of the contract, is a document.

A Cheque upon a banker is a document.

A power of attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

Cases : Synopsis

1. "Document".

2. Intended to be used or which may be used as evidence" of that matter.

3. Evidence.

A-15672

1. **"Document".**—An LTI affixed on a blank stamp paper simpliciter cannot signify acknowledgment of legal liability nor can it signify that person who put his LTI has not a legal right. It is, therefore, difficult to hold that a mere LTI on a blank paper to be a valuable security. Even though the appellants cannot be convicted of the offence under section 467 of the Penal Code, they are guilty of the offence under section 465 having committed forgery. Conviction is altered from sections 467/34 to 465/34 of the Penal Code. *7 BCR 10=6 BLD 52.* Is blank stamp paper containing L.T.I. a "document"—If the blank stamp paper is produced in a Court of law it will be admissible in evidence for proving the L.T.I.—It, therefore, fully answers the definition of the word "document" appearing in Section 29 of the Penal Code.

The blank stamp papers containing L.T.I. is "false document" under the third clause of Section 464 of the Penal Code. The accused persons will be guilty of committing the offence of forgery for creation of a false document—It is immaterial whether the stamp paper contained any contents or not—It is enough that the victim did not know the contents of the documents even though it was blank by reason of deception practised upon him but a mere L.T.I. on a blank stamp paper cannot be regarded as a valuable security. *6 BLD (HCD) 52=7 BCR 10.* A careful reading of sections 29, 463 and 464 of the Penal Code together would clearly show that a false document must have been actually made and that

mere taking of a signature on a blank paper without writing anything on that paper does not make it a document. Since the complainant petitioner did not disclose the nature of the document allegedly created the allegations made do not constitute the offence under section 465 of the Penal Code and as such the impugned proceeding is liable to be quashed. *49 DLR 16.*

Section 29 defines "document". *See* also Section 3 of Evidence Act and 3(16) of General Clauses Act. According to this section the document is the matter expressed or described upon any substance by means of letters *etc.* and not the substance on which the matter is expressed. The illustration also makes it clear that the endorsement on the back of a bill of exchange is a document. For convenience the substance on which the whole matter is expressed may be referred to as a document. The illustrations state that a cheque is document and that a map or plan is a document. Document includes foreign currency. *AIR 1962 Trip 50* An instrument though not signed by all the parties thereto, fulfils the requirements of the definition of a 'document' in Section 29. *41 Mad 589.* A printed marriage invitation is a document. *AIR 1954 Mys 119.* X-ray photoplate or Skiagram is a document, *ILR (1962) 1 Cal 392. See* also explanation 1. Letters or mark, imprinted on trees and intention to be used as evidence that the trees had been passed for removal by the Ranger of a forest, are documents within the meaning of Section 29. *AIR 1925 Bom 327.* Hammer may be a document. *3 Rang 17.* Assessment order is a document and valuable security. *AIR 1969 SC 40.*

2. Intended to be used or which may be used as evidence of that matter.—If the matter is intended to be used as evidence it would be a document even if it cannot be legally used as evidence. 10 WC 61 : *12 Mad 148* : *7 MHC (Apex.) 26.* Unless the matter is intended to be used or which may be used as evidence of that matter, it would not be a document. On this ground, the English cases which lay down that an announcement whether written or printed of the character or quality of a chattel, the false signature of an artist's name on a picture and the imitation of a trade mark on a wrapper enclosing spurious goods would not be documents, are correct. *27 LJ MC 225.*

3. Evidence.—It is immaterial whether the evidence is intended for or may be used in a Court of Justice or not. *See* Explanation 1. The word "evidence', occurring in Section 29 precedes the words "of the matter" and the word "matter" as occurring in the opening portion of the section is qualified by the words "expressed or described upon any substance by means of letter, *etc,*" This means that the matter contemplated by this section is what is expressed or described upon any substance, and the question is whether such a matter can be evidence of its existence. It is obvious that the matter expressed or described upon substance would certainly be the evidence of the fact that the matter exists, though it may not by itself be a proof of the truth of the contents of the matter. The word "evidence" in Section 29, implies evidence of the truth of the matter expressed and not merely of its existence. The actual meaning of the word, 'evidence' would depend on the question as to what is the matter of which evidence is in question. Is it the existence of a writing, if the question has arisen in connection with that, or is it the truth of the subject of the writing ? If the question is what was in fact the writing which the accused had filed before the House Controller and there is no question as to whether the contents of that writing were true or false the production of the writing would certainly be evidence within the meaning of Section 29. *AIR 1949 All 354* which referred to *4 Mad 393.*

Section 30

30. "Valuable security".—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.

Illustration

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security".

Cases : Synopsis

1. *Valuable security.*
2. *Document which is or purports to be a document whereby any legal right is created.*
3. *Legal right.*
4. *Improperly stamped or un-stamped.*
5. *Document with blanks and uncancelled stamps.*
6. *Unregistered document.*
7. *Cancelled document.*
8. *Invalid document.*
9. *Document not signed by all the praties thereto.*
10. *Document signed by a person on behalf of others.*
11. *Account books and papers.*
12. *Settlement of account not signed by any person.*
13. *Extorted documents.*
14. *Document executed by a minor.*
15. *Application.*
16. *Acknowledgment of legal liability.*
17. *Illustration.*
18. *Illustration of documents which are valuable securities.*
19. *Illustrations of documents which are not valuable securities.*

1. Valuable security : This term occurs in Sections 329, 330, 331, 347, 348, 420, 467 and 477. It refers to every document affecting a legal right of a person over a property. 'Valuable security' includes a document which on the face of it is a valuable security though in fact it is not so. *Fatik Talukdar Vs. State (1956) 8 DLR 414.*

2. Document which is or purports to be a document whereby any legal right is created.—A document means the original document and not a copy of it. *AIR 1924 Cal 502.* A document (patta which purports to have been executed by six persons, but two only signed the document, is a valuable security. It purports to create a legal right in S in a land. The use of the words "which is or purports to be" in Section 30 indicates that a document, which , upon certain evidence being given, may be held to be invalid, but on the face of it creates, or purports to create, a right in immovable property, although a decree could not be passed upon the document, is contemplated within the purview of that section. Had if not been so, any forged document, if the forgery was admitted, or any document which was not executed or stamped according to law and on which no decree could be passed by a civil court, could not be called a valuable security. *90 IC 918. Even* if the document be not admissible in evidence it might nevertheless be a valuable security. *12 Mad 148.* A copy does not create a right. *5 BHC 56.* A transit pass without which no forest produce could be removed was a valuable security. *59 Cal 1233.* An import licence without which no foreign goods could be imported would be a valuable security. *56 blr 188.* An acknowledgment of receipt of an insured parcel is not a valuable security. It is merely evidence that a parcel of some sort was delivered to the complainants and cannot operate as a discharge of any liability and is not, therefore, a valuable security. *AIR 1917 Pat 699.*

There can be no conviction under Section 467 for forging a copy of a document which is a valuable security. It is the original document which is a valuable security within the meaning of Section 30 and not a copy of it. *AIR 1962 Cal 174.*

Certificate in form of sales tax is a valuable security. *AIR 1960 Bom 145.* Share certificate, *ILR (1962) 1 All 451,* lottery ticket *1970 Ker LT 358* passport *1968 Cr LJ 1282* are valuable securities.

3. Legal right.—The expression 'legal right' used in the definition of valuable security is not defined but it can be said that a legal right is one which is either enforceable or recognized. A passport creates a legal right and is a valuable security. *AIR 1968 Mad 349.* Interview letter does not give any legal right to be consideration for the post and as such it is a valuable security. *1973 Cr LJ 1640.*

4. Improperly stamped or unstamped document.—This may not create such a legal right, but as it purports to create a legal right it would be within Section 30. It is a valuable security as it purports to be one. *AIR 1918 Pat 274.* Two documents were found in the possession of the accused each bearing a signature which purported to be that of one *B,* but which in fact was a forged signature. One document was intended to be filled up as a promissory note, the other as receipt, but the spaces for particulars of the amount, the name of the person in whose favour the document was executed, the date and place of execution and the rate of interest were not filled in ; a one-anna stamp was affixed to each but it was not cancelled in any way. Even if the documents as they stood did not purport to be valuable securities they would purport to be documents giving authority to the holder of the same to make a valuable security. No doubt, the holder of these documents had no intention of propounding them or using them in a court of law without first cancelling the adhesive stamps ; but the documents as they stand cannot be said to be stamped in accordance with law. However, the documents must be held to be, as they stand, "valuable securities", as they purport to be documents whereby a legal right is created.*38 All 430.*

5. Document with blanks and uncancelled stamp.—May be a valuable security. *38 All 430.*

6. Unregistered document.—*See 25 Cal 207.*

7. Cancelled instrument or document.—Document in Section 30 refers to one which is operative and not one which is cancelled. A document whereby any legal right is extinguished is within Section 30. But the legal right must be extinguished by the document and not by the cancellation of a document. Therefore, a cancelled document is not within Section 30. A cancelled instrument though by the cancelling of it a legal right may be extinguished inasmuch as the instrument upon which such right depended is thereby voided, does not fall within its scope.

8. Invalid instrument.—*See 48 All 140.*

9. Document not signed by all the parties thereto.—May be a valuable security if it imposes an obligation on the parties who have signed it. *41 Mad 589.*

10. Document signed by a person on behalf of other.—May be a valuable security. *48 All 140.*

11. Account books and papers.—An account paper which purports to be a document whereby a person acknowledges that he lies under a legal liability is a valuable security. *AIR 1918 Pat 274.* Account books do not come within the definition of the expression, "valuable security" under Section 30. As such, they do not create any right and any entry in the account books cannot be the basis of charging an accused with the liability of what is noted against him. Entries in the account books can be merely evidence of certain alleged facts. Certain entries which might be signed by a constituent may form the basis of acknowledging his liability. *AIR 1953 All 660. To* become a 'valuable security' the document itself should create the right or liability. Ordinarily speaking, account books do not by themselves create any such right or liability, though they may evidence the existence of such right or

liabilities. In other words, an account book generally speaking may be valuable evidence but is not valuable security within the definition given in Section 30. That is not to say that under no circumstances can an account book be considered valuable security. For instance, if such books contained entries showing that certain amounts have been received from customers as sale tax which would be an acknowledgment by the dealer of his liability to turn over those amounts to the Sales Tax Department, then it can be rightly argued that the books themselves are valuable security. *AIR 1963 Ker 68.*

12. Settlement of accounts not signed by any person.—Is a valuable security. *AIR 1918 Pat 274.*

13. Extorted documents.—(Blank or otherwise) Executed as a result of fear of force or threat of injury are valuable securities. *AIR 1953 Pat 160.*

14. Document executed by a minor.—May be a valuable security. *AIR.1953 Pat 601.*

15. Application.—Application filed by Q and subsequently torn by him is not a valuable security. *AIR 1963 All 131.*

16. Acknowledgment of legal liability.—The section provides that a document whereby any person acknowledges that he was under legal liability is a valuable security. *AIR 1918 Pat 274.*

17. Illustration.—*See* Explanation 2 to Section 29.

18. Ilustration of documents which are valuable securities.—(1) A title page in an account book signed by the partners and stating their names and the capital contributed by each ; (2) Deed of divorce ; (3) *Hundi.* (4) Imported licence ; (5) Kabuliyat ; (6) Transit pass of forest produce ; (7) Counterfeit of a bank pay in slip acknowledging receipt of money ; *AIR 1956 VP 30 ;* (8) Discharge receipt purporting to be signed by a fictitious nominee in an Insurance policy ; *AIR 1956 VP 30 ;* Assessment order is a valuable security. *AIR 1969 SC 40.*

19. Illustrations of documents which are not valuable securities.—Copies, *AIR 1924 Cal 502.* Interview letter, *1973 Cri LJ 1640.* Postal receipt of insured parcel. *AIR 1917 Pat 699.* Forged *sanad* to support title of Loskur—an office of dignity. *10 Cal 584.* An administrative order passed by the Criminal Superintendent of a Court of Sessions directing the Nazir of the Court to release an accused on bail is not a valuable security. Accused gave a (post-dated) cheque for certain goods delivered to him at an earlier date and got a receipt, but the cheque was dishonored. The receipt does not extinguish or realise any legal right. Unit payment of these charges, the rights remain, and the giving of the receipt does not cancel or extinguish them. The receipt could be given in evidence to prove that the payment had actually been made, but it would always be open to rebut this evidence by showing that in fact no payment had been received by them. Moreover, the receipt does not even purport to be an acknowledgment of payment. It amounts only to an acknowledgment that a cheque has been received. A cheque whether post-dated or not is only a promise to pay, either on demand, or upon the date which it has been post-dated. Therefore, the only effect of the receipt is an acknowledgment that a promise to pay has been given by means of the cheque in question. It cannot even come within the last part of Section 30. *AIR 1936 Cal 324.*

Section 31

31. "A will".—The words "a will" denote any testamentary document.

Meterial

Will.—A "will": is a disposition or declaration by which the person making it provides for the distribution or administration of property after his death. It does not take effect until the testator's death, and is always revocable by him. The term occurs in Sectioncs 467 and 477. Sections 3(h) of Succession Act XXXIX of 1925 defines will as the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect his death. Will shall include a codicil and every writing making a voluntary posthumous disposition of property. Section 3(57) of General Clauses Act, X of 1897.

Section 32

32. Words referring to acts include illegal omissions.—In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

Cases

1. Illegal omission.—'Act' is defined in Section 33. When the law imposes a duty to act on a person, his illegal omission to act renders him liable to punishment. *20 Bom 394.* In view of Section 32 an omission is included in an act, but it is incumbent that such an omission must be illegal and the onus lies in the perosecution to show that the omission, which is being treated as an act, was either an offence or was prohibited by law or was one which furnished grounds for a civil action as required by Section 43, which defines what "illegal' means. An inaction, which is not shown to be illegal would never amount to an act under P.C. It is an illegal inaction alone that can make a person equally liable with the actor himself. *AIR 1934 Lah 813.* The omission must be such as to have an effect conducing to the result, as a link in the chain of facts from which an intention to bring about the result may be inferred. *1 Weir 49.* G, a village chowkidar, was wrongly convicted of abetment of the extortion committed by S, as the omission on the part of G to disapprove of the conduct of S is not an illegal omission. *8 Cal 728.* An illegal omission would constitutte an act in law. *1968 Cr LJ 405.*

Section 33

33. "Act"—"Omission".—The word "act" denotes as well a series of acts as a single act; the word "omission" denotes as well a series of omissions as a single omission.

Material

1. Act includes illegal omission.—*See* Secetion 32.

2. Acts or act or a transaction.—'Act' must be construed in the light of common sense and not in a metaphysical sense.

Section 34

[17][**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].

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17. Subs. by the Indian Penal Code Amendment Act, 1870 (XXVII of 1870), section 1, for the original section.

Cases : Synopsis

• **Editorial Introduction.**—The case law on this section and the synopsis thereof as printed below have been excerpted and adapted from V.B. Raju's book on Penal Code and have been enriched with that of Bangladesh.

1. *Ingredients and applicability.*
2. *Common intention generally discussed.*
3. *Principle of Section 34.*
4. *Section 34 does not create a distinct or substantive offence but enunciates principle of constructive joint criminal liability.*
5. *Principle of vicarious liability, applicability of.*
6. *Criminal act.*
7. *Criminal act is done by several persons.*
8. *No overt act is necessary.*
9. *In furtherance of the common intention of all.*
10. *Liable for that act in the same manner as if it was done by him alone.*
11. *Common intention is the basis of liability.*
12. *Common intention—when applicable.*
13. *Common intention implies previous concert and prearranged plan. It may also develop a moment before the criminal act.*
14. *Common intention must be known to all and be shared by all.*
15. *Common intention must exist when the criminal act is done.*
16. *Common intention to commit a crime.*
17. *Common intention and similar intention.*
18. *Section 34 refers to common intention and not to common knowledge.*
19. *Common intention and common object.*
20. *Common intention and conspiracy.*
21. *Common intention and Mens Rea.*
22. *Common intention is a question of fact.*
23. *Common intention if proved, motive is immaterial.*
24. *Common intention and individual intention.*
25. *Common intention and primary intention.*
26. *Common intention of master and servant.*
27. *Common intention to kill A but B killed.*
28. *Common intention not shared after a stage.*
29. *Principle of common intention must not be pushed too far.*
30. *There can be no common intention if one person can claim the benefit of an exception.*
31. *No common intention in cases of sudden fight or quarrel.*
32. *Instigation is not common intention.*
33. *Presence when the act is done.*
34. *Mere presence if sufficient to infer common intention.*
35. *Persons with common intention and participating are not abettors.*
36. *Fatal assault with lathis by several persons.*
37. *The principle of constructive liability cannot be applied twice under Section 34 and Section 149.*
38. *Constructive guilt—"common intention" and "common object" under sections 34 and 149.*
39. *Act which can be done by only one person.*
40. *Section 34 and Section 35.*
41. *Section 34 and Section 37.*
42. *Section 34 and Section 107 or Section 109.*
43. *Section 34, Section 109 and Section 149.*
44. *Section 34 and Section 114.*
45. *Section 34 and Section 120A.*
46. *Section 34 and 148.*
47. *Section 34 and 149.*
48. *Section 34, Section 149 and Section 302.*
49. *Section 34, Section 149 and Section 326.*
50. *Section 34, Section 302 and Section 324.*
51. *Section 34 and Section 304 Part II.*
52. *Section 34 and Jurisdiction.*
53. *Charge.*
54. *Omission to mention Section 34 in the charge is not necessarily a fatal defect.*
55. *Proof and inference.*
56. *What the common intention was must be proved.*
57. *Conviction of one accused and acquittal of the remaining.*
58. *Conviction read with Section 34, without a charge under Section 34.*
59. *Conviction read with Section 34 but without a charge under Section 34 but with a charge under Section 149.*
60. *Charge with Section 34 : Conviction without Section 34.*
61. *Conviction under Section 302 read with Section 34 may be altered to one under Section 326 read with Section 149.*
62. *Section 34 and Sentence.*
63. *Miscellaneous.*

1. Ingredients and applicability.—For the applicability of Section 34, the following must be proved, *viz*—

(i) Commission of some criminal act.

(ii) Commission of criminal act by several persons.

(iii) Commission of criminal act in furtherance of common intention. *See* 1973 SCC (Cr) 384.

(A) Applicability of the section in general.—Applicability of the section to all of group insulting the modesty of women, in which some accused are found to have taken active part. *9 DLR (SC) 127.* Section 34 of the P.C. is applicable when the common intention of the participants in a crime is to commit an offence, and will have application when the number of the participants in the crime is more than one. It is established that the offence which resulted was committed in furtherance of the common intention of all the participants, the fact that any of them did not take part in the commission of that offence will not prevent his being held liable for the offence. *Feroze Vs. State (1956) 8 DLR (WPC) 128.* The question what injuries were inflicted by a particular accused in cases to which section 34 applies is immaterial, the principle underlying the section being that where two or more persons act with a common intention each is liable for the act committed as if it had been done by himself alone. *(1950) PLD (Pesh) 60.* Accused grappling with the deceased—Other persons coming and stabbing him to death—S. 34 not applicable. Where the accused was grappling with the deceased and held by hair when another person came and stabbed him. It was held that S. 34 did not apply to the case and as aid given to the killer by the accused was not given intentionally, sec. 107(3) did not apply. *Taj Din Vs. Crow 1955 PLD (lah) 356.* Abduction—person not actually taking part in, but doing his part by remaining outside the house—S. 34 applicable. *Ghulam Quadir Vs. State 1960 PLD (SC) 254.* Abduction and murder—Persons joining hands to abduct—One of them committing murder on the spot—Other not guilty of murder. *Ghulam Quadir Vs. State 1960 PLD (SC) 254.*

(B) Sudden fight—Common object of party proved—S. 34 applicable.—It is wrong to say that section 34 of the Penal Code, 1860 does no not apply in the case of a sudden fight or chance encounter. If there is proof that some of the persons taking part in the fight which had suddenly arisen committed an act indicating that their object was to commit that offence there is no bar to holding that they shared the common intention there and then. Mohammad *Akber Vs. State 1961 PLD (Lah) 348.*

(C) Sudden fight—"Common intention cannot be easily deduced"—Sec. 34 not applicable.—In a sudden fight as in this case, unity of mind and unity of action is not easily conceivable unless the circumstances conjointly point the same. *Ghulam Quadir Vs. State 1959 PLD (Lah) 753.* Under section 34 each of the accused must do some act in furtherance of common intention. *Abu Syed Vs. State (1986) 38 DLR 17.* In order to make an accused constructively liable with the help of s. 34 for an offence not actually committed by him, it is essential to prove that he had intention to commit the offence. Unless such intention is proved, he cannot be made liable under that section. *Belal Ahmed Vs. The State (1988) 40 DLR 154.* Mere standing of accused Belal at the door of Parvin will not constitute an offence u/s 34 read with s. 324 Penal Code in causing voluntary hurt by dangerous weapon. *Belal Ahmed Vs. The State (1988) 40 DLR 154.* Principle of vicarious liability— Applicability of—Test as to the applicability of that principle—Common intention implies a prearranged plan and it must be proved that a criminal act was done in concert pursuant to the pre-arranged plan. *Kabul Vs. The state (1988) 40 DLR 216* Common intention—Distinction between same or similar intention and common intention. *Kabul Vs. The state (1988) 40 DLR 216.* Mere proof of each of the participating culprits having same intention to commit certain act is not sufficient to constitute common intention. *Kabul*

Vs. The State (1988) 40 DLR 216. Principle of joint liability Existence of common intention animating the accused sledding to the doing of a criminal act in furtherance of it. *Kabul Vs. The State (1988) 40 DLR 216.* Inference of common intention shall never be reached unless it is a necessary inference from the circumstances of the case. *Kabul Vs. The State (1988) 40 DLR 216.* Common intention may be proved by direct evidence. *Kabul Vs. The State (1988) 40 DLR 216.* Inference of common intention shall not be reached unless it is a necessary inference from the circumstances of the case. *Kabul Vs. The State (1988) 40 DLR 216.* Common intention—Each person may have same intention to kill yet there might not be a prior meetings of minds to form a pre-arranged plan—Individual liability as opposed to joint liability. *Kabul Vs. The State (1988) 40 DLR 216.* No evidence of a pre-concert or meeting of minds to cause the death of the deceased—Assault in furtherance of common intention is difficult to prove. *Kabul Vs. State (1988) 40 DLR 216. Common* intention—Joint liability—all the appellants are equally liable. *Majibur Rahman Vs. State (1947) 39 DLR 437.* Common intention—Unless the Court is told what the exact words were used by the accused person it cannot act on the inference supplied by the witness—There is no evidence on record that the appellant Nos 2—4 had an intention to cause the death of Nandalal. *Amar Kumar Thakur Vs. The State (1988) 40 DLR (AD) 147.* Common intention—Each person may have same intention to kill yet there might not to be a prior meeting of minds to form a pre-arranged plan—Individual liability as opposed to joint liability. *Kabul Vs. State 40 DLR 216.* Pre-plan not essential ingredient—It is true in this case there was no pre-plan of the accused to kill the victim—their common intention to kill developed on the spot when they all simultaneously fell upon the victim as soon as he appeared on the scene. *State Vs. Montu 44 DLR (AD) 287.* Unless there is meeting of minds between the accused as to the commission of crime of common intention, the application of section 34 of the Penal Code is improper. *Abdul Khaleque and Vs. State 48 DLR 446.* For application of Section 34 it must be established first that a criminal act has been done by several persons and secondly that all the participants intended the commission of the criminal act and lastly the criminal act had been done in furtherance of a common intention shared by all of them—There must be evidence to show that the accused were physically present at the scene of the occurrence and they actually participated in the commission of the offence following a pre-concert or a pre-arranged plan—Inference of common intention within the meaning of Section 34 of the Penal Code should not be readily draw or pushed too far unless the same is clearly deducible from the evidence on record. *S.K. Baharul Islam Vs. The State 11 BLD (HCD) 158.* To invoke Section 34 successfully, it must be shown that the original act complained against was done by one of the accused persons in furtherance of the common intention of all. *Mahbub Shah Vs. Emperor AIR 1945 PC 118. State Vs. Md. Ershad Ali Sikdar and others (Criminal) 55 DLR 672.*

2. Common intention generally discussed.—*(1) Common intention when can be inferred—First blow by the Ist accused—Another blow by another accused—Latter guilty under section 34, common intention being inferred.*—In this case it should be noted that the allegation made by the prosecution is that the accused S dealt a very severe blow on the shoulder of the deceased, soon after he was given a similar blow by the accused. If the prosecution case is believed in this respect, and inference can be drawn that the blow given by S was in furtherance of the common intention with which he had dealt the blow. *Abbas Ali Vs. Ledu Sk. (1965) 17 DLR 108.*

(2) Judicial statement—Incriminating portions of the judicial statement were corroborated by other evidence on record.—It was held that the very admission of presence on the scene of occurrence indicates that the accused had complicity in the crime and the murder took place in furtherance of their common intention. *State Vs. Badiuzzaman, 91973) 25 DLR 41.*

(3) "Common intention"—Pre-arranged plan.—Common intention as used in section 34 P.C., implies a pre-arranged plan and an accused person cannot be convicted in respect of a criminal act by application of this section unless such act was "done" in concert pursuant to the pre-arranged plan. *Sarder Ali Vs. Crow (1957) 9 DLR (FC) 7.*

(4) Common intention can develop in course of the events.—Common intention can develop in course of the event which constitute the incident as a whole, although such intention may not have been present in the mind of any of the culprits at the commencement of the incident. *Sarder Ali Vs. Crow (1957) 9 DLR (FC) 7.* Common intention can be formed even during the course of the transaction. *Sana Ullah Vs. Crow (1954) 6 DLR (WPC) 90.* The common intention under section 34 of the P. Code can be established as an inference from the fact of participation in the commission of the offence. *Tera Mean. Vs. Crow (1955) 7 DLR 539.* The facts of the case were that when the accused went to the house of the deceased, he had no intention to kill him. When in response to his call for help the other accused came, they could have no intention to cause the death of the deceased although they came armed with sticks and takwa. It was held that they must have formed the common intention to cause the death of the deceased when they attacked him with their respective weapons, for they inflicted as many as five injuries in the region of the head, and only one on the chest and with such a force as to cause a fracture of as many as three of the ribs. *Sana Ullah Vs. Crown (1954) 6 DLR (WPC) 90.* Intention—To be gathered from conduct of accused and attending circumstances. In order to determine the intention of a person, it is very seldom that one can expect to find positive affirmative evidence; generally speaking, the intention is to be gathered from the conduct of the person and the attending circumstances. *Bahar Vs. crown (1954) 6 DLR (FC) 205.*

(5) In furtherance of common intention.—Under sec. 34, the criminal act must itself be committed by the accused persons in furtherance of a common intention the gist of the offence under section 34 consists on the "unity of criminal behaviour which results in something, for which an individual would be punishable if it were all done by himself alone." *Abdul Latif Vs. Crow (1956) 8 DLR 238.* The words "in furtherance of common intention of all" in S. 34 of the Penal Code do not require that in order that the section may apply, all participants in the joint act must either have common intention of committing the same offence or the common intention of producing the same result by their joint act. It is enough if all of them intend that the joint act be perform. *Fazar Vs. Crow (1952) 4 DLR 99.* When three accused were tried under section 304, Part II, read with section 34, P. Code for causing the death of one M, two of the accused being armed with sharp weapons and the third accused being armed with lathi only, the third accused can be found guilty under Sce. 304(II), read with section 34. *Fazar Vs. Crown (1952) 4 DLR 99.*

(6) Section 34 P.C. does not create any distinct offence but merely lays down principle of joint liability.—Since section 34 of the Penal Code does not create any distinct offence, but merely lays down a principle of joint liability in a criminal act, it is immaterial whether it is mentioned in the schedule to Act VII of 1963 or not as a referable offence. So, the mere fact that a person is charged constructively for an offence by appending section 34 P.C. to the said offence, does not affect the validity of the reference itself. *Shahadat Khan Vs. Home Secy. to the Govt. of West Pakistan and others, (1969) 21 DLR (SC) 323.*

(7) Common intention—Deaf and dump accused.—It cannot be said that a deaf and dump person cannot form an intention common with another person to commit an offence, but before such an inference is drawn, the evidence with regard to it must be very cogent. *Md. Aslam Vs. Crow (1954) 6 DLR (WPC) 133.*

(8) Common intention—Charge of criminal breach of trust.—If section 34 of P.C. is to be applied to punish persons for the offence of criminal breach of trust, it is necessary to establish that all of them were entrusted with the amount. In the absence of instrument a person cannot be charged and punished as a principal offender by the application of section 34, for this section cannot create instrument where there is none. *A Salam Vs. Crown (1952) 4 DLR 80.*

(9) Common intention—Strict proof—Before a person can be saddled with contraceptive liability and convicted for the act done by another person under section 34, it must be satisfactorily proved by the prosecution that the person so convicted had common intention of doing that particular act with the person actually doing it. "Common intention" should not be mixed up with "common object". *(1950) PLD (Pesh) 60.* In the present case only three persons took part and the absence of any evidence form which it can be inferred that they had a common intention, formed prior to the occurrence, to use the revolver if resisted, the common intention which can be safely attributed to them is, at the worst, the intention to commit robbery with the added knowledge that murder was a crime which was likely to be committed in the prosecution of their common object. *Rahmatullah Vs. State 1961 PLD (Lah) 221.* Where for instance 3 or 4 armed relatives burst upon a habitation, kill or injure 2 or 3 persons, and carry off a girl, the subject of a dispute between the two sides, the only reasonable inference is that these acts are unified by a common intention possessed by each, namely, to use force even to extent of murder in carrying off the girl. The prosecution must show that the offence committed was covered by the common intention. *Khalil Vs. State 1960 (WP) (Kar.) 38.* Common intention can be formed on the spur of the moment and can be inferred for the surrounding circumstances. If three gunmen fire shots simultaneously at the deceased and one of the shots proved fatal they will be held guilty under sections 302/34 of the Penal Code, 1860, even if there be no evidence of a pre-planned conspiracy to murder the victim. There must be clear evidence of some action of conduct on his part to show that he shared in the common intention of committing murder. *Muhammad Akbar Vs. State 1961 PLD (WP) (Lah) 348.* In furtherance of a common intention' indicate pre-arranged plan—Such plan in the sense of previous distinct plan need not be proved—A common intention may develop on the spot between the participants—To apply s. 34 the person must be physically present at the actual commission of the crime. *Abdur Rahim Vs. State (1977) 29 DLR (SC) 246.*

(10) Common intention—Circumstances that attract operation of section 34, P.C.—Evidence on record shows that three persons including the appellant had come around with fire-arms for a theft to the place where the deceased and his partners are asleep and they had a pre-planned design to counter-act resistance in their adventure. While they were committing theft the deceased and his party woke up, pursued the thieves and caught hold of one of them who shouted for his rescue ; whereupon, one of associates fired a shot at the pursuers killing one of them. The accused (excepting the other two who absconded), was tried and convicted under sections 302/34 P.C. on appeal before the High Court question raised was whether the circumstances as established by evidence atract section 34 P.C. It was held that the prosecution has proved that the accused-appellant committed the criminal act of theft and murder of Moula Baksh (one of the pursuers) in furtherance of the common intention pursuant to the prearranged plan with his other two co-accused absconders. Therefore, conviction and sentence of the appellant under sections 302/34 P.C. do not call for interference by the High Court. *Muhib Gul Vs. State (1976) 28 DLR (WP) 4.* Common object as envisaged u/s 34 can develop even at the time of occurrence. It is at the same time essential that the accused persons must be physically present when the crime was being committed and the incriminating acts and circumstances lead to the conclusion about their intention to commit the crime. *Nazimuddin Vs. the State (1984) 36 DLR, 22.*

(11) Common intention (to commit an offence) is the result of prior concert which may be established by direct or circumstantial evidence.—It is true that a prior concert is a precondition of a common intention before anyone can vicariously be convicted for criminal offence committed by another. There may be direct evidence of the prior concert or there may be circumstantial evidence, leading to that inference which are incompatible with the innocence of the accused or incapable of explanation on any other reasonable hypothesis. *Abul Basher Vs. State (1980) 32 DLR 182.*

(12) Common intention-Applicability—Unless the Court is told what the exact words were used by the accused persons, it cannot act on the inference supplied by the witness. The evidence of witness as to passing of order "to kill us" was nothing but a hyperbole. It seems rightly argued that there must have been some sort of a slogan uttered by the appellant, call for action, which prompted the accused to indulge in rioting. We have not come across anything particular that the appellant had any intention to cause the death. *BCR 1947 (AD) 465=1988 BLD (AD) 101= 40 DLR (AD) 147.*

3. Principle of Section 34.—Section 34 does not create a distinct offence ; it only lays down the principle of joint criminal liability. *1970 SCC (Cr) 274.* The necessary conditions for the application of Section 34 are common intention to commit an offence and participation by all the accused in doing act or acts in furtherance of that common intention. It these two ingredients are established, all the accused would be liable for the said offence ; that is to say, 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. What would be an offence by reason of constructive liability would cease to be one if the act constituting the offence was done in exercise of the right of private defence. *AIR 1965 SC 257.*

A meeting of minds 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 also. A Common intention pre-supposes prior concert. The plan need not be elaborate, nor is a long interval of time required. *1970 Cr LJ 653.* It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But per-arrangement there must be and premeditated concert. It is not enough to have the same intention independently of each other, *e.g.*, the intention to rescue another, and if necessary to kill those who oppose. 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 the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting subsequently. But the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation of any other reasonable hypothesis. *AIR 1955 SC 216, 431.*

Section 34 has been enacted precisely to cope with a situation where it is not possible to ascribe particular acts to individual accused in an attack jointly made by them. The Section lays down joint responsibility and the foundation of it lies in the common intention can be attributed to the several

accused. It is enough, even if it is not possible to ascribe a particular act to a particular individual provided it is shown that the ultimate result was in furtherance of that common intention. *Putta Venkata Reddy and Others Vs. State of Andhara Pradesh, Supreme* Court Judgment dated 20-3-1968. 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 the furtherance of the common intention of all ; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. 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 also done in concert pursuant to the pre-arranged plan. It 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. *AIR 1945 PC 118.*

Principle of vicarious liability does not depend upon the necessity to convict a required number of persons. *1975 SCC 595; AIR 1975 SC 1917 : 1977 SC 710.* Once it is found that a criminal act was done in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. The Section is intended to meet a case in which it may be difficult to distinguish between the 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. The principle which the section embodies is participation in some action with the common intention of committing a crime ; once such participation is established, Section 34 is at once attracted. *AIR 1960 SC 289.*

The essence of liability under Section 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offenders sought to be rendered liable under Section 34 is not one of the conditions of its applicability. To establish joint responsibility for an offence, it must of course be established that a criminal act was done by several persons ; the participation must be in doing the act, not merely in its planning. A common intention—a meeting of minds—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 intention not in all cases be by physical presence. In offences involving physical violence, normally presence at the sence of 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 offences consist of diverse acts which may be done at different times and places. *AIR 1960 SC 889.*

The question whether a particular criminal act may be properly held to have been 'done by several persons' cannot be answered regardless of the facts of the case. In order to convict a person for an offence with the aid of the provisions of Section 34 it is not necessary that that person should actually with his own hand commit the criminal act. If several persons have the common intention of doing a particular criminal act and if in furtherance of that common intention all of them join together and aid or abet each other in the commission of the act, then although one of these persons may not actually with his own hand do the act, but if he helps by his presence or by other acts in the commission of the act, he would be held to have done that act within the meaning of Section 34. *AIR 1951 Mys 1*

Persons who take no part in the actual commission of criminal acts, whatever they have done prior to the doing of those acts, which did not form an ingredient of the offences committed by another accused Q could not be said have participated in the commission of the criminal act which amounted to offences. They could not be, therefore, held liable by virtue of Section 34, P.C., for the acts committed by Q alone, even if those acts had been committed in furtherance of the common intention of all the three accused. *AIR 1955 SC 287; AIR 1965 SC 264.*

This section does not say, "Common intention of all" nor does it say, "an intention common to all". It emphasises the doing of a criminal in furtherance of such intention. The petitioner and the co-accused N and M were tried for causing the death of three persons by firing sten-gun on 15-5-73. On being charged for an offence u/s 302/34, PC r/w el. 4(a) of the art. 2 of Bangladesh Scheduled Offences (S.T.) Order, 1972. Prosecution examined 15 witness. The trial Court convicted the petitioner and co-accused "N" u/s. 302/34, PC and "M" was acquitted. On appeal, the High court considered evidence and found that except the incorporated testimony of P.W.I., there was hardly any evidence against "N" and therefore acquitted him by giving benefit of doubt. The conviction of the petitioner was affirmed who was seen by eye-witnesses running away from the place of occurrence with sten-gun. Before the Appellant Division, it was urged when the tow accused were acquitted, one by the trial court and another by the High Court, whether the conviction u/s 302/34, PC could be sustained. It was contended that when the two co-accused are acquitted, the common intention disappears and therefore, the conviction u/s. 302/34 cannot be sustained. **Observed** :—The petitioner was seen by as many as 4 witnesses running away from the place of occurrence with a sten-gun. The witnesses are the tea-stall-keepers where the occurrence took place. There persons killed by brush-fire and petitioner was holding the gun. **Held** :—Suffice it to mention that Sec. 34, Penal Code does not say, "the common intentions of all" not does it say "an intention common to all". It emphaseses the doing of a criminal act in furtherance of such intention. The crime was committed by firing sten-gun causing the death of three persons instantaneously which obviously show a pre-arranged plan of committing crime by the accused and since the petitioner was the person who was holding sten-gun, an irresistible conclusion is that his conviction u/s. 302 r/w S. 34, Penal Code was correctly recorded notwithstanding the acquittal of his co-accused. *4 BSCD, 25.* If one of the inflictors of the blows sees that his partner is inflicting blows on the head of the victim and he himself goes inflicting blows on other parts of the body knowing fully well that the blows on the head are likely to cause death, he shares the intention of his accomplices, even if he himself does not inflict any blow on the head. *1961 PLD (WP) (Kar) 358.*

This section does not create any distinct offence. It is intended to meet a case where the members of a party acted in furtherance of the common intention of all but it was difficult to prove exactly the part played by each of them. It means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. "Common intention' within the meaning of the section pre-supposes a prior concert. There must be a prior meeting of the minds leading to a pre-arranged plan to commit an offence. The common intention to commit the offence invites the application of section 34 of the Penal Code. In offences involving physical violence, the presence of the accused at the scene of the occurrence renders him liable on the principle of joint liability but where the offence consists of diverse acts and it may be committed at different times, the presence of the accused at the scene of the occurrence is not necessary. *The State Vs. Tajul Islam and 8 others, 15 BLD (HCD) 53.*

4. Section 34 does not create a distinct or substantive offence but enunciates principle of constructive joint criminal liability *(AIR 1956 All 241).*—Section 34 is only a rule of evidence and does not create a substantive offence. It means, that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done individually *AIR 1958 SC 672 ; 1965 SC 257 ; 1965 SC 132.* Section 34 is a mere statement of explanation to be attached to any section which deals with a criminal offence. Section 34 lays down a principle of joint liability for acts done by several persons in pursuance of a criminal design or enterprise, and the principle laid down in the section, as originally enacted, was the same principle as is recognised by the common law in England. Under that

principle one of several persons who engaged in a criminal enterprise of design may be liable for act done by another which he himself never intended, and perhaps never contemplated. If, for instance, a number of men set out to burgle a house, and entrust one among their number with a fire-arm, impressing on him that he is not to use it except under circumstances of compelling necessity, and if that man loses his head and shoots one of the inmates of the house, it would be no defence on the part of his companions to assert that they had never intended him to use his weapon in the way he did. *AIR 1952 Pat 135.*

Principle of joint liability—Existence of common intention animating the accuses leading to the doing of a criminal act in furtherance of it. *Kabul Vs. State 40 DLR 216.* Rule of joint responsibility for crime—In order to attract section 34 it is not necessary that any overt act must be done by the particular accused. The provision shall be applicable if it is established that the criminal act has been done by any one of the accused persons in furtherance of the intention of all. Mere distance from the scene of crime cannot exclude culpability. Criminal sharing, overt or covert, by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of section 34. *State Vs. Abdul Khair 44 DLR 284.* Constructive criminality—Section 149, like section 34, does not create and punish any substantive offence. These sections may be added to the charge of any substantive offence. Without the charge for any substantive offence, no charge under either of them can be conceived of. *Abdus Samad Vs. State 44 DLR (AD) 233.*

The essence of joint liability is to be found in the existence of a common intention animating the accused in the doing of a criminal act in furtherance of such intention. Before application of section 34 of the Penal Code to a case it must be shown that (1) a criminal act was done by several persons; (2) all of them intended the commission of the criminal act; and (3) the criminal act was done in furtherance of the common intention. In the instant case it is not clear that except accused appellant Abul Kalam Azad, the other accused had the intention of causing such bodily injury as was likely to cause the death of Abdul Wadud and even the participation of the other accused in causing death of the deceased is not free from doubt. *Abdul Kalam Azad Vs. 47 DLR 317.* Under section 34 of the Penal Code the essence of joint liability is to be found in the existence of a common intention animating the accused in the doing of a criminal act in furtherance of such intention. Before application of this section to a case, it must be shown : (a) a criminal act was done by several persons, (b) all the accused intended the commission of the offence and (c) the criminal act was done in furtherance of the common intention of all. *Abdul Kalam Azad Vs. The State, 14 BLD (HCD) 401.* Section 34 of the Penal Code does not create any distinct offence it merely lays down the principle of joint liability in a criminal act done in furtherance of the common intention of the offenders. *53 DLR 439.* Since section 34 merely lays down a principle of joint liability in a criminal act, the fact that a person is charged constructively for the offencec by appending section 34 to the said offence does not affect the validity of the reference itself. *State Vs. Lieutenant Colonel Syed Farook Rahman (Criminal) 53 DLR 287.*

The principle of joint liability for doing a criminal act—The essence of the liability lies in the existence of common intention animating the accused persons to the doing of a criminal act in furtherance of the common intention of them all. "Common intention" of several persons is to be inferred from their conduct, manner of doing the act and the attending circumstance.—If one has intention to do any act and others share his intention, then their intention becomes 'common intention' of them all. If the act is done in furtherance of the common intention, then all who participated in the act are equally liable for the result of the act. *12 BLD (AD) 42= 44 DLR (AD) 287.* Section 34 of the Code provides that when a criminal act is done by several persons in furtherance of a

common intention, each of such persons is liable for that in the same manner as if it were done by him alone. It does not create any distinct offence but merely lays down the principle of joint liability in a criminal act done in furtherance of the common intention of the offenders. *(Abdul Quium Vs, The State) 21 BLD (HCD) 300.* Section 34 lays down a principle of joint liability in the doing of a criminal act. Common intention implies acting in concert and existence of pre-arranged plan. *(Bangladesh V. Md. Ershad Ali Sikder and others) 23 BLD (HCD) 423.* Under section 34 of the Penal Code, the essence of joint liability is to be found in the commonness of intention animating the accused in doing of criminal act in furtherance of such intention. The circumstances of this case patently show that the common intention of the four appellants was to cause the offence under section 325 read with 34 of the Penal Code and accordingly they are guilty under sections 325/34 instead of sections 302/34 of the Penal Code. *State Vs. Kowsar (Criminal) 1 BLC 455.*

5. Principle of vicarious liability, application of.—Test as to the applicability of that principle—Common intention implies a pre-arranged plan and it must be proved that a criminal act was done in concert pursuant to the pre-arranged plan. *Kabul Vs. State 40 DLR 216.* The order of conviction under sections 302/34 of the Penal Code in respect of appellants other than Shamim is not tenable in law because a person cannot be held vicariously liable for the act of another if common intention for doing the act is not proved. *State Vs. Md. Shamim alias shamim Sikder and ors. (Criminal) 53 DLR 439.*

6. Criminal Act.—No liability can arise under Section 34 unless some criminal act is done. Mere intention is not punishable. An act includes a series of acts. *See* Section 33 and *1976 SCC (Cr) 578.* It need not necessarily mean one single and indivisible act. *1924 Cal 257.* An act also includes illegal omissions. *See* Section 32.

Once the criminal act becomes independent of the common intention, though done in pursuance to an intention same or similar to the common intention, the rule of constructive liability ceases to operate, *AIR 1968 All 358.* Presence of persons facilitating the crime itself amounts to actual participation in the criminal act. *1976 SCC (Cr) 578.*

7. Criminal act is done by several persons.—A criminal act means that unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence. *AIR 1927 Lah 765.* It is the essence of Section 34 that the person must be physically present at the actual commission of the crime. He need not be present in the actual room : he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or waiting 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 actually being committed. *AIR 1955 Pat 161.*

It must be proved that all the persons sought to be made liable did participate in the criminal act. Section 34 is not applicable except in a case where there is participation in action to commit a crime with a common intention. If, for example, one of four accused had prevented *FF* from running away and another had held him down and a third had struck him over the head with a lathi, they could all rightly be convicted under Section 325 read with Section 34. The element in Section 149, of being a member of the unlawful assembly has a counterpart in Section 34, *viz.*, participation in action to produce grievous hurt. But it is quite wrong to say that because they had a common intention to assert a right to the bamboo clump, therefore without showing which of these people took any part in beating either *F* or his wife, they can all be convicted because one of them—we do not know who—committed a grievous hurt. There must be participation in action with a common intention to produce grievous

hurt. although the different accused might have taken different parts. *AIR 1956 SC 177.* The fact that one of the accused indicated the place from where the weapon could be recovered would not be sufficient to establish his participation in the incident beyond reasonable doubt. *1974(3) SCC 704.*

Section 34, can be applied only when a criminal act is committed by several persons and there can be a criminal act which cannot be committed by several persons. If, in such a case, the criminal act is done by several persons it amounts only to repetition of the criminal act, *1966 Cr LJ 727.* Proof that a particular person committed crime is not necessary. *AIR 1961 Guj 16.* Nature of injuries caused by different accused—The fact that some of the accused had caused fatal injuries and others caused minor injuries is immaterial if the act was done in furtherance of their common intention. The nature of injuries has nothing to do as the two accused are found to have shared the intention of other accused whose acts resulted in the death of the victim. *44 DLR (AD) 287.* This section does not create any distinct offence. It is intended to meet a case where the members of a party acted in furtherance of the common intention of all but it was difficult to prove exactly the part played by each of them. In means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually, common intention within the meaning of this section pre-supposes a prior concert. There must be a prior meeting of the minds leading to a pre-arranged plan to commit an offence. The common intention to commit the offence invites the application of section 34 of the Penal Code. In offences involving physical violence, the presence of the accused at the scene of the occurrence renders him liable on the principle of joint liability but where the offence consists of diverse acts and it may be committed at different times, the presence of the accused at the scene of the occurrence is not necessary. *48 DLR 305.* If it is established that the offence which resulted was committed in furtherance of the common intention of all the participants, the fact that any of them did not take part in the commission of that offence will not prevent his being held liable for the offence. *53 DLR 287.*

8. No overt act is necessary.—Mere distance from the scene of crime cannot exclude culpability under Section 34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. *(1974) 4 SCC 544.* In *35 CWN 463,* it has been observed that 'all the accused persons can be found guilty of an offence constructively under Section 34, only on a finding that each of them took some part or other in, or towards, the commission of an offence'. To convict any particular accused constructively under Section 34 of an offence, say of murder, it is not necessary to find that he actually struck the fatal blow, or any blow, but there must be clear evidence of some action or conduct on his part to show that he shared in the common intention of committing murder. *AIR 1946 Cal 452.* For intentional co-operation in the commission of an offence, *see* Section 37. The act may be committed by several persons or actually by a single individual. *AIR 1953 All 668.* A mere direction from one person to an other and the carrying out of that direction by the other may be only instigation of the latter's act and may not be a case of a joint act falling under Section 34. But where two persons with their followers, all of them armed, move about together for a set purpose and one gives instructions to the other and keeps himself on the spot in readiness to see it carried out and the other carries it out, it is hardly possible to say that the act is not one which was done in the furtherance of the common intention of both. The accused's saying, 'people are collecting, let us fire', brings out the common intention clearly. 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 offence when the act is committed. In such a case the instigator is 'deemed' to commit the murder by virtue of Section 114. Actual presence plus prior abetment can mean nothing else but participation. That is the irrefutable presumption raised by Section 114 and brings the case under Section 34. *AIR 1956 SC 177.*

9. In furtherance of the common intention of all.—Each of the persons joining in the commission of a criminal act is liable for any such act committed by any of the persons joining as was done in furtherance of the common intention and it is not necessary for the liability of all that they must have the common intention about the exact result which was to follow from the act or about the offence which would be made out on account of the actual physical act and its result. It is practically impossible for any set of people to decide beforehand all the acts which may have to be performed in order to carry out the common intention. Only such acts are not to be deemed to be the acts done in furtherance of the common intention as could not have taken place ordinarily in carrying out of the common intention. Such acts would be mostly unpremeditated ones by some of the persons joining in the criminal act. For such an unpremeditated act of one person, the others cannot be made liable. The view that a person committing the particular crime can be held guilty of that crime with the aid of Section 34 of Penal Code if the commission of the act was such as could be shown to be in furtherance of the common intention not necessarily intended by every one of the participants, is not correct. The common intention must be to commit the particular crime, although the actual crime may be committed by anyone sharing the common intention. *(1975) 3 SCC 731*. The words 'in furtherance of the common intention of all' were added to Section 34 by Act, *XXVII of 1870*.

Whether an act is in furtherance of the common intention or not depends upon the common intention and the nature of the act. It is an incident of fact and not of law. If *A* and *B* jointly agree to strike *X*, with lathis, then the striking with lathis only can be in furtherance of their common intention and if *A* shoots *X* and kills him, his act being in opposition to the common intention cannot be said to be in furtherance of it and *B* will not be responsible for it. But of course there must be evidence to show that the common intention was to strike with lathis only. If at the time of their joint decision to strike *X*, *A* openly carried weapons must be deemed to have been contemplated and *A*'s shooting with the pistol would be an act in furtherance of the common intention. If, however, *A* had concealed the pistol and *B* did not know that he was armed with it and he suddenly took it out and shot *X*, it is obvious that the common intention did not contemplate the use of the pistol. When *B* did not know of its existence, he could not have intended its use and if he could not have intended the use there could have been no common intention to use it. The act of shooting with the pistol would not be said to be in furtherance of the common intention. When there is an agreement between *A* and *B* to assault *C* with fists and *A* of his own impulse, kills *C* with a weapon suddenly caught up, *B* would not be responsible for the death because the killing was not an act in pursuance of the common design. *(1874) 12 Cox CC 624. See also AIR 1951 All 21.*

A particular criminal act done by an individual in order to constitute a constructive liability against others must be one which is done in pursuance of a common intention as a step-in-aid to attain it or as a means to the end underlying that or must be one which is a link in the chain of acts all originating out of the common intention and culminating in its attainment. In case a particular criminal act is committed not as a means to the end contemplated by the common intention or not as a step-in-aid to attain the common intention or in case it does not constitute a link in the chain of acts all originating out of the common intention and culminating in its attainment, it will not constitute a basis for constructive liability under Section 34 against others who may be a party to the common intention. Once the criminal act becomes independent of the common intention though done in pursuance to an intention same or similar to that common intention or giving rise to consequences same or similar in nature as contemplated by the common intention, the rule of constructive liability as

laid down, under Section 34 ceases to operate and others, who are a party to the original common intention, will not be held liable constructively for that criminal act. Unless the facts lead to the irresistible conclusion that the criminal act done by an individual doer is in furtherance of the common intention, the doctrine of constructive liability under Section 34 should not be resorted to for a conviction of others for that act. And therefore, when the circumstances give rise to a number of alternative inferences, one of which indicates that the act done by an individual may be the result of common intention while others do not lend support to that conclusion, the safer course is to hold that the act done by that individual was his personal act and not done in pursuance of the common intention. *1955 Pat 161 ; 1948 All 229.* Intention or object of the accused is to be judged from the acts done by him, *AIR 1968 All 170.* The words "in furtherance of the common intention of all" after the word 'person' and before the word 'each'—Aim was to make the object of the section clear. *(1989) BLD (AD) 155=42 DLR (AD)3.*

10. Liable for that act in the same manner as if it was done by him alone.—When a number of persons are engaged in the commission of something criminal, all acting in furtherance of a common intention, each is of course punishable for what he has done as if he had done it by himself. But his liability does not end there, for he is liable not only for the acts he himself does but also for those which he thereby facilitates, provided of course they are done in pursuance of the common intention. *AIR 1941 Lah 423.* If the intention of a person be higher than the common intention or if he has special criminal knowledge he would be guilty of a more serious offences *See* Section 38. For tests and guidelines for fixing vicarious liability. *See 1979 SCC (Cr) 61.* It is not necessary that each person must have caused an injury, *1979 SCC (Cr) 722.*

11. Common intention is the basis of liability.—*1970 SC 1266; (1971) 1 SCR 31. Also See 1979 SCC (Cri) 61 ; 1979 SCC (Cr) 496 ; 1979 SCC (Cr) 722.* Intention or object of the accused is to be judged from the acts done by him. *AIR 1968 All 170.* Suddenly developed common intention can be gathered from the conduct of the accused, the weapons used and the injuries caused. *AIR 1979 Pat 411.* A *bona fide* mistake by one accused in killing one person in place of another does not displace "common intention" if the evidence showed that there was a pre-arranged plan to kill the escaped person. *AIR 1970 1970 SC 126.*

12. Common intention—When applicable.—Unless the Court is told what the exact words were used by the accused persons it cannot act on the inference supplied by the witnesses—The evidence of the witnesses as to passing of order "to kill" was nothing but a hyperbole—In the absence of any reliable evidence to show that appellants 2-4 ordered appellant No. 1 Amar Kumar Thakur to cause the death of Nandalal, they cannot be convicted under Section 34 of the Penal Code. *Amar Kumar Thakur and others Vs. The State 8 BLD (AD) 101.*

13. Common intention implies previous concert and pre-arranged plan. It may also develop a moment before the criminal act.—Common intention 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. It 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. *AIR 1945 PC 118.* Common intention referred to in Section 34 pre-supposes a prior concert, a pre-arranged plan, *i.e.* a prior meeting of minds. This does not mean that there must be a long interval of time between the formation of the common intention and the doing of the act. *AIR 1968 Raj 305.* It is not necessary to adduce direct evidence of the common intention.

Indeed, in many cases it may be impossible to do so. The common intention may be inferred from the surrounding circumstances and the conduct of the parties. *AIR 1955 SC 331.* Common intention implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also 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. There must be a pre-arranged plan but that plan may be made shortly or immediately before the commission of the crime. A long standing conspiracy is not required for the application of the section. 'Same or similar intention' is not to be confused with 'common intention. *AIR 1946 Oudh 250.* Act or conduct on the part of the accused must be proved from which an inference of a pre-arranged plan could be raised. *AIR 1956 SC 177.* Common intention implies acting in concert, the existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. *AIR 1958 Bom 439.* A pre-concert in the sense of a distinct previous plan is not necessary to be proved. *AIR 1956 M Bh 269.* Pre-concert should be distinct from the act. *AIR 1956 Sau 107.*

It is necessary before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done.. A common intention may develop in the course of events though it might not have been present to start with. And the intention can be inferred from the conduct of the assailants. The question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from the proved facts and not on any direct evidence about a pre-conceived scheme or plan which may not be available at all. *AIR 1945 Mad 259.* Where a person commits an assault upon another and a third person joins in committing the assault, it is a fair inference that the two were acting in concert. *AIR 1954 SC 706.* Pre-arranged plan can come into existence at the time of crime and can be inferred. *AIR 1961 Guj 16.* Common intention can develop suddenly without a pre-arranged plan and can be gathered even from circumstantial evidence. But in the absence of circumstantial evidence and motive it must be held not proved. *1963 RLW 436.* The arranged plan may develop on the spot during the commission of the offence. *AIR 1963 SC 1413.* But *see* 1972 Cr LJ 465, holding that it cannot develop during the fight. Despite their statement that they would kill *D,* if the wrong side of *axe* was used by one of them. Section 34 does not apply, *(1975) 3 SCC 751.* Prior concert and pre-arranged plan are essential. *(1971) 1 SCR 31.* Common intention may develop a few minutes before the criminal act. It has to be inferred from the consequences of the acts, motive, weapons used, the individual acts and the attitude of the others. *(1975) 2 An WR 413.* Common intention may be inferred if *Q* stands by to give warning and *P* commits murder, *AIR 1974 SC 2118.*

(A) Elements of common intention.—Common intention implies a pre-arranged plan in pursuance of which the criminal act is done—A pre-concert in the sense of a distinct previous plan is not necessary to be proved—Common intention to bring about a particular result may develop on the spur of the moment as between a number of persons. *Md. Chand Mia alias Chand Miah Vs. The State 9 BLD (AD) 155.* A common intention pre-supposes a prior concert and physical presence of the accused in the actual commission of the crime—The fact that all the accused were armed with deadly weapons and were physically present at the place of the occurrence and inflicted multiple injuries on the victim clearly prove the common intention of the accused persons. *Hazrat Ali and others Vs. The State 4 BLD (HCD) 257.* The test as to the applicability of the principle is that common intention implies a pre-arranged plan and it must be proved that a criminal act was done in concert to the prearranged plan. *State Vs. Lieutenant Colonel Syed Farook Rahman (Criminal) 53 DLR 287.*

Common intention is a state of mind which may develop in the course of the transaction constituting the offence and may be gathered from the number and nature of injuries inflicted on the person of the victim when in the instant case as many as 13 injuries most of which were grievous in nature were caused as a result of frontal attack can be said to be a result of pre-concert. Although the convict-appellant Badal had no pistol or any weapon in his hands, but in a different manner he also prevented the victim either from fleeing away or warding off the attack and facilitated the consequent infliction of injuries resulting in his death. *AKM Ataur Rahman Khan alias Badal and another Vs. State (Criminal) 5 BLC 508.* Common intention within the meaning of section 34 of the Penal Code though implies prearranged plan or concert between the persons, it can come into existence whilst the acts are being committed. *State Vs. Md. Shamim alias Shamim Sikder and ors (Criminal) 53 DLR 439.* 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 and circumstances of the case. *State Vs. Lieuteant Colonel Syed Farook Rahman (Criminal) 53 DLR 287.* Common intention can even be formed on the spot and a person can be killed without any pre-plan. Md. Chand Mia @ Chand Mia & others Vs. State 1999 BLD (AD) 155; *State Vs. Md. Ershad Ali Sikder and others (Criminal) 55 DLR 672.* There was no preplan of the accused persons to kill the victim but their common intention to kill the victim developed on the spot when they all simultaneously fell upon him as soon as he came to the scene. The Trial Court has correctly held that as soon as the victim ran towards the accused persons they intended to kill him. The fact that some of them had caused fatal injuries and others caused minor injuries is immaterial if the act was done in furtherance of their common intention. This section is clearly applicable in this case and the persons who had participated in the criminal act causing the death of the victim are equally liable for it. *The State Vs. Montu & ors. 44 DLR (AD) 287 = 12 BLD (AD) 42.* 'Common intention' within the meaning of section 34 of the Code though implies a pre-arranged plan or concert amongst the accused persons, yet it can come into existence while the acts are being committed. The ingredients of section 34 of the Code are not attracted in the instant case and as such the order of conviction under section 302/34 of the Penal Code in respect of the other appellants other than Shamim is not tenable in law. A person cannot be held vicariously liable for the act of another if common intention for doing the act is not proved. *(The State Vs. Md. Shamim @ Shamim Sikder) 21 BLD (HCD) 256.*

14. Common intention must be known to all and be shared by all.—Common intention under Section 34, P.C. does not mean similar intention of several persons. To constitute common intention it is necessary that the intention of each one of them be known to the rest of them and shared by them. *AIR 1953 All 668.* Also see *1979 SCC (Cr) 61,* for test and guidelines for fixing vicarious liability. *See* also *1980 SCC (Cr) 648 and 1980 SCC (Cr) 946.*

15. Common intention must exist when the criminal act is done.—A mere common intention to commit murder in certain circumstance, *e.g.* in the event of interference with escape, might not, of itself, be sufficient to justify a finding that the accused and his companions had, at the time of actual occurrence, the common intention of murdering *Ramjan.* In order to decide whether or not the accused and his companions had the common intention of murdering *R* it is necessary to consider what happened immediately before *R* was shot. *AIR 1935 Cal 526. See also 1972 Cr LJ 465.*

16. Common intention to commit a crime.—The common intention must be to commit a crime. But it was observed that under Section 34 when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it

were done by him alone. The words 'in furtherance of the common intention of all are a most essential part of Section 34 of the Penal Code. It is common intention to commit the crime actually committed. The common intention of same persons may be to commit simple hurt and the intention of one of that may be to commit murder which is actually committed. In some cases it was held that the common intention referred to in Section 34 is intention to commit the crime actually committed. See *AIR 1955 All 230.*

If *P* and *Q* set out with the common intention to cause an injury to *R*, which is likely to cause death, and *P* stands guard while *Q* causes the injury to *R*, in view of Section 34, P cannot plead that the injury was caused by *Q* and not by *P*. To extend this illustration, if in the same circumstances *Q* intentionally causes the death of *R* by intentionally causing him injury sufficient in the ordinary course of nature to cause death, *P* cannot plead: (1) that *P* did not cause death and (2) that the common intention of *P* and *Q* was not to cause death but only to cause an injury likely to cause death. Section 34 provides that *P* cannot make these two pleas if the act was done in furtherance of the common intention of both *P* and *Q*. But Section 34 does not proceed further and make *P* guilty of murder because *Q* is guilty of murder under Section 302. Section 34 merely makes *P* liable for the criminal act done. In other words, *P* alone is deemed to have caused the death of *R*. But Section 34 does not say that the intention of *Q* must be attributed to *P*. *P* is liable for his own or for the common intention alone although by virtue of Section 34 he is made liable for the death of *R*. *Q* would be guilty of murder as in addition to the common intention to cause an injury likely to cause death he had the individual intention to cause the death of *R*. But *P* had no intention beyond the common intention to cause an injury to *R* which was likely to cause death. Still Section 34 makes him liable for causing the death of *R*. Therefore, *P* is guilty of culpable homicide only although *Q* is guilty of murder. The words 'guilty' of that offence found in Section 149 are not found in Section 34. A criminal act done with a particular intent is an offence. The nature of the offence committed depends on the criminal act done or constructively deemed to have been done and the intention proved or inferred. That the view is correct is clear from Section 35 and the use of the words 'such act' in the marginal note to Section 35. Section 35 refers to the liability for the criminal act as if it were done by him alone. Therefore Section 35 applies only to 'such acts' as are referred to in Section 34 and makes it clear that the doers are liable only for the individual intention or knowledge or for the common intention.

17. Common intention and similar intention.—Same or similar intention is not to be confused with common intention. *1971 SCC (Cri) 497.* Persons who have a common intention must have the same intention. 'Same intention' must, to make it 'common intention', be indicated in some way by words or acts between the persons who share it. Such indication may be inferred from circumstances. The circumstances may lead to an irresistible inference that they had the same intention and that intention was shared by all in the sense that it had been communicated by them to each other before they rushed from their door. *AIR 1946 Oudh 250.* The impulse to assault may have arisen independently, but when five men assault at one and the same time, each of them seeing that the other four are assaulting also, the assault may be regarded as a common one. *AIR 1954 SC 706.* Where accused persons hearing a shout for help ran instantaneously to the spot and attacked the complainant's party, they might have been inspired by similar motives to help the person who was shouting for help but that cannot be taken to mean that they were inspired by a common intention. Common intention always presupposes some plan or some design to commit an act. *1952 RLW 17.* Common intention within the meaning of section 34 of the Penal Code pre-supposes prior concert ; it also requires pre-arranged plan and care must be taken not to confuse same or similar intention with common intention.

the partition which divides "their bounds" is often very thin ; nevertheless the distinction is real and substantial and if overlooked will result in mis-carriage of justice. *Kabul Vs. State 40 DLR 216.*

18. Section 34 refers to common intention and not to common knowledge.—See other notes.

19. Common intention and common object.—A common object is different from a common intention in that it does not require prior concert and a common meeting to minds before the attack, and an unlawful object can develop after the people get there. In case under Section 149 there need not be a prior meeting of minds. It is enough that each has the same object in view and that their number is five or more and that they act as an assembly to achieve that object. It is true that the two sometimes overlap but they are used in different senses in law and should be kept distinct. *AIR 1956 SC 513, 546.* Section 34 provides that when a criminal act is done by several persons in furtherance of their common intention each of them is liable for that common intention each of them is liable for that act in the same manner as if it was done by him alone. Section 149 postulates an unlawful assembly and commission of an offence by any of its members in prosecution of the common object of such an assembly. *Abdus Samad Vs. State 44 DLR (AD) 233.* Whether the accused who did not actively participate in the commission of the crime can be convicted for the offence committed by the co-accused—Whether accused who did not actively participate in the commission of the offence can be convicted under Section 326 of the Penal Code without adding Section 34 or 149 of the Penal Code in the charge and evidence that they acted in a concert or in furtherance of a common object—The prosecution case being that it was Ajit who threw the bomb at the order of the Chairman but there was no evidence as to acting in a concert or in pursuance of any common object and as such appellant Nos 2-6 could not be convicted individually under Section 326 of the Penal Code. *Ibrahim Mollah and others Vs. The State 7 BLD (AD) 248.*

20. Common intention and conspiracy.—Common intention cannot be inferred if on the same evidence conspiracy is held disproved, *AIR 1956 Hyd 99.* Courts cannot distinguish between co-conspirators nor can they inquire as to the part taken by each in the crime. *State Vs. Lieuteant Colonel Syed Farook Rahman (Criminal) 53 DLR 287.*

21. Common intention and Mens Rea.—There are cases in which common intention is identical with 'mens rea' required for the offence actually committed, and there are others in which its horizon is wider. *AIR 1944 Cal 339.*

22. Common intention is a question of fact.—The existence of a common intention said to have been shared by the accused person is, on ultimate analysis a question of fact. *AIR 1955 SC 331.* Appellants' participation from beginning to end in a pre-planned murder establishes a clear case under Section 34. *1979 SCC (Cr) 496.*

23. Common intention if proved, motive is immaterial.—*See* other notes.

24. Common intention and individual intention.—In addition to entertaining the common intention, such persons may in addition have their own individual criminal intention. *57 IC 918.*

25. Common intention and primary intention.—The two men were armed with guns and had plenty of ammunition and they entered the shop for the purpose of committing robbery. When they were disturbed in their act by a large number of villagers they decided to retreat and in so retreating they fired a large number of shots. It is clear that their primary intention was to effect their escape from their pursuers and it was their determination to prevent the pursuers from arresting them. It was not their primary intention to kill any of their pursuers. Their intention was merely to effect their escape from the pursuers, but it may be concluded that their intention was to effect their escape even though for

that purpose it was necessary to shoot any of the pursuers mortally. In the circumstances of this case the accused might well have been convicted under Section 302 read with Section 34. *AIR 1955 Pep 81.*

26. Common intention of master and servant.—Where both master and servant were present at the sale of ganja in contravention of the terms of his licence and the servant received the money paid for the ganja having regard to the provisions of Section 34, the servant was guilty of the offence of selling ganja without a licence and Section 114 had no application. *ILR 29 Cal 496.*

27. Common intention to kill A, but B killed.—In 1965 ISCR 287, the accused killed *B* to wreak his private vengeance, it could not be possibly in furtherance of the common intention for which others can be liable. But if on the other hand he killed *B* bona fide believing that he was *A* and the common intention was to kill *A*, the killing of *B* was in furtherance of the common intention. *AIR 1970 SC 1266.*

28. Common intention not shared after a stage.—It is quite wrong to say that if several persons have a common purpose, each person will be liable for every act done by the other in furtherance of that common purpose. For instance, three persons may have the common purpose of robbing a bank ; one of these persons, unknown to the others, arms himself with a pistol and shoots one of the bank's assistants who resisted him. The others will certainly not be liable for murder unless it is proved that all of them had the common intention that anyone who resisted them would be shot. *AIR 1941 Cal 659.* Where several accused persons struck the deceased several blows, it was held that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object and that they were all guilty under Section 326 and not under Section 302. *AIR 1953 All 203.* Although *M* and *L* took no part themselves in the assault, they joined in the pursuit of *K*. It is not at all clear from the evidence that these two men really pursued *K* to any distance. It may be that they ran at him or after him, but presumably their intention in so doing was merely to scare him away from the land so that they and their labourers might continue to cut the khesari without further interruption. They soon stopped and did not go up to *K* or strike him or molest him in any way. In these circumstances, it is quite impossible to apply Section 34 and make either *M* or *L* constructively liable for the assault committed by the other two men. *AIR 1942 Pat 376.* Even assuming that the primary object was to commit robbery the common intention to carry out the unlawful design at all costs, even at the cost of overcoming resistance by taking life, would be sufficient for the application of Section 34. *AIR 1955 Pep 81.* The accused assaulted the deceased while the latter was in the very act of violating a woman related to the accused. The deceased escaped out of the room ; in the corridor he was assaulted by persons other than the accused. The deceased finally got into the courtyard where he was beaten to death by a large body of persons. There was no common intention between the accused and the persons assembled outside the house. The accused were not shown to have taken any part in the assault upon the deceased after he had escaped from the room and come to the corridor and finally to the courtyard. Held that the accused could not be convicted under Section 304. 17 IC 1001. Due to old enmity, five accused, four armed with lathis and one with a spear, intended to give beating to the deceased. With this intention they attacked the deceased. One of the accused *A* aimed a first lathi blow at the deceased who avoided it and succeeded in striking a lathi at *'A'*. *A* fell down and could not take any further part in the incident on account of the injuries he received. The rest of the accused then beat the deceased with lathis and spear as a result of which the deceased received many injuries including wounds on the head and died instantaneously. Held that: (1) The accused formed on unlawful assembly with the

common intention of giving beating to the deceased. They further did commit the offence of rioting the moment '*A*' attacked the deceased. (2). The accused, other than *A*, were guilty under Section 302, read with Section 34. (3) *A* was guilty of the offence under Section 304, Part II, read with Section 109. *AIR 1950 All 418.* Where the appellant after the fatal gun-shot by his companion attacked the deceased with the blunt edge of a Gandasi, held, it was a separate and individual act under Section 323 P.C. not relevant to conviction under Section 302/34, P.C. 1979 SCC (Cr) 496.

29. Principle of common intention must not be pushed too far.—In order to determine the common intention and to determine also whether a particular act was done in furtherance of that common intention regard must be had not solely to the particular act, but to all the acts that were done. If two or three of several men proceed to assault another man with their fists and if suddenly one of the bystanders joins in the affray and pulls out a knife and stabs him fatally, it might well be said that the stabbing was not part of the criminal act in which all of them had joined, but was the individual act of the man who used the knife. Where however, two men, each armed with lathis, set out in pursuit of another and overtake and assault him, each of them striking him several blows, it is quite impossible to argue that any particular blow was not struck in furtherance of the common intention. *AIR 1952 Pat 125.* There must be evidence from which one might reasonably infer a common intention infecting each of the accused, in order to apply Section 34 and hold each accused responsible for the act done by several persons in furtherance of the common intention of all. The presumption of constructive intention must not be too readily applied or pushed too far. It is obvious that the mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under Section 34 ; the former by itself is irrelevant to the Section. It is only when a Court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued, or acted in concert with others in order to bring about that result, that Section 34 may be applied. *AIR 1953 All 203.* Where each of the two accused dealt a lathi blow on non-vital part of the deceased's body, held, in the absence of evidence as to which blow was fatal, none of the accused could be held liable under Section 302/34 as the common intention to cause death could not be inferred. They were, however, liable under Section 325/34. *1969 Cr LJ 1273.* Bona fide assertion of right of way through the uncultivated portion of a private land, by the villagers, when the road is submerged during the rainy season, cannot be considered to be the common intention to commit an offence. *AIR 1970 SC 219.* Section 34 may possibly be applied even though no charge was framed under Section 34 if the evidence is clear. 1973 SC 460.

30. There can be no common intention if one person can claim the benefit of an exception.—If one of the accused had brought his case within Exception 4 to Section 300 there was no room for the application of Section 34 against the other accused at all. *AIR 1940 Cal 147.* If there was a sudden quarrel over some exchange of words, Section 34 does not apply. *AIR 1973 SC 460.*

31. No Common intention in cases of sudden fight or quarrel.—*AIR 1949 All 191.* If there was a sudden quarrel over some exchange of words, Section 34 does not apply. *AIR 1973 SC 460.*

32. Instigation is not common intention.—A mere direction from one person to another and the carrying out of that direction by the other may be only instigation of the latter's act and may not be a case of a joint act falling under Section 34. But where two persons with their followers all of them armed, move about together for a set purpose and one gives instruction to the other and keeps himself on the spot in readiness to see it carried out and the other carries it out, it is hardly possible to say that

the act is not one which was done in the furtherance of the common intention of both. Actual presence plus prior abetment can mean nothing else but participation. That is the irrebuttable presumption raised by Section 114 and brings the case under Section 34. *AIR 1956 SC 177; AIR 1956 SC 177.*

33. Presence when the act is done.—For Section 34 to apply presence of accused is essential but not necessarily the physical presence. *AIR 1970 SC 1266.* If the accused was not present, he cannot be convicted with the aid of Section 34. *AIR 1955 SC 287.* Mere presence at the time of a commission of an offence by confederates is not in itself sufficient to attract Section 34. *1963 MLJ (Cr) 491.* Mere presence of a peson at the scene of offence does not bring him under Section 34. *AIR 1963 KLT 222.* It is the essence of Section 34 that the person must be physically present at the actual commission of the crime. He need not be present in the actual room ; he can, for instance, stand 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 other at the time the crime is actually being committed. The antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by Section 109 and the stage of commission when the plans are put into effect and carried out ; Section 34 is concerned with the latter. It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation, which, of course, can be of a passive character such as standing by a door, provided that it is done with the intention of assisting in furtherance of the common intention of them all and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act. The emphasis in Section 34 is on the word "done". It is essential that the accused join in the actual doing of the act and not merely in planning its preparation. If the accused was not present he cannot be convicted with the aid of Section 34. *AIR 1955 SC 287.*

A person who is an eye-witness of the incident is present at the spot as well as a person who is a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime. On the other hand, the latter is guilty because he is present for the purpose of seeing that the crime is committed. In other words, presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. It is the expectation of aid, in case it is necessary, to the completion of the crime and the belief that his associate is near and ready to render it, which encourage and embolden the chief perpetrator and incite him to accomplish the act. By the countenance and assistance which the accomplice thus renders, he participates in the commission of the offence. It is, therefore, sufficient to hold a party as principal, if it is made to appear that he acted with another in pursuance of a common design ; that he operated at one and the same time for the fulfilment of the same pre-concerted end, and was so situated as to be able to furnish aid to his associates with a view to ensure success in the accomplishment of the common enterprise. *AIR 1956 All 246.* It was held that a common intention pre-supposes prior concert and requires a pre-arranged plan because 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 them all. But the pre-arranged plan need not precede the commission of the crime by any great length of time. A pre-concert in the sense of distinct previous plan is not also necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily

lead to that inference or the incriminating acts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis. Further it is the essence of S. 34 that the person must be physically present at the actual commission of the crime. *Abdur Rahim Mondul Vs. The State, 29 DLR (AD) 246.* It is the essence of section 34 that the accused persons must be physically present at the place and at the time of commission of crime and the incriminating acts and circumstances must be necessary to lead the inference of common intention to commit the crime. *State Vs. Lieutenant Colonel Syed Farook Rahman (Criminal) 53 DLR 287.* In order to attract the principle of section 34 physical presence at the place of occurrence is not necessary provided the jointness of action can be inferred from the facts and circumstances of the case. *53 DLR 287.* Section 34 PC though may require some sort of physical presence in the place of occurrence but the physical presence may vary in the facts and circumstances and from circumstances to circumstances. *State Vs Lieutenant Colonel Syed Farook Rahman (Criminal) 53 DLR 287.* Physical presence of the accused is necessary at the place of occurrence, there are series of decisions that physical presence is not necessary provided jointness of action can be inferred from the facts and circumstances of the case furthering or facilitating from a distance in committing the offence. *State Vs. Lieutenant Colonel Syed Farook Rahman (Criminal) 53 DLR 287.*

34. Mere presence if sufficient to infer common intention.—The mere circumstance of a person being present on a lawful occasion does not raise a presumption of that person's complicity in an offence then committed so as to make Section 34 applicable. *14 Bom 115.* In case of physical violence the presence of person aiding or instigating is essential. *1976 SCC (Cr) 578.* Mere presence without proof of any act or omission done to facilitate the offence or at least without proof the existence of a common intention will not be sufficient to support a conviction. Certainly, if common intention is proved it will be no answer to say that the prosecution have not established which of the acts done in the commission of a crime was done by each individual accused. Actual participation in the commission of the offence is a condition precedent of Section 34 and is its main feature. Presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. Every person charged with the aid of Section 34 must in some form or the other participate in the offence in order to make him liable thereunder. *AIR 1953 SC 420.* Mere presence of the accused without anything more can bring him within Section 34. *1969 Cr LJ 542.* Mere distance from the scene cannot exclude culpability if criminal sharing is proved. *1974 SCC (Cr) 580.* Mere standing of accused Belal at the door of Parvin will not constitute offence under section 34 read with section 324, Penal Code in causing voluntary hurt by dangerous weapon. *Belal Ahmed Vs. State 40 DLR 154.*

35. Persons with common intention and participating are not abettors.—AIR 1953 All 668.

36. Fatal assault with lathis by several persons.—Accused came to the place of occurrence only with lathis in their hands with which they assaulted the deceased and though death had occurred there was nothing to show any apparent severity in the blows that were inflicted. From the facts and circumstances of the case, it did not appear that the three accused had ever any common intention to cause the death of the deceased. It was not therefore possible to uphold their conviction under Section 302 read with Section 34. But they had the common intention, which though not being in concert pursuant to the pre-arranged plan, developed on the spot to beat the deceased with lathis in their hands were likely to produce grievous injuries. In this view, therefore, the three accused would be guilty not under Section 302/34 but under Section 326/34. *AIR 1954 SC 706.*

37. The principle of constructive liability cannot be applied twice under Section 34 and Section 149.—When the charge and conviction are both under Section 302/34 and Section 302/149 and the conviction under Section 302/34 is held to be redundant or is set aside that would not affect the conviction under Section 302/149. *AIR 1964 Pat 158.* In order to make an accused constructively liable with the help of section 34 for an offence not actually commited by him, it is essential to prove that he had intention to commit the offence. Unless such intention is proved, he cannot be made liable under that section. *40 DLR 154.*

38. Constructive guilt—"Comman intention" and "Common object" under sections 34 and 149.—Both deal with a combination of persons to become punishable as "sharers in an offence"—They have a certain resemblance and may to some extent overlap—The basis of constructive guilt under Section 149 is mere membership of an unlawful assembly while the basis for the offence under Section 34 is participation in an act with the common intention of doing that act—Where the common intention and the common object are one and the same in a given case, both these Sections may apply—Alteration of the finding by applying Section 149 instead of Section 34 is not bad in law—But the accused cannot be held responsible for the offence of arson under Section 436 of the Penal Code though they are guilty of rioting under Section 147 by applying section 149. *Bangladesh Vs. Abed Ali and others 4 BLD (AD) 324.*

39. Act which can be done by only one person.—In such a case Section 34 cannot apply : (1) Sections 307 and 308. *52 Bom 168;* (2) Section 397 and Section 398. *AIR 1931 Pat 49;* (3) Section 458, 4 LAH 399; (4) Section 498. *AIR 1926 Rang. 207.*

40. Section 34 and Section 35.—Where several persons are concerned in committing an act which is criminal only by reason of its being done with a criminal knowledge, each of such persons who joins in the act with such knowledge is liable for the act in the same manner as if the act were done by him alone with that knowledge. This principle is embodied in Section 35 of the Code, which supplements the principle embodied in Section 34. *AIR 1949 All 343.*

41. Section 34 and Section 37.—Section 34 requires common intention for a criminal act which is done by a number of persons in order that they should become liable as if the act was done by each of them while the latter deals with the intentional co-operation in the offence which has resulted from several acts, each of which standing by itself is not the offence with which the accused are charged. *AIR 1952 All 435.* Section 34 required a common intention for a criminal act done by several persons, (*i.e.* 'a unity of criminal behaviour which results in criminal offence'), in which case each actor becomes liable as if that act was done by him alone. Section 37 deals with intentional co-operation (which, it was pointed out in 52 Cal 197, may be the same as a common intention) in an offence committed by means of several acts, and punishes such co-operation (Provided it consists in doing any one of those acts either singly or jointly with any other person) as if it constituted the offence itself. If intentional co-operation may not be the same as a common intention, it must include action which contributes to the offence and is done with the consciousness that the offence is on foot, though without sharing the intention to commit that offence. *AIR 1938 Pat 258.*

42. Section 34 and Section 107 or Section 109.—

Section 34	*Section 107*
A criminal act is done by several persons	The abettor does not take part in the criminal act; he merely abets it.

A criminal Act must have been completed : there must be common intention	The act abetted may not be committed. *See* Expln. 2 to Section 108.
Presence of all at the scene of offence is necessary. *AIR 1955 SC 287 ; AIR 1955 SC 331.*	Common intention is not necessary. *See* Explns. 2 and 5 to Section 108.
	Abettor need not be present at the scene of offence. *See* Section 114.

It is not necessary to call in aid Section 109 when the charge includes Section 149 or Section 34. *AIR 1956 Tc 230.* The conviction of appellant Nos. 2-4 upon the evidence on record for the offence of murder with the application of section 34 or 109, Penal Code is not sustainable in law. *Amar Kumar Thakur Vs. The State (1988) 40 DLR (AD) 147.*

43. Section 34, Section 109 & Section 149.—For application of section 34 some overt act by each of the accused is necessary in the commission of the crime by two or more persons but in the case of application of section 149, if one is found to be a member of the unlawful assembly for the commission of the crime, whether he takes active part in it or not, he comes within its mischief, and so far as section 109 is concerned, it is simply for abatement of the offence committed. Now, in the instant case, according to the prosecution, all the accused planned to commit the murder of the victim and towards that end they started acting and then all together in a joint action with common intention caused the murder of the victim. So, in such circumstances, it is not understood why section 34 will not be attracted in this case, when allegation is to the effect that each one of the accused persons took part in the commission of the alleged crime of murder of the victim Kalam. The question is whether the prosecution has been able to prove the allegation by evidence is a different one. We, therefore, find no illegality in framing the charge against the accused under sections 302/34 of the Penal Code apart from other sections of law. *Abdul Khayer and 3 others Vs. State 46 DLR 212.*

44. Section 34 and Section 114.—A person may be guilty of abetment even if he is not present at the scene of offence and even if the offence be not committed. If the offence is committed and he is present when the act is committed, Section 114 provides that he shall be deemed to have committed such act. Although the criminal liability under both Sections 34 and 114 is similar, the basis for the criminal liability is not exactly identical. There need not be any abetment in the case of Section 34 and there need not be any common intention in the case of Section 114. The whole object of Section 34 and 114, is to provide for cases in which the exact share of one of several criminals cannot be ascertained, though the moral culpability of each is clear and identical. Neither of these two sections should be so interpreted as to defeat the very object which underlies them. *AIR 1936 All 437.* There may be cases in which a person convicted under Section 302, read with Section 114 might as well have been convicted under Section 302, read with Section 34. *61 Cal 10.*

45. Section 34 and Section 120A.—"There is not much substantial difference between conspiracy, as defined in Section 120A and acting on a common intention, as contemplated in Section 34. While in the former, the gist of the offence is bare engagement and association to break in law even though the illegal act does not follow, the gist of the offence under Section 34 is the commission of a criminal act in furtherance of a common intention of all the offenders, which means that there should be unity of criminal behaviour resulting in something, for which an individual would be punishable, as if it were all done by himself alone". The evidence as to conspiracy under Section 120B having been rejected, the same evidence could not be used for finding a common intention proved under Section 34. *AIR 1955 SC 420.* Section 34 requires not only common intention but also participation in crime,

whereas conspiracy is merely an agreement to commit crime. Thus, where an offence is committed by some conspirators in pursuance of the conspirary, the common intention of all would not be enough to fasten the guilt on all of them. Only participants in the crime will be responsible. *AIR 1969 Cal 481.*

Requisite ingredients when the section will apply—In furtherance of the common intention—Actual participation not necessary—Difference between section 34 and section 120A. There is a difference of substance between common intention as contemplated under section 34 and acting in concert or conspiracy as contemplated under section 120A, P.C. for, under section 120A, the association or coming together or the forming of the common intention itself without more may be sufficient. *Abdul Latif Vs. Crown (1956) 8 DLR 238.* Under section 34, the criminal act must itself be committed by the accused persons in furtherance of that common intention. The gist of the offence under section 34 consists in the "unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone." *Abdul Latif Vs. Crown (1956) 8 DLR 238.* Distinction between conspiracy as defined in section 120A and acting in common intention under section 34 is a very fine one. In the case of section 120A, the gist of the offence is a bare engagement or association to break the law even though illegal act does not follow, while the gist of the offence under section 34 is the commission of the original act in furtherance of common intention of all the offenders and that only means that there must be unity of criminal behaviour resulting in something for which an individual be punishable if it were done by himself alone. *Md. Yaqub Vs. Crown (1955) 7 DLR 75.*

46. Section 34 and Section 148.—Common intention is an intention to commit the crime actually committed and each accused person can be convicted if he shared the common intention. The common intention contemplated by section 34 is anterior to the commission of the crime and it does not refer to the time when the offence is actually committed. A person cannot be found guilty under section 148 of the Penal Code unless he carried with him a dangerous weapon. A general statement that the accused persons were armed with dangerous weapons like dhal, katra, lathi and sorki is not sufficient to warrant a conviction under this section. *Nurul Haque Matbar and others Vs. The State, 14 BLD (HCD) 178.*

47. Section 34 and Section 149.—*(1) Generally.*—Like Section 149, Section 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by Section 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged, each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of Section 34. In some ways the two sections are similar and in some cases they may overlap. But nevertheless, the common intention which is the basis of Section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. Cases to which Section 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different, may vary in their character, but they are all actuated by the same common intention.

The common intention required by Section 34 is different from the same intention or similar intention. *AIR 1963 SC 174.* Whereas Section 34 is merely declaratory of a rule of 'criminal liability' and does not create a distinct offence. Section 149 is not a merely declaratory provision and does create a distinct offence. *AIR 1956 All 241.*

(2) Differences between sections 34 and 149.—To some extent Section 34 and 149 overlap as they provide for joint liability but there are points of difference, *1956 SC 731 ; AIR 1955 SC 274 ; 52 Cal 197 PC.*

Section 34 : Common intention	*Section 149 : Common object.*
Section 34 applies when 2 or more persons including the accused do a criminal act and must therefore be present when the act is done. Before Section 34 can be applied to persons they must all participate in a criminal act.	Common intention is not necessary but an offence must be 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.
A criminal act must be done by 2 or more persons IN FURTHERANCE of the COMMON INTENTION of ALL.	Section 149 applies only when there is an unlawful assembly of 5 or more persons.
In Section 34 it is not sufficient that one person knew it to be likely that another would commit an offence. Both must fully share the common intention.	In Section 149 it is not necessary that persons should participate in a criminal act. But an offence should be committed by a member of the unlawful assembly, before Section 149 is applied to another member of the unlawful assembly.
Before Section 34 can be applied several persons must actually participate in the offence. Section 34 does not create a distinct offence but explains a principle of criminal liability.	Section 149 imposes liability on every person who, at the time of the commission of the offence by another, was a member of the unlawful assembly.
Section 34 has a wider application to cases of 2 or more persons but the range is restricted to participation in a criminal act by all in furtherance of the common intention of all.	Section 149 creates a distinct offence. Sectiond 149 is restricted in its application to 5 or more persons who form an unlawful assembly but when Section 149 is applicable, that is when there is an unlawful assembly of 5 or more persons Section 149 has a wider scope and criminal range.

See AIR 1956 SC 116 ; AIR 1954 SC 204 ; AIR 1953 SC 364.

The words 'in furtherance of common intention of all' which are a most essential part of Section 34 are absent in Section 149. It is common intention to commit the crime actually committed. The common intention is anterior in time to the commission of the crime. Common intention requires a prearranged plan. But Section 149 speaks of an offence being committed by any member of an unlawful assembly in prosecution of the common object of that assembly. The distinction between 'common intention' in Section 34 and 'common object' in Section 149 is of vital importance. Under section 34 in case of a criminal act in furtherance of common intention by several persons each shall be individually liable for the act which he has committed—Under section 149 every member of the unlawful assembly is guilty of the offence committed in prosecution of the common object. *Abu Syed*

Vs. State (1986) 38 DLR 17. Section 34 applies to cases in which whatever the number of the culprits, the prosecution can establish that the criminal act was done in furtherance of the common intention of all in which case each one of them is punishable as if he had done the act himself. *Nawab Vs. Crown (1954) 6 DLR (WPC) 22.* Section 149, on the other hand, does deal with a common intention but applies to an offence committed by any member of an unlawful assembly in furtherance of the common object of the assembly. Section 149 will apply even if the common intention of the culprits was not to commit the offence committed if the offence was committed in order to gain the common object of unlawful assembly. *Nawab Vs. Crown (1954) 6 DLR (WPC) 22.* Section 34 and 149 have some common features, but some difference between them is that while section 34 may apply to a case where the culprits are five, more than five or less than five ; section 149 can apply only to cases in which culprits are five or more. Another difference is that while section 34 will apply where the common intention is to do an act which was done, the latter section will apply even if there was no common intention to do the act but it was done in furtherance of the common object of unlawful assembly. *Nawab Vs. Crown (1954) 6 DLR (WPC) 22.*

(3) Resemblance between sections 34 and 149.—Both may apply in a case where "common intention" and "common object" are one and the same—Both the sections deal with combination of persons who became punishable as "shares in an offence"—They have certain resemblance and may, to some extent, overlap—The basis of constructive guilt u/s.149 is mere membership of an unlawful assembly—The basis of the offence u/s. 54 in participation in an act with common intention of doing the act—Where common intention and common object are the one and the same in a given case, both these sections may apply. The alteration of finding by applying Sec. 149, instead of Sec. 34 is not bad in law in a case where "common intention" and "common object" have overlapped—But the accused cannot be held responsible for the offence of arson u/s. 436 though they are guilty of rioting u/s. 147 by applying Sec. 149. *4 BCR 1984 AD 186 = 1984 BLD (AD) 324 = (1985) 14 BLR (AD) 115.*

(4) Conversion of a charge u/s. 302/34 to one u/s 149 not safe.—It is not only a question of prejudice but in a charge of murder where the normal sentence is death and the lesser sentence is transportation, the conversion of conviction from sections 302/34 to 302/149 is not at all safe. *The State Vs. Idris Pandit, (1973) 25 DLR 232.* The intention in using a firearm was clearly to cause death and, therefore, the two deaths which have been caused can be rightly held to be result of a joint attack by the four persons before us thus attracting the application of section 34 P.C. Yet, it would have been similar and in fact, not in any way a contravention of either fact or law, to hold that these four persons with others who had not been identified carried out the attack in which case the liability would be extended to all of them under section 149, P.C. *Mohammad Shafi Vs. The State, (1967) 19 DLR (SC) 216.*

(5) Section 34 and 149 deal with liability for constructive criminal action—Distinct features of these two sections—Points on which both are similar and on which they are different.—These two sections both deal with combinations of persons who became punishable as "sharers in an offence". They have a certain resemblance and may to some extent overlap. Section 34 applies to a case in which several persons both intend to do an act and in fact do that act ; it does not apply to a case where several persons intend to do an act but some one or more of them do an entirely different act ; in such a case section 149 may apply provided other requirements are fulfilled. Mere membership of an unlawful assembly makes one liable u/s. 149 ; under section 34 there is participation in an act with common intention. *Bangladesh Vs. Abed Ali (1984) 36 DLR (AD) 234.*

(6) Scope of the two sections.—Both sections deal with combination of persons to become punishable as sharers in an offence. Basis of a case under section 34 is the element of participation, and that of one under section 149 is membership of an unlawful assembly. The scope of the latter is wider than that of the former. *Abdus Samad Vs. State 44 DLR (AD) 233.* These sections do not confer punishment for any substantive offence. They are intended to deal with liability for constructive criminality. Section 34 applies where criminal act is done by two or more persons in furtherance of the common intention of all, whereas section 149 applies in the case of a member involved in unlawful assembly for a common object. So there is difference between the two sections as there is a difference between object and intention. *Ataur Rahman Vs. State 43 DLR 87.*

Section 34 of the Penal Code involves a direct overt act on the part of the accused sharing "a common intention" with others for the commission of an offence while section 149 is essentially a vicarious liability for being a member of an unlawful assembly with the "common object" of committing the offence. These two offences are of different nature. *Abu Talukder Vs. State 51 DLR 188.* Section 34 applies in a case where a criminal act is done by two or more persons in furtherance of the common intention of all while section 149 applies in the case of a member of an unlawful assembly when a criminal act is committed by any member of the unlawful assembly in prosecution of the common object of that assembly. *Ataur Rahman and others Vs. The State, 14 BLD (HCD) 391.* Section 34 and 149 of the Penal Code are two distinct and separate offences with different ingredients. Section 34 of the Penal Code involves a direct overt act on the part of the accused sharing a 'common intention' with others for the commission of an offence while section 149 of the Penal Code is essentially a vicarious liability for being a member of an unlawful assembly with the 'common object' of committing the offences. These two offences are of different nature. *Abu Talukder Vs. The State, 19 BLD (HCD) 225.* Section 34 and 149 of the Penal Code, 1860 operate in two different situations in relation to commission of an offence. There can be no charge under section 34 and 149 of the Penal Code independent of any substantive offence. When several accused in furtherance of common intention participate in the commission of offence the charge against all of them will be under section 34 of the Penal Code together with the principal offence. On the other hand when five or more persons forming an unlawful assembly commit an offence animated with common object, every member of the assembly is equally liable for the offence under section 149 of the Penal Code read with the substantive offence. *Abdus Samad Vs. The State 44 DLR (AD) 233.*

48. Section 34, Section 149 and Section 302.—Under section 34 the two elements that constitute the crime are the common intention and the participation in the crime, while those in the case under section 149 are the common object and the participation in the unlawful assembly. Where the common object becomes equivalent to the common intention and where participation in the assembly is coupled with the participation in the crime then the two elements of both the constructive liabilities become the same. In such cases, no separate charge need be framed for each of them as laid down under section 233, CrPC and the conviction of the accused may be altered from one under sections 302/149 to that under sections 302/34 without there being a charge for the latter as provided under sections 236 and 237, CrPC. *State Vs. Abdul Hye Miaj and others (Criminal) 1 BLC 125.*

49. Section 34, Section 149 and Section 326.—Strict scrutiny of oral evidence—In a case where witnesses are related and partisian and have a strong motive to depose falsely their evidence must be put to the strict scrutiny having regard to the attendant circumstances–Common intention and common object–An accused who did not actively participate in the commission of the crime whether can be

convicted for in the offence committed by the co-accused–The accused who did not actively participate in the commission of the offence, whether can be convicted u/s 326 without adding section 34 or 149 in the charge and evidence that they acted in a concert or in furtherance of a common object–The prosecution case being that it was Ajit who threw the bomb at the order of the Chairman–No evidence having been led as to acting in concert or in pursuance of any common object, it is surprising how appellants No. 2 to 6 could be convicted individually u/s 326, Penal Code. *BCR 1987 AD 320=1987 BLD (AD) 248=40 DLR (AD) 216.*

50. Section 34, Section 302 and Section 324.—In the absence of premeditated intention to kill, the injuries caused by the four accused persons are not being grievous in nature and the same has no contribution towards the cause of death for which they would not be guilty of the offence under section 302 of the Penal Code and accordingly, their conviction is altered from 302/34 of the Penal Code to that under section 324 of the Penal Code and the sentence is reduced to the period already undergone. *Madris Miah and others Vs. State (Criminal) 2 BLC 249.*

51. Section 34 and Section 304 Part II.—It is legally permissible to apply Section 34 to a case under Section 304 Part II provided the facts establish common intention. *AIR 1964 SC 1263.* In the case of offences depending on knowledge, the sections to be applied are Sections 34 and 35 and not Section 34 alone. The wording of Section 35, and the words 'such act' in the marginal note to Section 35 are a complete answer to the difficulty. Persons can be convicted under Section 304, Part II in fit cases by the application of Sections 34 and 35 and not Section 34 alone. Section 34 can be applied where a criminal act is done by several persons in furtherance of the common intention of all. In such a case each of such persons is liable for the act in the same manner as if it were done by him alone. Further, if in addition to the common intention, some of the persons have a criminal knowledge such as that the act done is likely to cause death, those persons will be liable for the act under Section 34 and will also be liable for the criminal knowledge not by reason of Section 34 but by reason of the fact that their individual criminal knowledge is proved. But Section 34 cannot be applied where an act is not criminal but for the knowledge with which it is done *e.g.*, Section 413 or Section 497.

52. Section 34 and jurisdiction.—Section 34, not only provides for liability to punishment, but also for subjection of a conspirator who is not within the jurisdiction of the Court where the act conspired is committed to its jurisdiction. The accused *C* is a subject of the Cambay State. He lived in Cambay and there traded with his business partner, *A*. In May 1910 the accused, conspiring with *A*, sent *A* to a certain professional forger by name *S. R.*, living in Umreth, with instructions to instigate *S* to forge a valuable security, namely a khata. To facilitate the forgery, the accused sent his khata book with *A* to *S*, *S* committed the forgery in pursuance of *A*'s instigation. As there is a conspiracy, Section 34 applies and each of the conspirators is liable for any or all of the acts of the others done in pursuance of the common intention. Where a foreigner in foreign territory initiates an offence which is completed within British territory, he is, if found within British territory, liable to be tried by the British Court within whose jurisdiction the offence was completed. *AIR 1960 Mys 228.*

53. Charge.—If a person is charged under Section 302, it is not necessary that he should be charged under Section 302 read with Section 34 before he can be convicted under Section 302 read with Section 34. If a person is charged under Section 302 read with Section 34 he can be committed under Section 302 simpliciter. *AIR 1956 SC 116.*

Model charge.—That on or about (date) at (place) you, *A, B, C* and *D* (Names of persons charged) along with *F, G* and *H* (names of persons absconding or dead) and others unknown or unidentified did a criminal act, to wit (here state the criminal act and its consequences), which is an offence punishable

under Section in furtherance of the common intention of you all to wit (here describe the common intention of all) and you are therefore guilty under Section (here state the section) read with Section 34, *P.C., etc.*

54. Omission to mention Sectiond'34 in the charge is not necessarily a fatal defect.—Section 34 can be applid even though no charge was framed for it if the evidence establishing it is clear and free from doubt. *AIR 1973 SC 460.* The object of a charge is to warn the accused person of the case he is to answer. It cannot be treated as if it was a part of a ceremonial. The omission to mention Section 34 of the Penal Code in the charge cannot affect the case unless prejudice is shown to have resulted in consequence thereof. *AIR 1958 SC 672.* The omission to mention Section 34, in the charge had only an academic significance and had not in any way misled the accused and further that on the evidence in the case the charge of murder had been brught home against both the appellants. *AIR 1956 SC 171.* Where the charge under Section 409/34 against two persons did not state that there was joint entrustment of property, held, charge of misappropriation of property entrusted in furtherance of common intention could not be sustained. *1967 Cr LJ 1429.* Section 34 does not create any specific offence. It is a principle of constructive liability. A person could be convicted of an offence read with Section 34 if the facts of the case justify and if the accused had understood the evidence led against him, of such facts irrespective of the fact whether the section was expressly mentioned in the charge or not. *AIR 1956 SC 116, 171.* Omission of charge as to common intention—Non-mentioning of section 34, Penal Code during his examination under section 342, CrPC has not in any manner prejudiced the accused in their defence. It is a mere irregularity which is curable and there has been no failure of justice for such non-mentioning. *Abul Kashem Vs. State 42 DLR 378.*

55. Proof and inference.—To apply Section 34, prove that—

(1) A criminal act was done.

(2) It was done by several persons (including the accused).

(3) They had a common intention.

(4) What the common intention was.

(5) The criminal act was done in furtherance of that common intention. See 1977 SCC (Cr) 602.

The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. *AIR 1968 Bom 254.* "Even if it is held proved that all the appellants were seen at that spot at the time of firing, this fact by itself could not be held enough to prove a common intention of the appellants to murder *S.* It can well be that these four persons were standing together and one of them suddenly seeing *S* fired at him. This possibility has not been eliminated by any evidence on the record. In such a situation when it would not be known who fired the fatal shot, none of such persons could be convicted of murder under Section 302", *AIR 1954 PC 118.* The evidence as to conspiracy under Section 120B, P. C., having been rejected, the same evidence could not be used for finding a common intention proved under Section 34. *AIR 1953 SC 420.* The mere circumstance of a person being present on a lawful occasion does not raise a presumption of that person's complicity in an offence then committed so as to make Section 34 applicable. *AIR 1947 Mad 259.* Mere presence without proof of any act or omission done to facilitate offence or at least without proof of the existence of a common intention will not be sufficient to support a conviction. *AIR 1951 Pat 550.* Where a criminal act or series of acts is done by several persons in combination, it is essential to consider, first, the common intention of all, and secondly, the individual

intention of each of the accused as disclosed by the circumstances. *57 IC 918.* A common intention may be inferred from the conduct of the assailants or their participation in the commission of the crime and from circumstances such as the character of the attack or the nature of the injuries inflicted or from the nature of the weapons employed. Common intention can develop in the course of events though it may not have been present to start with. The question whether there was such an intention or not will in most cases depend on inferences to be drawn from proved facts and not on any direct evidence about a pre-arranged plan which may seldom be available. Common intention may be conceived of, immediately before or at the time of the offence. The precise intention of several persons acting in concert is a matter of inference from their conduct. *AIR 1936 All 437.* In that case it was held that where it is proved that the accused attacked with lathis a person belonging to a party with whom they were on inimical terms, as soon as they sighted him, and all of them used their lathis, it can be inferred that all of them became of one mind when they suddenly saw that person and entertained the common intention of beating him with lathis. It was also pointed out there that every one is supposed to intend the probable consequences of his acts. *AIR 1955 SC 331.* If common intention is proved, motive is immaterial. *18 Pat 101.* When several persons attack another, not upon a sudden quarrel but in concert and after previous consultation they must be deemed to be acting with a common intention and each one's act must be presumed to have been done in furtherance of the common intention. The intention to be inferred must be that deducible from the entire act committed by all. *AIR 1953 All 203.* The mere fact that human blood was found on the appellant's dhoti at one place, in the absence of other evidence, was no corroboration of the prior concert that Section 34 required. It was no corroboration of participation in the crime. *AIR 1956 SC 51.* Direct evidence of common intention is always difficult to obtain and its existence which is an essential ingredient of constructive liability has invariably to be deduced from surrounding facts. *AIR 1964 Punj 321.* Whether there was common intention or not is in the ultimate analysis a question of fact and it has to be determined on the circumstances of each case. Common intention has to come into being prior to the commission of the act in point of time, but this point of time has not to be a long gap. A common intention may develop on the spot and suddenly. Direct evidence of common intention is a rarity. It has to be found mostly on circumstantial evidence. The ordinary rule on which circumstantial evidence has to be judged by Courts must be applied in judging circumstantial evidence showing common intention. *AIR 1957 All 50.*

Common intention cannot be inferred because *P* and *Q* were on the same cycle where *Q* fired a shot and both ran away. *AIR 1975 SC 12.* Where the assault started at the instigation of the accused, held, he shared common intention even though he had no weapon in his hand *1971 SCC Cr 497.* Giving of 2 forcible lathi blows on the head by *H* and *K* does not prove that their associate *P* and *Q* who gave kicks shared the common intention with *H* and *K. (1976) 1 SCC 406.* Mere carrying of spears, which is not unusual for sikhs would not establish pre-planning. *1972 SCC Cr 568.* The presumption of the common intention must be subject to the same restrictions as other presumptions, it must not take the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred and the inference of common intention "should never be reached unless it is a necessary inference deducible from the circumstances of the case". *AIR 1945 PC 118.* Pre-arranged plan is proved from conduct or from circumstances or from incriminating facts. *1971 (1) SCR 31.* Accused's leading to the place of recovering of weapon is not sufficient by itself to infer his participation, *1974 Cr LJ 369.* For inference of "common intention". *See also 1978 SCC (Cr) 191.* For cases on "inference not drawn". *See also 1976 SCC (Cr) 414.*

Mere proof of each of the participating culprits having same intention to commit certain act is not sufficient to constitute common intention. *Kabul Vs. State 40 DLR 216.* The conviction of appellant

Nos. 2-4 upon the evidence on record for the offence of murder with the application of section 34 or 109, Penal Code is not sustainable in law. *Amar Kumar Thakur Vs, State 40 DLR (AD) 147.* Common intention may be proved by direct evidence. *Kabul Vs. State 40 DLR 216.* Common intention—Unless the Court is told what the exact words were used by the accused person it cannot act on the inference supplied by the witnesses—There is no evidence on record that the appellant Nos. 2-4 had an intention to cause the death of Nandalal. *Amar Kumar Thakur Vs. State 40 DLR (AD) 147.* Inference of common intention shall not be reached unless it is a necessary inference deducible from the evidence or circumstances of the case. *Kabul Vs. State 40 DLR 216.* There is no evidence whatsoever from the side of the prosecution that the accused-appellants attacked Momdel Hossain to kill him, rather it appears that the presence of deceased Momdel at the place of occurrence is accidental one and as such the prosecution has failed to prove the ingredient of section 34 of the Penal Code. *State Vs. Azharul (Criminal) 3 BLC 382.*

Although under section 34 of the Penal Code, 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, in awarding punishment each of such persons may be sentenced to death if there is direct evidence of their criminal act in furtherance of the common intention of all. *Khalil Mia Vs. State (Criminal) 4 BLC (AD) 223.* Section 34 of the Penal Code provides that when a criminal Act is done by several persons in furtherance of 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. It does not create any distinct offence but merely lays down principle of joint liability in a criminal act done in furtherance of common intention of the offenders, that is, there must be a common intention. It appears that the learned Sessions Judge misconstrued the meaning of section 34 of the Penal Code as in the absence of proof of prior planning of common intention it cannot be said that the acts done by the accused persons is in furtherance of common intention. *Abdul Qaiyum Vs. State (Criminal) 6 BLC 415.* In the impugned judgment the learned Sessions Judge recorded on finding as to the offence committed by the appellants in furtherance of their common intention when the High Court Division has found that there is no evidence to that effect. *Kala Miah & others Vs. State (Criminal) 6 BLC 335.*

56. What the common intention was must be proved.—The existence of a common intention is the sole test of joint responsibility and what the common intention is must be proved. It is of course but rarely that there could be direct evidence of a common intention which must be judged and decided by a consideration of all the facts proved, and the circumstances surrounding the case. It is not sufficient to say that such and such act was likely to occur, but it must be found on a consideration of all the circumstances available, what the common intention was. *AIR 1941 Rang 301.*

57. Conviction of one accused and acquittal of the remaining.—Where two accused were convicted under Section 302/34 and one of them was acquitted in appeal, the other accused could not be convicted under Section 302 simpliciter in the absence of proof of exact nature of injury caused by each accused. He can be convicted under Section 325 only. *AIR 1968 SC 728.* Once the other named co-accused persons are acquitted, the remaining accused cannot be convicted on the basis of his having shared the common intention. *AIR 1966 Pat 448.* If the case proved is that some persons committed an offence in pursuance of their common intention and all but one of the accused are acquitted on the ground that their identity with the actual participation is not proved, the remaining one accused can be convicted under Section 34, but not if the acquitted accused are acquitted by giving them benefit of doubt the remaining are accused to whom benefit of doubt is not given cannot be convicted under

Section 34 because acquittal means that the acquitted persons did not take part in the offence. *Q* can be convicted if the court holds that the criminal activity was done by *Q* and some other person known or unknown. (identified or unidentified in furtherance of the common intention of all). *1979 SCC (Cr) 994.*

58. Conviction read with Section 34, without a charge under Section 34.—Where by oversight or otherwise specific mention of Section 34 is not made in the charge, that defect by itself would not be fatal, if no prejudice is caused and otherwise the Court can come to the conclusion that the accused had notice that they would be liable under Section 34 also, for after all Section 34 is merely an explanatory provision in the Code, and does not create any specific offence itself. It is not necessary to frame a charge under Section 34, for the purpose of convicting a person under Section 498/34, provided the facts and circumstances of the case establish the common intention, *AIR 1957 Pat 285.* Section 34 can be applied even if no charge is framed. *1972 SCC (Cr) 568.*

59. Conviction read with Section 34 but without a charge under Section 34 but with a charge under Section 149.— *AIR 1956 SC 116.* When there is a charge under Section 149 but no charge under Section 34 even in the alternative, Section 34 cannot be applied. *AIR 1953 SC 364.* But it was held that charge under Section 149 is no impediment to conviction under Section 34. Section 34 can be applied even if no charge is framed if the evidence is clear and free from doubt. *(1972) 3 SCC 418.*

60. Charge with Section 34—Conviction without Section 34.—A reference to the decisions of the Supreme Court, the Privy Council and the High Courts would bear out the proposition that where an accused is charged with a substantive offence by invoking the aid of Section 34, there is no legal bar to the conviction of the accused under the substantive offence simpliciter. A conviction of an accused person under Section 420 would be valid though the charge is under Section 420 read with Section 34 unless prejudice is shown to have occurred. *AIR 1957 SC 857.* A person charged with other accused under Section 201 read with Section 34, can be convicted only under Section 201 if the evidence justifies. The omission to frame alternative charge under Section 201 does not become material when the evidence on record is sufficient for a conviction under Section 201. *AIR 1958 Andh 37*

61. Conviction under Section 302 read with Section 34 may be altered to one under section 326 read with Section 149.—*AIR 1926 (SC) 238, which relied on AIR 1956 SC 116.*

62. Section 34 and Sentence.—When Section 34 is applied lesser sentence may given to the persons who did not give fatal blows. *AIR 1956 SC 754.*

63. Miscellaneous.—*(1) In a jury trial the section has to be explained with reference to the facts of a particular case.*—The Sessions Judge explained the law to the jury with regard to the application of section 34 of the Penal Code, but in doing so, he failed to direct the jury as to what bearing the law had with reference to the facts of the particular case before them. **Held** : The explanation of law in the abstract could not have been of any assistance to the jury to appreciate the facts of the case with reference to the laws which would be applicable. *Samar Mallick Vs. State (1960) 12 DLR 438.* Accused standing outside—Others going in, and pulling girl outside courtyard and killing her—Accused standing outside is guilty of the offence of abduction though not of murder. *Ghulam Quadir Vs. State (1960) 12 DLR (SC) 171 ; 1960 PLD (SC) 254.* Joint action by several persons based on common intention more properly fits section 34 rather than section 149. *Ghulam Quadir Vs. State (1960) 12 DLR (SC) 171.* To sustain a charge under section 34 pre-concert is a necessary element. Existence of such pre concert can be established even by proof of acts performed by individual after the

completion of main crime. *Ghulam Quadir Vs. State (1960) 12 DLR (SC) 171.* Knife was taken out by one of the accused at the spur of moment—Death caused by knife injuries amounts to an individual act. *Shihab Din Vs. State (1964) 16 DLR (SC) 269.* In the case, where the number of assailants is five or more than five, section 149 of the P. Code is attracted. This section has no concern with the common intention of the participants in the crime but concerns itself mainly with either common object and provides that even if the offence committed by any member of the unlawful assembly was not committed in furtherance of the common object of that assembly, every one of the members of the unlawful assembly would be liable for the offence if the result was such as was known to be likely. *Feroze Vs. State (1960) 8 DLR (WP) 128.* Ingredients of s. 34 must be fulfilled to justify its application in the absence of which no conviction under sec. 34 valid. *The State Vs . Idris Pandit, (1973) 25 DLR 232.*

(2) S. 34 with sec. 309.—The accused Mitho actually stabbed the deceased fatally. Simultaneously, Abdul Jabbar held off the other inmates of the house by pointing a pistol at them and sought to suppress their effort to seek assistance from outside. *A Jabbar Vs. State (1964) 16 DLR (SC) 177.*

(3) See also *Sekendar Ali Vs . Crown. (1950) 2 DLR 158 (Supra) ; Muzaffar Sarker Vs. Crown (1950) 2 DLR 90 ; Lal Meah Ali Vs. State (1988) 40 DLR 377 ; Ahmed Ali Vs. State (1960) 12 DLR 365 ; Fazar Ali Vs. Crown (1952) 4 DLR 99 ; State Vs. Tayed Ali (1988) 40 DLR (AD) 6 ; Lal Meah. Vs. State (1988) 40 DLR 377 ; Ibrahim Molla Vs. State (1988) 40 DLR (AD) 216 ; Abdus Saelam Vs. Croen (1952) 4 DLR 80 or Crown Vs. Motilal Sen (1953) 5 DLR 66.*

Section 35

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 intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

Cases and Materials

1. When such an act is criminal by reason of its being done with a criminal knowledge or intention.—The word 'such' is found in the marginal note but not in the section but it is clear from Section 35 that it refers to such an act as is referred to in Section 34. Every word in the section is important. The expression 'in furtherance of the common intention of all' is absent in Section 35. Moreover Section 35 deals with act which is criminal *only* by reason of its being done with a criminal knowledge or intention. Section 35 applies also to criminal knowledge whereas Section 34 does not. In Section 34 all must have the same common criminal intention. In Section 35, some may have a criminal intention ; others may have a different criminal intention and others may have only criminal knowledge. In such a case all are responsible for the criminal act but only for their individual criminal intention or knowledge.

2. Act is done by several persons.—As in the case of Section 34, this section deals with joint constructive liability where an act is done by several persons.

3. Charge under Section 35 not necessary.—*See* Notes under Section 38.

4. Case Law.—(1) Like S. 34 this section also refers to cases in which a criminal act is done by several persons and provides that each of such persons will be liable for such act as if it were done by him alone. *AIR 1964 SC 1263 (1267).*

(2) The section is confined to cases in which an act is criminal only by reason of its being done with a certain criminal knowledge or intention. While the language of Section 34 is not so limited. But, S. 34 is wide enough to cover acts which are criminal only by reason of their being done with a criminal knowledge or intention. Provided that such act is done by several persons in furtherance of the common intention of them all. *AIR 1964 SC 1263.*

(3) S. 35 operates by way of a supplement to S. 34 and elucidates the legal position in cases in which the criminality of an act done jointly by several persons depends on the possession of a particular knowledge or intention on the part of the accused. *AIR 1964 SC 1263.*

(4) Like S. 34, this section also requires that the crime committed must be a joint crime which is the result of a joint action of two or more persons. *AIR 1955 NUC (Pepsu) 3280 (DB).*

(5) Suppose two men go out together and one of them holds a third man for the purpose of enabling his companion to cut that man's throat and his companion does so. They are both equally guilty of murder. This will be the position both under S. 34 and this section. *(1857) 7 Cox CC 357.*

(6) A pre-concerted plan will not be necessary to make this section applicable. Thus, in this sense, S. 35 may be looked upon as supplementing the principle embodied in S. 34. *AIR 1925 PC 1.*

(7) Where it is not proved on the evidence that the accused had the same criminal intention, even S. 35 will not apply and each of the accused will be liable only for his individual act. *1961 (2) CriLJ 515 (Mys).*

(8) A and B make an attack on C. A's intention is to cause grievous hurt to C and murder him. B's intention is to assist A in the attack. Grievous hurt is caused to C as a result of which he dies. Here A and B share in the common intention of causing grievous hurt to C and by virtue of S. 34, B also is liable for the grievous hurt, although the primary actor in the crime is A. But, unless it is proved that B also shared A's intention of murdering C, B will not be liable for the murder but A alone will be liable for it. *(1838) 173 ER 610.*

(9) A, B and C attacked D 'with the common intention of giving a beating to D, and each knowing it to be likely that grievous hurt was likely to be caused to D. Grievous hurt is caused to D. A, B and C are all of them guilty of causing grievous hurt. *AIR 1968 Bom 254.*

(10) Father armed with a stick and his two sons armed with knife rushing from their house to attack the opponents—Accused attacking opponents with stick and knife—All will be held guilty under Section 326/35, P.C. *AIR 1968 Bom 254.*

(11) Where two persons go out with the common object of robbing a third person, and one of them, in pursuit of that common object, does an act which causes the death of that third person, under such circumstances as to be murder in him who does the act, it is murder in the other also. *(1857) 7 Cox CC 357.*

Section 36

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.

Cases

1. **Effect caused partly by an act and partly by an omission.**—The section is clear. But the last two words 'same offence' are important. Section 36 applies only when the causing of a certain effect by the act alone or by the omission alone amounts to the same offence. It is then only that causing the effect "partly by an act and partly by an omission" amounts to the same offence. Causing death partly by beating and partly by a rash or negligent omission is not murder. That is because causing death by rash or negligent omission does not amount to murder. But if in both cases there was intention to cause death, then causing death partly by beating and partly by a rash or negligent omission would be murder. See *AIR 1924 Cal 257 FB.*

2. **Illustration.**—Here although there is only beating and omission to give food the offence is murder because beating was with intention to cause death and the illegeal omission to give food was also with the intention to cause death.

3. **Charge under Section 36, not necessary.**—See *AIR 1924 Cal 257 FB.*

4. **Scope.**—(1) This section shows that when an offence is the effect partly of the act and partly of an omission, it is only one offence which is committed and not two. *AIR 1924 Cal 257.*

(2) Like S. 34, this section also and Sections 35, 37 and 38, create no substantive offence. These sections are merely declaratory of a principle of law in charging an accused person ; it is not necessary to cite them in the charge. *AIR 1924 Cal 257.*

Section 37

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

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 intent to murder Z. Z dies from the effect of 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 acts are separate.

(b) A and B are joint jailors, 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.*

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* In all Indian books on the Penal Code, the word "alternatively" has been mentioned in place of "alternately". —*Chief Editor.*

(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.

Cases : Synopsis

1. Co-operation by doing one of several acts constituting an offence.
2. This section and section 34.
3. This section and section 35.
4. "Co-operates"
5. Charge under section 37 not necessary.

1. Co-operation by doing one of several acts constituting an offence.—As in Sections 34 and 35, in Section 37 also an offence is committed by means of several acts. In Section 34, the several acts form one criminal act. In Section 37, the several persons do not participate in doing the same act but intentionally co-operative by doing several acts either singly or jointly with any other person. *AIR 1953 All 663.* Sections 37 provides that, when servile acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. *52 IA 40.* Where it is established that *P* and *Q* were acting in concert in the sense that their attach was a single indivisible thing, so that both of them would be liable for the result ensued. That is the consequence of the provisions of Section 37. *14 Cr LJ 235.*

2. This section and section 34.—(1) A, B and C attacked D and caused various hurts and grievous hurts to D. Such a case will fall under S. 34 and not this section. *AIR 1952 All 435.*

(2) A, B and C attacked D and caused various hurts and grievous hurts to D. If S. 37 is to be applied to such a case it will have to be found what act was done by each of the accused for the purpose of co-operating in the commission of the crime, which for the purpose of S. 34, it is sufficient to find that the accused participated in the doing of a criminal act which was done in furtherance of the common intention of the joint criminals. *AIR 1924 All 78.*

(3) "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. Section 37 provides that when several acts are done so as to result together in the commission of an offence, the doing of any one of them with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence". *AIR 1925 PC 1.*

(4) A and B attacked D with lathis while C was holding D by the waist. There were two marks of blows on the arm of D. A and B gave one blow each, but whose blow broke D's arm was not proved. It was held that in the absence of evidence of a common intention of all to cause grievous hurt, A and B could only be convicted under S. 323 and C who abetted the commission of the offence could also be convicted under S. 323/109. In such a case, although all the three A, B and C do different acts, they are not doing several acts within the meaning of this section but must be regarded as doing only one act together, i.e., the acts are parts of the same act as explained above. *(1912) 13 CriLJ 265.*

(5) If several persons jointly attack the deceased with lathis fracturing his skull and inflicting a number of other injuries they are all equally guilty even though it may not be possible to prove which of them actually infected the fatal blow. *AIR 1924 All 78.*

3. This section and Section 35.—(1) A lathi is a lethal weapon. Where the three accused armed with lathis moved by same intent and object on a sudden altercation with the deceased attacked him with lathis causing him several injuries including a fracture of the skull resulting in death it was held that all of them must be held guilty under Section 304, Penal Code as the case falls within Excep. 4 to Section 300. *14 CriLJ 615.*

(2) Where three persons acting in concert brutally and mercilessly assaulted another with lathis and killed him but two of the accused alone were convicted and the third acquitted, the acquittal was bad. *(1913) 14 CriLJ 615 (All).*

(3) A and B attacked C acting in concert in the sense that their attack was single, indivisible act. A struck C savagely on the head with a heavy stick and B smashed C's skull by a blow dealt with a heavy stone held firmly in his hand. C died in consequence of the injury. But there was no general fight of any description before the attack. It was held that A and B were both guilty of murder according to S. 37, because A who used the stick intentionally co-operated with B in the commission of murder. *(1913) 14 CriLJ 235 (Bom).*

4. "Co-operates".—(1) This section contemplates two or more persons co-operating by their several acts and committing one offence by such co-operation. In such a case the section provides that each person who co-operates in the commission of the offence by doing any one of the acts is either singly or jointly liable for that offence. *AIR 1964 SC 1263.*

(2) If several persons combine to forge an instruments and each executes by himself a distinct part of the forgery, the fact that they are not together when the instrument is completed will not absolve them from liability and they will all be guilty as principals. *(1821) 168 ER 890.*

(3) It is not necessary to constitute intentional co-operation within the meaning of this section in the commission of an offence, that each one of the persons alleged to do an act in such co-operation must know who the other persons co-operating in the commission of the offence are. *(1831) 168 ER 1281.*

5. Charge under Section 37 not necessary.—*See AIR 1924 Cal 257 FB.*

Section 38

38. Persons concerned in 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.

Cases : Synopsis

1. Scope
2. Persons concerned in a criminal act may be guilty of different offences.
3. Sections 34, 35, 36, 37 and 38 create no substantive offence.
4. This section and section 34.
5. This section and section 35.
6. This section and section 37
7. This section and section 149.

1. Scope.—(1) This Section is one of a batch of Sections, viz., Ss. 34, 35, 37 and 38, which deal with cases in which two or more persons are involved in one and the same crime. The Sections do not create any substantive offence but only lay down a principle for the determination of the criminal liability of such persons. In this respect, the sections differ from S. 149 which also deals with the question of vicarious liability of a person for an offence which he himself has not committed, but which is committed by another person. *AIR 1925 PC 1.*

(2) The failure to make specific mention of the sections which create a constructive liability, is not necessarily fatal to a charge or a trial but it is only a matter which has to be considered from the point of view whether the accused has been prejudiced in his defence by such omission. *AIR 1955 SC 274.*

(3) Section 38 applies where a criminal act is jointly done by several persons and the several persons have different intentions or stages of knowledge in doing the joint act. *AIR 1968 Bom 254.*

2. Persons concerned in a criminal act may be guilty of different offences.—When a criminal act is done by several persons, they will all be guilty of the same offence if Section 37 applies, that is if they intentionally co-operate in the commission of the same offence. But they will be guilty of different offences if Section 35 or Section 38 applies. When the criminal intention or knowledge of the several persons is different, they will be guilty of different offences. This is what Section 38 provides.

3. Sections 34, 35, 37 and 38 create no substantive offence.—They are merely declaratory of a principle of law and in charging an accused person it is not necessary to cite them in the charge. *AIR 1924 Cal 257 FB.*

4. This Section and S. 34.— (1) Under S. 34 the liability of the different actors participating in a crime is of an equal degree. Each of such participants is liable for the crime as if he alone had committed it. His liability is not confined to what he himself personally did or omitted to do. *AIR 1925 PC 1.*

(2) Under this Section as contrasted with S. 34 there is no common intention so far as the particular offence charged is concerned, among the criminals. Each of the participants is held liable for his individual act and for the offence constituted by such act, so that although several persons may take part in the same crime they may, by their acts, make themselves liable for different offences. *AIR 1977 SC 2252.*

(3) Where the several persons taking part in a crime have not been acting in furtherance of a common intention of all. Sec. 34 does not come into play at all and each of the persons who takes part in the crime will be guilty only of the offence which is constituted by his particular act and the intention with which he does such act. *AIR 1927 Oudh 313.*

(4) Several persons acting with a similar or same intention cannot be said to be acting under a common intention so as to attract the application of S. 34 and in such a case each of them will be liable for the offence constituted by his own individual act. In such cases, therefore, different offences

may be committed by different persons although the criminal transaction in the course of which they are committed may be one and the same. *AIR 1927 Oudh 313.*

(5) A and B cause C's death. A is acting under sudden and grave provocation and is entitled to the benefit of Exception 4 to Section 300. But B merely acts out of vengeance and not entitled to the benefit of Exception 4 to S. 300. They commit different offences, although in the course of the same criminal act. A is guilty of culpable homicide not amounting to murder and B is guilty of murder. *AIR 1955 NUC (Pepsu) 3280 (DB).*

5. This Section and Section 35.—(1) Section 35 contemplates only cases of a single act constituting an offence although done by two or more persons. The present section contemplates cases in which different persons do different acts and thereby become liable for different offences. But it is not necessary that the accused should be guilty of offences falling under different sections of the Code as the acts of the different accused may constitute offences falling under the same provision of the Code. *(1961) 2 CriLJ 515 (DB) (Mys).*

6. This Section and Section 37.—(1) Section 37, like Sections 34 and 35, is a section under which the several persons taking part in a crime commit the same offence. But under this section the persons taking part in a crime become liable for different offences, although the act done by the criminals is one and the same. Illustration to the section brings out this point clearly. *AIR 1964 SC 1263.*

7. This Section and Section 149.—(1) The principle of Sections 38 and 110 applies to offences under Section 149 and the liability of individual members of an unlawful assembly under the latter section depends on the intention or knowledge of the members. *AIR 1936 Pat 481.*

Section 39

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 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.

Cases: Synopsis

1. *"Intention", "knowledge" and "reason to believe".*
2. *Causing an effect voluntarily.*
3. *Intention presumed.*
4. *Knowledge presumed.*
5. *Voluntarily and negligently.*
6. *Rash and negligent act.*
7. *Act under threat.*

1. "Intention", "knowledge" and "reason to believe".—(1) It is not necessary in order to constitute an offence under Section 296. viz., the offence of voluntarily causing disturbance to a religious assembly that the accused should have intended to cause disturbance to such assembly. If the accused knew or had reason to believe that this act would cause such disturbance, he would be guilty under the Section. *(1896) ILR 20 Cal 60 (DB).*

(2) Where the accused threw brickbats at another's house as a result of which an inmate of the house was injured, the accused may be convicted of voluntarily causing hurt under Section 323. *AIR 1916 Low Bur 98.*

(3) The intention, etc. referred to in this Section must be determined from the nature of the injury, the weapon used, the part of the victim's body affected, force used and other related circumstances. *(1968) 2 SCWR 801.*

(4) Where the accused threw an ignited match stick upon the clothes of his wife resulting in serious burns and grievous injury to her, it was held that in the circumstances of the case, and from the manner in which the accused lit the match stick and threw it upon the clothes of his wife, it could be reasonably inferred that the accused did intend to cause burns to her body and that hence, his act was "voluntary" within the meaning of S. 39. *1979 Bom CR 507 (DB).*

(5) All accused persons travelling in a long distance bus with prior plan to commit dacoity—More than one person armed with pistols and cartridges—One accused asking bus driver to stop bus in a lonely place—Bus driver shot dead—In execution of their plan 2 victims were robbed of cash worth Rs. 2 laks—**Held** that the common object of the unlawful assembly was to commit dacoity at all costs including use of firearms—Murder could not be said to constitute separate transaction. *(1980) CriLJ (NOC) 131.*

2. Causing an effect voluntarily.—Voluntarily causing an effect embraces (1) with intention to cause the effect, (2) with the knowledge of likelihood of causing the effect, (3) having reason to believe that the effect is likely to be caused. In all the three cases there is criminal responsibility for causing the effect. The principle of exemption from criminal responsibility in respect of a hurtful consequence is that of *bona fide* ignorance of the connexion existing between the mere mechanical act and its consequence. That principle ceases to operate where the connexion is known to be either certain or probable. If the doer of an act knows or believes that a noxious consequence will result from that act, he is just as culpable both in Law and Morals as if he had acted with the most direct intention to hurt. Let it however be supposed that the consequence is not certain, but that it is a likely or probable consequence and that the likelihood or probability is known to the doer of the act. Here again it is clear that the principle of exemption above-mentioned is unavailable to exempt the offender from liability in respect of the consequence. All he can urge is that he was not sure that the hurtful consequence would follow ; but he had no right to incur the risk and danger of producing the mischief and having done so is justly responsible for it ; he cannot reasonably complain that the law did not give him notice of the penalty annexed to the offence or that he did not wilfully offend, for the law may justly, after due notification, doom such an offender to the penalties inflicted on those who accomplish their purposes by more certain direct means ; the safety of society is inconsistent with any distinction in this respect and the offender in truth acted wilfully, in wilfully incurring the risk and danger of causing the injurious result. (English Law Commissioner's 7th Report.)

3. Intention presumed.—Everyone is ordinarily presumed to intend the natural and probable consequences of his Acts. A man is not guilty of culpable homicide if his intention was directed only to what he believed to be a lifeless body. Complications may arise when it is arguable that the two acts of the accused should be treated as being really one transaction as in 15 Bom 194, or when the facts suggest a doubt whether there may not be imputed to the accused a reckless indifference and ignorance as to whether the body he handled was alive or dead, as in 42 Mad 547, FB, which followed, 15 Bom 194.

4. Knowledge presumed.—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 (*see* Section 39). It is not, therefore, necessary for the purpose of Section 296, that the accused should have had an active intention to disturb religious worship. It is sufficient if knowing they were likely to disturb it by their music they took the risk and did actually cause the disturbance. *6 IC 774.*

5. 'Voluntarily', 'negligently'.—Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they may not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal or mischievous effect 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. *7 MHC 119.*

6. Rash and negligent act.—(1) For the purposes of the criminal law an act or omission must be treated as voluntary, if it might have been avoided by the exercise of reasonable care and hence the negligent act or omission must be treated as voluntary act or omission, because the person responsible for it does not exercise his will to prevent or to avoid the commission or the omission. *AIR 1951 Punj 418.*

(2) Where the driver of a lorry carrying passengers allows a minor boy to drive the lorry with the full knowledge that the boy did not know driving, and the boy drives in a rash and negligent manner causing an accident in which persons received grievous hurt, the driver of the lorry must, in such a case, be held to have voluntarily aided the rash and negligent driving by the minor boy, both by not preventing him from driving as well as by allowing him to drive the lorry. *AIR 1951 Punj 418.*

7. Act done under threat.—(1) Where a person aids in the commission of a murder under a threat that otherwise he will himself be put to death, it must be held to have acted voluntarily within the meaning of Section 39. *(1913) 14 CriLJ 207.*

Section 40

[18][**40. "Offence".**—Except in the [19][chapters] and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, [20][Chapter VA] and in the following sections, namely, sections [21][64], [42][65], [42][66], [22][67], [42][71], 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

18. Subs. by the Indian Penal Code Amendment Act, 1870 (XXVII of 1870), s. 2, for the original section 40.
19. Subs. by the Repealing and Amending Act, 1930 (VII of 1930), s. 2 and Sch. I, for "chapter".
20. Ins. by the Indian Criminal Law Amendment Act, 1913 (VIII of 1913), s. 2.
21. Ins. by the Indian Penal Code Amendment Act, 1882 (VIII of 1882), s. 1.
22. Ins. by the Indian Criminal law Amendment Act, 1886 (X of 1886), section 21(1).

And in sections 141, 176, 177, 201, 202, 212, 216, and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.]

Cases and Materials : Synopsis

1. *Scope of section.*
2. *'Offence' denotes a thing made punishable by the Penal Code.*
3. *'Offence' denotes a thing punishable under the Penal Code or under any Spccial Law or Local Law.*
4. *Only some offences under a special or local law.*
5. *Offence as defined in Criminal Procedure Code.*
6. *Offence defined in General Clauses Act.*
7. *Special or local law.*
8. *Rules and bye-laws made under a special law or local law.*
9. *Abetment.*
10. *Attempt.*
11. *Acts not amounting to offence.*
12. *Mens rea.*
13. *This section and Section 149.*
14. *Continuing offence.*
15. *Technical offence.*
16. *Contempt of Court.*
17. *Offence for purpose of Constitution of Bangladesh, Article 35.*

1. Scope of section.—(1) It is a fundamental principle that what constitutes crime is essentially matter of statute law. *AIR 1931 PC 94.*

(2) Doing of an act prohibited by statute is an offence. *1983 TaxLR (NOC) 47.*

(3) The test of a thing being an offence is its punishability under a statutory provision. But the same act or omission may be both an offence under the criminal law and a matter which gives rise to a suit for damages in a Civil Court. Hence an act which amounts to an offence under the law will not cease to be such merely because a suit for damages in a Civil Court will lie in respect of such act. *1966 AllWR (HC) 703.*

2. 'Offence' denotes a thing made punishable by the Penal Code.—The subject-matter of P.C. is crimes and the punishment of those who commit crime. Except in sections referred to in Clauses 2 and 3 offences denote a thing punishable by Code.

3. 'Offence' denotes a thing punishable under the Penal Code or under any Spccial Law or Local Law.—In the second para of Section 40 'offence' has an extended meaning and denotes a thing punishable under the Penal Code or under any Special or Local Law. *AIR 1943 Pesh 72.*

4. Only some offences under a special or local law.—In the sections enumerated in clause 3 of Section 40, 'offence' does not include all offences punishable under a special or a local law but only those punishable with imprisonment for 6 months or upwards whether with or without fine.

5. Offence as defined in Criminal Procedure Code.—*See* Section 2(n) Cr. P.C.

6. Offence defined in General Clauses Act.—Offence shall mean any act or omission punishable by any law for the time being in force. *AIR 1956 Cal 253.* See Article 35, Constitution of Bangladesh.

7. Special or local law–Special Law.—*See* Section 41. **Local Law.**—*See* Section 42. The definition includes offences under special Acts. *1972 CrLJ 1097.*

8. Rules and bye-laws made under a special law or local law.—Under Section 40 the term "offence" employed in Section 109 denotes a thing punishable under the Code, or under any special or local law ; and it is clear that the Rural Self-Government Act is a local law within the meaning of Section 42. But the Act itself has not declared a breach of a bye-law of a District Council to be an offence. *AIR 1929 Rang 75.* Where a local law declares, a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of Section 40. *AIR 1938 Rang 350.*

9. Abetment.—Of an offence as defined in clause (2) is an offence as defined in Section 40. Abetment is a thing punishable by the P.C. *See* Section 109-117.

10. Attempt.—An attempt to commit an offence is itself an offence within the definition of an offence as given in Section 40 and where no express provision is made in any other part of the Code for the punishment of such offence, it is punishable under Section 511.

11. Acts not amounting to offence.—An escape from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour, is not punishable under either Section 224 or Section 225, P.C. as he was not charged with an offence as defined in Section 40. *8 Cal 331.* Neglect to maintain a wife is not an 'offence'. An order for payment of maintenance is not a conviction for an offence. *(16 Mad 234) ; 7 WC 10 ; 5 BHC 81.* A breach of an order under the Defence Rules is not an offence. *1945 Nag 395.*

12. Mens rea.—It is an essential ingredient of the offence unless excluded by statute. *AIR 1966 SC 43.*

13. This section and Section 149.—(1) The word "offence" in S. 149 covers only an offence under the Penal Code and not an offence under a special or a local Act. The reason is that, although S. 141 is included in paragraph 2 of this section and so, for the purpose of S. 141 the word "offence" occurring in that section will include an offence under a special or local law, yet, as S. 149 is not included in paragraph 2 or 3 of S. 40, the word "offence" occurring in that section will not include an offence under a special or local law. *AIR 1929 Mad 880.*

14. Continuing offence.—(1) A continuing offence is one which continues without a break from moment to moment and without interruption and is not the same as one which is repeated day after day. *AIR 1961 All 88.*

(2) An offence under the Defence Rules is not a continuing offence. *AIR 1970 Guj 108.*

15. Technical offence.—Under Section 79 of the Code an act done under a mistake of law, although in good faith, does not cease to be an offence. But if a person accepts the decision of a Full Bench of the High Court from which no appeal has been preferred to the Supreme Court as a guide to his conduct, he commits nothing more than a technical offence, if that view is later on not accepted as laying down the correct law. *AIR 1955 All 397.*

16. Contempt of Court.—(1) Contempt of the High Court is an offence and contempt proceedings are of a criminal nature, though contempt of Court is not an offence under the Penal Code except in cases coming under S. 228. *AIR 1945 Oudh 266.*

17. Offence for purpose of Constitution of Bangladesh, Article 35.—(1) The word "offence" has not been defined in the Constitution and hence under Art 152(2) of the Constitution the definition of "offence" in S. 3(37) of the General Clauses Act. 1897, will apply to the interpretation of the word "offence" in Art. 35 of the Constitution. *AIR 1954 All 319.*

Section 41

41. "Special law".—A "special law" is a law applicable to a particular subject.

Cases and Materials

1. Scope of section.—(1) The present section defines the words "special law" as a law applicable to a particular subject. In other words the words "special law" refer to a law which is not applicable generally but which only applies to a particular or specified subject or class of subjects. *AIR 1961 Bom 154.*

(2) The expressions "general law" and "special law" are relative terms and refer to the particular subject dealt with by the respective Acts. so that it is not possible logically to label any set of laws as being general laws or special laws. Thus, provisions relating to crimes in connection with the Stamp Law contained in the Stamp Act, will come under the description of a 'special law', although as regards stamps the Stamp Act will be a general law. Thus, the same enactment may be a general law with regard to a particular subject and a special law with regard to some other subject. *AIR 1964 SC 260.*

(3) The Municipalities Act (1959) is a special law, as well as local law within the definition of Ss. 41 and 42, Penal Code and as such the application of S. 64. P.C., cannot ordinarily be ruled out to the offences under the Municipalities Act, but in view of the special provision in Section 265(2) of that Act which provides a special mode for the recovery of fine imposed under the Act S. 64, P.C. which deals with the power of the Criminal Court for awarding sentence of imprisonment in lieu of fine cannot apply to the cases where fine is imposed under the Municipalities Act. *AIR 1966 Raj 238.*

(4) Essential Articles Control and Requisitioning (Temporary Powers) Act and Livestock (Control of Movement and Transactions) Order are covered by Ss. 41 and 42. In view of S. 40 of the Code it cannot be said that the principles underlying the 'general exceptions' in Chapter 4 of the Code are not applicable to a special or local law. *AIR 1951 Orissa 284 : 52 CriLJ 837 (DB).*

(5) Section 36 of the Legal Practitioners Act, 1879 is a special law and the abetment of an offence under that section is covered by the provisions of the Penal Code relating to abetment. *(1895) ITR 17 All 498.*

(6) The Municipal Act is a special or local law within the meaning of Ss. 41 and 42, Penal Code, and therefore by virtue of S. 40, Para. 2, Penal Code, offences under the Municipal Act will be offences for purposes of Ss. 64 to 67, Penal Code. *AIR 1953 Cal 41.*

(7) The expression 'special law' as defined in S. 41, P.C., cannot be taken to mean only enactments which create fresh offences not made punishable under the P.C. The term 'special law' refers only to a law dealing with those matters which had not been dealt with in the P.C., i.e., law creating offences not contemplated by the Code. *AIR 1940 Lah 129.*

(9) The Criminal Law Amendment Act is a special law within the meaning of S. 41 and hence there can be abetment of an offence under Criminal Law Amendment Act. *AIR 1939 Mad 21.*

(10) Section 103 of Insolvency Act does not substantially interfere with S. 421 of the Code. As its essential ingredients show, it is more or less a new offence created by the Act in addition to the offence under the Code. *(1910) 11 CriLJ 548.*

(11) An offence falling under both the Penal Code and under a special or a local law is triable under both the laws although it can be punishable only once. *AIR 1953 Mad 137.*

2. Special Law must create fresh offences.—The special law contemplated by Sections 40 and 41 of the Penal Code are laws creating fresh offences, that is, laws making punishable certain things which are not already punishable under the general Penal Code. Coroners Act is a special and local law. *16 Bom 169 ; 31 Cal 1.* Criminal Law Amendment Act is a special law. *1939 Mad 87.*

Section 42

42. "Local law".—A "local law" is a law applicable only to a particular part of [23][the territories comprised in [24][Bangladesh]].

Cases and Materials

1. Local Law.—Local law is a law applicable only to a particular part of Bangladesh. *AIR 1954 Mad 321. See Notes to Section 41.*

2. Scope of section.—(1) It is only where the act or omission charged is punishable under a local (or a special) law, it would be an offence within the meaning of S. 40. *AIR 1929 Rang 75.*

(2) The Municipalities Act is a special law, as well as local law within the definition of Ss. 41 and 42 of the Penal code. *AIR 1966 Raj 238.*

(3) Municipal Act is a local Act and Section 26 of the General Clauses Act attracts the provisions of Section 67 of the Penal Code and Section 23 read along with Sections 67 and 42 of the Penal Code made the position plain that a Court is entitled to pass a defaulting sentence of simple imprisonment in case under the Municipal Act. *(1958) 62 CalWN 812.*

(4) The Maintenance of Public Order Act creates no fresh offence but merely provides the supplementary or alternative punishment for offences primarily punishable under P.C. or which can be dealt with under preventive or reformative provisions of the Code, Therefore, this is not a special law. On the other hand it is a local law within the meaning of Section 42, Penal Code. *AIR 1954 Mad 321.*

(5) The Municipal Act is a special or local law. *AIR 1953 Cal 41.*

(6) See also *AIR 1951 Orissa 284.*

2. Rules made under a local law.—They do not fall under the category of 'local law' but a breach of such rules would be an offence as defined in Section 40 if the local law makes such a breach punishable.

Section 43

43. "Illegal"—"Legally bound to do".—The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which 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.

Cases and Materials : Synopsis

1. *Scope of section.*
2. *"Which is an offence".*
3. *"Which is prohibited by law.*
4. *"Which furnishes ground for a civil action.*
5. *"Legally bound to do".*
6. *Illegal omission.*
7. *"Illegal" and "unlawful"—Distinction.*

23. Subs. by A. O. 1949, Sch., for "British India".

24. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Sch. (w.e.f 26-3-71).

1. **Scope of section.**—(1) The section gives three calegories of acts or omissions which will be "illegal" within the meaning of the Code. The three categories are as follows :

(a) A thing which is an offence ; or

(b) which is prohibited by law ; or

(c) which furnishes ground for a civil action.

A thing which does not fall under any of these categories cannot be regarded as "illegal" for the purpose of the Code, as for instance, for the purpose of determining whether a certain act is intended to cause "illegal" harm to a person within the meaning of S. 44. *AIR 1933 Sind 196 (DB).*

2. **"Which is an offence".**—(1) Offence in section 43 means an offence punishable under the P.C. *AIR 1945 PC 147.*

(2) The term "illegal" under the Code will, according to this section, cover inter alia everything which is an offence. Thus, for instance, pointing a gun at a person is an assault within the meaning of Section 351 and will be an offence under the Code, unless it is done for the protection of person or property. Hence it is an illegal act, if it is done without such lawful excuse. *AIR 1946 PC 20.*

(3) The omission on the part of a husband to give food and shelter to his wife under circumstances under which she is completely helpless will amount to the offence of murdering her, if the omission leads to her death and will, therefore, be an offence and the omission will, therefore, be illegal within the meaning of this section, where the husband is guilty of such omission in spite of his being in a position to maintain and support his wife and protect her. *AIR 1959 Punj 134.*

3. **"Which is prohibited by law.**—(1) To be illegal the thing must be prohibited by law and not by government or departmental rules or orders. Then what is law? Constitution of Bangladesh lays down the definition of law as such : 'law' means any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, haring the force of law in Bangladesh *(Article 152 (1)).*

(2) Where a Counsel, who threatens a witness to put the questions, which are prohibited by Ss. 151 and 152 of Evidence Act, to him in cross-examination with a view to coerce that witness into paying him money to prevent him from putting such question, commits an offence under S. 385, as the intention of the Counsel is to cause wrongful loss (loss by unlawful means) to the witness within the meaning of S. 23. *AIR 1930 Pat 593.*

4. **"Which furnishes ground for a civil action".**—(1) The publication of a pamphlet of a defamatory nature which leaves no doubt as to the persons defamed will furnish such persons a ground for a civil suit and hence, the publication of such a pamphlet is "illegal" within the meaning of this Section. Where such publication is made malignantly or wantonly so as to give provocation to any person and thereby to cause the offence of rioting to be committed, the publication will be an offence under S. 153, as it will be an illegal act within the meaning of that Section and will further be of the description which will make it an offence under that Section. *AIR 1920 Bom 402.*

(2) When a Karnam is in possession of Government records, he is bound to hand over the same to another Karnam who is duly appointed to take his place. His failure or refusal to hand over possession will give rise to a civil action against him and his omission will, therefore, be illegal within the meaning of this Section and will be an offence falling under Sec. 175 P.C. *AIR 1956 Mad 335.*

(3) Where according to the contract between a Municipality and the Government the Municipal Doctor was to furnish reports to the Government about post-mortem examinations ; the contract is not

one between the Doctor and the Government and his failure to furnish such reports will not give a cause of act on to the Government to sue him for breach of contract. Hence in such a case the Municipal Doctor cannot be held to be "legally bound" to furnish information within the meaning of S. 177 and his furnishing a false report to the Government will therefore not be an offence under this Section. *AIR 1934 Bom 202.*

5. "Legally bound to do".—(1) An act or omission is not an "offence" as that word is used in Section 40 of the Penal Code if it is punishable only under some other enactment. Reading Section 40, 43 and 176 of the Code together the result follows that one who fails to furnish information which he is legally bound to furnish is punishable under Section 176, that he is legally bound to furnish what it is illegal for him to omit, that it is illegal for him to omit what is an offence and that an offence is what is punishable under the Code.

(2) A Chowkidar allowing a person to escape from his custody has been held not to commit any offence under S. 221, Penal Code because he was not legally bound to keep in confinement such person, there being no legal duty on the part of the village Chowkidar to arrest and keep in detention any person. *AIR 1929 All 935.*

(3) A plaintiff in a Civil Suit who fails to produce his account books as ordered by the Court does not commit any offence under Section 175, Penal Code, as he is not legally bound to do so within the meaning of that section read with Section 43. *AIR 1955 NUC (Raj) 4627.*

(4) Vaccinators who are legally bound to furnish to their official superiors returns in regard to their work will be committing an offence under S. 177, Penal Code if they furnish false returns. *(1871) 6 MHCR (App) 48.*

(5) Where a Government servant, who is legally bound to obey a departmental order requiring him to keep a diary of his tour and to submit it to his official superior fails to do so or submits a false diary commits an offence under S. 177, Penal Code. *(1882) ILR 4 Mad 144.*

(6) Where a person is not legally bound to furnish information to a public servant as mentioned in S. 176, Penal Code his failure to furnish information will not amount to an offence under that section. 1886 Pun Re No. (Cr) 19, P. 42(43) (DB).

(7) Where the accused a Deputy Tahsildar submitted to his official superior a false Nil return of lands in his enjoyment and also made a false statement to the same effect in the Revenue enquiry before the Principal Assistant Collector, the accused could not be convicted under S. 177, Penal Code. Though he was guilty of a breach of a departmental order he was not legally bound to furnish such information within the definition given in this section. *(1891) 1 MadLJ 741 (DB).*

(8) Where the licensee of a brick-field failed to take proper sanitary precautions as required by the conditions of his licence and as a result of his failure to do so there was an outbreak of cholera on his brick-field and many people died in consequence, and where he also failed to report to the authorities the outbreak of cholera on his brick-field, it was held that he was not guilty of any offence under S. 269, Penal Code. (Negligent act likely to spread infection of disease dangerous to life). *AIR 1923 Rang 140.*

(9) When a Karnam is in possession of Government records he has ex necessitate to hand over the records to another Karnam who is duly appointed by the Collector in his place. His failure to do so will give rise to a cause of action for a civil suit against him for the recovery of the account books and the Government records and hence such failure will be an illegal omission on his part and will amount to an offence under S. 175 of the Penal Code. *AIR 1956 Mad 335.*

6. Illegal omission.—(1) Where G, one of the co-mortgagors, remained silent when two persons falsely presented two of the joint-mortgagors before the registering officer at the time of the registration of the mortgage deed and affixed false signatures to the registration endorsement it was held that G's mere silence was not an illegal omission and there was no question of his silence being ipso facto an offence or being prohibited by law or being a matter which gives rise to a cause of action for a suit against him, merely because he stood by and heard and saw the personation committed by other persons. *(1906) 4 CriLJ 183.*

(2) The omission to fence a well within 8 yards of the highway, within private premises, was held to be not punishable as a public nuisance. Such omission was neither an offence nor prohibited by law, nor did it furnish a ground for a civil action and therefore it was not an illegal omission within the meaning of this section so as to constitute a public nuisance within the meaning of Section 268, Penal Code. *(1883) ILRl 6 Mad 280.*

(3) A decree for injunction was passed entitling a certain Hindu religious sect to the exclusive right of reciting scriptures in a certain temple. The rival sect was prohibited by the decree from interfering with the exercise of this right. At the same time the rival sect was assured the continuance of its rights as ordinary worshippers. It was held that the recital of the scriptural text by the rival sect separately and at a distance without in any way interfering with the right of the decree-holder-sect was not an illegal act so as to amount to an offence under S. 153 of the Penal Code. *(1903) ILR 26 Mad 554.*

(4) The failure of an agent to remit to his principal the monies collected by him on behalf of the principal, which he was bound by his contract to remit to the principal is an illegal omission and will amount to a criminal breach of trust under the Second Part of S. 405 of the Penal Code, giving jurisdiction to the Court at the place where such omission takes place. *AIR 1936 All 193.*

(5) Under Section 304-A causing death of a person by doing a rash or negligent act not amounting to culpable homicide is made punishable with the punishment prescribed therein. As under S. 32, act includes an illegal omission causing death by negligently omitting to do something is also covered by Section 304A. *1968 CriLJ 405.*

7. "Illegal" and "unlawful"–Distinction.—(1) The term 'unlawful' is not defined but as observed by the Law Commissioners in First Report, Section 658, it has the same meaning as the word 'illegal' which is defined in Section 43. The word "illegal" has been given by the section a very wide meaning and that it has the same meaning as "unlawful".

(2) The specific definition of the word "illegal" in this section as including anything which gives rise to a civil suit will not apply to the interpretation of the word "unlawful" occurring in definition of "wrongful loss" in S. 23, Penal Code. Thus the installation of an oil engine on one's own property but so as to cause vibration and damage to the neighbouring property, would not amount to the offence of mischief under S. 425 Penal Code although where damage was caused a civil suit for damages might lie against the person who instals the oil engine and the act of installing the oil engine may, therefore, come within the definition of "illegal" under Section 43, Penal Code. *AIR 1935 Bom 164.*

(3) The word "unlawful" occurring in the definition "wrongful gain" in S. 23, Penal Code in the context of the meaning of "dishonestly" in S. 378) would bear the same meaning as the word "illegal" as defined in this section. Thus where a clerk was bribed to take out official papers from the Tahsil office without the Mamlatdar's consent with a view to show them to the vakil of one of the parties to a case before the Mamlatdar, the act amounted to a theft by the clerk within the meaning of Section 381, P.C. and that it was an act done with a 'dishonest' intention within the meaning of S. 378 and the temporary removal of the records amounted to the use of 'unlawful, means within the meaning S. 23, Penal Code. *AIR 1926 Bom 122.*

(4) The definition of the word "illegal" would apply to the interpretation of the word "unlawful" in the definition of "wrongful loss" in S. 23 (in the context of the expression "dishonestly" occurring in S. 383). Thus, trying to extract money from a witness by putting to him scandalous question in crossexamination would amount to extortion within Section 385 of the Penal Code and that it would be a "dishonest" act within the meaning of Section 383 and the act amounted to the using of unlawful means for causing wrongful loss within the meaing of S. 23 and so was "dishonest" within the meaning of Section 383 as the meaning of "illegal" and "unlawful" was the same. *AIR 1930 Pat 593.*

(5) The meaning of the word "unlawful" occurring in the Goods (Unlawful Possession) Act has the same meaning as the word "illegal" as defined in this section. *1977 CriLJ (NOC) 231.*

Section 44

44. "Injury".—The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

Cases and Materials : Synopsis

1. *Injury.*
2. *"Damage" and "injury"—Distinction.*
3. *Threat of harm.*
4. *Harm illegally caused.*
5. *Harm to reputation.*
6. *Harm to property.*
7. *Threat of legal proceedings.*
8. *Threat of social boycott.*
9. *Act done for self-protection.*
10. *Illustrative cases.*

1. Injury.—Injury as defined in Section 44 has a very wide meaning. "The word injury has a wide meaning. Some persons were arrested. Bail was offered but the accused refused to accept it. They were taken to the police station and locked up. The threat was extended that if they did not pay the money they would not be released and it was only when money was paid to the accused that the persons were released." It was held that the accused was guilty under Section 383. *AIR 1942 Oudh 163.* Injury has been held to include every tortious act. Obtaining money against the will of a person on threat of loss of appointment may be extortion. *AIR 1936 Sind 29.* A false charge laid before the police and never intended to be prosecuted in Court, may obviously subject the accused party to very substantial injury, as defined in Section 44. *5 Cal 281.* Unlawful detention of a cart at a toll gate after an illegal demand of toll is an injury. *1 Weir 551.* False charge is injury. *5 Cal 281*

2. "Damage" and "injury"—Distinction.—(1) The word "damage" in Section 477 means pecuniary damage. As the word "injury" (which also occurs in Section 477) is, according to the definition in this section, wide enough to include any harm whatever illegally caused to any person in body, mind, reputation or property, it is not confined to pecuniary damage and hence is of wider import than the word "damage". *AIR 1963 All 131.*

(2) In a suit for malicious prosecution against A, A files a compromise petition in which he admits that the complaint which he had given against the plaintiff was groundless. But the plaintiff does not accept the document and has it returned to the defendant (A) saying that he may file it again after consulting his legal adviser. The defendant takes it and destroys it. By doing so, the defendant does no harm to the plaintiff. The action of the defendant was due to the fact that the document was of an incriminatory nature and he did not want that it should be in existence. Thus, there is neither "damage" nor "injury" intended within Section 477. The word "damage" in Section 425, Penal Code was considered as equivalent in meaning to "injury" as defined in this section. *1968 CriLJ 398.*

3. Threat of harm.—Threat of forged decree that cannot be executed by competent Court amounts to harm or injury within meaning of Section 44. *AIR 1940 Pat 486.* Threat to use the process of law to obtain more money than was due amounts to a threat of injury. *AIR 1923 Cal 590.*

4. Harm illegally caused.—(1) Where a person promises another to do a thing which he is not legally bound to do and says that if money is not paid to him, he would not do that thing, he cannot be said to threaten the other person with any injury or to put him in fear of any injury, within the meaning of S. 383 (Extortion). The reason is that in such a case the accused does not threaten the other person with any illegal harm. *AIR 1924 All 197.*

(2) The complainant's crops are attached by the Court. The accused tells the complainant that he can get the crops released, but that he will not do so unless he is paid for his trouble. The accused does not thereby threaten to cause any injury to the complainant. *AIR 1924 All 197.*

5. Harm to reputation.—Where Counsel threatens to ask scandalous and indecent questions in the cross-examination of a witness, unless the witness pays him a certain sum of money, the Counsel threatens to cause illegal harm to the witness as regards his reputation and hence the Counsel must be held to threaten the witness with 'injury' within the meaning of the section. The Counsel will in such a case be liable for trying to commit extortion within the meaning of Section 383. *AIR 1930 Pat 593.*

6. Harm to proerty.—(1) Illegal harm to property of a person will be injury within the meaning of this section. Thus, where in a marriage procession the accused used fire works on the road and the fire works burnt two bundles of straw belonging to the complainant, it was held that in the circumstances of the case the accused was guilty of an offence under S. 285, P.C. (negligent conduct with regard to fire or combustible matter) and that the burining of the bundles of straw belonging to the complainant amounted to injury within the meaning of Ss. 285/44. *(1868-69) 5 Bom HCR 67.*

(2) Rash and negligent driving so as to endanger another's property is also an offence under S. 279, P.C. though there may not be any danger to any other person's life or body. 1975 KerLT 750.

7. Threat of legal proceedings.—(1) A threat of a civil suit for a declaration of right is not a threat of any injury under S. 190, P.C. as such threat is not a threat of illegal harm. *AIR 1926 All 277.*

(2) The threat to ruin by "cases" does not necessarily imply that the cases are false ones. If the cases are not false the mere fact that they are instituted for the purpose of persecuting the complainant will not bring them within the definition of "injury" under this section because the harm although caused by an improper motive would not be caused illegally. *(1903) 7 CalWN 116.*

(3) If the threat is to ruin the complainant by false cases, the offence of criminal intimidation would be committed. *(1903) 7 Cal WN 116.*

(4) There is nothing illegal in a landed proprietor asking the police to investigate a suspected case of smuggling liquor. It would, on the contrary, be his duty to give information of such smuggling. Hence a threat to report a person discovered in such smuggling to the police does not amount to a threat of injury within the meaning of Section 385, Penal Code. *AIR 1919 Mad 954.*

(5) The threat by the President of a selfappointed Court of arbitration to pass an ex parte decree amounts to a threat of illegal harm to property and, therefore, is a threat of injury within the meaning of S. 503, Penal Code (Criminal Intimidation). *AIR 1923 Cal 590.*

(6) A false charge laid before the police and never intended to be prosecuted before the Court may subject the accused arty to very substantial injury as defined in this section. *(1880) ILR 5 Cal 281.*

(7) Though a threat to use the process of the law is perfectly lawful, to do so for the purpose of enforcing payment of more than what is illegal and such a threat made with such object must be held to be a threat of injury sufficient to constitute the offence of extortion. *(1968) 2 Malayan LJ 39.*

(8) The accused whose goat had been injured by the complainant demanded of her a sum in excess of its value and by threatening to prosecute her, succeeded in obtaining payment of that amount. It was held that the accused was guilty of extortion. *(1895) 1 Weir 441.*

(9) Threat of a decree that could not be executed by any competent authority was threat of harm or injury within the meaning of the Code. *AIR 1940 Pat 486.*

8. Threat of social boycott.—It is not an injury to threaten excommunication or social boycott because such a threat is not a threat of illegal harm. *AIR 1949 Mad 546.*

9. Act done for self-protection.—(1) Anything done merely to save oneself from a criminal prosecution and conviction in such prosecution, i.e., something done to save oneself from injury cannot be said to cause any illegal harm or injury to another. *AIR 1963 All 131.*

10. Illustrative cases.—(1) The unlawful detention of a cart at a toll-gate caused by an illegal demand for payment of toll, amounts to injury within the meaning of S. 44 and in such a case S. 384 (Extortion) will apply. *(1895) 1 Weir 29 (29).*

(2) Obtaining money against the will of a person on threat of loss of apopintment may be extortion, threat of injury or illegal harm, within the meaning of Section 44. *AIR 1936 Sind 29.*

(3) A police officer taking a bribe for releasing arrested persons on bail under threat of not releasing them unless money was paid, commits the offence of extortion by threatening the arrested persons with "injury". *AIR 1942 Oudh 163.*

(4) A threat to withdraw the plot allotted to a member of a Building Co-operative Society is not a threat of any illegal harm and so is not a threat of "injury". *AIR 1933 Sind 196.*

Section 45

45. "Life".—The word "life" denotes the life of a human being, unless the contrary appears from the context.

Section 46

46. "Death".—The word "death" denotes the death of a human being, unless the contrary appears from the context.

Section 47

47. "Animal".—The word "animal" denotes any living creature, other than a human being.

Cases

(1) A 'hen' would be covered by the definition of an 'animal'. *1972 AllWR (HC) 901*

Section 48

48. "Vessel".—The word "vessel" denotes anything made for the conveyance by water of human beings or of property.

Section 49

49. "Year"—"Month".—Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar.

Cases

(1) The term calendar month is a legal and technical term. In computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days and one month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one. *(1879) 4 CPD 233.*

(2) 'Month' not defined in Criminal P.C.—It must be given meaning as assigned to it in S. 49. *1964 AllWR (HC) 269.*

Section 50

50. "Section".—The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

Section 51

51. "Oath".—The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

Cases and Materials

(1) An Oath is a religious asseveration by which a person renounces the mercy and imprecates the vengeance of Heaven if he did not speak the truth. *1 Leach 430. See* the Oaths Act 10 of 1873. It in cludes solemn affirmation and declaration but declaration must be required or authorised by law and not by a departmental order. *14 Mad 484.*

Section 52

52. "Good faith".—Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

Cases and Materials : Synopsis

1. *Scope and applicability of section.*
2. *Good faith : Penal Code and General Clauses Act.*
3. *Moral honesty and good faith.*
4. *Belief.*
5. *Belief and suspicion.*
6. *Belief must be based on strong grounds.*
7. *Good faith as defence in cases of defamation.*
8. *Contempt of Court.*
9. *Giving false evidence etc, charge of—good faith as defence.*
10. *Public servant acting in good faith.*
11. *"Due care and attention".*
12. *Good faith, if a question of fact.*
13. *Good faith when presumed.*
14. *Arrest must be based on good faith.*
15. *Burden or onus of proof.*

1. Scope and applicability of section.—(1) A plea of good faith will be negative on the ground of recklessness indicative of want of due care and attention. *AIR 1970 Guj 171.*

(2) Even in the realm of criminal offences mens rea may be excluded either expressly or impliedly by legislative mandate. *AIR 1982 Punj 1.*

(3) In Criminal law unless a thing is done with due care and attention, it cannot be held to be done in good faith. The mere fact that it has been done with a pure motive or without any impure intention or that the actor has been quite honest and free from malice will not justify his action and make it one done in good faith, unless it is shown that he has taken due care and paid due attention. *AIR 1957 Orissa 130.*

(4) For the purpose of the Code, good faith is inconsistent with negligence and carelessness, although the conduct of the person concerned or his words may be absolutely unimpeachable from the point of view of his honesty and purity of intention. *AIR 1961 Punj 215.*

(5) An honest blunderer can never be held to act in good faith under the Penal Code if he had been negligent. *1964 RajLW 126.*

(6) In order to establish the want of good faith, it is not necessary to prove that the person in question acted dishonestly. It is enough if it is found that he has acted without due care and attention. *1964 RajLW 126.*

(7) "Good faith" as defined in this section requires a genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. *AIR 1964 Ker 277.*

(8) 'Good faith' does not require logical infallibility but only such care and attention as in the circumstances of each case, considered along with the capacity and the intelligence of a person and the position he occupies, is held by the Court to be sufficient to constitute due care and attention on his part. *AIR 1966 SC 97.*

(9) The same standard of care and attention will not apply to each and every case and what will be due care and attention will naturally depend on the circumstances of each case. *AIR 1960 Orissa 161.*

(10) Under the Section the expression "good faith" is used both in connection with an act and a belief. Thus, in S. 499, Exception 9, the expression "good faith" refers to an act and in S. 300. Exception 3, the expression refers to a belief. In either case it must be taken in the sense explained in this section. *AIR 1929 All 1.*

(11) The definition of "good faith" in this Section will apply to the Criminal Procedure Code, also by virtue of S. 2(2) of the latter Code inasmuch as there is no separate definition of the phrase "good faith" under the Cri. Procedure Code and S. 2(2) thereof provides that in such cases the definition in the Penal Code will apply. *AIR 1958 AndhPra 165.* (Meaning of "good faith" in S. 529, Cri. P.C.)

2. 'Good Faith' : Penal Code and General Clauses Act.—(1) In the General Clauses Act X of 1897, good faith is defined as follows : 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. (Section 3(22)). But the definition in P.C. is different and it requires due care and attention. *AIR 1955 Cal 353.* In the P.C., absence of good faith does not mean 'want of honesty' but 'want of care. *AIR 1938 Rang 350.* The element of 'honesty' which is prescribed by the General Clauses Act is not introduced by the definition of the Code. *AIR 1966 SC 97.* In determining the question of good faith of a person one should take into account his intellectual capacity, capacity to reason, his position, his predilections and the surrounding facts and the circumstances in which he acted. *12 Bom 377.* A police constable on duty who has an honest suspicion that the cloth in the possession of the complainant was stolen property, was justified in putting questions to the complainant the answers to which might clear away his suspicions and having received answers which were not, in his opinion, satisfactory, he acted under a *bona fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to

the complainant, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions, was an indication of good faith. *12 Bom 377.*

(2) Honest, though negligent, conduct will satisfy the test of good faith under the General Clauses Act, while negligence will negative good faith for the purpose of the Code. *AIR 1966 SC 97.* "Honesty" is enough even in spite of negligence. *AIR 1955 Cal 353.* Negligence does not by itself show want of good faith, where General Clauses Act applies. *1948 JaipurLR 230.*

(3) The undermentioned cases relate to the meaning of 'good faith' in cases governed by the General Clauses Act. *ILR (1965) Cut 255.*

(4) The definition of "good faith" in the Limitation Act. S. 2(h) is also on the same lines as the definition in the Penal Code and hence, "good faith" for the purposes of S. 14 of the Limitation Act is incompatible with negligence and unless due care and attention are established, "Good faith" within the meaning of that section cannot be held to exist. *AIR 1956 Orissa 124 (DB).*

3. Moral honesty and good faith.—Section 52 makes no reference to the moral elements of honesty and right motive which are involved in the popular significance of "good faith" and which are predominant in the positive definition enacted in the other Acts of the Legislature, for example, the General Clauses Act, 1897. While an honest blunderer acts in good faith within the meaning of the General Clauses Act, an honest blunderer can never act in good faith within the meaning of the Penal Code for being negligent. The element of honesty is not introduced in the definition of the term defined in the Penal Code. *AIR 1966 SC 97 ; AIR 1953 Mad 936.*

4. Belief.—The expression "good faith" can be used both in connection with something done and in connection with something believed. For example in Section 300, exception 3, the expression "good faith" has been used in connection with a belief. The expression is found, in exception 9 to Section 499, in connection with an act. *51 All 313.*

5. Belief and suspicion.—*See* Notes to Section 76.

6. Belief must be based on strong grounds.—There must be sufficiently strong and just grounds for the belief. *10 WC 20 ; AIR 1953 Mad 936.* The phrase "due care and attention" implies genuine effort to reach the truth and not ready acceptance of an ill-natured belief. When a question arises as to whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention but that he exercised such care and skill as the duty reasonably demanded for its due discharge. Where the question is whether a public servant was justified in doing a certain thing, his justification must have a better foundation than his mere private belief, for a man may be very foolish in believing himself justified, but the law could not adopt so vague and unsafe a criterion. Where a station-house officer did not believe that it was necessary for the public security to disperse a group by firing on them, it was held that he and the constable were not acting in good faith and that the order to shoot was illegal and that both he and the station-house officer were guilty of murder. "A writer cannot claim to act in good faith when he ignores the sources of the truth which were open to him". *42 Cr LJ 1; 1941 Kar 3.*

7. Good faith as defence in cases of defamation.—(1) The words "in good faith" in this provision must be taken in the sense defined in S. 52. Hence, where the accused who were editors of a newspaper published in it a story said to be given by a correspondent without making any enquiry as to the truth of it, it was held that they would be liable for defamation where the story was derogatory to the reputation of a public functionary. *AIR 1914 PC 116.*

(2) It is not using due care and attention to publish defamatory statements about a person and also to publish his denials of such statements and let the public take their choice. *AIR 1933 All 434.*

(3) Where defamatory allegations were found to be false it could not be said that they were made with care and attention and in good faith in view of S. 52. *1980 (UP) CriLR 141 (All).*

(4) Under Exception 9 to S. 499, it is not defamation to make an imputation on the character of a person where the imputation is 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. In this provision also the expression "good faith" must be understood in the sense defined in S. 52. Categorical statements of facts which are baseless and defamatory will not be protected under Exception 9. *AIR 1944 Mad 484.*

(5) Where the defamatory imputations are made against the complainant as a matter of opinion in good faith and for public good after taking due care and caution, the accused will be protected by Exception 9 to S. 499, though such imputations were baseless and incorrect. *AIR 1944 Mad 484.*

(6) If a man takes upon himself a duty requiring skill or care and a question arises whether he had acted therein in good faith he must show not merely a good intention but such care and skill as the duty reasonably demands for its due discharge. *1980 Bom CR 567.*

(7) Where, at the name of making a defamatory statement the accused had no material with him to base his statement on the fact that subsequently he gets some material to support his statement, which he files in the Court in the case against him, does not prove his good faith at the time of his making the defamatory statement and does not entitle him to the benefit of Exception 9 to S. 499. *AIR 1924 Cal 611.*

(8) Reckless imputations negative good faith. *AIR 1970 All 170.*

(9) Criticism of public man in newspaper—Editor's responsibility in the matter is in a sense greater—He must submit to a more rigorous test of "good faith" to seek protection of Exception 9 to S. 499—**Held** on facts that relevant allegations were true. *AIR 1966 Cal 473.*

(10) Defamatory matter contained in plaint and signed and filed by plaintiff—Filing of such plaint amounts to publication. *AIR 1966 Mad 363.*

(11) Prosecution of Internal Auditor and General Manager of a bank under S. 500, P.C.—Allegation that General Manager placed report of Internal Auditor containing defamatory matters against complainant (subordinate of General Manager) before Board of Directors—Communication held privileged—Even if there was censure against complainant in good faith it was saved by Exception 7 to S. 499. *AIR 1960 Raj 213.*

(12) It could not be held that the imputation was for the protection of his own interest or for the public good. *AIR 1957 Andh Pra 345.*

8. Contempt of Court.—(1) Contempt of Court except in cases coming under S. 228, is not an offence under the Penal Code. Hence the definition of "good faith" in this section is not directly applicable to proceedings for contempt of Court. But such proceedings being of a criminal nature when the plea of good faith is raised in defence to such proceedings, the general principle that under Criminal law good faith always implies due care and attention, will apply and in the absence of such due care and attention, the plea of good faith raised in defence to contempt proceedings cannot be sustained. *AIR 1940 Sind 239.*

(2) Where an imputation was made against a Magistrate that he did not act in good faith in passing an order of forfeiture of a surety bond because his order was contrary to the provisions of the law and contained various irregularities, the imputation of want of good faith was justified on the facts and did not amount to contempt of Court. *AIR 1960 Pat 326.*

9. Giving false evidence etc., charge of—good faith as defence.—(1) It is not necessary where a person, as a matter of fact believes the statement to be true, that in order to avoid liability under the section for giving false evidence, he should have taken due care to see that the statement was true. The reason is that the section only requires that the accused should believe the statement to be true and not that he should, in good faith, believe it to be true. *AIR 1913 All 170.*

10. Public servant acting in good faith.—(1) A public servant acting in contravention of a mandatory provision of law cannot be said to have acted in good faith. *AIR 1969 Raj 121.*

(2) The right of private defence will not be affected or taken away where a Sub-Inspector of Police gives verbal instructions to private individuals to arrest persons whom it is his own duty or the duty of his subordinates to arrest. *AIR 1946 Sind 17.*

(3) Police Officer undertaking a search without taking care to see whether he was competent to do so cannot be said to have acted in good faith. *1964 RajLW 126.*

(4) Arrest by order of Magistrate of person for violation of Brick and Cement Control Order under Defence Rules—It was held that the Magistrate had acted with due care and attention. *AIR 1958 All 758.*

(5) Amin trying to execute warrant of attachment after expiry of the period does not act in good faith. *AIR 1942 Oudh 57.*

(6) The mere fact that a Sub-Inspector went to a village dressed up in his uniform to arrest the accused will not justify one in saying that he was acting in good faith. *AIR 1934 Oudh 124.*

(7) Sub-Inspector of Police proceeding to search house of person accused of having stolen bicycle without complying with the provisions of S. 165(1). Criminal P.C.—He does not act in good faith. *AIR 1932 Pat 66.*

11. "Due care and attention".—"Care and attention would verify *bona fides*". *AIR 1958 All 758.* Although *M* is subject to fits of violent insanity, nevertheless he has lucid intervals. It seems, in fact, that these fits only come on occasionally and are temporary. Having regard to the fact that the accused is a person of education and wealth and that he lives in a town where medical attendance could easily be procured, he cannot be said to have acted with due care and attention in chaining up his brother who is subject to fits of violentl insanity for over three months. *45 All 495.* It is certainly not using due care and attention to publish defamatory statements about a person and also to publish his denial and let the public take their choice. *AIR 1933 All 434 ; 42 Cr LJ 1.* It does not constitute 'good faith' necessarily that the person making the imputation believed it to be true. 'Due care and attention' implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. *27 IC 657.* Good faith requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions 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. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning. At the same time it must be borne in mind that good faith in the formation or expression of an opinion, can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment. *31 Bom 293.* Question of good failth must be considered with reference to the position of the accused and the circumstances under which he acted. If he acted with due care and attention such as sought to be expected from a constable in his position, in the circumstances in which he was placed, then he acted in good faith : and even though his act might not have been "strictly justifiable by law", that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the

cloth was stolen property, still the complainant had no right of private defence. *12 Bom 377.* A *kobiraj* operated on a man for internal piles by cutting them out with an ordinary knife. The man died from haemorrhage. He had performed similar operation on previous occasions. It was held that, as the prisoner was admittedly uneducated in matters of surgery, and having regard to the meaning of "good faith" he was not entitled to the benefit of Section 88. *14 Cal 566.* Where a search was made but none of the preliminaries indicated in Section 165, Cr. P.C. was complied with it was held the search was not strictly in accordance with law and the Sub-Inspector did not act in good faith. *10 Pat 821.*

12. Good faith, if a question of fact.—Good faith is a question of fact. Even if it is assured to be a mixed question of fact and law the Court will not re-examine the matter if there are concurrent findings of the Courts below unless it appears that High Court has, in dealing with question, misdirected itself materially on points of law. *AIR 1966 SC 97 ; AIR 1966 Mad 363.*

13. Good faith when presumed.—When a pleader is charged with defamation, in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith and not him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose. *36 Cal 375.*

14. Arrest must be based on good faith.—Justification for arrest could not be sought under section 99 if there is absence of good faith. An arrest merely on the report of apprehension of a breach of the peace is not an act of good faith. Good faith requires due care and attention as provided by section 52. *Ahmed Vs. Crown (1954) 6 DLR (WPC) 149.*

15. Burden or onus of proof.—(1) *See* Evidence Act, Section 103.

(2) The definition in this section does away with the presumption that the accused acted bona fide until the contrary is proved and where he is charged with making an imputation for which he is criminally liable it is for him to show that he made the imputation not without due care and attention. *AIR 1966 Cal 473.*

(3) Where the accused is charged with making an imputation for which he is criminally liable, it is for him to show that he made the imputation not without due care and attention, but the question to what extent he should have pushed his care and circumspection is a different matter and it will depend on the facts and circumstances of eachd case. *AIR 1929 Cal 346.*

Section 52A

[25][**52A. "Harbour".**—Except in section 157, and in section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension.]

Cases

(1) The word "harbour" must be construed liberally. The person at whose instance harbouring is effected is guilty of the offence although the house in which the harboured person stays may belong to a different person. *(1912) 13 CriLJ 701 (DB(Bom).*

25. Ins. by the Indian Penal Code (Amendment) Act, 1942 (Act VIII of 1942), s. 2.

CHAPTER III
Of Punishments

Section 53

53. **Punishments.**—The punishments to which offenders are liable under the provisions of this Code are,—

First.—Death ;

Secondly.—[1][Imprisonment] for life ;

[2][* * *]

Fourthly.—Imprisonment, which is of two descriptions, namely :—

(1) Rigorous, that is, with hard labour ;

(2) Simple ;

Fifthly.—Forfeiture of property.

Sixthly.—Fine.

[3][*Explanation.*—In the punishment of imprisonment for life, the imprisonment shall be rigorous.]

Cases and Materials : Synopsis

1. *Scope of section.*
2. *Punishments—General principles.*
3. *Measure of punishment—General principles.*
4. *Measure of punishment—Social status of accused and other considerations.*
5. *Imprisonment already suffered—Whether to be deducted.*
6. *Compensation out of fine.*
7. *Compensation is not fine.*
8. *Attitude of Judge.*
9. *Suspension, remission and commutation of sentence.*

1. Scope of section.—(1) This section enumerates the punishments to which offenders are liable under the provisions of the Code. The section is not exhaustive of the kinds of punishment that can be inflicted on the offender under the criminal law. *AIR 1933 Rang 329.*

(2) The section is only applicable to the Penal Code and does not cover the punishments to which an offender under any other law may be sentenced. Thus the suspension of the licence of a taxi driver under the Motor Vehicles Act. 1939 was held to be a punishment. *AIR 1936 Rang 329.*

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1. Subs. by Ord. No. XLI of 1985, for "transportation".
2. Clause *Thirdly* was omitted by the Criminal Law (Extinction of Discriminatory Privileges) Act, 1949 (Act II of 1950) Sch.
3. Explanation was added by Ord. No. XLI of 1985.

2. Punishments—General principles.—(1) Section 53 enumerates the different kinds of punishments which can be awarded to an accused person and forfeiture of property and fine are mentioned as two distinct kinds of punishments under clauses fifthly and sixthly. The effect of conviction of a person on his dependents is not matter for consideration by the Courts. *1966 Cr LJ 834.* Law is good but justice is better. Sentence should be reasonable. *AIR 1969 Cal 32.*

(2) Under the Criminal Procedure Code, S. 367 when there is a conviction a sentence must follow the conviction as a matter of law in each and every case. In other words when a Court finds an accused guilty, it is its bounden duty under the law to pass some sentence on the accused. *AIR 1956 SC 146.*

(3) The Court to specify the nature of the punishment in the judgment. *(1971)73 BomLR 215.*

(4) An omission to specify the nature of the punishment cannot be rectified by the trial Court by a subsequent order. *(1971) 73 BomLR 215.*

(5) The object of punishment is to make the offender suffer either in person or in purse or in both so that he may not follow his errant way in future and at the same time to make others understand that they will be similarly dealt with if they commit any offence against society. *AIR 1951 Orissa 259.*

(6) The objects of punishment are fourfold : (i) to serve as a deterrent to other persons, (ii) to be preventive, (iii) to be reformative, and (iv) to be retributive. *AIR 1960 All 190.*

(7) The sentence should neither be too lenient nor disproportionately severe. The former losses its deterrent effect and the latter has a tendency to tempt the offenders to commit a more serious offence. The object of punishment for crimes being to impress on the guilty party and other like-minded persons that the life of crime does not pay, the Court has a duty to guard itself against the aforesaid two tendencies and to draw a proper balance between them. In order to do so, the Court has to consider the nature and gravity of the offence and duly take into account all the relevant circumstances leading to its commission. *(1969) SCD 1091.*

(8) Although the punishment for each offence under the Code is prescribed by the Code itself, the actual sentence is passed under the provisions of the Criminal Procedure Code. *AIR 1933 Pesh 90.*

3. Measure of punishment—General principles.—(1) The quantum of punishment to be awarded in each case is a matter within the discretion of the Court. *1969 SCD 1091.*

(2) In awarding punishment, the Court must bear in mind the objects for which the law provides for punishment. The Court must pass such sentence as fits the crime in each case. *AIR 1944 Pat 16.*

(3) There must be a proper proportion between the gravity of the offence and the punishment imposed. *AIR 1979 SC 1820.*

(4) Where an accused (a Reader holding M.Sc. and Ph.D. degrees) was convicted for offences of attempting to issue counterfeit University Degrees the award of sentence by the Sessions Court till the rising of the Court was too lenient. Award of sentence by the High Court for three years was just and proper. *AIR 1978 SC 1548.*

(5) In fixing the punishment for any particular crime the Court should take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation, if any, which he had received, (if the crime is one of violence), the antecedents of the offender, his age and character and so on. All these factors must be established by the evidence and not by mere impressions formed on the spur of the moment. *AIR 1976 SC 392.*

(6) Except in cases where a minimum period of imprisonment has been prescribed, as for instance under Ss. 397 and 398, the Court has a discretion to adjust the period of imprisonment according to

the requirements of justice in each case subject to the maximum mentioned in the punishment Section. *AIR 1956 Punj 85.*

(7) It is the duty of the Court in every case to award a proper sentence having regard to the nature of the offence, the manner in which it was committed and to all attendant circumstances—Reduction of sentence in case of an accused found guilty of offence punishable under S. 304, Part II to 20 months R. I. only on ground of absence of opposition to reduction on part of counsel for State is not proper. *AIR 1983 SC 172.*

(8) The quantum of punishment should not exceed the interests of justice. *AIR 1969 Cal 132.*

(9) In case of fine where a maximum amount is fixed by the section, the Court ought not to impose the maximum amount as fine unless the offence is of a very serious character. *AIR 1929 All 919.*

(10) The punishment to be awarded must be the least that will achieve the double object of deterring the accused from repeating his offence and other persons from committing a similar offence. *AIR 1958 All 198.*

(11) The real object of punishment being prevention of crime, the measure of punishment naturally varies according to the prevalence of a particular form of offence at the given time. Hence, the degree of severity that may be appropriate at one time may be uncalled for at another time. *AIR 1950 Pepsu 9.*

(12) Justice should be even-handed. Other things being equal the same offence should receive the same punishment. *AIR 1952 Sind 143.*

4. Measure of punishment—Social status of accused and other considerations.—(1) The mere fact that the accused is a man of position and status is no ground for awarding to him a lighter sentence than would be justified in the case of an ordinary person. *AIR 1928 All 150.*

(2) The loss of reputation which the accused would suffer his old age and such other factors may be taken into consideration while awarding a sentence. *AIR 1927 Oudh 319.*

5. Measure of punishment—Imprisonment already suffered—Whether to be deducted.—(1) Ordinarily a sentence of imprisonment commences to run from the time that the sentence is passed. *ILR (1954) 4 Raj 438.*

(2) The Court has no power to direct that such sentence should commence from a future date. *(1869) 4 MadHCR App 1.*

(3) The Court has no power to make a sentence precede a conviction. The reason is that a sentence should follow and not precede a conviction. *ILR (1954) 4 Raj 438.*

(4) It is illegal to sentence an offender for the period already undergone by him in the police custody, or for the period of his imprisonment as an under-trial prisoner. *ILR (1954) 4 Raj 438.*

(5) The period during which the accused has been in detention as an under-trial prisoner should be taken into account in awarding the sentence and in fixing the period for which a sentence of imprisonment should be passed. *AIR 1923 Lah 104.*

(6) A Magistrate in awarding a sentence of imprisonment has no jurisdiction to order that the period of detention as under-trial prisoner should be counted as part of the sentence. *ILR 4 Raj 438.*

(7) It is illegal for a Magistrate to refuse to give a punishment however nominal it may be on the ground that the period of detention as under-trial prisoner is a sufficient punishment, as in every case in which an accused is convicted, the sentence of punishment must follow as a matter of law. *AIR 1962 MadhPra 36.*

6. Compensation out of fine.—*See* Sections 545, 546, Cr. P. C.

7. Compensation is not fine.—*See AIR 1930 Nag 149.*

8. Attitude of Judge.—A Judge, when administering justice, is as much influenced by the tides and currents of human emotions and passions as other human beings, but yet he is enjoined by the law to restrain and control them, else he will not be qualified to try a criminal case, but at the same time he is not expected to act ostrich-like and close his eyes to deliberate disregard of defiance of the law of the land. Judicial detachment is a virtue, but not judicial passivity. *AIR 1970 Goa 56.*

9. Suspension, remission and commutation of sentence.—Suspension clearly meant that the sentence had not been remitted and was only in abeyance at the pleasure of the person who was authorised to suspend. *1950 All 816. See* also Chapter XXIX Cr. P. C.

Section 53A

[4][**53A. Construction of reference to transportation.**—(1) Subject to the provisions of sub-section (2), any reference to "transportation for life" in any other law for the time being in force shall be construed as a reference to "imprisonment for life".

(2) Any reference to transportation for a term or to transportation for a shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted.

(3) 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.]

Cases

(1) Sentence of imprisonment for life means rigorous imprisonment for life. *AIR 1983 SC 855.*

(2) The Borstal Schools Act has to be read along with S. 53A. Therefore the only meaning that could be given to the term transportation occurring in any law is transportation for life. The result is that the word transportation in the Act should be construed as imprisonment for life. *1983 CriLJ 509.*

(3) In Reformatory Schools Act, for the Expression "transportation" the expression "imprisonment for life" should be substituted. In all those cases where an accused (less than 16 years of age) is convicted of an offence punishable with a sentence higher than the sentence of transportation which means imprisonment for life in view of S. 53A, Penal Code, or imprisonment, the accused is not included within the definition of a "youthful offender". *AIR 1968 MadhPra 97.*

(4) Children Act—Wherever word "transportation" occurs in the Act, it should be construed in the light of provisions of S. 53A, Penal Code. *1971 CriLJ 1929 (Pr 5) (DB).*

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4. Section 53A was inserted, *ibid.*

Section 54

54. Commutation of sentence of death.—In every case in which sentence of death shall have been passed, [5][the Government] may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

Cases

(1) In proper cases an inordinate delay in the execution of the death sentence may be regarded as a ground for commuting it, but this was no rule of law and was a matter primarily for the consideration of the Government. If the Court has to exercise a discretion in such matter, the other facts of each case would have to be taken into consideration. *AIR 1954 SC 278.* (Supreme Court declined to order commutation of the death sentence, as there were no extenuating circumstances.)

Section 55

55. Commutation of sentence of [1][imprisonment] for life.—In every case in which sentence of [1][imprisonment] for life shall have been passed, [6][the Government] may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding [7][twenty] years.

Cases

1. Scope of section.—(1) The power of commutation has been conferred on the "appropriate Government" as defined in S. 55A and not on the Court. *AIR 1955 NUC (All) 2753.*

(2) Sentence of imprisonment for life means rigorous imprisonmentk for life. In the absence of order of commutation under S. 55. P.C. or S. 402(1) of Cr. P.C. a convict cannot be released forthwith even after expiry of 14 years. *AIR 1983 SC 855.*

(3) Where the accused was sentenced to imprisonment for life direction by court that he shall in no case be released unless he has undergone minimum 25 years imprisonment was bad in law. *1982 CriLJ 1762.*

2. Distinction between commutation and remission.—See *AIR 1939 Rang 124.*

Section 55A

[8][**55A. Saving for [9][President's] prerogative.**—Nothing in section fifty-four or section fifty-five shall derogate from the right of [10][the President] to grant pardons, reprieves, respites or remissions of punishment.]

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5. The words "the Government" were substituted for the words "the Central Government or the Provincial Government of the Province within which the offender shall have been sentenced" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Sch. (w.e.f. 26-3-1971).
6. The words "the Government" were substituted for the words "the Provincial Government of the Province within which the offender shall have been sentenced", *ibid.*
7. Subs. by Ord. No.XLI of 1985, for "fourteen".
8. Ins. by A.O., 1937, by s. 295 of the G. of India Act, 1935 (26 Geo. 5. ch. 2).
9. Subs. by A.O., 1961, Art. 2 and Sch., for "His Majesty, or of the (Governor-General if any) such right is delegated to him by His Majesty" (with effect from the 23rd March, 1956).
10. Subs *ibid.*, for "Royal" (with effect from the 14th October, 1955).

Section 56

56. Sentence of Europeans and Americans to penal servitude.—*Rep. by the Criminal Law (Extinction of Discriminatory Privileges) Act, 1949 (11 of 1950), Schedule.*

Section 57

57. Fractions of terms of punishment.—In calculating fractions of terms of punishment, [11][imprisonment] for life shall be reckoned as equivalent to [12][rigorous imprisonment for thirty years].

Cases

1. Scope of section.—(1) It is only for the purpose of calculating fractions of terms of punishment that a sentence of imprisonment for life is to be treated as one for 20 years. For other purpose such a sentence will not become one for 20 years by operation of this section. *AIR 1976 SC 1552.*

(2) A sentence of imprisonment for life cannot be treated as being equivalent a sentence for 14 years unless it has been commuted by the apropriate Government under S. 55. *AIR 1961 SC 600.*

(3) Under this section, for the purpose of calculating the fractions of the term of imprisonment for purpose of granting remisions on the ground of good conduct the sentence of imprisonment for life should be treated as one for 20 years. *AIR 1945 PC 64.*

(4) Imprisonment for life is not "imprisonment for a term" within S. 428 of Cr.P.C. *1976 CriLJ 315.*

2. Sections 57 and 302.—Sentence—Normal sentence under section 302 of the Penal Code is death but under some extenuating circumstances it may be imprisonment for life but such sentence can never be 30 years taking the aid of section 57 of the Code. *Farid Ali Vs. State (Criminal) 4 BLC 27.*

Sections 58 and 59

[13][* * * * * * * *]

Section 60

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.

Cases

1. Scope of section.—(1) Under this section the Court can direct that the imprisonment shall be rigorous or simple for the whole term of the sentence or for any specified portion of such term. *(1971) 73 BomLR 215.*

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11. Subs. by Ord. No. XLI of 1985, for "transportation".
12. Subs. *ibid.*, for "transportation for twenty years".
13. Sections 58 and 59 were omitted, *ibid.*

(2) The section has no application to cases in which the prescribed punishment is imprisonment for life. In such cases the imprisonment is always to be rigorous imprisonment and the Court has no power to direct that the imprisonment should be simple imprisonment. *AIR 1964 Orissa 149.*

(3) The sentence of imprisonment for life has to be equated to rigorous imprisonment for life. *AIR 1983 SC 855.*

(4) The nature of imprisonment to be undergone by an accused person must be specified in the judgment itself. It cannot be specified for the first time in the warrant which the trial court issues to the jailor, under the Criminal P.C. for the execution of the sentence. *(1971) 73 BomLR 215.*

Section 61

61. Sentence of forfeiture of property.—*Rep. by the Indian Penal Code (Amendment) Act, 1921 (XVI of 1921), s. 4.*

Section 62

62. Forfeiture of property, in respect of offenders punishable with death, transportation or imprisonment.—*Rep. by the Indian Penal Code (Amendment) Act, 1921 (XVI of 1921), s. 4.*

Section 63

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.

Cases

1. Scope of section.—(1) Where the maximum amount of fine is not laid down by the Code, the Court has a discretion to impose any amount of fine that it considers fit according to the needs of justice in each case. But the fine must not be excessive and the accused must not be made to feel that he is being persecuted and not prosecuted. *AIR 1957 Assam 74.*

(2) The amount of fine should among other things be commensurate with the financial circumstances of the accused and must not be beyond his means to pay so as to subject him to a further term of imprisonment as an inevitable consequence in addition to the substantive term of imprisonment to which he may have been sentenced. *AIR 1957 All 764.*

(3) Though the fine must not be excessive it must be sufficiently heavy to make the accused feel that it is a punishment. *AIR 1953 Mys 75.*

(4) Considering the close relationship of the accused with the victim and the bleeding head injuries caused fine of Rs. 100/- imposed for offence under S 324, P.C. was held not excessive. *1981 CriLJ 562.*

(5) Even though the punishment section may authorise a sentence of fine in addition to a substantial term of imprisonment such sentence of fine need not be imposed where the accused are poor people and the imposition of the sentence would be too hard upon them. *(1929) 30 CriLJ 838.*

(6) A nominal fine may be sufficient in some cases where the offence is not a serious one but some punishment must be inflicted wherever there is a conviction and after convicting an accused the Court cannot say that the offence is so trifling that no sentence need be passed. *AIR 1951 Orissa 284.*

(7) Where the offence is of an aggravated type, the sentence of imprisonment is obviously more suitable than mere sentence of fine where the punishment section provides for both. *AIR 1924 Lah 81.*

(8) Where a substantial term of imprisonment has been imposed there should not be also a heavy sentence of fine except in exceptional cases. *AIR 1952 SC 14.*

(9) Where an offender is convicted under two or more sections and is sentenced to fines of different amounts in regard to the different offences with sentences of imprisonment in case of default if he makes any payment towards the fines inflicted in him such payments should be first appropriated for the smaller amounts as otherwise the severity of the punishment may be increased. *AIR 1931 Sind 73.*

2. Daily fine cannot be imposed under the Penal Code.—*27 Cal 565; 25 WC 6.*

Section 64

64. Sentence of imprisonment for non-payment of fine.—[14][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 [15][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, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

Cases and Materials : Synopsis

1. *Scope of section.*
2. *Analogous law.*
3. *Imprisonment in default of payment of fine—When can be ordered.*
4. *Period for which imprisonment in default of fine can be ordered.*
5. *Imprisonment in default—Whether amounts to discharge of liability for fine.*
6. *Applicability of section to local and special Acts.*
7. *Imprisonment in default cannot be concurrent with other terms of imprisonment.*
8. *Amount of fine that can be imposed.*
9. *Appropriation of payments of fine.*
10. *Imprisonment as well as fine.*
11. *It shall be competent.*

1. Scope of section.—(1)This section deals with the power of the Court to award sentence of imprisonment in default of payment of fine in cases in which a sentence of fine may have been passed. This power of passing a sentence of imprisonment in default of payment of fine imposed does not make it imperative on the Court to pass such a sentence of imprisonment in every case in which a sentence of fine may have been passed. *AIR 1953 Trav-Co 233.*

(2) Under the Criminal Procedure Code also, it is not imperative that a sentence of imprisonment in default should necessarily be passed wherever a sentence of fine is passed., *1878 Pun No. 30. p. 73.*

(3) This section only applies to cases where a sentence of fine has been passed. An amount which is recoverable as if it were a fine is not fine. This section not to apply to such case. *AIR 1960 Ker 86.*

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14. Subs. by the Indian Penal Code Amendment Act, 1882 (VIII of 1882), s. 2, for "in every case in which an offender is sentenced to a fine".
15. Ins. by the Indian Criminal Law Amdt. Act, 1886 (X of 1886) s. 21(2).

2. Analogous law.—(1) Even though a particular special or local Act which provides for the sentence of fine being passed for a certain offence under that Act does not itself provide for a sentence of imprisonment being passed in default of payment of the fine such a sentence may be passed under the provisions of the Penal Code. *AIR 1957 SC 645.*

3. Imprisonment in default of payment of fine—When can be ordered.—(1) The order for imprisonment in default of payment of fine should be contained in the sentence itself. This is clear from the words, "by the sentence" in the third paragraph of the section. There is no provision in the law for the passing of such an order separately and subsequently. *AIR 1936 Lah 348.*

(2) Where an accused person is sentenced to a substantive term of imprisonment and fine and has served the full term of imprisonment and the Court orders his release on his offering security for payment of the fine by instalments and the accused defaults in payment of the instalments the Court cannot then order him to suffer imprisonment in default of payment of the fine. *AIR 1936 Lah 348.*

(3) After the lapse of six years from the original sentence the fine will not be recoverable. Court to have no power to pass any order for imprisonment in default of payment of fine. *AIR 1936 Lah 348.*

4. Period for which imprisonment in default of fine can be ordered.—(1) Within the limits prescribed by Sections 65 and 67 the imprisonment in default of payment of fine should be long enough to induce the accused to pay the fine rather than suffer the imprisonment. *AIR 1950 Kutch 73.*

5. Imprisonment in default—Whether amounts to discharge of liablity for fine.—(1) The undergoing of imprisonment in default of payment of fine does not operate as a discharge of the liability to pay the fine. *AIR 1969 All 116.*

(2) Although it is an obligatory duty of the Court to pass a sentence of punishment, as a matter of law in every case in which it has recorded a finding of conviction, it is not imperative on the Court to pass a sentence of imprisonment in default of payment of fine as such sentence is not the punishment for the offence for which the accused has been convicted. *AIR 1953 Trav-Co.233.*

(3) Although imprisonment in default of payment of fine does not by itself operate as a discharge of the liability for the fine yet, under S. 386 of the Criminal P.C. where the accused has suffered the full term of imprisonment for default in payment of fine the Court shall not issue a warrant for the realisation of the fine unless for special reasons to be recorded in writing the Court considers it necessary to do so. *AIR 1969 All 116.*

6. Applicability of section to local and special Acts.—(1) Under S. 40, para. 2, the word "offence" as used in Ss. 64, 65, 66, and 67 includes offences under special and local laws. Hence a sentence of imprisonment for default in payment of fine can be passed even in cases in which the sentence of fine has been imposed under a special or local law. *AIR 1957 SC 645.*

(2) The effect of S. 25 of the General Clauses Act also is that a sentence of imprisonment for default in payment of fine can be passed even in relation to fine imposed under special and local Acts. *AIR 1957 SC 645.*

(3) Where the special or local Act provides a special procedure for the relization of fines imposed under the Act, the general provisions of the Penal Code and the Criminal P.C. will not apply and a sentence of imprisonment for default under such general provisions will be illegal. *AIR 1966 Raj 238.*

(4) Where a tax is recoverable "as if it were a fine" it does not become a fine and the court cannot pass an order for imprisonment in default of the payment of such sum. *1959 Ker LT*

(5) Penalties imposed under a Municipalities Act for failure to comply with the directions of the Municipal Officers cannot be equated to fines and a sentence of imprisonment cannot be imposed for default in the payment of such penalties. *AIR 1918 Cal 645.*

7. Imprisonment in default cannot be concurrent with other terms of imprisonment.—(1) Under S. 31 of the Criminal P.C. when a person is convicted at one trial of two or more offences and is sentenced to a term of imprisonment for each of the offences the normal rule is that the sentences should run consecutively. *AIR 1953 All 510.*

(2) Sentence of imprisonment in lieu of fine cannot ordered to run concurrently with a substantive sentence of imprisonment. *Qutub Vs. State (1959) 11 DLR (WP) 45.*

(3) Where a person who is already under a sentence of imprisonment for default in payment of fine is sentence to a substantive term of imprisonment such substantive term of imprisonment cannot be made to run concurrently with the term of imprisonment for default. *AIR 1931 Rang 51.*

(4) Where a person had been ordered to be imprisoned for failure to furnish security under S. 122 of the Criminal P.C. and is subsequently convicted for an offence and sentence to fine the imprisonment in default of the payment of such fine will run from the expiry of the imprisonment under S. 122 Criminal P.C. *AIR 1932 Rang 50.*

8. Amount of fine that can be imposed.—(1) Inasmuch as imprisonment in default of payment of fine is in excess of any substantive term of imprisonment that may have been awarded to an accused person, a sentence of fine for an amount which is beyond the means of the accused to pay should not be passed where he has been sentenced to a substantial term of imprisonment, as the result of such a sentence of fine would be only to add to the term of imprisonment of the accused. *AIR 1941 All 310.*

9. Appropriation of payments of fine.—(1) An accused person is convicted under one section to a fine of Rs. 200 or in default to 3 months' imprisonment and also under two other sections to a fine of Rs. 15 or in default to one month's imprisonment for each offence. The accused pays into the Court Rs. 30 and requests that the payment should be appropriated to two smaller amounts of fine—**Held** the amount paid should be so appropriated. *AIR 1931 Sind 73.*

(2) Where a person prosecuted for non-payment of tax and he is convicted and is ordered to pay the arrears of tax and is also sentenced to fine the accused making any payment is entitled to require that the payment should be adjusted towards the fine and not the arrears of tax. *AIR 1955 Mad 599.*

10. Imprisonment as well as fine.—Section 64 enables the Court , in every case in which an offender is sentenced to fine, to direct that in default of payment of the fine the offender shall suffer imprisonment. Sections 65 and 67, declare what shall be the limit of this imprisonment. When an offence is punishable with imprisonment as well as fine the imprisonment which can be awarded in default of payment of fine is limited by Section 65, to one-fourth the maximum fixed for the offence, but if the offence be punishable with fine only, it was necessary to set up another standard, and accordingly by Section 67, scale was fixed varying with the amount of fine which could be imposed. The wording of Section 64 is not happy but the Legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed. Those cases the section divides into three classes *viz* offences : (1) "punishable with imprisonment as well as fine", (2) "punishable with imprisonment and fine" and (3) "punishable with fine only".

11. It shall be competent.—Means it is permissive but not imperative. *See 18 Bom 400.*

Section 65

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 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.

Cases : Synopsis

1. *Offences to which section applies.*
2. *Period for which imprisonment can be ordered.*
3. *Amount of fine that can be imposed.*
4. *Offences under special and local laws.*
5. *This section and Sections 32, 33, Criminal P.C.*

1. Offences to which section applies.—(1) The words "punishable with imprisonment as well as with fine" will apply not only to cases where the offence is punishable with imprisonment and fine but also to cases in which the offence is punishable with imprisonment or fine, or both. *(1919) 25 Mys CCR No. 151.*

(2) Where the offender is only sentenced to fine and not to imprisonment at all, it is this section that will come into play and not S. 67 which only applies to cases in which the offence is punishable with fine alone. *(1868) 10 Suth WR (Cri) 30.*

2. Period for which imprisonment can be ordered.—(1) Under this section the period of imprisonment for which an offender can be sentenced on default in payment of fine shall not exceed one-fourth of the maximum term of imprisonment to which he can be sentenced under the punishment section by way of substantive punishment.*(1881) 2 Weir 26 (FB).*

(2) The maximum term of imprisonment referred to in this section is the maximum term fixed in the punishment section in regard to the offence and does not include the enhanced punishment to which an offender with a previous conviction is liable under S. 75 of the Penal Code. *1890 Oudh SC No. 175 p. 223 (223).*

(3) Where an offender is convicted on three separate charges of bribery and sentenced to fine on each of the three charges, a sentence of imprisonment in default for 6 months on each charge, *i.e.* for a total term of 18 months is legal. *1919 Punj WR (Cri) 3 (4)*

3. Amount of fine that can be imposed.—(1) Where a long term of imprisonment has been awarded to the offender by way of substantive punishment and he also sentenced to a fine, the amount of which is beyond his means to pay the period of imprisonment in default of payment of fine to which he may be liable.under his section may, when added to the substantive term of imprisonment which has been imposed imposed on him, exceed the maximum limit of the substantive term of imprisonment permissible under the punishment section. Although technically speaking there is nothing illegal in this yet as far as possible the Court should exercise its discretion in the matter of imposing a sentence of fine and avoid such a contingency. *AIR 1941 All 310.*

4. Offences under special and local laws.—(1) By virtue of S. 40, Paragraph 2.

(2) This section applies also to offences under special and local laws and hence even in regard to such offences the limit of the term of imprisonment in default of payment of fine will apply. *1891 Rat Un Cri C 563.*

5. This section and Sections 32, 33 Criminal P.C.—(1) A Magistrate whose powers of awarding imprisonment are limited to those conferred by S. 32, Criminal P.C. cannot by resorting to S. 65 of the Penal Code award a period of imprisonment in default of payment of fine beyond one-fourth of the maximum period of substantive imprisonment which he is empowered to impose. *AIR 1972 SC 1809.*

(2) The term of imprisonment which can be legally awarded in default of payment of fine is not to exceed one-fourth of the maximum term of imprisonment fixed for the offence. *Abdul Hakim Bhuiyan Vs. Gulabi (1954) 6 DLR 488.*

(3) Scale fixing limits of the terms of imprisonment is binding upon all Courts trying a criminal case—High Court Division Sessions Judge, Assistant Judge or Magistrate—This section has given the High Court Division and the Sessions judge unlimited power in respect of awarding fine, but in the case of imprisonment in default of fine two limits have been imposed, one u/s 65 and the other u/s 67 BPC. *37 DLR (AD) 91=1985 BLD (AD) 166.*

(4) Sec. 65 relates to a case in which the offence is punishable with imprisonment as well as fine, whereas Sec. 67 attracts a case in which the offence is punishable only with fine. Reading all these sections of the Penal Code and the Criminal procedure Code together it is clearly found that all courts including the Court of a Magistrate got power to direct recovery of fine, when the offence punishable only with fine, by any of the three methods, such as by issuing distress warrant or by referring the matter to the Collector of the District or by committing the offender to prison. *Ibid.*

Section 66

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.

Cases

1. Scope of section.—(1) Where the substantive sentence for the offence can only be a sentence of rigorous imprisonment, the imprisonment in default of the payment of fine must also be rigorous. *(1967) 7 Suth WR (Cri) 31 (2) (31) (DB).*

(2) If the substantive sentence of imprisonment for the offence can only be simple imprisonment, then the sentence of imprisonment for default in payment of fine can only be simple imprisonment. *(1868-69) 5 Bom HCR (Crown Cas) 43(43) (DB).*

(3) When an offence is punishable with imprisonment of either description, the imprisonment in default of payment of fine may be of either description. *1872-1892 Low Bur Rul 434 (435).*

(4) Imprisonment in default of payment of fine—May be of the description prescribed for the offence—Simple imprisonment prescribed for offence—R.I. cannot be ordered for default. *Shafiq Ahmed Vs. State 1959 PLD (WP) (Lah) 851.*

Section 67

67. Imprisonment for non-payment of fine, when offence punishable with fine only.—If the offence be punishable with fine only, [16][the imprisonment which

16. Ins, by the Indian Penal Code Amondment Act, 1882 (XIII of 1882), s. 3.

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 the fine shall not exceed fifty [17][taka], and for any term not exceeding four months when the amount shall not exceed one hundred [17][taka], and for any term not exceeding six months in any other case.

Cases

1. Scope of section.—(1) This section deals with the question of imprisonment in default of payment of fine in cases in which the offence is punishable with fine only. *(1875-77) ILR 1 All 461.*

(2) The limit to the period of imprisonment to which an offender can be sentenced in summary trials under the Criminal P.C. only applies to substantive sentences of imprisonment and not to sentence of imprisonment in default of the payment of fine. *(1883) ILR 6 All 61.*

(3) Where a warrant is issued for an outstanding sum the period of imprisonment must not be more than the maximum for the aggregate sum found on the warrant. *(1981) 1 WLR 374.*

(4) The period of imprisonment in default of payment of fine varies under this section according to the amount of the fine whereas under S. 65 such period varies according to the maximum term of imprisonment to which the offender can be sentenced by way of substantive punishment. *(1875-77) ILR 1 All 461.*

(5) Where an offence under a special and local law is punishable only with fine, the offender can only be sentenced to simple imprisonment in default of the payment of fine. *AIR 1957 SC 645.*

(6) An accused convicted of an offence to which this section applies can be given the benefit and can be released on admonition and probation under Probation of Offenders Act. *1971 CriLJ 873.*

(7) When an offence is punishable with fine only, it can be realised by issue of distress warrant, etc. and also by committing the accused to imprisonment. In an offence punishable with fine only, awarding of imprisonment in default is not illegal. *The State Vs. Abul Kashem (1985) 37 DLR (AD) 91.*

Section 68

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.

Cases

1. Scope of section.—(1) Where the amount of the fine is paid by the offender while undergoing imprisonment in default the imprisonment shall terminate. *AIR 1969 All 116.*

(2) Both under this section and under S. 69 the imprisonment in default of payment of fine will terminate under either section only on the actual realization of the fine and not merely on the setting in motion of the legal process for the recovery of the fine. *AIR 1963 Bom 21.*

(3) The word "levied" as used in S. 70 in contrast to that word as used in Ss. 68, 69 refers to the setting in motion of the legal process for the recovery of the fine imposed, so that where such legal process has been started within the period of limitation as laid down in the section the recovery of

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17. Subs. by Act VIII of 1973, s. 3 and 2nd Sch, for the word "rupees" (with effect from 26-3-1971).

the fine will not be time-barred even if the actual realization of the fine is made afterwards. *AIR 1963 Bom 21.*

2. Section 68 and 69.—(1) There being a clear provision in substantive law dealing with the subject it would not be proper to invoke Article 104 of the Constitution by ignoring the provision of sections 68 and 69 of the Penal Code when exercise of such inherent power comes into direct conflict with the express provision of the law. *Hussain Muhammad Ershad Vs State (Criminal) 6 BLC (AD) 30 = 6 MLR (AD) 11.*

(2) As there is express provision contained in sections 68 and 69 of the Penal Code for payment of fine and termination of sentence following thereof, the Appellate Division rejected the prayer for payment of fine in installments in exercise of the power under article 104 of the Constitution. *6 MLR (AD) 11 = 6 BLC (AD) 30.*

Section 69

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 [17][taka] and to four months' imprisonment in default of payment. Here, if seventy-five [17][taka] 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 [17][taka] 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 be immediately discharged. If fifty [17][taka] 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 [17][taka] be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

Cases

1. Scope of section.—(1) Ss. 68 and 69 are independent of S. 70. The expiry of limitation for levy of fine imposed under S. 70. P.C. would in no way affect the liability of the convict to undergo imprisonment in default of payment of fine under S. 68. *1980 CriLJ 1160.*

(2) The term "levied" under this section means realized. In other words, unless the proportion of the fine referred to in the section is actually realized the accused will not be entitled to release from the imprisonment. This meaning is in contrast to the meaning of the word "levy" as used in S. 70. Under that section the word "levy" refers to the taking of legal proceedings for the recovery of the fine and not the actual realization thereof. *AIR 1963 Bom 21.*

(3) Although under this section the accused is entitled to be released from imprisonment on the payment or realization by process of law of the proportionate part of the fine as mentioned in the section this will not discharge the accused from his liability for the balance nor entitle him to the remission of the balance of the fine and the Magistrate has no power to order such remission, notwithstanding the

release of the accused under this section, the balance will still be recoverable from him within the period of limitation laid down in S. 70. *1882 AllWN 85.*

(4) Imprisonment in default of payment of fine cannot be made to run concurrently with other terms of imprisonment to which the offender may be liable. This principle applies also to two sentences of imprisonment in default of payment of fine. The illustration given under this section makes this position still clearer. *AIR 1950 All 625.*

Section 70

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 the 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 offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

Cases : Synopsis

1. *Scope and applicability of the Section.*
2. *"Levied"*
3. *Limitation for levy of fine.*
4. *Starting point of limitation.*
5. *Limitation where offender has been sentenced to imprisonment for longer term than 6 years.*
6. *Imprisonment in default does not operate as discharge from liability.*
7. *Payment of portion of fine.*
8. *Death of the offender*
9. *Fine written off—Effect.*
10. *Property acquired after sentence.*
11. *Appropriation of payment.*
12. *Enhancement of sentence.*
13. *Applicability of special and local laws.*
14. *Fine for contempt of High Court.*
15. *Amount recoverable as fine.*

1. Scope and applicability of the section.—This section only lays down the substantive rule as to the recoverability of the fine to which an offender may be sentenced. The procedure for the recovery of the fine is laid down in Criminal P.C. (1898), S. 386. *AIR 1963 Bom 21.*

2. "Levied.—(1) The meaning of the word "levied" in Ss. 68 and 69 different from that under this section. In the context of Ss. 68 and 69 the word refers to the actual realisation of the legal proceedings for the recovery of the fine. *AIR 1963 Bom 21.*

3. Limitation for levy of fine.—(1) The warrant which is issued to the Collector for the recovery of the fine by civil process has the effect of a decree. But notwithstanding this, the period of limitation applicable to the recovery even in such cases will be governed only by this section and not S. 48 of the Civil P.C. The reason is that the Criminal P.C. S. 421, being only a provision as to procedure, does not govern the operation of this section. *AIR 1941 Bom 158.*

4. Starting point of limitation.—(1) One of the periods of limitation for recovery of fine under this section is six years from the date of the sentence. *AIR 1979 SC 1263.*

(2) Even where there has been an appeal or revision against the sentence, period of limitation must be counted from the date of the trial Court., inasmuch as the filing of the appeal or revision does not operate to stay the execution of the sentence automatically. *AIR 1962 SC 1145.*

(3) In computing the period of limitation of six years for levying the fine from the date of the passing of the sentence by the trial court, the period during which the sentence passed by the trial court was stayed by the appellate Court has to be excluded. *AIR 1979 SC 1263.*

(4) Even where the sentence is substantially modified on appeal, the limitation begins to run only from the date of the trial Court's order. *AIR 1967 All 276.*

5. Limitation where offender has been sentenced to imprisonment for longer term than 6 years.—(1) If the offence is punishable with imprisonment for a period of 10 years but the offender is actually sentenced only to a term of 7 years imprisonment and fine, the fine can be recovered only within the period of seven years from the date of the sentence and not ten years. *AIR 1943 Pesh 56.*

6. Imprisonment in default does not operate as discharge from liability.—(1) The fact that the offender has served the full term of imprisonment to which he has been sentenced in default of payment of fine, does not discharge him from the liability for the fine. *(1865) 3 Suth WR (Cri) 61.*

(2) Even after the accused has suffered the full term of imprisonment for default, the fine can be levied at any time within the expiry of the period of limitation under this section. But, under S. 386(1)(b) (Proviso) of the Criminal P.C. 1898, as amended by Act 18 of 1923, where the offender has suffered the full term of imprisonment to which he has been sentenced in default of the payment of fine, no Court shall issue a warrant for the levy of the fine unless for special reasons to be recorded in writing the Court considers it necessary to do so. *AIR 1967 All 276.*

(3) On the basis of principle as envisaged in S. 386 (1) (b) proviso of the Cr. P.C., 1898 as amended by Act 18 of 1923, where a warrant for the recovery of the fine is issued while the offender is undergoing a term of imprisonment for default and subsequently he serves the full term of such imprisonment, the warrant ought not to be excused in absence of special reasons recorded although the case does not technically fall within the terms of S. 386(1)(b)Proviso. *AIR 1964 Mys 64.*

7. Payment of portion of fine.—(1) Under S. 69 where the accused pays a portion of the fine while he is serving a sentence of imprisonment for default in the payment of the fine, he will be entitled to release, if the period of imprisonment already suffered by him is not less than proportional to the part of the fine remaining unpaid. *1871 Bom Un Cri C 40.*

8. Death of offender.—(1) Under this section the death of the offender before payment of the fine to which he has been sentenced does not extinguish the liability for the fine and even after his death the fine can be levied and recovered from any property which would be legally liable for his debts. *AIR 1953 Trav.-Co 233 (234).*

(2) Where the property held by the deceased passes on his death to reversioners under the customary law and is not liable in their hands to be proceeded against for the debts of the deceased the fine to which the deceased was sentenced cannot be recovered from such property after his death. *AIR 1955 Pepsu 170.*

(3) Where the person in possession of certain property which is sought to be proceeded against for the payment of a fine for which a deceased person was liable claims the property to be his own his remedy is by way of a suit for a declaration of title in a Civil Court and he cannot apply for revision against the order of the Magistrate's Court issuing a warrant for proceeding against the property. *AIR 1950 Kutch 20.*

(4) As the death of the offender does not extinguish the liability for fine an appeal against sentence of fine does not abate on the death of the offender. *AIR 1941 Pat 526.*

(5) Under section 70 the fine imposed on the deceased accused may be realised from his assets which after his death may come into the possession of his legal representative. An order directing the fine to be realised from any property of the legal representatives of the deceased accused is illegal. *Daktar Ali Vs. Sukramain Das.6 DLR 29.*

9. Fine written off—Effect.—(1) Even where the Magistrate has written off the fine as irrecoverable, the fine may be levied at any time within the period of limitation under the section. *1906(4) CriLJ 404.*

10. Property acquired after sentence.—(1) Even where at the time of the sentence the accused has no means to pay the fine, it can be recovered from any property acquired by him afterwards within the period specified in this section. *AIR 1953 Trav. Co. 233.*

11. Appropriation of payment.—(1) Where an order for payment of arrears of sales-tax is passed against the accused and he is also sentenced to fine for not having paid the sales-tax and then he makes a payment and asks it to be appropriated to the fine and not to the arrears of the tax, he is entitled to have it so appropriated. *AIR 1955 Mad 599.*

12. Enhancement of sentence.—(1) Where the Appellate Court reduces a sentence of 6 months' rigorous imprisonment to 4 months but imposes a fine of Rs. 100 or in default, 2 months' further imprisonment there is in effect an enhancement of the sentence which the Appellate Court is not competent to order. *(1901) ILR 23 All 497.*

13. Applicability to special and local laws.—(1) The section applies to fines imposed under-special and local Acts. *AIR 1962 SC 1145.*

14. Fine for contempt of High Court.—(1) The power of the High court to punish for contempt of itself is derived from the Constitution. The jurisdiction is a special one not arising under the Contempt of Courts Act and is therefore not within the purview of the Penal Code. The period of limitation fixed by S 70 of the Code does not apply to the recovery of fine imposed by the High Court for its contempt. *AIR 1972 SC 858.*

15. Amount recoverable as fine.—(1) An amount which is recoverable as if it were a fine is not "fine" and hence the provisions of this section do not apply to the recovery of such amounts. But although an amount is not required to be deemed to be fine but is only recoverable as if it were a fine, the provisions of the Criminal P.C., S. 386 (relating to the issue of a warrant to the Collector of the District to realise the amount by execution according to civil process) will apply. *AIR 1967 Ker 254.*

Section 71

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 [of] his offences, unless it be so expressly provided.

[18][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,

18. Added by the Indian Penal Code Amendment Act, 1882 (VIII of 1882), s. 4.

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one 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 blow. But he is liable only to 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 no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

Cases : Synopsis

1. *Scope and applicability of the section.*
2. *Applicability of section to offenders under special and local laws.*
3. *Section 71, Paragraph 1—Scope.*
4. *Paragraph 1—Illustrative cases—Cases falling within the clause..*
5. *Illustrative cases—Offences not falling within Paragraph.*
6. *Paragraph 2—Scope.*
7. *Paragraph 2—Illustrative cases.*
8. *Paragraph 3—Scope.*
9. *Aggravated form of same offence.*
10. *Offence committed with intent to commit intended offence—Similar cases.*
11. *Conspiracy to commit offence and offence committed in pursuance of conspiracy.*
12. *Criminal breach of trust and falsification of accounts.*
13. *Hurt and robbery—Similar cases.*
14. *Theft, robbery, etc. and receipt or retention of stolen property.*
15. *Receiving stolen property and assisting in concealing stolen property.*
16. *Theft and taking gratification of restoration of stolen property.*
17. *Theft and mischief in regard to same property.*
18. *Causing evidence of offence to disappear.*
19. *Forgery and using as genuine forged document.*
20. *Personation of public servant and allied offences.*
21. *Laying false charge and giving false evidence.*
22. *Illicit manufacture of liquor, etc., and similar or allied offences.*
23. *Counterfeiting and similar or allied offences.*
24. *Drunken and disorderly behaviour.*
25. *Rioting and hurt.*
26. *Paragraph 3, Illustrative cases—Miscellaneous.*
27. *Distinct offences.*
28. *Sentence—General principles.*
29. *Effect of Section 71 on question of sentence.*
30. *Sentence in cases of distinct offences.*
31. *Distinct offences forming part of same transaction.*
32. *Separate conviction or offences coming under section.*
33. *Double punishment for offences under two different statutes or falling under two or more separate definitions of law.*
34. *Separate sentences, when not legal.*
35. *Sentences on two counts legal.*
36. *Convictions under sections 143, 447, 379 and 427.*
37. *Separate sentences under sections 379 and 44 improper.*

1. Scope and applicability of the section.—(1) This section deals with what may compendiously be called "separable" offences as distinguished from "distinct offences" and lays

down the limits of the punishment to which the offender can be sentenced in such cases. *AIR 1953 All 510.*

(2) The section governs assessment of punishment. It does not indicate that separate punishments cannot be awarded. *AIR 1969 Guj 62.*

(3) There has to be a community of time, place and person in order to bring the case within the ambit of this section. *1972 CriLJ 1536.*

2. Applicability of section offences under special or local laws.—(1) By virtue of S. 40, Para 2 of the Code, the word "offence" used in the section denotes a thing made punishable under the Code or under any "special" or "local law" as defined in the Code. Thus, this section applies to offences under a special law and a local law. *AIR 1950 Assam 5.*

3. Section 71, Paragraph 1.—Scope.—(1) Paragraph 1 of this section deals with cases of the kind mentioned in Illustration (a) to the section. In such cases, according to paragraph 1, the accused can be punished only with the punishment of one offence. *AIR 1953 All 510.*

(2) Paragraph 1 will apply to cases where an offence consisting of several parts of the same nature is committed by two or more persons acting in concert. *AIR 1963 SC 1620.*

4. Paragraph 1—Illustrative cases—cases falling within the clause.—(1) The theft of several properties in the same burglary constitute only one offence, although the properties may belong to several persons. *AIR 1926 Nag 89.*

(2) The dishonest receipt of stolen property at the same time constitutes only one offence although it may consist of several items stolen at different times from different persons. *AIR 1932 Lah 615.*

(3) A number of lies uttered in one continuous deposition constitute only one offence of giving false evidence. *(1908) 8 CriLJ 497.*

(4) False statements made in two separate depositions will not constitute one offence but two separate offences. *(1898) 6 App Cas 229.*

(5) Where the complainant has been induced to part with a sum of money in instalments by fraud and deception, only one offence of cheating is committed. *1935 Mad WN 1225.*

(6) A number of acts of cheating by obtaining money on presentation of false bills may together constitute only one offence under Paragraph 1. *AIR 1963 SC 1620.*

(7) A bribe received partly on one day and partly on another day together constitutes only one offence under Paragraph 1. *(1901) 5 Cal WN 332.*

(8) Where a person causes the death of two children by a rash and negligent act committed at the same time and place, he can be convicted for the offence as one act under paragraph 1. *1896 (Bom) Un Cri C 852.*

(9) Kindling fire and leaving it burning in the vicinity of a reserve forest so as to endanger the trees therein constitute only one offence under the Forest Act. *AIR 1916 Lah 70.*

5. Illustrative cases—Offences not falling within Paragraph 1.—(1) When A attacks two persons B and C and causes hurt to each of them the hurt caused to either of them is no part of the hurt caused to the other and so, A's act does not fall under Paragraph 1 of S. 71. *AIR 1934 Oudh 244.*

(2) Where the Directors of a Bank cheat three different depositors by means of a false balance sheet and induce them to make deposits in the Bank, three distinct offences are committed and the three acts

of cheating do not form parts of one and the same offence coming under Paragraph 1. *AIR 1914 Low Bur 65.*

(3) Kidnapping of two persons in the course of the same transaction amounts to two distinct offences. *(1926) 27 CriLJ 64.*

(4) A criminal intimidation of three different persons constitutes three distinct offences, though the intimidation is committed at the same time, and in such a case, Para 1 of this section will not apply. *(1868) 9 Suth WR (Cri) 30.*

(5) The abatement of two distinct offences of criminal breach of trust by two dirrerent persons constitutes two distinct offences and is not covered by Para 1. *AIR 1923 Cal 403.*

(6) Rioting and causing damage to crops on the holdings of different persons will constitute a distinct offence in regard to each holding. *AIR 1929 Pat 710.*

(7) The appointment or employment of several persons contrary to the provisions of the Factories Act is not a repetition of the same offence but constitutes a distinct offence in regard to each of the workmen employed. *AIR 1920 Bom 315.*

(8) The failure to take out a licence as required by the law in respect of commodities sold will constitute a distinct offence in respect of each commodity sold where the law requires a separate licence for each commodity. The offences will be distinct ones although the commodities are sold at the same place and time and by the same person under the same proof. *1955 KerLT 106.*

(9) The possession of a number of excisable articles beyond the permitted limit is not single offence but constitutes as many offences as there are articles illegally possessed. *AIR 1932 Rang 184.*

(10) A person who delivers counterfeit coin to another knowing it to be counterfeit and with intent that fraud may be committed, when that coin includes both queen's coin and coin of another country, can be separately convicted and sentenced to consecutive terms of imprisonment under both Ss. 239 and 240 of the Code. Para 1 of this section will not apply to the case. *AIR 1933 Pesh 99.*

(11) Offences under Ss. 279 and 338 P.C.—Distinct offences—One include the other—Separate sentences for each offence legal. *AIR 1968 Guj 240.*

(12) Unlawful assembly—Common object to commit trespass—Criminal trespass committed—Separate conviction and sentence under Ss. 143 and 447 both—Not illegal—Para 1 of S. 71 does not apply. *AIR 1962 Manipur 23.*

(13) It cannot be said that counterfeiting is an offence made up of parts one of which is the possessing of the mould and the other is the act of counterfeiting. *AIR 1931 Cal 445.*

(14) Offence under S. 147, P.C., with object of preventing people from going by train and offence under S. 127, Railways Act, consisting in throwing stones at train after it started—Distinct offences—Separate sentence for each offence legal. *AIR 1924 Lah 585.*

6. Paragraph 2—Scope—(1) Paragraph 2 of this section corresponds to S. 235(2) of the Criminal P.C. (1896) and refers to cases where the offence committed by the accused falls under two or more provisions of the same law. The law may be a general law (=Penal Code) or special or local Act. *AIR 1958 SC 935.*

(2) Where the accused seized, dragged and pushed the complainant to a certain place in order to punish him and was convicted under Ss. 342 of the Penal Code for his acts, it was held that the acts taken together fell within the definitions both of wrongful confinement and of using criminal force, and thus fell within the second para. of the section. *(1906) 4 CriLJ 69.*

(3) The offence of preparation of a false signature-sheet at an election is specifically provided for in S 171, and hence it cannot be said that the offence falls also under S. 465 of the Penal Code so as to attract paragraph 2 of this section. *AIR 1925 All 230.*

(4) Where the common object of the accused under S. 147 of the Penal Code (Rioting) was the same as that of the offence under S. 379, Penal Code *viz.*, unlawful removal of paddy, it was held that only one offence was committed the offence of rioting, under Section 147. *AIR 1955 NUC (Assam) 2850.*

(5) Where the accused himself was found carrying illicit opium, he could not be convicted and sentenced both for importing and possession of illicit opium. *AIR 1950 Assam 5.*

(6) Where a person is accused of running a common gambling house and also of personally taking part in the gambling in that house, the latter act is one of the modes of running a gambling house and the accused is liable under this section to only one sentence, viz., for running a common gambling house although he may be convicted for both offences. *(1908) 7 CriLJ 76.*

7. Paragraph 2—Illustrative cases.—(1) Sending a fabricated message by telegram may be an offence both under S. 29 of the Telegraph Act, 1885 as well as under S. 420 read with S. 511, P.C., where the false message was sent with the object of obtaining payment of a sum of money to which the sender of the money was not entitled. *1903 All WN 26 (DB).*

(2) A person driving on a public road so rashly as to endanger human life and causing grievous hurt by such rash driving commits an offence which falls both under S. 279 and S. 338 of the Penal Code. *AIR 1956 Madh B 141.*

(3) Where a person causes the death of a pregnant woman, he may be committing an offence which falls both under S. 302 (murder) and under S. 316 (causing the death of a child in the womb) and such a case will fall under the 2nd para of this section. *AIR 1953 Trav-Co 374.*

8. Paragraph 3—Scope.—(1) Where the accused personates a public officer and by doing so commits extortion as the offence of personating a public officer and committing extortion by such personation do not together constitute any one offence under the Code. The personation and the extortion, though committed in the course of the same transaction, are distinct offences and neither of them is a constituent element in the other such a case will not fall under para. 3 of the section. *(1888) ILR 10 All 58.*

(2) Where the accused causes both hurt and grievous hurt to another, the case will not fall under para. 3 nor under Criminal P.C. Section 235(3). Hence, in such a case., the accused cannot be charged and convicted of both hurt and grievous hurt but he can only be convicted of grievous hurt. *AIR 1968 Guj 218.*

9. Aggravated form of same offence.—(1) Where the acts of the accused amount both to causing simple hurt (S. 323, P.C. and causing grievous hurt (S. 325, P.C.), he commits only one offence *Viz.*, grievous hurt, and the case does not come under para. 3 of the Section or under Cl. 3 of Section 235 of the Criminal P.C. so that in such a case a conviction both under S. 323 and Section 325, Penal Code, will not be legal under S. 235 of the Criminal P.C. *AIR 1968 Guj 218.*

(2) Where the accused purposely aims his gun and shoots at A and causes grievous hurt to him, the offence falls under S. 307 and he cannot be convicted both under S. 307 and S. 326, P.C. Since para. 3 of this section and S. 235 not being applicable to such a case, there can be only one conviction namely for attempt to commit murder. *AIR 1953 All 726 (728) : 1953 CriLJ 1677.*

(3) Robbery is only an aggravated form of theft and when a person commits robbery he cannot be convicted both for robbery and theft under Cl 3 of S. 235 of the Criminal P.C. but can only be convicted of robbery as robbery is not a different offence from theft within the meaning of para. 3 of this section of the corresponding sub-section (3) of S. 235 of the Criminal P.C. *AIR 1958 Mys 150.*

10. Offence committed with intent to commit another offence and commission of the intended offence—Similar cases.—(1) Where the accused after committing lurking house-trespass by night with intent to commit theft therein, steals property in the house the accused can be punished with a separate sentence both under S. 457 of the Penal Code (imprisonment which may extend to 5 years) and also under S. 380 (imprisonment for a term which may extend to 7 years) i.e. in the aggregate imprisonment which may extend to 12 years. The reason is that in such a case the sentence passes not subject to the limit imposed by this section *Viz.*, the sentence that can be imposed for the more heinous of the offences, namely in this case, imprisonment which may extend to 7 years under S. 380. *AIR 1962 SC 1116.*

(2) If one of the offences with which an accused has been charged is a constituent element of another offence with which he has also been charged he cannot be sentenced separately on a conviction on both these counts. The test is whether the one is a constituent of the other or whether they are by themselves separate offences. *Rewail Vs. State 8 DLR 569.*

11. Conspiracy to commit offence and offence committed in pursuance of conspiracy.—(1) Where there was a conspiracy to obtain money by cheating and different acts of cheating were done by different conspirators in pursuance of the conspiracy by presenting false bills, the different acts of the conspirators were not distinct offences but only separate offences which could all be lumped together in one charge. *AIR 1963 SC 1620.*

12. Criminal breach of trust and falsification of accounts.—(1) Where moneys are dishonestly misappropriated and false accounts or vouchers prepared for the purpose of screening the misappropriation, the offence of falsification becomes a part and parcel of the offence of misappropriation and the whole trunsaction must be considered practically as one offence consisting of criminal misappropriation. *(1904) 1 CriLJ 105.*

13. hurt and robbery—Similar cases.—(1) Causing grievous hurt combined with lurking house trespass or house-breaking constitutes the offence under S. 459 and thus, the offence is a compound offence directly falling within the purview of paragraph 3 of this section and hence the offender can only be punished for the offence under S. 459 and not also separately for the offence of causing grievous hurt under S. 325 of the Penal Code. *(1929) 30 CriLJ 838.*

(2) Wrongful confinement committed in the course of dacoity was not a constituent part of the dacoity and was a distinct offence. *AIR 1962 Manipur 7.*

14. Theft, robbery etc. and receipt or retention of stolen property.—(1) Section 411 of the P.C., which relates to dishonestly receiving or retaining any stolen property does not apply to the thief himself. Hence, the thief himself cannot be convicted of receiving or rationing stolen property. The same principle applies also to property which is the subject-matter of dacoity. Hence a thief, or a robber or a dacoit himself cannot be held guilty of receiving stolen property (obtained by such theft, robbery or dacoity.) *AIR 1950 Kutch 88.*

15. Receiving stolen property and assisting in concealing stolen property.—(1) Receiving stolen property and concealing or assisting in concealing such property are not distinct offences. *AIR 1928 Bom 145 (1).*

16. Theft and taking gratification for restoration of stolen property.—(1) Under S. 215 of the Penal Code, taking gratification for the restoration of the stolen property is an offence. But this section does not apply to the thief himself and hence where the thief himself takes such gratification, he is not liable to punishment under S. 215 in addition to the punishment for theft. He must be regarded as having simply committed the offence of theft. *AIR 1914 Upp Bur 43.*

17. Theft and mischief in regard to same property.—(1) Where a person steals a fowl, calf, sheep or other animal and then kills it, he cannot be separately punished for the offences of theft and mischief, and he must be treated as committing only one offence, viz., theft. *AIR 1925 Pat 34.*

18. Causing evidence of offence to disappear.—(1) 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. *AIR 1953 SC 131.*

(2) In a charge of murder under S. 302 a conviction under S. 201 will be justified under S. 237 of the Criminal P.C. 1898. *AIR 1925 PC 130.*

(3) Where the accused, by the same act, causes the disappearance of evidence of two crimes, he commits two offences, though both the offences fall under the same Section. *AIR 1965 SC 1413.*

19. Forgery and using as genuine forged document.—Where, a person who has forged a document uses it as genuine he is only liable to be punished for the forgery under S. 467 of the P.C. and not for using it as a genuine document under S. 471 P.C. *AIR 1927 Oudh 630.*

(2) The abetment of the forgery of a document and the abetment of using of a forged document as genuine which are separate transactions constitute distinct offences not falling within the scope of this section. *AIR 1924 Nag 162.*

20. Personation of public servant, and allied offences.—(1) Where an accused is convicted of an offence under S. 171 of the P.C., for wearing the grab of a public constable with the intention that it may be believed that he is a police constable and is also convicted under S. 170 of the Penal Code for personation such Police constable his offence will come under para. 3 of this section. *1888 Bom Un CriC p. 405.*

21. Laying false charge and giving false evidence. —(1) Making a false charge under P.C., S. 211 and giving false evidence under P.C., S. 193 are distinct offences and do not fall under this section inasmuch as the acts of the accused in such a case do not constitute, when combined, any specific offence different from that under S. 211 or S. 193. *(1887) ILR 10 Bom 254*

22. Illicit manufacture of liquor etc., and similar or allied offences.—(1) The manufacture of illicit liquor and the possession of illicit liquor so manufactured are not distinct offences and are covered by S. 71. *AIR 1951 Bom 244.*

23. Counterfeiting and similar or allied offences.—(1)The possession of implements and materials for counterfeiting coins is a constituent part of offence of counterfeiting coins and the two offence, therefore, do not constitute distinct offences. *AIR 1932 Cal 445.*

(2) The offence of counterfeiting trade marks will include the offence of possessing instruments and materials for counterfeiting trade-marks and the two offences will not be distinct offences but will fall under para. 3 of this section. *AIR 1931 Cal 445.*

24. Druken and disorderly behaviour.—(1) The fact that a person gets drunk and behaves in a disorderly manner under the influence of the drink, means that he was not capable of taking care of himself and hence, the offence of drinking and not being able to take care of oneself is not an offence

distinct from the offence of drunken and disorderly behaviour. The two offences together fall under the provisions of para. 3 of this section. *AIR 1956 Bom 279.*

25. Rioting and hurt.—(1) Where A, B ,C, D and E are members of an unlawful assembly and A in prosecution of the common object of the assembly commits hurt. A would be guilty of rioting and hurt, the hurt caused may itself be a form of force used which converted the unlawful assembly into rioting, or it may be caused in the course of rioting after the offence of rioting is complete, by the use of other force. In the latter case, it is clear that the hurt is not part of rioting within the meaning of S. 71 and separate sentences can be passed. *(1893) ILR 17 Bom 260.*

(2) Separate sentences for rioting and for hurt or grievous hurt, even where the common object of the unlawful assembly was to commit assault, are legal. *Amir Hossain Vs. Crown, 9 DLR 71.*

26. Paragraph 3—Illustrative cases—Miscellaneous.—(1) Where the same person acquires rationed food grains without permit and transports the same outside rationing area without permit he commits two offences, namely, under Clause 8 and Clause 23 of the Food Grains Rationing (Second) Order 1966 but he cannot be punished separately for each of the offences though he can be convicted of both the offences the reason being that the act of transporting food grains was not feasible without previously acquiring the same. He can, therefore, be punished only for the offence under cl, 23. *(1973) 75 BomLR 223 (224).*

27. Distinct offences.—(1) A with six others commits the offences of rioting, grievous hurt and assaulting a public servant endeavoring the discharge of his duty as such to suppress the riot. A commits distinct offences under Sections 147, 325 and 152 of the Penal Code. *AIR 1953 All 510.*

(2) Separate sentences for offence under Section 167(81), Sea Customs Act and one under S. 120B, Penal Code for conspiracy to commit this offence—Not illegal. *AIR 1970 SC 45.*

(3) Offence under Ss. 279 and 304B—Former is a distinct offence though a minor one in relation to the latter. *AIR 1971 Guj 72.*

(4) P.C., Ss, 379 and 352 (assault) are distinct offences. *AIR 1955 NOC (All) 5501.*

(5) Failure to hold general body meeting of shareholders of company and failure to lay before general body meeting company's balance sheet are distinct offences. *AIR 1953 Mad 558.*

(6) Rioting—Damage caused to crops of different owners—Distinct offences. *AIR 1929 Pat 710.*

(7) Affray (Section 156) and causing hurt (Section 323) are distinct offences. *AIR 1925 All 299.*

28. Sentence—General principles.—(1) Although S. 35 of the Criminal P.C. uses the word "may" and only provides that subject to the provisions of S. 71 of the Penal Code separate sentences may be passed in respect of the several offences of which the offender may be convicted at the same trial yet the general trend of decisions is to the effect that the word "may" in the context must be understood in the sense of must, and it is obligatory on the Court to pass a sentence for every offence of which the accused is convicted at a trial. *AIR 1958 All 575.*

(2) Where by the same act the accused was found to have caused the disappearance of the evidence of two different offences (under Ss. 330 and 348 of the Penal Code) held the case was not covered by S. 71 of the Penal Code or by S. 26 of the General Clauses Act, 1897 and the punishment for the two offences could not be limited under those sections, however normally no Court should award two separate punishments for the said act constituting two offences under S. 201. *AIR 1965 SC 1413.*

(3) Where a person is convicted of two offences at the same trial, the Court may pass a single sentence for both the offences but cannot pass a sentence for only one of the offences and refuse to any sentence for the other offence. *AIR 1950 All 610 (610).*

(4) Where th· Court passes a sentence under two specified Sections of the Code the order of the Court must be interpreted to mean that the Court intended to pass concurrent sentences, as this is a very common, though slovenly, form of order passed by Courts. *AIR 1924 All 492.*

(5) Prior to the Criminal P.C. 1898 there was no provisions in the Criminal P.C. enabling the convicted Court to order that the different terms of imprisonment to which the offender was sentenced should run concurrently and hence where such an order was passed it was held to be illegal. *(1886) ILR 10 Bom 254 (255).*

29. Effect of Section 71 P.C., on question of sentence.—(1) Under Para. 1 of S. 71, which relates to an offence consisting of parts, each of which parts constitutes an offence of the same kind it is expressly provided by the section that the offender shall not be punished with the punishment for more than one of such offences. *AIR 1953 All 510.*

(2) Separate sentences for the several offences would be barred under this section in cases coming under Paras. 2 and 3 thereof. *AIR 1965 SC 1413.*

(3) The section does not restrict the aggregate punishment to the lowest punishment that can be awarded by the Court for the different offences, but restricts it to the highest punishment that can be awarded by the Court for any of the offences. *AIR 1955 All 275.*

(4) Neither this section nor section 35 of the Criminal P.C. has any application where the conviction is only for one offence. *AIR 1955 All 275.*

30. Sentence—distinct offences.—(1) This means (a) that separate sentences can be passed for the several offences of which the accused is convicted at the same trial and the aggregate of such sentences need not be restricted to the maximum punishment that can be awarded for the most serious of the offences. *AIR 1928 Bom 145.*

(2) The Court has always to adjust the punishment to the needs of justice in each case, and to see that it is not unduly harsh and out of proportion to the guilt of the accused. *AIR 1965 SC 1413.*

31. Distinct offences forming part of same transaction.—(1) Where, though the offences charged are distinct and separate offences, the accused can be sentenced only for one of the offences where the offences are committed in the course of the same transaction. *ILR (1978) 2 Kant 1914.*

32. Separate conviction for offences coming under section.—(1) Where the accused is charged with the different offence at the same trial this section is no bar to the conviction of the offender of different offences at the same trial. *AIR 1962 SC 1116.*

33. Double punishment for offences under two different statutes or falling under two or more definitions of law.—Double punishment in a case which the same acts constitute offences under two different statutes or the same acts constitute offences falling within two or more separate definitions of law, the person so accused cannot be made to suffer separate sentences for each of the said offences, although he may be convicted for the same. Imposition of the separate sentences on each of these counts is a contravention of section 71 and amounts really to a double punishment. The imposition of two separate sentences, even though they may have been made to run concurrently for each of the offences, illegal. *Fazlul Haque Vs. State 11 DLR 316=1959 PLD (Dac) 931.*

34. Separate sentence—When not legal.—Separate sentences under S. 147 as well as under S. 426 not legal, though convicted under both sections is valid. *Mamataz Uddin Vs. Crown 8 DLR 95.*

35. Sentences on two counts legal.—If the two counts are by themselves separate offences, the accused can be convicted and sentenced separately on both those counts. *Rewail Vs. State 8 DLR 569.*

36. Convictions under sections 143, 447, 379 and 427—Separate sentences.—A and four others were convicted under Ss. 143, 447, 379 and 427 of the Penal Code and separate sentences under Ss. 143, 379 and 427 of the said Code could legally be imposed on each of them. *1 PLR (Dac) 10.*

37. Separate sentences under sections 379 and 411 improper.—The accused himself being the thief, the recovery of stolen property from his possession was in fact evidence of theft and cannot constitute a separate offence under section. 411, P.C. It was improper to convict and sentence the accused under both sections 379 and 441. *1950 PLD (Bal) 14.*

Section 72

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 offence for which the lowest punishment is provided if the same punishment is not provided for all.

Cases : Synopsis

1. Scope of section. *2. Applicability of section.*

1. Scope of section.—(1) Where, a charge in framed in the alternative, for an offence under the Penal Code and for an offence under any other law, this section will not apply. *(1911) 12 CriLJ 224.*

(2) Finding that A has committed the murder of B either by administering poison to him or by stabbing him or by drowning him, is not a finding that A is guilty of "one of several offences" and is not an alternative judgment for the purpose of this section. *(1904) 1 CriLJ 390.*

(3) A finding that A has committed the offence of perjury by giving false evidence in one or other two contradicting depositions is a judgment that he is guilty of "one of several offences" within the meaning of this section. *(1874) 13 BengLR 324 (336) (FB).*

(4) Where the Court finds that the accused is guilty of one of several heads of charges framed against him, but is in doubt as to which particular charge he is guilty of, the case is one of an alternative judgment for the purpose of this section. *(1867) 7 SuthWR (Cri) 13.*

2. Applicability of Section.—(1) This section like Ss. 236 and 372, Cri. P.C. applies only to cases where the actual facts are not in doubt and are established but there is a doubt as to the law applicable, namely as to which of several offences the accused is guilty on the facts established. If there is a doubt as to the facts themselves the Judge must acquit the accused. *AIR 1914 Lah 549.*

(2) Neither this section nor S. 236 Criminal P.C. applies to a case in which the doubt is only as to the existence of particular facts. *1887 Pun Re (Cri) No. 19(21) (DB).*

(3) Where the charge is framed in the alternative in respect of offences under Sections 302 and 201, in view of S. 72 it may be open to the Court to give a judgment that the accused is guilty of one of several offences specified in the judgment but it is doubtful of which of these offences he is guilty. Such a finding is in accordance with S. 354(2) of the Criminal P.C. and will have the consequence that under this section, the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all. *AIR 1940 Pat 289.*

Section 73

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 [19][shall not exceed one] year;

a time not exceeding three months if the term of imprisonment shall exceed one year.

Cases : Synopsis

1. *"Solitary confinement."*
2. *"Offence".*
3. *"For which court has power to sentence him to rigorous imprisonment."*
4. *"Not exceeding three months".*
5. *Scale of solitary confinement.*

1. "Solitary confinement."—Direction for solitary confinement is a salutary punishment for hardened offenders.

2. "Offence."—(1) The punishment of solitary confinement cannot be awarded for offences not under the Code but under a special or local Act, in the absence of a provision therein for imposing such punishment. *AIR 1927 All 472.*

3. "For which Court has power to sentence him to rigorous imprisonment."—(1) Solitary confinement can be awarded only as part of a substantive sentence of imprisonment. *AIR 1923 Rang 197.*

4. "Not exceeding three months."—(1) Assuming that separate sentences of solitary confinement for separate offences for which an accused is convicted at one trial may be legal even where the aggregate period of solitary confinement exceeds maximum of three months under this section, such a sentence is not considered expedient and advisable, and it is the practice to limit the aggregate sentence of solitary confinement to a period of three months, even where the accused is convicted of several offences and sentenced to separate terms of rigorous imprisonment at one trial. *AIR 1923 Lah 104.*

5. Scale of solitary confinement.—(1) Solitary confinement cannot be imposed for the whole of the term of a person's imprisonment merely because that term is a short one coming within the extreme limit of fourteen days prescribed in S. 74(1). *(1869) 3 BengLR (App) (Cri) 49(50) (DB).*

(2) Where the accused is sentenced to four months' rigorous imprisonment, with a fine and in default, to one month's further rigorous imprisonment, a sentence of one month's solitary confinement would be perfectly legal according to para. 2 of the section even though the accused could not lawfully under S. 74 be subjected to more than 28 days' solitary confinement, if the imprisonment actually continued only for four months. *1878 Pun Re (Cri) no. 7 p. 16(17) (DB).*

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19. Subs. *ibid*, s. 5 for "be less than a".

Section 74

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.

Cases

(1) It would be illegal to order a convict to be kept in solitary confinement for the whole term of imprisonment to which he is sentenced even though such term does not exceed the maximum limit of 14 days' duration prescribed by this section. *(1869) 3 BengLR (A Cri) 49.*

Section 75

75. Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.—[20][Whoever, having been convicted,—

(a) by a Court in [21][Bangladesh] 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,[22][*]

[22][* * * * * * * *]

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to [23][imprisonment] for life, or to imprisonment of either description for a term which may extend to ten years.]

Cases : Synopsis

1. *Scope and applicability of sentence.*
2. *Separate sentence for previous conviction.*
3. *Offence committed before previous conviction.*
4. *Punishable with imprisonment for a term of 3 years or upwards.*
5. *Imprisonment for default in giving security for good behaviour.*
6. *Question of punishment in cases of offenders with previous convictions.*
7. *Charge.*
8. *Evidence as to previous conviction.*
9. *Enhancement of sentence in revision.*
10. *Enhanced punishment—Meaning of.*
11. *Commitment to Court of Session.*
12. *Practice and Procedure.*

1. Scope and applicability of section.—Where the subsequent offence is not one under Chapter 12 or Chapter 17 of the Code a previous conviction under this Chapter is not relevant for assessing the punishment for the subsequent offence, through it could be taken into consideration. *1968 SCD 477.*

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20. Subs. by the Indian Penal Code Amendment Act, 1910 (Act III of 1910), for the original section.
21. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Schedule (w.e.f. 26th March, 1971).
22. The word "or" at the end of clause (a) and clause (b) were omitted, *ibid.*
23. Subs by Ord. No. XLI of 1985, for "transportation".

(2) This section applies only to offences under Chapter 12 or Chapter 17 of the Penal Code and a conviction under some section not falling under the above Chapters will not come under this section. A fortiori the section does not apply to offences under any other law. *AIR 1966 MadhPra 271.*

2. Separate sentence for previous conviction.—(1) The passing of a separate sentence under this section, in addition to the sentence for the offence of which the accused is subsequently convicted is not legal. *1936 Mad WN 752.*

3. Offence committed before previous conviction.—(1) The mere fact that the accused has committed an offence after he had committed the offence to which the previous conviction relates is not enough to attract the application of this section unless the offence to which the subsequent conviction relates was committed after the previous conviction. *AIR 1941 Sind 207.*

(2) The point of time by reference to which it is to be determined whether a conviction is or is not in law a previous conviction the moment when the charge is framed and not the moment when the subsequent conviction occurs—The provisions of Section 221(7) make this clear. *1879 Pun Re (Cri) No. 21, p. 60 (FBI).*

4. "Punishable with imprisonment for a term of 3 years or upwards."—(1) This section applies only to cases in which both the previous as well as the subsequent convictions relate to offences which not only fall under Chapter 12 or Chap. 17 of the Penal Code but are also punishable with imprisonment of either description for a period of 3 years or more. *AIR 1924 Pat 665.*

(2) This section is only concerned with the question as to whether the offence for which the accused was convicted on the previous occasion and is subsequently convicted is one which is punishable with imprisonment for 3 years. The fact that at the previous conviction the accused was actually sentenced for a period less than 3 years is immaterial where the offence itself was one punishable with imprisonment for 3 years and more. *1977 CriLJ 88 (90).*

(3) Where the accused has two previous convictions, only one of which came within the purview of Section 75 and the other did not it is only the former that can be taken into consideration under this section. *(1928) 29 CriLJ 772 (773) (Lah).*

5. Imprisonment for default in giving security for good behaviour.—(1) When an order for security for good behaviour for security and imprisonment in default are proved in the proper way, they can be taken into consideration, though not for enhancement of the sentence hereunder, but for the purpose of considering the adequacy of sentence that could be awarded to the accused. *AIR 1930 Sind 58.*

10. Question of punishment in cases of offenders with previous convictions.—(1) Question of punishment in cases of offenders with previous conviction has to be considered from the point of view of cases coming under this section. In such cases the Code itself provides that the offender with previous conviction is liable to enhanced punishment up to the limit mentioned in this section irrespective of the limit of punishment prescribed for the offence under the section under which such offence falls. *ILR (1966) 1 Ker 251 (253 to 255) (DB).*

(2) Question of punishment in cases of offender with previous convictions has to be considered from the point of view of cases which do not fall under the section. In such cases the fact that the offender has previous convictions may be taken into account while determining the sentence to be passed against him. But such sentence cannot exceed the limit prescribed by the section under which the offence falls. *AIR 1941 Sind 173.*

(3) Where the offender commits the subsequent offender shortly after coming out of jail after the previous conviction he may properly be dealt with under this section and be awarded the enhanced sentence under it. *AIR 1926 Lah 336.*

(4) In cases of robbery dacoity and other offences of a particularly heinous nature a severe punishment is called for in the case of old offenders. *AIR 1934 Oudh 122.*

(5) Even in cases not falling under this section, the fact that the accused is a person with previous convictions can be taken into consideration in passing sentence on him. *AIR 1928 Rang 200.*

7. Charge.—(1) In cases in which it is proposed to ask the Court to award enhanced punishment under this section on the ground of the accused being a person with previous convictions, the charge itself must include particulars of the previous conviction or convictions. If the above provisions are not complied with the Court will have no power to act under this section and award enhanced punishment under this section for a subsequent offence on the ground having previous conviction. *AIR 1944 Lah 25.*

(2) The charge of previous conviction is not to be framed before an accused is convicted and the accused cannot be asked to plead about the previous conviction unless and until the accused has been convicted in a subsequent case. *1983 RajasthanLR 615(617).*

(3) Facts about the previous conviction have to be mentioned in the charge only when it is intended to punish the accused by invoking S. 75. *1957 CriLJ 275.*

8. Evidence as to previous conviction.—(1) The previous conviction may be proved in addition to any other mode provided by any law for the time being in force. *AIR 1941 Sind 173.*

(2) In cases in which it is intended to award enhanced sentence under this section on the ground of previous convictions, the evidence as to the previous convictions can only be taken, where the accused does not admit it, after he has been convicted of the subsequent offence or in trials by jury after the jury has returned a verdict of guilty. *AIR 1944 Lah 25.*

(3) As the evidence about previous conviction can only be taken after the accused has been found guilty of the subsequent offence, or after the jury in Jury Trial has returned a verdict of guilty, the Court cannot in its examination of the accused under S. 342 of the Criminal P.C. ask the accused any question about his previous conviction. *AIR 1914 Lah 25.*

(4) Previous conviction when need not be proved. Where the accused pleads guilty to the charge of previous conviction, that amounts to admission of guilt under section 255A, Cr.P.C. and, therefore, the previous conviction need not be proved under section 511 Cr.P.C. *Qaim Din Vs. State 10 DLR (WP) 69.*

(5) Enhanced sentence for previous conviction is to be legally proved. Mere admission by the accused is not enough. *Alif Din Vs. State 10 DLR (WPC) 41.*

(6) Previous conviction taking place about a month after case under consideration. Application of section 75 held doubtful. *1949 PLD (Bal) 11.*

9. Enhancement of sentence in revision.—(1) It is the duty of the prosecution to place before the trial Court itself, under the provisions of the Criminal P.C., the relevant material relating to the previous conviction justifying an enhanced punishment under this section. If this is not done before the conclusion of the trial that is no ground for asking the Court of revision to enhance the sentence on the ground of previous conviction. *AIR 1929 All 267.*

10. Enhanced punishment—Meaning of.—(1) Enhanced sentence must be taken to mean not merely a sentence over and above the sentence specified for a particular offence but also a deterrent sentence even within the range of the maximum sentence that the Court is competent to award. *(1970) 2 MadLJ 668.*

11. Commitment to Court of Session.—(1) A committal to the Session is not obligatory in every case in which the accused may have had previous conviction. Such committal is necessary only on such cases in which the trying Magistrate, after applying his mind to the case, thinks that in view of all circumstances of the case and the previous convictions of the accused, action under S. 75 of the Penal Code is necessary and the offender must be awarded the enhanced sentence under that section which is beyond his powers as a Magistrate. *AIR 1957 Madh Pra 213.*

(2) In committing the accused to the Sessions u/s. 348, Criminal P.C. 1898, the Magistrate must not record a finding of guilty against the accused but not only frame a charge. *AIR 1914 Mad 140.*

12. Practice and procedure.—(1) The question of previous conviction assumes relevance only in connection with a sentence to be passed and the question of sentence will arise only after the accused is found guilty. In the case of substantive offence read with this section the non-compliance with the provisions of S. 310(a) of the Criminal P.C. 1898 would make the conviction illegal. *1971 All Cri R. 21 (25).*

CHAPTER IV
General Exceptions

Chapter introduction.—*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. Every such exception evidently ought to be appended to the rule which it is intended to modify. 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, indiots, persons under the influence of delirium, the exceptions in favour of facts done by the direction of the law, of acts done in the exercise of the right of self-defence, of acts done by the consent of the party harmed by them.*

It will be seen that the dealing with exceptions or criminal responsibility contains 32 sections, but the main principles which they illustrate are only seven : They are :

1. *Where there is an absence of criminal intent (Secs. 81—86 and 92—94).*
2. *Cases of accident (Sec. 79).*
3. *Mistake of fact (Secs. 76, 79).*
4. *Acts done by consent (Secs. 87—90).*
5. *Triviality (Sec. 95).*
6. *Act done in exercise of the right of private defence (Secs. 95—106).*
6. *Privileged acts (Secs. 77 and 78).*

All these cases, though variously classified and described, are really cases in which there is absence of criminal intent. There is only one case dealt with in Sec. 95, in which provision is made for exemption in spite of the presence of criminal intent, the act committed being so inconsiderable as to be negligible.

The general exceptions in Chapter IV of the Penal Code are applicable not only to offence under the Penal Code but also to offences under special or local laws.

Section 76

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.

Cases and Materials : Synopsis

1. *Scope.*
2. *General and special law—Offence under.*
3. *"Bound by law"*
4. *Act done under order of superior authority.*
5. *Arrest under warrant of Court.*
6. *Mistake of law.*
7. *Mistake of fact.*
8. *Good faith.*
9. *Inconsistent plea of accused.*

1. Scope.—(1) This section and section 79 are based upon the well known Latin Maxim, that "ignorance of law is no excuse." Every man is presumed to know the law. However, ignorance of fact is a valid defence in law. The essentials regarding mistake falling under sections 76 to 79 are that: (a) It must be bonafide; and (b) The mistake must be one of fact. Where an offence is committed by reason of a mistake of fact in good faith, the offender is entitled to the benefit of sections 76 to 79. In holding a person guilty of an offence the existence of mens rea in himself is essential. The test to ascertain the intention is subjective and not objective.

2. General and special law—Offence under.—(1) Under S. 40. paragraph 2, the word "offence" has been defined as including a thing made punishable by a special or a local law also for the purpose of Chapter IV of the Code (General Exceptions). Hence, this section applies also to offences under special and local laws. *AIR 1951 Orissa 284.*

3. "Bound by law".—(1) A person who is charged with the offence of defamation in respect of a statement made by him while deposing as a witness in a Court of law is not entitled to plead in defence the provisions of this Section, as he is not bound by law to make a defamatory statement as a witness. *AIR 1920 All 232.*

(3) Where the accused is charged with the offence of kidnapping a minor girl under S. 361 of the Penal Code and he pleads that he took away the girl at the request of her mother his defence will not avail him under this Section, as the mother's request was not legally binding on him, nor can he plead that he, in good faith, believed himself to be bound by law to take away the girl as requested by the mother. *AIR 1929 Pat 651.*

(3) Mere defiant attitude of a crowd—Not a justifiable ground for the police party to fire in self-defence—Liability thereunder. *Jahir Mia and Islam Howlader Vs. State 13 DLR 857.*

4. Act done under order of superior authority.—(1) The mere fact that the act which constitutes the offence has been done by the accused under the order of a superior authority will not save him from liability where the order of the superior authority is an obviously legal order. *AIR 1942 Sind 106.*

(2) The fact that an employee acted in obedience to the order of his superior can only be taken into consideration in mitigating the sentence to be passed on him and cannot be pleaded in defence to a charge under this section. *AIR 1940 Lah 210.*

(3) Where as a result of the mob violence the Deputy Commissioner ordered police force to open fire and in the firing resorted to in pursuance of that order some persons in the mob were killed, it was held, that the members of the police force who opened fire could seek protection of the order of the superior (order being justified) and plead that they acted in obedience to that order and therefore they could not be held guilty of the offence of murder with which they were charged. *AIR 1981 SC 1917.*

(4) Protection might be claimed by a police constable under section 76 for opening fire, under the orders of superior officer , and killing a man thereby, if he could reasonably thing that the officer had

good reasons for ordering to fire into a disorderly crowd but no such protection could be sought if there was no riot in progress nor was there any evidence to show that the police party was in danger from the crowd. *A Sattar Vs Crown 5 DLR 184.*

(5) Military man acting on illegal command of his officer—No benefit under section 76 can be given to him. *Sube Khan Vs. State 1959 PLD (WP) (Lah) 541.*

5. Arrest under warrant of Court.—(1) A Police officer arresting a wrong person under a warrant under bona fide mistake of fact is not liable and is protected by this Section. *AIR 1924 Bom 333.*

6. Mistake of law. —(1) It is a general principle that a mistake or ignorance of law, however bona fide, is no defence to a charge of a criminal offence. *AIR 1928 Nag 188.*

(2) A mistake of law ordinarily means a mistake as to the existence or otherwise of any law on the relevant subject as well as a mistake as to what the law is. *AIR 1951 Orissa 284.*

7. Mistake of fact.—(1) An error on a mixed question of law and fact is treated as a mistake of fact. *AIR 1951 Orissa 284.*

8. Good faith.—(1) Where the accused was not, as a matter of fact., bound by law to do the act impugned as an offence, he may still rely on this section where after taking due care and attention, he believed in a certain state of facts which would, if true, have made his act an obligatory one under the law. Thus, due care and attention on his part are essential before he can plead good faith under this section. *AIR 1943 Pat 64.*

9. Inconsistent plea of accused.—(1) Where the accused by his pleading has taken up a position inconsistent with the fact that his case is covered by an exception he cannot change his stand in the appeal and rely on the exception. *(1910) 11 CriLJ 374 (DB) (All).*

Section 77

77. Act of Judge when acting 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.

Cases and Materials : Synopsis

1. *Analogous law.*
2. *Scope, object and applicability of section.*
3. *"Judge".*
4. *"Acting judicially".*
5. *"In exercise of power given by law".*
6. *In exercise of power believed in good faith to be given by law.*
7. *Judge acting beyond jurisdiction—Applicability of section.*
8. *Defamatory remarks in judgment.*
9. *Illegal refusal of bail—Liability of Magistrate for wrongful confinement.*
10. *Unwarrantable delay in disposal of criminal cases.*

1. Analogous law.—(1) The protection afforded by the Judicial Officers' Protection Act is not absolute but qualified. *AIR 1969 Pat 194.*

(2) The protection afforded to judicial officers rests on public policy, but it does not follow that a malicious Judge can exercise his malice with impunity. His conduct can be investigated elsewhere and due punishment awarded. *(1905) 7 Bom LR 951 (DB).*

2. Scope, object and applicability of section.—(1) This section should be read with Judicial Officer's Protection Acts (XVIII of 1850). "No Judge, Magistrate, Justice of the Peace, Collector or

other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction provided that he, at the time in good faith, believed himself to have jurisdiction to do or order the act complained of. For the prosecution of Judge and Magistrate sanction under section *197 CrPC* is prerequisite.

(2) There is no distinction between cases in which a Magistrate delivers a written judgment and those in which he passes an oral order, so far as the applicability of this section is concerned. Where the words in a judgment are prima facie defamatory and not bearing directly on the matter in hand, the complaint against the Magistrate who delivers the judgment should be admitted even if this section was held to apply. *AIR 1934 Nag 123.*

(3) The object of the protection given under this section and under the Judicial Officers' Protection Act *(18 of 1850)* is to ensure the independence of the Judges to enable them to discharge their duties without any fear of the consequences. *(1874) 14 Reng LR 254.*

3. "Judge".—(1) The word "Judge" in this section should be taken in the sense of the definition given in S. 19. *(1910) 11 CriLJ 205.*

(2) The protection under the Judicial Officers' Protection Act *(18 of 1850)*, in regard to civil liability of a judicial officer for his official acts applies not only to a person who holds a regular judicial officer but also to one whose duty is to adjudicate upon the rights of persons, or to punish for misconduct of any given person, whatever from the proceedings may have taken. *(1874) 14 Beng LR 254.*

4. "Acting judicially".—(1) A Magistrate passing an order under S. 133 of the Criminal P.C. acts judicially. *(1870-71) 6 Mad HCR 423.*

(2) An order to bring a person before the Court to be there dealt with on a criminal charge is an act of a judicial nature. *(1837-41) 2 Moor Ind App 293.*

(3) A Magistrate's order under S. 517 the Criminal Procedure Code, 1898 ordering delivery of stolen property to a certain person is an order of a judicial nature covered by the Judicial Officers' Protection Act. *(18 of 1850). (1905) 9 CalWN 495.*

(4) A Magistrate's directing a general search in view of an enquiry under the Criminal P.C. is acting in the discharge of his judicial function within the meaning of the Judicial Officers' Protection Act *(18 of 1850). (1912) 13 CriLJ 693.*

(5) The issue of a search warrant by a competent Magistrate is a judicial act. *(1909) 13 CalWN 458 (FB).*

(6) Judicial acts not confined to acts done in the open Court but include also orders passed in Chambers. *(1813) 13 ER 15.*

(7) An act done by a Magistrate in his executive of ministerial capacity is not a judicial act. *(1875) 14 Beng LR 254.*

(8) Search conducted by a Magistrate in his executive capacity is not a judicial act. *(1909) 13 Cal WN 458 (FB).*

(9) A Magistrate conducting a search for discovery of arms cannot be held to be acting judicially within Act *(18 of 1850). (1908) 12 CalWN 973.*

5. "In exercise of power given by law.—(1) Where the act of the Judge which is alleged to be an offence was done by him while acting judicially and was within the limits of his legal authority, it is clear that the act is protected by this section and will not be an offence. *(1904) 1 CriLJ 146.*

6. In exercise of power believed in good faith to be given by law.—(1) The protection under this section extends not only to an act done by a Judge *(acting judicially)* in the exercise of a power which is given to him by any law, but also to an act done by him in the exercise of a power which he, in good faith, believes to be given to him by law. *AIR 1934 Nag 123.*

(2) In the context of S. 77 the expression "in good faith" implies that care and attention which the dictates of justice, prudence and common sense would demand in the particular case. *(1904) 1 CriLJ 146.*

(3) Judicial Officer cannot be held to have acted in good faith in the discharge of his duties, unless he acted reasonably, circumspectly and carefully. *(1875) ILR 1 Mad 89.*

(4) A mistake of law, though made in good faith, will not be a good defence under Ss. 76 and 79, but may be one under Ss. 77 and 78. The question in such cases will be (i) whether the Judge believed he was acting legally and (ii) whether such belief was under all the circumstances, reasonable or so irrational as to indicate malice or corruption. *(1905) 1 CriLJ 146.*

7. Judge acting beyond jurisdiction—Applicability of section.—(1)The protection under this section will also extend to cases in which a Judge acts beyond the limits of his jurisdiction. *AIR 1934 Nag 123.*

(2) Under the Judicial Officers' Protection Act, immunity is given to Judges acting without jurisdiction but in the bona fide belief of their having jurisdiction. *(1887-41) 2 Moor Ind App 293.*

8. Defamatory remarks in judgment.—(1) Where in the course of a judgment in a criminal case the Judge makes the remark that the accused is such a person that his very association with the case makes the matter so clear that no further proof of the guilt of the accused is required such a remark is not covered by any of the Exceptions to S. 499 (Defamation) ; nor can S. 77 be pleaded in defence to a prosecution against a Judge for defamation in respect of such remark. *AIR 1934 Nag 123.*

9. Illegal refusal of bail—Liability of Magistrate for wrongful confinement.—(1) Where a Magistrate illegally refuses bail to a person from an improper motive he will be liable for wrongful confinement as the improper motive proves the absence of good faith on the faith of the Magistrate. *4 QB 468.*

10. Unwarrantable delay in disposal of criminal cases.—(1) An unwarrantable delay by a Magistrate in the disposal of a criminal case and the consequent detention of an under-trial prisoner illegally beyond the period allowed by law will make the Magistrate liable to a suit for damages and he will not be entitled to the protection of the Judicial Officers' Protection Act *(18 of 1850). (1869) 11 Suth WR 19 (Cri).*

Section 78

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.

Cases

1. Scope.—(1) This section is a corollary to section 77. It affords protection to the officer acting under the authority of judgment or order of a Court.

(2) This section is supplementary to S. 77. S. 77 deals with immunity of Judges from criminal liability for acts done by them while acting judicially. This section deals with the immunity of ministerial officers or others executing the process of Court issued in pursuance of the judgments and orders of Court. *(1837-1841) 2 MIA 293.*

(3) This section will not apply where the officer executing the process of Court acts illegally or beyond his powers and is sought to be made liable for his conduct and there is no question of the judgment or order of the Court being beyond jurisdiction. *(1865) 3 Suth WR (Cri) 53.*

(4) A ministerial officer who purports to act in pursuance of an order of a Court and arrests the judgment-debtor while the latter is on his way to a Court to give evidence there as a witness, the arrest is entirely illegal and the ministerial officer concerned cannot claim the protection of this section. *(1908) 8 CriLJ 68.*

(5) A galore, who receives and detains a person into his custody under the warrant of a Magistrate is protected. *(1819) 171 ER 850.*

Section 79

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 act, 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.

Cases and Materials : Synopsis

1. ***Scope and applicability.***
2. ***Mistake of law.***
3. ***Mistake of fact.***
4. ***Claim of right.***
5. ***Good faith.***
6. ***Onus of proof.***
7. ***Illustrative cases—Examples of acts held justified by law.***
8. ***Illustrative cases—Examples of acts not justified by law.***
9. ***Husband and wife—Husband's authority over wife.***
10. ***Parent and child—Parent's authority to punish child.***
11. ***Bigamy—Charge of.***
12. ***Offences under special or local law.***

1. Scope and applicability.—(1) This section is analogous to section 76. While section 76 deals with cases in which a person acts in the belief that he is bound by law to act in a particular manner, section 79 deals with the cases in which a person acts in the belief that he is justified by law

to act. Mistake of law is no justification under this section. This section can be distinguished from section 132 CrPC. Protection given by this section is a protection against conviction, while protection under section. 132 CrPC is a protection against trial.

(2) The protection given under S. 197 of the Criminal P.C. is a protection against trial, the protection under this section is against conviction and the section can only be applied after the trial is over. Similar is the protection under Cls. (a), (b), (c), and (d) of S. 132, Criminal P.C.. *AIR 1933 Mad 268.*

(3) Section 79 deals with circumstances, which when proved make [the] acts complained of not an offence. The circumstances to be established to get the protection of S. 132, Criminal P.C. are not circumstances which make the acts complained of no offence but are circumstances which required the sanction of the Government in the taking of cognizance of a complaint with respect to the offences alleged to have been committed by the accused. *AIR 1964 SC 269.*

(4) Section 76 deals with cases in which the accused acts under compulsion of law while under this section he does an act which is justified by law. *1949 Bur. LR (SC) 112.*

(5) This section will have no application to cases where, in acting under the provisions of the Police Act or other similar law conferring powers on the Police. The Police Officer or other person on whom power is conferred goes beyond what is strictly justified by law *(unless he acts under a bona fide mistake of fact and believes in good faith that he is justified by law in doing what he does).* But, even in such cases, any provision, which limits the period of time within which the Police officer or other person can be prosecuted or the act done by him in excess of his powers will apply. *AIR 1964 SC 33.*

(6) Defamation—Allegation not true, but believed to be so published for public good—Section applicable. *1958 PLD 747 Lah.*

2. Mistake of law.—Where the offence does not require that the act constituting the offence must have been done by the accused with a particular knowledge, the fact that the accused was ignorant that there was a law which prohibited the doing of the act or made it an offence will be no defence. *AIR 1965 SC 722.*

(2) The principle that ignorance of law is no excuse is really based on the ground that it is everybody's business to know the law. It is not based on the principle that everyone is presumed to know the law, because such a presumption will be contrary to actual facts. *AIR 1928 Nag 188.*

(3) A mistake of law, even in good faith, will not be a defence under this section. *AIR 1965 All 161.*

(4) Where the law prescribes a particular mode in which the law must be published and that mode is not followed in the publication of the law, the plea of ignorance will prevail. But where 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. *1955 BLJR 460.*

(5) A misconception arising from a mistake in the construction of a document would be a good defence to a charge for perjury. *(1765) 170 ER 357.*

(6) A mistake of law includes both a mistake as to the existence of law on the relevant subject as well as a mistake as to the contents of such laws. *AIR 1951 Orissa 284.*

(7) Although a mistake of law as such, even though made in good faith, is no defence to a criminal charge, yet may be taken into consideration in mitigation of the punishment to be awarded to the accused on conviction. *AIR 1965 SC 722.*

(8) A mistake of law committed owing to Full Bench decision, which is subsequently reversed by the Supreme Court, will make the offence committed under such mistake only a technical offence. *AIR 1955 All 397.*

3. **Mistake of fact.**—(1) Under this section, although an act may not be justified by law yet if it is done under a mistake of fact, in the belief in good faith that it is justified by law, it will not be an offence. *AIR 1956 Madh Bha 241.*

(2) Where the accused under a bona fide mistake of fact shoots and kills a human being in a jungle mistaking him to be a wild animal, at night time and under circumstances under which the mistake must be held to be one made in good faith, the accused will not be liable. *AIR 1947 All 99.*

(3) Where the accused shoots and kills another person under the mistaken belief, in good faith, that such person has entered his house for the purpose of killing him, the accused's act would be justified under this section. *AIR 1947 Lah 249.*

(4) Where the accused in a moment of delusion considered that his own son, to whom he was attached was a tiger and he accordingly assaulted him with an act, it was held that the accused was protected under this section. *AIR 1952 Nag 282.*

(5) "Mistake of fact" and "good faith" must at least appear from the record of the case if the plea to that effect is not taken and established by the accused. *7 PLD 356 Lah.*

4. **Claim of right.**—(1) A bona fide claim of right which negatives the intention which is a constituent element of the offence as defined under the law must be distinguished from a claim of right which *(under this section)* proves that the accused believed, in good faith, that he was justified by law in doing the act which is charged as an offence. *AIR 1968 Ker 126.*

(2) A claim of right, in order to be a defence in such cases, must, however, be only due to a mistake of the accused's rights under the civil law and not due to a mistake as to Criminal law. *(1828) 172 ER 477.*

5. **Good faith.**—(1) Even in a case where, as a matter of fact, the accused was not justified by law in doing an act which is alleged to constitute offence, he will be protected under the section, if he believed, in good faith, under a mistake of fact, that he was justified by law in doing the thing which is alleged to constitute the offence. *(1903) 5 Bom HCR (Crown Cas) 17.*

(2) The question of good faith has to be determined in the light of all the surrounding circumstances of a case including the position of the accused, the general knowledge expected of him and so on. *AIR 1926 Lah 554.*

(3) The expression "good faith" in this section, as throughout the Code, has to be taken in the sense defined in S. 52 as involving as essential factors due care and attention. *AIR 1948 Pat 299.*

(4) Where the offence depends upon the existence of certain circumstances and the knowledge thereof by the accused, it must be seen whether in the circumstances of the case the accused was bound to enquire and acquaint himself with the facts. If he was so bound and had failed to make due enquiries before he acted, he would be guilty of want of good faith and would not be entitled to the protection of this section. *AIR 1951 Orissa 284.*

(5) A party who is charged with an offence cannot plead that he acted under a good motive where his act was not justified by law and where he does not prove that he had acted with due care and attention before coming to the conclusion that his act would be justified by law. *1949 Bur LR (LC) 112 (120).*

6. Onus of proof.—(1) The burden of proving that the accused believed, in good faith, under a mistake of fact that he was justified by law in doing something of speaking some words is on the accused and it is question of fact. *AIR 1964 SC 269.*

(2) "Mistake of fact" and "good faith" must at least appear from the record of case if plea to that effect not taken and established by the accused. *1955 PLD (Lah) 356.*

7. Illustrative cases—Examples of acts held justified by law.—(1) A person is entitled to cut off those portions of the tree growing on his neighbour's land which overhang his land. Hence, his act in cutting off such portions of the tree does not amount to an offence under S. 427 (Mischief). *1978 KerLT 441.*

(2) When the Police officer acts within the limits of his power, it is not necessary to consider whether he has acted corruptly or maliciously. *(1886) ILR 10 Bom 506.*

(3) Where certain violators mistakenly believing that certain Police officers were armed dacoits, who had in an attempt to escape arrest used a revolver, arrested those officers and kept them in confinement till the matter was brought to the notice of the proper authorities, it was held that they were justified by law under S. 43 of the Criminal Procedure Code and so were protected by S. 79. *AIR 1924 All 645.*

(4) Where the arrest and detention of a person are illegal, his rescue or escape from custody is not an offence and is a perfectly justifiable act. *(1900) ILR 27 Cal 366.*

(5) Where a Police Constable entertaining an honest suspicion that a person was carrying stolen cloth, stopped him and put questions to him to clear his suspicion, but finding that the answers were not satisfactory, detained the cloth and arrested him in the bona fide belief as to his legal right, through he was entirely mistaken as to the character of the person, it was held that the Constable was protected under this section. *(1888) ILR 12 Bom 377.*

(6) Restraining persons on bona fide suspicion that they were smuggling rice out of the State held justified. *1977 CriLJ 1725(1728) (Orissa).*

(7) Defamation allegation not true, but believed to be so—Published for public good—Section applicable. *Mushtaq Ahmed Gurmani Vs. Z.A. Suleri 1958 PLD (WP) (Lah) 747.*

8. Illustrative cases—Examples of acts not justified by law.—(1) The act of a mother-in-law in abducting her daughter-in-law and selling her to another with the intention that she might be compelled to marry against her will, is an offence under S. 366, and is not one which the mother-in-law is justified by law in doing and S. 79 can afford no protection to her. *AIR 1929 Lah 713.*

(2) Where a private person arresting another in the exercise of his authority given by the Criminal P.C., *(Power to arrest person committing nonbailable and cognizable offence or proclaimed offender)*, instead of taking the arrested person to a Police officer as required by the Code keeps the arrested person unnecessarily in his own custody without making any effort to handing over to the police, he is guilty of an offence under S. 313 and not protected by this section. *(1926) 27 CriLJ 1378 (Pat).*

(3) Obeying unlawful order of a superior does not exonerate a person who commits an offence as was sequence of such order—If the order is obviously illegal the officer carrying out the order would be justified in refusing to carry out such an order. 22 DLR 218.

9. Husband and wife—Husband's authority over wife.—(1) A husband is not justified by law to restrain or keep in confinement his wife in order to enforce his right to restitution of conjugal rights. *AIR 1918 Sind 69.*

(2) A husband is entitled to carry away by force his own wife from another person who has enticed her away. *(1909) 10 CriLJ 208 (Sind).*

10. Parent and child—Parent's authority to punish child.—(1) When a child is sent by his parent or guardian to a school the parent guardian must be held to have given an implied consent to the infliction of such reasonable punishment as may be necessary for the purpose of school discipline. The limits within which the power of the school master can be exercised extend to the infliction of punishment for offences committed out of school also in certain cases. *AIR 1926 Rang 107.*

(2) The Head Master of a School is justified in inflicting corporal punishment upon one of his pupils for an act done not only in School premises but also outside the premises while on the way to and from the school. *(1893) QB 465.*

11. Bigamy—Charge of.—(1) Where the second marriage is contracted under the mistaken belief that the first marriage has been put an end to by a valid divorce but the error is one of law and not of fact, there will be no defence to a charge of bigamy be reason of this section. *(1921) 2 KB 119.*

(2) The execution of an agreement of divorce would not operate as a valid divorce in spite of divorce being allowed by the custom of the caste of the parties, and hence, the second marriage contracted under the belief that the divorce was valid would amount to the offence of bigamy under this Code. *(1881-82) ILR 6 Bom 126.*

(3) Where a Mohammedan woman on the opinion of certain Muslim theologians that in certain circumstances the first marriage will be dissolved, contracts a second marriage she will be committing bigamy under S. 494 and her error being one of law, though in good faith, she will not get the protection of this section. *AIR 1923 Mad 171.*

12. Offences under special or local law.—(1) Under Section 40, Para. 2, this section will apply also to offences under any special or local law. *AIR 1943 Pesh 72.*

Section 80

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

Cases and Materials : Synopsis

1. *"Criminal intention or knowledge".*
2. *"Doing of a lawful act in a lawful manner by lawful means".*
3. *"Proper care and caution".*
4. *Shooting cases.*
5. *Driving accidents.*
6. *Accidents in games and sports.*
7. *Burden of proof.*

1. "Criminal intention or knowledge".—(1) To constitute an act a crime, it must, except in the case of certain statutory crimes, be accompanied by a criminal intent or mens rea. The intention may be express or implied. It is express if the person doing the act expects the resulting situation. It will be

implied or presumed if the resulting situation is the natural and probable consequence of his act for, every person is presumed to intend the natural and probable consequences of his act. *AIR 1965 Punj 291.*

2. "Doing of a lawful act in a lawful manner by lawful means.—(1) If an act is not lawful or is not done in a lawful manner by lawful means the section can have no application. *(1899) 12 CPLR (Cr) 11.*

(2) If a blow is aimed at an individual unlawfully and it strikes another and kills him, the accused cannot escape under S. 80. *AIR 1924 Oudh 228.*

(3) Where a mother being angry with one of her children took up a small piece of iron used as a poker and on his running to the door threw it after him, and hit another child who happened to be entering the room at the moment, in consequence of which it died, it was held that the woman was guilty of manslaughter although she had no intention of hitting the child with whom she was angry but only intended to frighten him as her act was an improper mode of correcting her child. *(1835) 173 ER 194.*

(4) Where the accused gives a kick to a trespasser for the purpose of turning him out and the trespasser dies as a consequence, the accused would be guilty of manslaughter, inasmuch as the kicking cannot be said to be a lawful act. *(1837) 168 ER 1132.*

(5) Where the accused was well within his right to voluntarily causing a fatal injury to "N" in the defence of his father who was lying injured, he was doing a lawful act in a lawful manner when he aimed the lathi blow at "N" but suddenly deceased came in between and received injury. The accused, therefore, was not guilty of any offence as S. 80 came to his aid.. *1983 AllLJ 1316.*

3. "Proper care and caution.—(1) The caution which the law requires is not the utmost that can be used, it is sufficient if it is reasonable, such as is usual in ordinary and similar cases, such as have been found by long experience in the ordinary course of things to answer the end that end being the safety of life and property. *(1867) 19 LT 89.*

4. Shooting cases.—(1) Where in an area in which the accused could not have reasonably anticipated the presence of human beings, he, with the intention of killing a wild animal fired at a moving object bona fide believed it to be a wild animal and caused the death of a human being, it was held that the act of causing death was purely an accident and the accused was protected under S. 80. *1978 CriLJ 1305 (Orissa).*

(2) Where two hunters agreed to take up different positions in a forest and lie in wait for game and one of them hearing a result and thinking that a porcupine was approaching shot and killed his companion it was held that no offence was committed under S. 304A as the killing was an accident within the meaning of this section. *(1901) 3 BomLR 679.*

(3) Death of deceased caused by pistol shot when appellant in play, drew the trigger after taking every possible precaution to ascertain that it was unloaded—It was done in reasonable and bona fide belief that there was no bullet in it—No offence was committed murder S. 304A as the lcilling was committed. *1974 AllLJ 602 (DB).*

5. Driving accidents.—(1) It is the duty of every man who drives any carriage to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur. *(1824) 171 ER 1213.*

(2) If a man drives a cart at an usually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, and if by reason of the fast driving or any other cause the person cannot get out of the way in time and is killed, the driver is in law guilty of manslaughter. *(1824) 171 ER 1213.*

6. Accidents in games and sports.—(1) Where a player in a game commits an unlawful act in the course of the play and thereby causes hurt or injury to another player, he cannot excape liability by a resort to this section, although the act was done in accordance with the rules and practice of the game. *(1898) 14 TLR 229(230)* (In such cases it is immaterial to consider whether the act was done in accordance with the rules and practice of the game.)

(2) Where there is no foul play or the doing of an unlawful act on the part of a player, an injury caused to another player in the course of the play is not an offence under this section. *AIR 1950 All 95.*

7. Burden of proof. —(1) The burden of proving an exception is, by virtue of S. 105 of the Evidence Act, 1872, on the accused and the court shall presume the asbsence of circumstances excepting the accused from liability. *AIR 1962 SC 605.*

(2) Even where the accused does not raise the plea of accident, he would be entitled to benefit of doubt if the prosecution fails to prove its case beyond reasonable doubt. *AIR 1949 Lah 85.*

(3) According to section 80, nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge., in doing of a lawful act in a lawful manner by lawful means and with proper care and caution. The buden of proving all the conditions mentioned above is on the accused who wishes to bring his case within the purview of section 80. *Jalal Din Vs. Crown 5 DLR (WPC) 58.*

Section 81

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 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.

Cases and Materials

1. Scope.—(1) Mens Rea is an essential ingredient in every offence except in three cases, namely: (a) Cases not criminal in any real sense but which in the public interest are prohibited under a penalty, that is Revenue Act; (b) Public nuisances; and (c) Cases criminal in from but which are really only a summary mode of a civil right. An intention to offend against the penal provisions of an Act constitute mens rea. The intention and act that must both concurs to constitute the crime. Every offence under the Code virtually imports the idea of criminal intent or mens rea.

(2) Where A places B in confinement, being under a genuine and resonable apprehension that to allow B to remain at large will endanger the person and property of others, the case falls under this section and A does not commit any offence. *AIR 1923 Mad 523.*

(3) When the accused dug up a road in view of the fact that water had accumulated in his field the section was held inapplicable as the act was done by the accused with the intention of causing damage to the road. *1967 All WR (HC) 572.*

(4) Where a sepoy was stationed to guard a burning house under orders not to allow any one to intrude and a chief constable, not in uniform, attempted to enter, and the sepoy, not knowing who he was, gave him in good faith, not unnecessarily, a violent kick in the course of the fracas, it was held that the sepoy was protected under this section as the kick was given in good faith for preventing much greater harm (spreading of fire and looting). *(1893) ILR 17 Bom 626.*

(5) The "person or property" to be protected may be the person or property of the accused himself or of others. *AIR 1923 Mad 523.*

(6) The word "harm" in this section means physical injury. *AIR 1966 SC 1773.*

(7) Where there is no apprehension of any danger to the person or property there is no basis for the application of this section. *(1965) 2 MysLJ 263.*

(8) Where in the context of the situation the act of firing by a police officer at the [students] was done without any criminal intention to cause harm and in good faith for the purpose of preventing further harm to the persons at the house of Municipal President and his property, the case would squarely come within the exception embodied in Section 81 of P.C. *1980 CriLR (Guj) 238.*

(9) Where a toddy-vendor placed juice of milk bush in his toddy pots, knowing that if it was taken by a human being it would cause injury his purpose being to detect some unknown thief who was in the habit of stealing toddy from such pots and toddy was drunk by some soliders who purchased it from the unknown vendor, it was held that Section 81 did not apply as there was clearly a criminal intent to cause harm to a person or persons. *(1866-69) 5 Bom HCR (Crown Cases) 59.*

(10) Criminal trial—Mens rea—When cannot be invoked—It has been argued that in the absence of any mens rea the petitioner could not be held guilty of the offence charged. The short answer to this ground would be that there is hardly any scope of any mens rea being invoked in a case like this. There is no charge or allegation that the petitioners (namely, the shipping agents) concealed or suppressed a fact in the import manifest that was submitted before the Customs Authority. The only thing they w. charged for was shortage of the imported oil after it was measured in accordance with the customs regulations. *Heig & Company Ltd. Vs. Assistant Collector of Custom, 31 DLR 306.*

Section 82

82. Act of a child under [1][nine] years of age.—Nothing is an offence which is done by a child under [1][nine] years of age.

Cases and Materials

1. Scope.—For relevant case law see under section 83.

2. Comments.—The immunity of children under nine years of age from criminal liability is not confined to offenders under the Code only but extends to offences under any special or local law by virtue of section 40. A child under nine years of age cannot distinguish right from wrong and if he is prosecuted the very fact that he is below nine years is a sufficient answer to prosecutions.

Section 83

83. Act of a child above [1][nine] and under twelve of immature understanding.—Nothing is an offence which is done by a child above [1][nine] 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.

Case and Materials : Synopsis

1. *Comments.*
2. *Scope and applicability of Sections 82 and 83.*
3. *Offences under special or local laws.*
4. *Maturity of understanding : (S. 83).*
5. *"Nature and consequence of his conduct".—(Section 83).*
6. *Maturity of understanding—Illustrative cases—(Sections 83).*
7. *Age of offender and quantum of punishment.*
8. *Vicarious liability of children.*
9. *Theft by child—Receipt of stolen property from child.*
10. *Rape.*
11. *Onus of proof and evidence.*
12. *Arrest of child offender.*

1. Comments.—This section may be read along with the Children Act of 1974 (Act No. XXXIX of 1974) where definition of "child" has been given in section 2 (f) of the Act and according to the provision of section 71 of the said Act the words "conviction" and "sentence" shall not be used in relation to children. If a child between nine and twelve years of age is to be convicted of an offence it must be shown or proved that he has sufficient maturity of understanding to judge the nature and consequences of the act done. Full criminal responsibility irrespective of maturity of understanding commences after a person attains the age of twelve years.

2. Scope and applicability of Sections 82 and 83.—(1) An act of child over 7 years of age and under 12 years should not be taken as an offence unless it can be shown that he has attained sufficient maturity of understanding the consequences of his conduct. *31 DLR 101.*

(2) Section 83 applies to a child-offender who is more than 9 years of age and less than 12 years. But the immunity conferred by that section is as absolute as that conferred by S. 82, provided it is

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1. Substituted by The Penal Code (Amendment) Act, 2004 (Act No XXIV of 2004), for "seven".

found by the Court that the child has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct. *AIR 1919 Bom 173.*

(3) Beyond the age of 12 years there is no immunity from criminal liability, even if the offender is a person of undeveloped understanding and not capable of understanding the nature and consequence of his act. *AIR 1959 All 698.*

(4) The proceeding against 4/5 years old child cannot be allowed to continue and hence it should be quashed. *Labu Mia Vs. State (Criminal) 53 DLR 218.*

3. Offences under special or local laws.—(1) By virtue of S. 40 para. 2, all the general exceptions in the Code, including those enacted in Ss. 82 and 83, apply to offences under special or local laws. *AIR 1967 Pat 312.*

4. Maturity of understanding (Section 83).—(1) Where the accused is below 12 years of age, (though above 9) the issue as to his having attained sufficient maturity of understanding to judge of the nature and consequences of his act is essential to determine the question of his guilt. But 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 the maturity of understanding he has attained will be relevant in the context of the sentence to be passed against him in the event of his conviction. *AIR 1977 SC 2236.*

(2) In determining the question whether a juvenile accused falling within the age limits mentioned in Section 83 had attained sufficient maturity of understanding to judge of the nature and consequence of his act, the maxim malitia supplet aetatem (= malice supplies the want of age) may be applied. *AIR 1950 Orissa 261.* Boy of eleven cutting to pieces another person). *(1864) 1 Suth WR (Cr) 43.* (Girl of 10 cutting throat of her sleeping husband).

5. "Nature and consequence of his conduct"—(Section 83).—(1) The "consequences of his conduct" mentioned in S. 83 are not the penal consequences to the offender, but the natural consequences which flow from the voluntary act, such as, for instance, that when fire is applied to an inflammable substance, it will burn; or that a heavy blow with an axe or sword will cause death or grievous hurt. *(1874) 22 SuthWR (Cr.) 27(28) (DB).*

(2) Where a child accused of an offence, who is over 11 and below 12 years of age disclosed an acute and intelligent mind he cannot be regarded as acting for any immaturity of understanding and he must be held to have intended the natural and probable consequences of his act and to have known that such consequence will follow. *AIR 1950 Orissa 261(263) (DB).*

6. Maturity of understanding—Illustrative cases—(Section 83).—(1) The accused was held to have attained "sufficient maturity of understanding". *AIR 1950 Orissa 261.*

(2) The accused was held not to have attained sufficient maturity of understanding for the purpose of this section. *(1977) 1 FAC 95(98) (All).*

7. Age of offender and quantum of punishment.—(1) Imprisonment for life is the minimum sentence for murder, irrespective of the age of the offender. *AIR 1930 Mad 972.* Beyond the provisions of Sections 82 and 83, the Penal Code does not say anything about there being any age limit for the capital sentence. *AIR 1929 Lah 64.*

8. Vicarious liability of children.—(1) A child who is entitled to the benefit of those sections cannot be made vicariously liable for the offences committed by the partners or servants of a firm such as a joint family firm of which he is a member. *AIR 1945 Lah 238.*

9. Theft by child—Receipt of stolen property from child.—(1) Where theft is committed by a child of 6 years and another person is charged under S. 411 of the Penal Code for having dishonestly received the property acquired by such theft, it has been doubted whether such person can be held guilty under S. 411. *(1885) I Weir 470.*

10. Rape.—(1) Under English law the presumption is that a boy under 14 is incapable of committing the offence of rape. This presumption does not apply to the subcontinent, where the question is one of fact in each case. *AIR 1915 All 134.*

(2) A boy physically incapable of committing the offence of rape, such as a boy of 12 years can yet be held to be guilty of an attempt to commit rape. *AIR 1918 Low Bur 96.*

11. Onus of proof and evidence.—(1) Where the accused is a child above nine years of age and under 12, it must be shown or proved that he has sufficient maturity of understanding to judge the nature and consequence of the act done before he can be held guilty. *(1862) 176 ER 234.*

(2) It is not necessary for the prosecution to lead positive evidence to show that an accused person below 12 years of age has attained sufficient maturity of understanding within the meaning of S. 83. It would be permissible for the Court to arrive at that finding on a consideration of all the circumstance of the case. *AIR 1949 Lah 51 = 1 PLD (Lah) 372.*

12. Arrest of child offender.—(1) As Section 82 exempts a child under 9 years of age from any criminal liability, it is illegal for a Police Officer to arrest a boy under 9 years of age for the offences of theft and hence, an obstruction offered to such arrest is not an offence under Section 255-B of the Penal Code. *AIR 1916 Mad 642.*

Section 84

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.

Cases and Materials : Synopsis

1. *Scope and applicability of section.*
2. *"By reason of unsoundness of mind".*
3. *"Incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law."*
4. *Legal insanity—General principles.*
5. *Unsoundness of mind as defence to criminal charge—General principles.*
6. *Type of insanity to which section applies.*
7. *Lucid intervals—Fits of insanity.*
8. *"Incapable of knowing that he is doing what is either wrong or contrary to law."*
9. *Hallucination.*
10. *Irresistible impulse.*
11. *Somnambulism*
12. *Partial mental derangement.*
13. *Aberrations of mind.*
14. *Eccentricity of behaviour.*
15. *Annoyance, fury, etc.*
16. *Mental agitation, depression, etc.*
17. *Incapacity to form particular intention required for offence.*
18. *Point of time at which accused should be shown to have been insane.*
19. *Insanity caused by excessive drinking, smoking Ganja, etc.*
20. *Mental retardation.*
21. *Deaf and dump accused.*
22. *Insanity—evidence of.*

23. *Evidence as to preparation, precautions taken to avoid detection, attempts to conceal offence, etc.*
24. *Insanity during trial—Evidentiary value of.*
25. *Motive for crime.*
26. *Unnaturalness of crime.*
27. *Hereditary insanity.*
28. *Handwriting—Relevancy of.*
29. *Medical evidence.*
30. *Evidence of relations.*
31. *Excessive or unusual violence as proof of insanity.*
32. *Burden of proof.*
33. *Plea of insanity.*
34. *Sentence.*
35. *Abnormality of mind of accused—Duty of court.*
36. *Procedure.*

1. Scope and applicability of section.—(1) Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crime, until the contrary is proved, and to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the accused was labouring under such a disease of the mind as not to know the nature and quality of the act he was doing, or if he did not know it, that he did not know if he was doing what was wrong. Insanity must be proved by the accused unless proved from the prosecution evidence. The burden of proving insanity is cast upon the accused by section 105 read with section 4 of the Evidence Act and under section 84 of the Penal Code, he must prove that at the time of committing the act or crime his cognitive faculties were impaired, that because of the insanity he was incapable of knowing the nature of the act or that what he was doing wrong or contrary to law. Legal insanity as contemplated by the section is different from medical insanity. There are four kinds of persons who may be said to be not of sound mind: (a) an idiot, (b) one made non compos by illness, (c) a lunatic, (d) one who is drunk. Drunknness is no excuse. If a deaf mute has sufficient intelligence to understand the character of his criminal act, he is liable to be punished. *AIR 1947 All 301.* Temporary insanity caused by one bout of drinking or ganja smoking which is of such an extremely temporary nature as to pass off a few hours after the consumption of the liquor or drug, is not even temporary unsoundness of mind, it is nothing more or less than intoxication and affords no excuse to the accused unless the intoxication be involuntary *(13 CrLJ 164).* Somnambulism is the unconscious state known as sleep walking and might constitute a good ground for exemption from criminal liability if it could be established that the act was done while in that state of mind *(AIR 1959 Mad 239).* If a deaf mute has sufficient intelligence to understand the character of his criminal act, he is liable to be punished *(18 CrLJ 143).*The crucial point of time at which the unsoundness of mind as defined in this section has to be established is when the act constituting the offence was committed *(PLD 1954 Pesh 1).* A murder committing during epileptic insanity is covered by this section and the accused cannot be punished *(PLD 1961 SC 998).*

(2) Whether the condemned prisoner was in such a state of mind as to be entitled to the benefit of section 84 of the Penal Code can only be established from circumstances which preceded, attended and followed the crime. *State Vs. Abdus Samad @ Samad Ali (Criminal) 54 DLR 590.*

(3) As an insane person who is incapable of knowing what he is doing or that he is doing what is wrong or contrary to law, cannot be said to have a guilty intention, he is exempted from punishment by virtue of this section. *AIR 1969 SC 15.*

(4) The essential elements of the section are as follows :

(a) The accused must at the time of the commission of the act be of unsound mind;

(b) The unsoundness of mind must be such as to make the accused, at the time when he is doing the act charged as an offence, incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. *1962 (2) CriLJ 135(140) (DB) (Ker).*

(5) It is not in every case of insanity that the accused will be exempt from criminal liability, but it is only in cases in which the accused, by reason of his unsoundness of mind, is incapable, at the time of his committing the offence of knowing what he is doing, or that he is doing something wrong. *AIR 1972 SC 2443.*

2. **"By reason of unsoundness of mind.**—(1) This section deals with incapacity due to unsoundness of mind. Incapacity caused by intoxication forms the subject-matter of Sections 85 and 86. *AIR 1948 Nag 20.*

(2) The Code does not define "unsoundness of mind". The Courts have treated this expression as equivalent to insanity. But the law limits the exemption form liability to those cases where the cognitive feature are completely impaired and not to cases where the insanity affects only the emotion and the will. *AIR 1969 Orissa 222.*

3. **"Incapable" of knowing the nature of the act or that he is doing what is either wrong or contrary to law.**—(1) This section does not confer immunity from criminal liability in every case of insanity of the accused. Coupled with the insanity of the accused, there must be the additional fact that at the time of the commission of the act, he is, in consequence of the insanity, incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. *1976 CriLJ 1416.*

4. **Legal insanity—General principles.**—(1) An unsoundness of mind which may amount to insanity from a medical point of view will not necessarily be legal insanity for the purpose of this section so as to confer immunity on the insane person from criminal liability for any act done by him while he is in that state of mind. *AIR 1977 SC 608.*

(2) Guiding principles to be kept in view when accused takes special plea of unsound mind—Legal insanity different from medical insanity. Principles laid down regarding special plea when raised by and accused under section 84 are as follows :

(i) If the accused raised any special plea or claims exoneration on the basis of any special or general exceptions he must prove his special plea or the existence of conditions entitling him to claim the exoneration.

(ii) The prosecution must prove its case beyond any reasonable doubt.

(iii) If after an examination of the entire evidence the Court is of opinion that there is a reasonable possibility that the defence put forward by the accused may be true or that the evidence casts a doubt on the existence or the requisite intention or *mens rea* which is necessary ingredient of a particular offence, this will react on the whole prosecution case entitling the accused to the benefit of doubt.

(iv) Legal insanity as contemplated in section 84 is different from medical insanity. If the cognitive faculty is not impaired and the accused knows that what he is doing is either wrong or contrary to law he is not insane. *State Vs. Balashri Das Sutradhar 13 DLR 89.*

(3) There is a difference between medical insanity and legal insanity. The mere fact that the accused was mentally deranged and behaved irrationally on some earlier occasions or even if his mental

illness is proved subsequently is not enough. *(Nikhil Chandra Halder Vs. The State) 22 BLD (HCD) 197.*

(4) There is distinction between legal insanity and medical insanity. In order to bring a person within exception of section 84 of the Penal Code the onus lies on the accused to show that at the time of the occurrence due to unsoundness of mind he was incapable of understanding the nature of the act or that what he was doing was unlawful or wrong. *Abu Nasir Bhaiya Vs. State 30 DLR 275.*

(5) The test for legal insanity as distinct form the medical insanity is that the nature and extent of unsoundness of mind must appear to be of such a stage where the cognitive faculty of the mind would be so materially affected as would make the offender incapable of knowing the nature of the act or that what he was doing was wrong or contrary to law. *Abu Nasir Bhaiya Vs. State 30 DLR 275.*

(6) When a plea of legal insanity is set up, it is for the court to consider whether at the time of commission of the offence the accused by reason of insanity was incapable of knowing the nature of the act. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such state of mind as to be entitled to the benefit of section 84 of the Penal Code can only be established from the circumstances which preceded, attended and followed the crime. *Abu Nasir Bhuiya Vs. State 30 DLR 275.*

(7) The mere fact that on earlier occasions a person had been subject to insane delusions or had subsequently from derangement of the mind had suffered from derangement of the mind or had subsequently at times behaved like a mentally deficient person is per se insufficient to bring his case within the exemption provided by S. 84. The incapacity must have existed at the time of his doing the act charged as an offence. *AIR 1971 SC 778.*

(8) The expression "incapable of knowing the nature of the act" will include the incapacity to know the consequences of the act. *1976 CriLJ 1416(1418) (DB).*

5. Unsoundness of mind as defence to criminal charge—General principles.—(1) Unsoundness of mind is not ipso facto a ground of defence under this section. Unless in consequence of such unsoundness the accused was incapable, at the time of his committing the alleged offence, of knowing either the nature of his act or that the act was either wrong or contrary to law. *AIR 1955 NUC (Madh-B) 2993.*

(2) The words "the nature of the act" refer to the bearing of the act in relation to other person (i.e., the victim) and the words "that he is doing what is either wrong or contrary to law", refer to the bearing of the act in relation to the doer himself, i.e., the accused's own responsibility for it. *AIR 1949 Nag 66.*

6. Type of insanity to which section applies.—(1) In order to avail of the benefit under this section, it must be shown that the cognitive faculties of the accused were, as a result of unsoundness of mind, so completely deranged as to render him incapable of knowing the nature of his act or that what he was doing was either morally wrong or contrary to law. *AIR 1964 SC 1563.*

(2) What may be termed legal insanity under the section is not identical with medical insanity. *AIR 1960 Guj 1.*

(3) A distinction must be made between insanity affecting the cognitive faculties of a man and that affecting the will or emotions. It is only the first type of insanity that is within the purview of the section. *AIR 1948 Nag 20.*

7. Lucid intervals—fits of insanity.—(1) The section will apply even in cases in which the accused is subject to periodic fits of insanity. But in such cases it must be proved that at the time when he committed the alleged offence, he was suffering from such a fit of insanity. *(1976) 42 CutLT 958.*

(2) Epileptic Psychosis—Whether such psychosis is sufficient to exonerate the accused—Whether the accused committed the murder during psychosis—An epileptic psychosis is generally characterised by short transitory fits of uncontrollable mania followed by complete recovery—There is general impairment of the mental faculty with loss of memory and self-control—They are deprived of all moral sensibility given to the lowest forms of vice and sexual excesses and are sometimes dangerous to themselves as well as to others—True epileptic insanity is that which is associated with epileptic fit. This may occur before and after the fits or may replace them and is known as pre-epileptic insanity, post epileptic insanity and masked or psychic insanity—There is a total absence of motive behind the murder—This is in keeping with a motiveless murder by an epileptic patient but the other conditions do not suggest that the killing was done during an epileptic fit in course of which the condemned prisoner lost control of her mental faculties temporarily—An epileptic maniac would attack his or her victim with maniacal fury repeatedly and indiscriminately—Her choice of weapon will also bear the imprint of a maniacal mind—The condemned prisoner has chosen a sharp-pointed weapon and killed the victim by single blow on the vital part of the body—There is lack of evidence that the killing as preceded or followed by maniacal shouts or that the condemned prisoner was in an uncontrollable fury at that time—No reasonable doubt has been created as to whether the condemned prisoner committed the murder with a guilty mind or not—The accused is not entitled to the benefit of doubt. *The State Vs. Mosammat Mallika Khatun 6 BLD (HCD) 352.*

8. "Incapable of knowing that he is doing what is either wrong or contrary to law.—(1) Where at the time of committing the alleged offence, he is aware that his act is wrong (whether from the moral or legal point of view) he will not be entitled to the benefit of this section. *1962 (2) CriLJ 135.*

(2) Where at the time of committing the alleged offence the accused in spite of his insanity, is capable of knowing that he is doing something which is morally or ethically wrong. He will not get the protection of this section even though he may not be aware and may not be capable of knowing that his act is contrary to the law. *AIR 1941 Cal 129.*

(3) The benefit of the section is available to an accused person where owing to insanity, he was not aware at time of the commission of the alleged offence, either that act was wrong or that it was contrary to law. *AIR 1949 Cal 182.*

(4) Murder or other offence committed under the influence of an insane delusion for redressing or revenging some supposed or imaginary grievance will be an offence punishable under the law where the accused was not incapable of knowing that his act was contrary to law. *AIR 1918 Pat 179.*

(5) A person suffering for an insane delusion and committing a murder or other offence under its influence is not the same as a person suffering from insanity within the meaning of this section as this section contemplates only an inherent and organic defect and not a mere delusion. *AIR 1959 All 534.*

(6) Facts not disclosing 'irresistible impulse' or 'insane delusion' pleaded in defence could not attract either S. 84 or Exception 2 to S. 300 Penal Code—The mild quarrel and the alleged threat by the deceased to kill the accused could not have rendered the latter 'insane' to the extent of killing deceased. *1982 CriLJ 1044.*

9. Hallucination.—(1) Where a person is not insane but is unbalanced and exited and is probably labouring under some kind of obsession or hallucination, this section cannot be invoked in his favour. *1963 MahLJ (Notes) 24 (DB).*

10. Irresistible impulse.—(1) Irresistible impulse is not insanity in the sense of this section and is no defence under it. *1978 KerLT 177.*

11. Somnambulism.—(1) Somnambulism, if proved, will constitute unsoundness of mind attracting the application of this section. *AIR 1959 Mad 239.*

12. Partial mental derangement.—(1) Mental derangement of partial type which at the time of the commission of the alleged offence, does not affect the capacity of the accused to understand the nature of his act or that he is doing what is morally or legally wrong is not within the section. *AIR 1932 All 233.*

13. Aberrations of mind.—(1) Mere aberrations of mind not amounting to insanity of the degree and type described in this section (i.e., incapacitating the accused at the time of committing the alleged offence from understanding what he is doing or that his act is morally or legally wrong) will not make this section applicable. *(1972) 2 MalayanLJ 178.*

14. Eccentricity of behaviour.—(1) Mere eccentricity of behaviour will not prove that the person concerned was insane in the sense of this section, i.e., so as not to be able to understand the nature of his act, or that his act is wrong or contrary to law. *1979 CriLJ 403 (Pr 9) (DB) (Bom).*

15. Annoyance, fury, etc.—(1) The mere fact that the accused had become highly excited and flew into a fury would not bring his case within this section and operate as a defence to a charge of murder committed by him in that state of mind. *AIR 1955 NUC (Assam) 2852 (DB)..*

16. Mental agitation, depression, etc.—(1) The mere fact the accused was in a state of acute mental agitation, depression or despondency or that he was for some time before the act extremely moody, taciturn and so on will not prove that he was suffering form such unsoundness of mind as to make him incapable of knowing what he was doing or that his act was morally or legally wrong. Hence, in such cases the accused will not be entitled to protection under this section merely on the proof of facts of the above nature. *AIR 1967 Ker 92.*

17. Incapacity to form particular intention required for offence.—(1) The unsoundness of mind of the accused may, in certain cases, make him incapable of understanding that his act is "dishonest" so as to constitute the offence of criminal breach of trust. In such a case, he will not be criminally liable at all. *AIR 1939 Mad 407.*

18. Point of time at which accused should be shown to have been insane.—(1) The crucial point of time under this Section at which the insanity of the accused in the sense of the section must have existed, is the time when the alleged offence was committed by the accused. *AIR 1964 SC 1563.*

(2) The insanity of the accused at the time of the trial is immaterial for the purpose of the substantive law under this Section relating to the criminality or otherwise of the accused. *1961 (1) CriLJ 811.*

19. Insanity caused by excessive drinking, smoking Ganja, etc.—(1) Where insanity is caused by excessive drinking (although voluntary) or by excessive smoking of Ganja, etc., such insanity will also amount to "unsoundness of mind" under this section. *AIR 1956 SC 488.*

(2) The mere loss of self control due to drinking, smoking Ganja, etc., will not be "insanity" in the sense of this section. *AIR 1955 Punj 13.*

20. Mental retardation.—(1) Mental retardation and extremely low intelligence falling into the category of "severe sub-normality" cannot per se be treated as equivalent to the kind of the unsoundness of mind contemplated by this section. *1976 RajLW 551.*

21. Deaf and dump accused.—(1) The mere fact that the accused is deaf and dump and cannot understand the proceedings in Court will be no ground for holding him to be exempt from criminal liability. *(1960) 2 KerLR 206(207) (DB).*

22. Insanity—Evidence of.—(1) Scientific evidence of insanity is not necessary to sustain a defence under this section and the plea of insanity may be proved from inference of facts and circumstances of each case. *AIR 1961 SC 998.*

(2) Lack of proof of motive and other attending circumstances in the commission of crime cannot be accepted as a valid plea to absolve the accused. *Abu Nasir Bhuiya Vs. State 30 DLR 275.*

(3) Evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time of or immediately after the crime, his mental condition, family history and so forth will be relevant on the question of the accused's insanity at the time of the offence. *AIR 1969 SC 15.*

(4) As the material point of time at which the insanity of the type mentioned in the section should be proved to have existed is the time when the alleged offence was committed, evidence that some time previous to the offence in the past the accused was behaving like an insane person is not in itself sufficient to prove his insanity at the time of the commission of the offence. *AIR 1965 Mad 283.*

(5) The previous history of the mental condition of the accused is 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. *AIR 1964 SC 1563.*

(6) Where from evidence on record it could be inferred that both prior to the incident as well as after the incident the accused was mad and that on the date of the incident also his conduct was such as to show that he was not in a mentally fit condition to understand the nature and consequence of the act which was committed by him, it was held, that the accused succeeded in discharging the burden cast on him under Section 84. *(1983) 2 Crimes 960(2) (DB) (Raj).*

(7) The previous and subsequent conduct of the accused is only relevant for the purpose of showing his state of mind at the time when he committed the offence, which is the only material point of time for the purpose of the section. *AIR 1928 Pat 363.*

(8) The Court while considering the defence of insanity would have to look at and consider the totality of the emerging situation and position in light of facts and circumstances relating to the mental condition of the accused preceding the occurrence, at about the time of the occurrence as also after the occurrence. *1983 CriLJ 1769.*

(9) A tendency to set fire to his own clothes and house is more than mere irrationality. It is prima facie proof of insanity. *AIR 1971 SC 778.*

(10) Homicidal tendency is only a sign of insanity. *AIR 1971 SC 778.*

(11) Prosecution witness declared hostile and cross-examined—Much reliance could not be placed on his statement that accused was insane. *1977 CriLJ 513(517) (Pat).*

23. Evidence as to preparation, precautions taken to avoid detection, attempt to conceal offence etc.—(1) The fact that after committing a murder the accused tried to run away to conceal himself or otherwise tried to avoid detection and punishment would be evidence to show that he was

conscious of his guilty and hence was capable of knowing, in spite of his insanity, if any, that his act was wrong or contrary to law. *1977 CriLJ 296.*

(2) The mere fact that the accused has not attempted to run away or to avoid detection of his crime will not prove that he was insane and could not understand that he had done something wrong or contrary to law. *1977 CriLJ (NOC) 21 (DB).*

(3) Facts that accused did not attempt to run away or to avoid detection of crime are relevant in determining the question of insanity under this section. *1977 CriLJ 1765 (1770) (DB) (Pat).*

(4) The conduct of the accused in giving information on leading to the recovery of some pieces of the dead body indicates that at the time of commission of the offence the accused was not insane. *1980 Raj CriLJ 113 (117, 118) (DB)*

24. Insanity during trial—Evidentiary value of.—(1) Insanity of accused during the trial or during the investigation or preliminary enquiry into the offence is by itself irrelevant for the purpose of this section. But such insanity may give rise to suspicion that the accused might have been insane at the time of the commission of the offence and might be a relevant fact in that context. *1961 (1) CriLJ 881 (Cal) (DB).*

25. Motive for crime. —(1) The absence of an adequate motive for a serious crime like murder is not by itself proof of insanity on the part of the accused in the sense of this Section. *1982 CriLJ 2158.*

(2) The absence of a strong motive or any motive at all may be taken along with other circumstances as a relevant factor in determining the question of sanity or insanity of the accused for the purpose of this Section. *AIR 1964 SC 1563.*

26. Unnaturalness of crime.—(1) Where the accused, a woman, committed the murder of her own child in broad daylight without in the least making any attempt at secrecy or to escape detection and remained perfectly calm and absolutely unaffected by the act, it may be inferred that she was insane at the time and did not understand what she was doing, so that her case would come under this Section. *AIR 1968 Delhi 177.*

27. Hereditary inanity.—(1) Before evidence regarding hereditary insanity in the family of the accused can be admitted the accused has to prove insanity by testimony of medical men. *(1844) 1 Cox Cr C 103.*

28. Handwriting—Relevancy of.—(1) The handwriting of a person is not a conclusion proof of his sanity or insanity. Hence, the mere fact that the handwriting of the accused is steady and not shaky does not prove his sanity or disprove his plea of insanity. *AIR 1946 Nag 321.*

29. Medical evidence.—(1) The opinion of an expert is relevant in determining the question of insanity under this section. *1886 Bom Un Cr C 229 (DB).*

30. Evidence of relations.—(1) Relations of the accused who are likely to remain in intimate contact with the accused are proper witness as to the state of mind of the accused. Their evidence cannot be disbelieved merely because they are relations of the accused. *AIR 1971 SC 778.*

31. Excessive or unusual violence as proof of insanity.—(1) The insanity of the accused, in the sense of this section, at the time of his committing the act constituting the alleged offence, cannot be established merely by the brutality or the ferociousness of the Act. *AIR 1964 SC 1563.*

32. Burden of proof.—(1) The law presumes every person to be sane and quite capable of distinguishing between right and wrong till the contrary is proved . *1978 KerLT 177.*

(2) Where the accused pleads insanity at the time of the commission of the offence the burden of proof of such plea is entirely on the accused. *AIR 1974 SC 216.*

(3) If the accused wants to bring his acts within any one or more of the general exceptions enumerated in Chapter IV of the Penal Code, it is for him to prove that his acts are so covered under any of those general exceptions. *Nikhil Chandra Halder Vs. State (Criminal) 54 DLR 148.*

(4) The legal test as laid down by section 84 requires that the accused at the time of committing the crime was in such a state of mind, so much so, that he was incapable of knowing the nature of consequence of his act or that what he was doing was either wrong or contrary to law. *Nikhil Chandra Halder Vs. State (Criminal) 54 DLR 148.*

(5) The duty is generally cast upon the prosecution to negative any special defence raised by the accused. *Nikhil Chandra Halder Vs. State (Criminal) 54 DLR 148.*

(6) The accused is required to prove his plea of insanity on the balance of probabilities on preponderance of evidence . *Nikhil Chandra Halder Vs. State (Criminal) 54 DLR 148.*

(7) The burden of proving the existence of circumstance bringing the case within the exception lies on the accused. *State Vs. Abdus Samad @ Samad Ali (Criminal) 54 DLR 590.*

33. Plea of insanity.—(1) Plea of insanity must be raised and established during trial. *1983 CriLJ 904.*

(2) An accused would be better advised when setting up the plea of unsoundness of mind to specify the type of mental disorder from which he was suffering at the time of offence. *AIR 1959 MadhPra 259.*

(3) Occasional looseness of head, unsoundness of mind or even partial derailment of brain will not entitle one to claim exemption from criminal liability under section 84 U.P.C. Uncontrollable impulse coexisting with the full possession of the reasoning powers is no defence in law. Existence of delusions which indicate a defect of sanity will not be deemed sufficient to attract section 84. It is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shown that the prisoner had no competent use of his understanding so as to know that he was doing a wrong thing in the particular act in question. *Shiraj Ali Vs. State, 24 DLR 69.*

(4) Plea of insanity—Circumstances to be considered—In all cases where the plea of insanity is set up it is most material to consider the circumstances which preceded, attended and followed the crime—To prove the plea of insanity it is not necessary to adduce scientific evidence—The question as to whether the accused was mad or insane at the time of the occurrence will have to be decided on the facts and circumstances of the case and the evidence on record. *Lalu alias Lal Miah Vs. The State, 11 BLD (HCD) 1.*

34. Sentence.—(1) A person committing multiple murder for no understandable reason at short intervals on irresistible impulse although may be regarded as subject to some kind of insanity, will not be entitled to lenient treatment in the matter of punishment merely on that ground where he was not incapable of understanding that what he was doing was wrong or contrary to law. *AIR 1952 Mad 289.*

(2) Where the accused, a woman, was not insane at the time when she murdered her own children out of desperate poverty, it was held that the capital sentence would not be appropriate and that a sentence of imprisonment for life would meet the ends of justice in this case. *(1960) 1 MadLJ 332 (DB).*

35. Abnormality of mind of accused—Duty of Court.—(1) An accused, who is insane, especially if he is undefended is naturally thrown on the mercy of the Court whose duty is then to offer him all reasonable assistance. The first thing is to place the prisoner suspected of insanity under medical observation promptly so that when the case comes up for trial, there would be reliable medical evidence of the state of the mind of the accused immediately after the incident. *AIR 1960 Ker 241.*

(2) When in a trial before the Court of Sessions it is made to appear to the Court that the accused facing the trial is of unsound mind and consequently incapable of making his defence, the court is required to enquire into the question of insanity, if necessary by taking evidence, to satisfy itself whether he is fit to make his defence. *State Vs. Abdus Samad @ Samad Ali (Criminal) 54 DLR 590.*

36. Procedure.—The procedure for trial of insane persons is laid down in Chapter XXXIV of the CrPC.

Section 85

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.

Cases and Materials

1. Comments.—Voluntary drunkenness is no excuse for the commission of a crime. But if a man is made drunk through fraud of others or through ignorance or through any other means causing intoxication against his will, he is excused.

2. For case law see under section 86.

Section 86

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.

Cases and Materials : Synopsis

1. *Scope and applicability of sections 85 and 86.*
2. *Intoxication and insanity.*
3. *Involuntary intoxication.*
4. *"Liable to be dealt with....."—Meaning.*
5. *Offence requiring particular knowledge.*
6. *Intention and knowledge—Distinction in mode of treatment under S. 86.*
7. *Relevancy of drunkenness where intention is a material factor in determining guilt of accused.*
8. *Presumption that person intends the natural consequence of his act—Applicability of this presumption to cases of voluntary intoxication.*

9. *Voluntary intoxication incapacitating accused from forming particular intention which is necessary to constitute offence.*
10. *Voluntary intoxication making accused excitable and violent.*
11. *Grave and sudden provocation.*
12. *Burden of proof.*
13. *Sentence.*
14. *Right of private defence against acts of person under intoxication.*
15. *Ganja and other narcotics—Effect.*

1. Scope and applicability of sections 85 and 86.—(1) This section attributes to a drunkenman the knowledge of a sober man when judging of his action, unless the thing which intoxicated him was administered to him without his knowledge or against him will.

(2) Sections 85 and 86 deal with cases in which an offence is committed by a person while he is in a stage of intoxication. Where there is no evidence of intoxication, these sections do not apply. *AIR 1970 Pat 303.*

(3) Under both the sections, the defence that the alleged criminal act was done under the influence of intoxication will not be available if the intoxication was "voluntary" i. e., was the result of the accused's own voluntary act. *(1978) 45 CutLT 533.*

2. Intoxication and insanity. —(1) Although intoxication may resemble insanity, it is not the same as insanity and offences committed by a person while in a state of intoxication should be dealt with under Ss. 85 and 86, and not under S. 84. *1920 AppCas 479.*

(2) Where the incapacity to understand the nature of the act or have the particular knowledge or to have the particular intent necessary to constitute the offence is the result of an inherent defect or infirmity of the mind, S. 86 will have no application, but the case will come only under S. 84. *AIR 1939 Mad 407.*

3. Involuntary intoxication.—(1) The expression "without his knowledge" means that he is ignorant of the fact that what is being administered to him is or contains or is mixed with an intoxication. *AIR 1960 MadhPra 242.*

4. "Liable to be dealt with..."—Meaning.—(1) The words in S. 86 "is liable to be dealt with...had not been intoxicated" only mean that in the case of voluntary intoxication the accused is to be presumed to have the same knowledge as if he had not been intoxicated. *1971 CriLJ 1497.*

5. Offence requiring particular knowledge.—(1) 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 to have known at the time of his act that it was likely to cause death and will be liable to punishment under Paragraph II of S. 304. *AIR 1955 Punj 13.*

6. Intention and knowledge—Distinction in mode of treatment under Sec. 86.—(1) Section 86 makes a distinction between offences requiring a particular knowledge and those requiring a particular intention. While under S. 86 presumption as to the accused at the time of commission of offence can be raised there is no provision in S. 86 for presuming intention. *AIR 1942 Pat 420.*

7. Relevancy of drunkenness where intention is a material factor in determining guilt of accused.—(1) Where the intention with which an act is done is a material factor in determining the criminality of the act, it is obvious that the questions whether the accused was intoxicated at the time of the alleged offence and what was the degree and nature of the intoxication are relevant issues for determination. *AIR 1938 Rang 219.*

8. Presumption that person intends the nature consequence of his act—Applicability of this presumption to cases of voluntary intoxication.—(1) The presumption under S. 86 that the voluntary drunkard who commits an offence has the same knowledge as he would have had if he had not been intoxicated gives rise to a further presumption that he intended the ordinary and natural consequence of his act. *(1912) 13 CriLJ 864 (FB) (UppBur).*

9. Voluntary intoxication incapacitating accused from forming particular intention which is necessary to constitute offence.—(1) Where the voluntary intoxication is not such as to make accused incapable of forming the intention requisite to constitute the offence he will be liable for the offence notwithstanding the intoxication. *AIR 1956 SC 488.*

10. Voluntary intoxication making accused excitable and violent.—(1) The presumption that in spite of intoxication the accused intended the natural consequence of his act, cannot be rebutted by merely showing that the intoxication had made him excitable and predisposed to violence. *AIR 1957 All 667.*

11. Grave and sudden provocation.—(1) In determining whether the accused acted under grave and sudden provocation for the purpose of Ss. 300 and 334. P.C., it may be considered whether the accused was in a state of intoxication at that time and how far such intoxication might have contributed to the fact of his having been provoked. *(1904) 1 CriLJ 473.*

12. Burden of proof.—(1) The onus of proof that by reason of intoxication the accused had become incapable of having the particular knowledge or forming the particular intention necessary to constitute the offence is on the accused. *1978 CutLR (Cri) 219.*

13. Sentence.—(1) Although voluntary intoxication is no defence to a criminal charge, such intoxication may be taken into consideration along with other facts and circumstances of the case in determining the appropriate sentence to be passed. *AIR 1953 Raj 40.*

14. Right of private defence against acts of person under intoxication.—(1) The right of private defence against attacks by persons in a state of intoxication is not in any way different from the right against attacks by other person. *AIR 1927 Rang 121.*

15. Ganja and other narcotics—Effect.—(1) Hemp acts on the brain causing usually excitement followed by narciotism. If the drug is taken in small doses the effect produced is slight, consisting merely of some pleasurable stimulation of the higher centres. This in no way affects the individual's appreciation of the consequences of his acts. In large doses hemp, like datura, causes a temporary insanity associated with hallucinations under the influence of which a person may be violent even to the extent to committing homicide. *AIR 1939 Cal 244.*

Section 87

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.

Cases and Materials : Synopsis

1. *Scope and applicability.*
2. *Illustrative cases.*
3. *Death of persons caused with his consent—Effect.*
4. *Consent.*
5. *"Harm"—Meaning.*
6. *Any person above eighteen years of age.*

1. Scope and applicability.—(1) The principle of this section is based on two simple propositions: (a) that every person is the best judge of his own interest, and (b) that no man will consent to what he thinks harmful to himself. Every man is free to inflict any suffering or damage he chooses on his own person and property and if instead of doing this himself, he consents to its being done by another, the doer commits no offence.

(2) In order that this section may apply the accused must have acted without any intention of causing death or causing any grievous hurt, or without knowing that his act was likely to cause death or grievous hurt. *(1878) 14 CoxCrC 226.*

2. Illustrative cases.—(1) Complainant who had made indecent assault on girl consenting to submit to decision of panchayat—Panchayat deciding to blacken complainant's face and beat hin with shoe—Persons doing so in accordance with decision are not liable. *AIR 1951 All 500.*

3. Death of person caused with his consent—Effect.—(1) Where the accused was not actuated by any intention of causing death or grievous injury, or with the knowledge that he is thereby likely to cause death or grievous injury, the mere fact that by some mishap death may have resulted, will not deprive the accused of his defence under this section where he has acted with the consent of the deceased. *AIR 1915 LowBur 101.*

4. Consent.—(1) Where the accused deceased were friends and engaged themselves in a friendly wrestling match during which the accused's friend received, by accident, an injury on his skull and no foul play was attributed to the accused, the accused will not be liable for any offence. *AIR 1950 All 95.*

5. "Harm"—Meaning.—(1) A person who attends a cabaret dance in a hotel after buying a ticket will be precluded from complaining that the cabaret show and acting therein amounted to an offence under S. 294 (obscenity), even assuming that the causing of such annoyance would amount to the causing of harm within the meaning of S. 87. *(1975) 77 BomLR 218.*

6. Any person above eighteen years of age.—(1) This section only applies to cases where the harm is caused to a person above the age of eighteen years with his consent. The consent of a person below that age will not exempt the accused from liability. *(1899) 12 CPLR (Cr) 11.*

Section 88

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 the 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.

Cases and Materials : Synopsis

1. Comments.—(1) Where a person is suffering from painful disease which cannot be cured except by surgical operation the sufferer has the choice whether he will continue to suffer or to a chance of cure by an operation and if he chooses to get it cured by an operation and gives his consent but unfortunately, death results, the surgeon has committed no offence.

2. For case law see under section 89.

Section 89

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.

Cases and Materials : Synopsis

1. Scope
2. "Harm"—Meaning of.
3. "Benefit"
4. "Nothing which is not intended to cause death" (Section 88).
5. "Consent".
6. "Good Faith".
7. Corporal punishment of school boys.
8. Burden of proof.

1. Scope.—(1) This section empowers the guardian of an infant under 12 years or an insane to consent to the infliction of harm to the infant or the insane person, provided it is done in good faith and is done for his benefit.

2. "Harm"—Meaning of.—(1) The expression "harm" in S. 88 and S. 89 means only physical injury .AIR *1966 SC 1773.*

3. "Benefit"—(1) Harm done for the benefit of the person injured and with his consent will not make the person causing the harm criminally liable. *AIR 1951 All 500(501).*

(2) Where the husband desires to have possession of his wife who has attained the age of puberty, presumably for the purpose of having sexual connection with her the act is not one for her benefit and is one which it is the policy of the law to prevent. It cannot, therefore, be said that he is entitled to his minor wife away whether she desires it or not. *AIR 1935 All 916.*

4. "Nothing which is intended to cause death" (Section 88).—(1) The illustrations to this section and to Ss. 89 and 92 indicate that the Code uses the word "intention" in the sense that a thing is voluntarily done if it is done deliberately or purposely or in other words, is a willed, though not necessarily a desired, result or a result which is the purpose of the deed. *AIR 1970 Ker 98.*

5. "Consent".—(1) Under S. 88 the consent of the person harmed is essential to make the act of causing harm not an offence. Thus, where Devil-dancers attempted to cure a woman with the consent of her husband but without her consent by branding her and death resulted from the injuries caused by the treatment, it was held that the Devli-dangers were guilty under Section 326, Penal Code, notwithstanding the consent of the husband. *AIR 1935 All 282.*

6. "Good faith".—(1) In order to get the benefit of S. 86 or of S. 89 it must be proved that the act charged as an offence was done by the accused with "due care and attention". *AIR 1923 All 546.*

(2) Unnecessary cruelty in the treatment of a mad person will negative "good faith" and the accused who has practised such unnecessary cruelty will be criminally liable for his acts. *AIR 1923 All 546.*

(3) Where death is caused by the culpable negligence of the physician in administering a dangerous drug, he will be liable criminally for his negligence. *(1876) 10 Cox Cr C 486*

(4) Where a person undertaking cure of a disease is guilty of gross negligence in attending to his patient after he has applied a remedy or of gross rashness in the application of it and death ensures in consequence, he will be criminally liable for the death. *(1831) 172 ER 767.*

(5) If a person takes upon himself to administer a dangerous medicine, or to perform a surgical operation it is his duty to administer the medicine to perform the operation with proper care. *(1869) 12 CoxCrC 534.*

(6) Mere error of judgment or mistake which cannot be said to have been caused by any want of care or attention on the part of the physician or surgeon will not be sufficient to make him guilty, even if death has occurred. *(1969) 12 CoxCrC 534.*

(7) Due care and attention, which are essential for good faith within the meaning of the Penal Code and this section, imply that the physician or surgeon, who undertakes to administer medicine or to perform a surgical operation, possesses a reasonably sufficient knowledge and experience of his business. *AIR 1963 MadhPra 102.*

(8) An unsuccessful operation for cataract done in a recognised method of treatment will not make the surgeon criminally liable, although it may have ended in the loss of sight of the patient, where

there has been no negligence or want of care or the usual skill on the part of the surgeon. *(1908) 7 CriLJ 306 (All).*

(9) Where a person not having a reasonable amount of experience or knowledge takes upon himself the responsibility of prescribing a dangerous drug as a medicine thus causing injury or death to the patient, the person prescribing the medicine will be criminally liable. *(1864) 176 ER 598.*

(10) The reasonable diligence and care, which good faith connotes, in the context of this section, is not merely care and caution at the moment when the act is done but also the learning and the experience the doer of the act should have acquired before he offers to treat another person medically or surgically. *AIR 1963 MadhPra 102.*

7. Corporal punishment of school boys.—(1) Corporal punishment inflicted on a school boy a by teacher in good faith, in the interest of school discipline and without exceeding reasonable limits, will be covered by these sections and the schoolmaster will not be criminally liable for his act in inflicting the punishment. *AIR 1965 Cal 32.*

8. Burden of proof.—(1) Under S. 105 of the Evidence Act, 1872, the burden of proof is on the accused to prove his defence under this section. In discharging his burden accused should prove that the patient on whom he operated knows the risk he was running in consenting to the operation by a Kabiraj uneducated in the practice of surgery. *(1887) ILR 14 Cal 566.*

Section 90

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.

Cases and Materials : Synopsis

1. *Scope and applicability of section.*
2. *"Consent"—What constitutes.*
3. *Act done without consent and act done against will—Distinction.*
4. *Consent and submission—Distinction.*
5. *Consent and non-resistance—Distinction.*
6. *Consent given under misconception of facts.*
7. *Consent by idiot.*
8. *Consent of child under 12 years of age.*
9. *Evidence of consent.*
10. *Killing person at his request.*

1. Scope and applicability of section.—(1) Consent obtained by a false representation which leads to a misconception of facts will not be a valid consent. Mere submission by one who do not know the nature of the act done, cannot give consent. The consent of an insane woman is no consent in the eye of law and a person who subjects such a woman to sexual intercourse even though she apparently consents to it cannot escape liability for an offence under section 376 of the Penal Code.

Consent is an act of reason accompanied with deliberation, the mind weighing as in a balance, the good and evil on each side.

(2) The meaning of "consent" for the purpose of Ss . 378, 415 and 375 and similar other Sections in which the word "consent" may occur is to be determined in accordance with this section, so that the definition in this section is applicable to the whole of the Code and not merely to Ss. 87 to 89.. *1975 MahLJ 660 (DB).*

2. "Consent"—What constitutes.—(1) "Consent" under this section may be express or implied. *(1891) ILR 18 Cal 484.*

(2) Mere submission is not consent. *(1872) 12 CoxCrC 180.*

(3) Consenting to an offence is different from allowing the offence to be committed with a view to have the offender 'trapped and punished'. *(1801) 168 ER 555.*

(4) "Consent" under this section is the act of a man in his character of a rational and intelligent being, not in that of an animal. It must proceed from the will, not when such will is acting without the control of reason, as in idiocy or drunkenness, but the will sufficiently enlightened by the intellect to make such consent the act of a rational being. *(1884) 15 Cox CrC 579.*

(5) The consent of the husband of a woman to the infliction of injury on her for the exorcism of the Devil supposed to dwell in her will not legalise the harm inflicted. *AIR 1935 All 282(283) = 36 CriLJ 346.*

(6) Mere consent to a surgical operation without realising the harm or risk of harm which the operation involved is no "consent" within the meaning of the section. *AIR 1915 Bom 101.*

3. Act done without consent and act done against will—distinction.—(1) An act done without the consent of a person is not necessarily one done against his will. But the converse is not true and an act done against the will of a person must necessarily be regarded as done without his consent. *AIR 1933 Rang 98.*

4. Consent and submission—Distinction.—(1) Mere submission does not amount to consent. *(1841) 178 ER 1026.*

5. Consent and non-resistance—Distinction.—(1) Mere non-resistance is not consent. *(1877) 13 CoxCrC 388.*

6. Consent given under misconception of facts.—(1) Where consent is given on a misrepretation of facts, it must be regarded as a consent not given under misconception of facts and will not be sufficient to afford a defence under the Penal Code in a criminal prosecution for the act professed to be done with such consent. *AIR 1963 Bom 74.*

(2) A consent obtained by fraud stands on the same footing as a consent given under a misconception of facts and will be of no avail for the purpose of defence under the Penal Code. *AIR 1914 Mad 49.*

(3) 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 P.C. cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other. *(1983) 2 Cal HN 290.*

7. Consent by idiot.—(1) Consent by an idiot is no "consent" within the meaning of this section. *(1846) 2 CoxCrC 115.*

8. Consent of under child under 12 years of age.—(1) The mere fact that a girl under 12 is kidnapped does not ipso facto prove that she is kidnapped for the purpose of being compelled to marry a person against her will within the meaning of S. 366. *AIR 1938 Rang 96.*

9. Evidence of consent.—(1) Consent may be proved by circumstantial evidence. *(1891) ILR 18 Cal 484 (FB).*

(2) There is no deference between civil and criminal cases as to the degree of proof necessary to establish consent and even in a criminal case evidence, that will be sufficient to prove consent in a civil case, will be sufficient to prove consent. *(1866) 6 SuthWR (Cr) 57.*

(3) Whether consent was given under a misconception of facts is a question of fact to be decided on the evidence in each case. *(1897-1901) 1 UPR 298.*

10. Killing person at his own request.—(1) Where the accused—a snake chamber—represented that owing to his powers of charming even the bite of a poisonous snake would do no harm and a person was induced by such representation to allow himself to be bitten by a poisonous snake and died in consequence, the snake-charmer will be guilty of murder, not only of culpable homicide not amounting to murder, where the knew that the person who allowed himself to be bitten by snake did so in consequence of the misconception of fact for which the snake charmer was responsible. *(1869) Beng LR (A Cr) 25.*

(2) The accused, a student, became extremely depressed owing to his repeated failure in his examination and wanted to put an end to his own life. His wife, who was equally upset, requested him that he should first kill her and then kill himself. In accordance with this fact, the husband killed his wife, but was arrested by the police before he could kill himself. It was held that the wife's consent was not given under any misconception of facts and the husband was, therefore, only guilty of culpable homicide not amounting to murder under S. 300 Exception 5. *AIR 1958 Pat 190.*

Section 91

91. Exclusion of acts which are offences independently of harm caused.— The exceptions in sections 87, 88 and 89 do not extend to acts 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.

Cases

1. Scope.—(1) The general principle is that consent of the victim cannot legalise crime, except when it is otherwise provided by statute or the absence of consent for the act in question is a constituent element of the offence as under S. 375 (rape) or S. 378 (theft). *(1934) 103 LJKB 683.*

(2) The word "harm" in this section means physical injury. *AIR 1966 SC 1773.*

Section 92

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 housetop, 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.

Cases

1. Scope.—(1) Where a person submits to physical harm being inflicted on him in consideration of a monetary benefit, it cannot be said that the harm inflicted for his benefit and the persons who inflict the harm will, therefore, not be protected under this section. *(1866) 5 SuthWR (Cr) (77) (DB).*

(2) Where a woman is branded in spite of her objection for the alleged purpose of exercising a devil from her it cannot be said that, as she was possessed of a devil, she was incapable of giving or withholding her consent within the meaning of this section. *AIR 1935 All 282.*

(3) Both under this section and under Sections 88 and 89, the accused, in order to get the benefit of the sections, must show that he acted in good faith. *AIR 1923 All 543.*

Section 93

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.

Cases

1. Scope.—(1) The word 'harm' in Section 93 means an injurious mental reaction. *AIR 1966 SC 1773.*

Section 94

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 this exception.

Cases and Materials : Synopsis

1. *Scope and applicability of section.*
2. *Offences to which section applies.*
3. *Offences against State.*
4. *Abetment.*
5. *Act must be done under threat of instant death.*
6. *Explanation 2.*
7. *Evidence.*
8. *Burden of proof.*
9. *Sentence.*

1. Scope and applicability of section. —(1) This section only applies to cases where a person sets up defence to a criminal prosecution against him and not to cases in which merely departmental action is being taken against him, as under Section 60 of the Motor Vehicles Act, 1939, for cancellation or suspension of permit for plying transport buses. *(1957) 2 AndhWR 296.*

(2) Order of superior authority was not sufficient to justify irregular payment. *45 DLR 243.*

(3) In order to be an accomplice, a person must have mens rea. A person does not become an accomplice by assisting another person to commit an offence unless voluntarily and knowingly giving that assistance and knowing that the offence is being or likely to be committed. This is so even if the offence is one of strict liability. When he did not act voluntarily and acted under threat of instant death he could not be said to have had any of the intentions necessary to make him liable for the offence of murder and therefore his conduct in holding the legs of the deceased would not amount to the commission of the offence of murder. Under section 94 of the Penal Code a plea of compulsion by threats which reasonably cause the apprehension of instant death is a good defence by a person charged with any offence except murder and offences against the State punishable with death. The word 'murder' in section 94 of the Penal Code cannot be held to include abetment of murder. *26 DLR 419.*

2. Offences to which section applies.—(1) Membership of an unlawful assembly is an offence under the Penal Code S. 142. But, where the presence of the accused in an unlawful assembly is due to a threat of instant death he will not be liable for the offence of being a member of the unlawful assembly. *AIR 1957 All 184.*

3. Offences against State.—(1) This Section is not applicable to offences against the State punishable with death. There are several offences against the State which are not punishable with death—e.g., offences under Ss. 121-A, 122, 123, 124, 124-A. In the case of these offences this section will apply and if they are committed under that of instant death the offender will not be liable for punishment. But offences against the State under S. 121 are punishable with death. That section relates to the waging of war against the Government, or an attempt to wage such war or the abetment of such war. In all these cases the offence is punishable with death, and the exemption from punishment under S. 94 will have no application. *AIR 1931 Rang 235.*

4. Abetment.—(1) Actual participation in the commission of a crime must be distinguished from abetment thereof. Hence, where the act of the accused amounts to participation in commission of murder, he will not be entitled to protection under this section even though such participation may be the result of compulsion by a threat of instant death. *AIR 1964 Orissa 144.*

(2) Although abetment of murder is treated on a different footing from murder and is regarded as within the purview of protection of this section when such abetment takes place under threat of compulsion of insane death the same principle is not applicable to the offence of waging war against the Government under S. 121. The reason is that under that section, not only the waging of war against the Government, but also the abetment of the waging of such war and the attempt to wage such war are punishable with death and under this section all offences against the State, which are punishable with death, are excluded from the purview of the protection conferred by it in regard to offences committed under threat of instant death. *AIR 1946 Nag 173.*

(3) *Mens rea* is necessary to constitute an offence in the case of an accomplice. Anything done under threat of instant death is not an offence. *State Vs. Makbul Hossain 26 DLR 419.*

5. Act must be done under threat of instant death.—(1) Where the accused has voluntarily placed himself in the power of another person, who compels him by threat of death to commit an offence, the accused will not be entitled to the benefit of this section. *AIR 1933 Rang 204.*

(2) Where one policeman abets another in the torturing of a person for extracting a confession, he will be guilty and liable to punishment as an abettor for an offence under S. 330, unless he can show that he was compelled., against his will under threat of instant death, to abet the commission of the torture. *(1896) ILR 20 Bom 394.*

(3) An allegation of coercion by the police into making false statements is not covered by this section, as there is no threat of instant death in such a case. *(1868 10 SuthWR (Cr) 48.*

(4) The offence of falsification of accounts committed under the orders of a superior officer cannot be excused under this section, as there is no question of the offence having been committed under threat of instant death. *AIR 1951 Mad 894.*

(5) Anything done under coercion or duress or threat of certain death is not an offence when it is shown that the accused had to do the act complained of under duress, coercion and thereat of life. He cannot be said to have intentionally aided an act for the consequence of which he is to be held liable. *State Vs. Makbul Hossain 26 DLR 419.*

(6) Even order of the superior authority, in the absence of threat of instant death, was not sufficient to justify the irregular payment for which the accused was prosecuted. *AMA Wajedul Islam Vs. State 45 DLR 243.*

6. Explanation.—(1) It is a question of fact depending on the circumstance and evidence in each case whether a person was forced by threat of instant death by a gang of dacoits to commit an offence within the meaning of Explanation 2. Where there is no proof that a person was so forced to join a gang of robbers or dacoits but was involved in a crime committed by such gang, the Explanation 2 will not apply and he will be liable for the offence notwithstanding his allegation of his having been forced to join in the crime on threat of instant death. *(1904) 1 CriLJ 282.*

7. Evidence.—(1) The fact that the act charged as an offence was done of instant death may be inferred from the circumstances of a case, even though there may be no definite allegation by the accused himself in that regard. *AIR 1957 All 184.*

8. Burden of proof.—(1) Under S. 105 of the Evidence Act, 1872, the burden of proving that the accused was compelled under threat of instant death to commit the offence and hence was not liable to punishment by force of this section, is on the accused. But the accused is entitled to the benefit of doubt, if the evidence in the case realises a doubt. *AIR 1925 All 315.*

9. Sentence.—(1) Where the offence is committed under the influence of some threat of injury, but the threat falls short of an instant death, the case will not come under this section. But, at the same time the fact may be taken into consideration in mitigation of the punishment. *AIR 1946 Nag 173 (DB).*

Section 95

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.

Cases and Materials : Synopsis

1. Scope, object and applicability of section.
2. Trifling value of property involved in offence.
3. "Harm"
4. Vulgar abuse.
5. Sentence.
6. Offences under other laws.

1. Scope, object and applicability of section.—(1) The law does not care about trifles on the basis of this section. This section is intended to exempt from criminality offences which from their triviality do not deserve the name of crime.

(2) One of the first principles of law is deminimise non curate lex = (The law does not concern itself with trifles. This has found expression in S. 95 P.C. *AIR 1977 SC 2432.* (Prosecution should not lodge a complaint where it is simply a case of exchanging abuse in a public street).

(3) Whether an act which amounts to an offence is trivial would depend upon the nature of the injury, the position of the parties, the relation between them, the situation in which they are placed, the knowledge or intention with which the offending act is done, and other related circumstances. It cannot be judged solely by the measure of physical or other injury the act causes. *AIR 1966 SC 1773.*

(4) This section will only apply where the act alleged against the accused would be an offence but for this section and where such act will not be an offence even independently of this section, there is no question of applying this section. *(1902) 29 Cal 489 (DB).*

(5) Trivial amount alleged as paid as gratification—Court may decline to presume it as such. It was contended on behalf of the prosecution that since the accused admitted the acceptance of Rs. 3 though denied it was on account of illegal gratification, it was immaterial whether the prosecution had succeeded in establishing that it was paid by way of illegal gratification or not. The Court may decline to draw such presumption if the gratification is, in its opinion, so trivial that no inference of corruption may fairly be drawn from the same. Where the amount of the alleged gratification was only Rs. 3 the amount was such a trivial one that it was hardly likely to have been accepted by the accused as illegal gratification. *8 DLR 562.*

2. Trifling value of property involved in offence.—(1) The circumstances of a case may be such as to attract the application of this section with the result that the court will be led to hold that no offence has been committed. *1978 KerLT 441.*

3. Harm.—(1) The section applies not only to acts which are accidental but also to deliberate acts which cause harm or are intended to cause harm or known to be likely to cause harm. *AIR 1966 SC 1773.*

(2) Dragging by hair in an aggressive manner and fisting in the course of attack are not trivial acts but constitute the offence of causing hurt. The Magistrate is not justified in ignoring the acts by holding that dragging by hair and fisting was not uncommon amongst the women in the particular class and status to which the accused belonged. *AIR 1967 Andh Pra 208.*

(3) Accused prevented from crossing barrier raised to prevent entry of uninoculated persons into mela area—Accused pushed aside complainant in charge of barrier and crossed it after lifting it himself—Sight harm to complainant—Section 95 applied. *1965 AllWR (HC) 69.*

4. Vulgar abuse.—(1) If the words used are insulting and cause provocation, the offence under S. 504 would be constituted if the requisite intention or knowledge under the section is proved by the circumstances of the case. *AIR 1955 Assam 211.*

(2) Advocate uttering insulting words against witness in cross-examination—Court stopping further cross-examination—Enmity between advocate and witness—**Held,** case was not covered by Sec. 95 but advocate could be validly convicted under S. 504. *AIR 1964 Mys 285.*

5. Sentence.—(1) Under this section, the effect of the provision is that the act charged as an offence is not an offence at all and if the Court considers that the section applies, the accused should be

acquitted. But even where the accused is convicted, the relatively trifling nature of the offence may be taken into consideration while awarding the sentence. *1891 Bom U CrC 564.*

6. Offences under other laws.—(1) The provisions of S. 161, P.C. read with S. 95 cannot be applied in a case where a railway servant has demanded and accepted a bakshish from a passenger. This is because the Railway Establishment Code itself prohibits the acceptance of any 'gifts', gratuity or reward and it is immaterial whether it was given voluntarily or not by the passenger, and any contravention of the disciplinary rules prescribing the code of conduct of railway servants must necessarily amount to misconduct. *AIR 1964 Orissa 263 (254).*

(2) Even where the offence is of a very trivial nature, where a prosecution has been started and judicial proceedings have been commenced, the law must take its own course, till the case ends in a conviction or acquittal unless there is a provision for compromise and the case is compromised in accordance with such provision. The effect of such composition, if any, will depend in the provisions of the particular law applicable. *AIR 1967 SC 895.*

(3) The procession of an empty cartridge case, though it is a part of ammunition under the Arms Act, would be ignored under S. 95, Penal Code, if it is not suspected that the cartridge would be reloaded and used as ammunition. *AIR 1936 All 392.*

Of the Right of Private Defence

Section 96

96. Things done in private defence.—Nothing is an offence which is done in the exercise of the right of private defence.

Cases and Materials : Synopsis

1. Scope.
2. Basis of the right of private defence.
3. Burden of proof.
4. Standard of proof necessary.
5. Burden of proof how may be discharged.
6. Injuries on the accused—Presumption.
7. Plea of private defence.
8. Accused denying act charged, if can plead private defence in the alternative.
9. Court's duty where plea of private defence is raised.
10. No right of private defence against lawful acts.
11. Resistance to an illegal search or arrest or seizure of property.
12. Right of private defence if available to aggressor.
13. Trespass and right of private defence.
14. "Free fight".
15. Unlawful assembly and private defence.

1. Scope.—(1) The right of private defence of person and property is recognised in all free, civilised and democratic societies within certain reasonable limits. Those limits are dictated by two considerations: (a) that the same right is claimed by all other members of the society, and (b) that it is the State which generally undertakes the responsibility for maintenance of law and other. The citizens, as a general rule, are neither expected to run away for safety when faced, with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrongs done to them to punish the wrongdoer for commission of the offence. The right of private defence serves as a social purpose and there is nothing more degrading to the human spirit than to run away in the face of peril. But this right is basically preventive and not punitive. It is

in this background that the provisions of sections 96 to 106 Penal Code which deal with the right of private defence have to be construed. According to section 96, nothing is an offence which is done in the exercise of the right of private defence and under section 97 subject to the restrictions contained in section 99 every person has right to defend: (a) his own body and the body of any other person against any offence affecting the human body, and (b) 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, dacoity, mischief or criminal trespass or which is an attempt to commit these offences. The right of private defence according to section 99 does not extend to an act which does not reasonably cause the apprehension of death or of grievous hurt, or done or attempted to be done by a public servant acting in good faith, etc. and there is also no right of private defence in cases in which there is time to have recourse to the protection of public authorities nor does it extend to the inflicting of more harm than is necessary to inflict for the purpose of defence. Section 100 lays down the circumstances in which the right of private defence of one's body extends to the voluntary causing of death or of any other harm to the assailants, They are: (i) if the assault which occasions the exercise of the right reasonably causes the apprehension that death or grievous hurt would otherwise be the consequences thereof and (ii) if such assault is inspired by an intention to commit rape or to gratify unnatural lust or to kidnap or abduct or to wrongfully confine a person under circumstances which may reasonably cause apprehension that the victim would be unable to have recourse to public authorities for his release. In case of less serious offences his right extends to causing any harm other then death. The right of private defence to the body commences as soon as reasonable apprehension of danger to the body arises form an attempt or threat to commit the offence though the offence may not have been committed and it continues as long as the apprehension of danger to the body continues. The right of private defence of property under section 103 extends, subject to section 99, to voluntary causing of death or of any other harm to the wrongdoer if the offence which occasions the exercise of the right is of robbery, house breaking by night, mischief by fire or any building, etc. if such offence is theft, mischief or house trespass in such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if the right of private defence is not exercised. This right commences when reasonable apprehension of danger to the property commences and its duration as prescribed in section 105, in case of defence against criminal trespass or mischief, continues as long as the offender continues in the commission of such offences. Section 106 extends the right of private defence against deadly assault even when there is risk of harm to innocent person *(1970 CrLJ 1004)*.

(2) The right of private defence is based on the principle that it is the first duty of man to help himself. The right of private defence is found on two cardinal principles: (a) Everyone has the right to defend one's own body and property, as also another's body and property. The law does not require him to be cowardly; (b) This right cannot be used as a presence for justifying aggression for causing harm to another person nor for inflicting more harm than is necessary to inflict for the purpose of defence. Law allows resort to repel force for warding off an injury but not for taking revenge. The right of private defence is not available to one who resorts to retaliation for any past injury but to one who is suddenly confronted with the immediate necessity of averting an impending danger not of his creation. In a word, the right is essentially of defence and not of retribution. In criminal case where right of private defence is pleaded by the accused persons that it is not necessary that they must prove beyond the reasonable doubts the existence of the circumstances on which the right is founded. It would be sufficient in the case if the accused persons from the evidence on record merely make out a prima facie case and if from the evidence it appears probable that the defence version is true, they are

entitled to a decision in their favour though they have not proved the truth of their version beyond reasonable doubt. It is not necessary in such a case for the accused persons to lead evidence about the right of self-defence and of property if the evidence on record and circumstances themselves show or prove that plea of right of private defence need not be specially pleaded. It can be alternatively taken with the plea of a alibi also.

(3) Right of private defence of property—This right extends to the causing of any hurt except death of the aggressor. *Siddique Munshi Vs. State (1992) 44 DLR (AD) 169.*

(4) The right of private defence is a legal right which one can exercise for the defence of person and property. But right is to be exercised under certain restrictions or limitations. The said right in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. The accused intended to cause such bodily injury as was likely to cause death. Sentence of 7 years R.I. not at all excessive u/s 304 part 1. *Antulya Kumar Biswas & others Vs. The State. BSCD, Vol I, P 293.*

(5) While the first revolver shot in exercise of right of private defence the second shot immediately thereafter must be held as exceeding the right of private defence . *Rahman Gul Vs. The State 23 DLR (Pesh) 12.*

(6) Right of private defence, when, cannot be claimed. The convict appellant's case was that the deceased armed with a rifle was proceeding towards him, he as a precaution took position behind a morcha and warned the deceased not to proceed towards him but in spite of that the deceased continued proceeding towards him with dangerous intention. The appellant fearing that he would be killed shot at the deceased to protect his own life and killed him. Right of self-defence as herein asserted cannot be claimed. The place wherefrom the deceased was coming towards the appellant-convict and the place at which the appellant took his position and fired short at the deceased is 120 paces. The appellant in the circumstances could avert the danger of apprehension to his life. If the act done in exercise of right of private defence itself amounts to a gross excess of what could be done in the exercise of that right a plea of private defence is not available. *Gulabat Khan Vs. The State 23 DLR (Pesh) 7.*

(7) Plea of self-defence is not to be discarded on the ground that it is not proved or it is false or belated. If the plea of self-defence gets reasonable support from the prosecution evidence it shall not be refused to the appellant. *Gulabat Khan Vs. The State, (1971) 23 DLR (Pesh).*

(8) The mere fact that a certain theory was not put forward at the time when evidence was recorded does not prevent a Court from accepting it but before the court accepts a theory which has no evidence to support it, there must be strong circumstantial evidence which makes it very probable. *Firoz Vs. State (1956) 8 DLR (WP) 128.*

(9) Where an owner of cattle uses force to get his cattle, which are wrongfully taken to a pound, released, he is not guilty of any offence as he has a right to protect his cattle in the exercise of the right of private defence. *Qadir Baksh Vs. Crown (1954) 6 DLR (WP) 179.*

(10) Where the seizure of cattle belonging to the accused by the deceased, was illegal and amounted to theft the accused being competent to get his cattle released by use of force, was justified to exercise the right of private defence to protect his person. *Qadir Baksh Vs. Crown (1954) 6 DLR (WP) 179.*

(11) 8 persons were on trial for offences under secs. 147 and 148 P. Code, who pleaded exercise of the right of private defence—Charge to the injury is defective, if it directs the jury that the accused are guilty if they exceeded that right, without any qualification. *Naimuddin Vs. Crown (1954) 6 DLR 120.*

(12) Right of self-defence—On a view of the fact as found in this case the High Court was right in allowing to the respondent the right of self-defence by use of a firearm to the point of killing a person when he was set upon by a body of persons who started to assault him on suspicion that he was a thief. *State Vs. Md. Akbar (1966) 18 DLR (SC) 299.*

(13) The finding being that either the cattle had caused damage to the crop or were caught before they could cause such damage leads to the logical inference that the right to seize the cattle under section 10 of the Cattle Trespass Act aeros in favour of the accused. Having seized the cattle they were taking them to the cattle pound. If in doing so they were resisted and attacked, they had the right of self-defence. *Naru Vs. State (1966) 18 DLR (WP) 31.*

(14) Right of private defence cannot be pleaded by those who believing they will be attacked, and when the primary object of both the parties is to fight and the vindication of their right to property is mere pretext—No question of self-defence can arise. *Jamshed Ali Vs. Crown, (1953) 5 DLR 363.*

(15) This section applies to cases where there is excess of jurisdiction as distinct from a complete absence of jurisdiction. It applies where an official does wrongly what he might have done rightly but not to cases where the act could not possibly have been done rightly. *Crown Vs. Fateh Md. (1951) 3 DLR 205.*

(16) Where a Naib Tahsilder issued warrant of arrest against the accused in a bona fide mistake that revenue was due from them, while it was not; it might be a case of exceeding the jurisdiction and the accused had no right of private defence. *Crown Vs. Fateh Md. (1951) 3 DLR 205.*

(17) Exceeding, deliberately, right of private defence of property—Accused responsible for harm or injury caused. *PLD (1955) (Lah) 575.*

(18) Private defence of property against a corporation—official debuted to remove encroachment on the road—Not available unless such act amounts to mischief. *9 PLD (Lah) 451.*

(19) Accused actuated by desire to punish deceased and not for purpose of defence—Exceeding right of private defence. *PLD (1954) (Lahore) 170.*

(20) Use of force in exercise of the right of private defence to the property must not be disproportionate to the act which calls for exercise of such a right—Killing a trespasser in the right of private defence cannot be justified when no apprehension of injury to life is imminent from the trespasser. *Sardarai Vs. The State, (1970) 22 DLR (SC) 129.*

(21) The possession for exercising right of private defence must be a settled possession, a peaceful possession for a pretty long time without any resistance. *Sarwar Kamal & others Vs. State 48 DLR 61.*

(22) As there is no evidence of any aggression from the side of victim and even if there was any threatening behaviour from the victim, the person threatened could have used only that much of force which was proportionate to repeat the attract. In the instant case it was a one-sided affair for which the contention that the action of the convict-appellant was in exercise of the right of private defence either of his body or property or the body and the property of others cannot be accepted. *AKM Ataur Rahman Khan Alias Badal and another Vs. State (Criminal) 5 BLC 508.*

(23) The right of private defence of the body extends to the voluntary causing of death if the offence which occasions the exercise of the right is an assault which may reasonably cause the apprehension of either death or grievous hurt. *Khandoker Saiful Islam Vs. State 50 DLR (AD) 126.*

(24) An act which would be an offence is declared by this section not to be an offence if it is done in exercise of the right of private defence. *AIR 1974 SC 1570.*

(25) The provisions of Ss. 96 to 106 are complete in themselves and it is not permissible to interpret them on the principles governing the right of private defence under the common law of England; the words used in the sections themselves must be looked to for finding the limits and extent of the right. *AIR 1959 Pat 22.*

(26) The subject-matter of the right of private defence covers : (1) the body of the person exercising the right and the body of any other person; (2) the property of the person exercising the right or of any other person against certain specific offences referred to in S. 97. *1979 CriLJ 502.*

(27) The right of private defence applies not only where the accused is charged individually but also where the charge is laid against him as a member of a group which has together committed an offence so as to make each member of the group liable, under S. 34 as if alone committed the offence. *1977 CriLJ (NOC) 244 (DB).*

(28) Right of private defence of property. An accused of murder must prove that the property in question is his property. *43 DLR 269.*

(29) Right of private defence can be pleaded if no. *44 DLR 431.*

(30) The onus of approving right of private defence lies on accused claiming or exercising such right and possession must be settled possession. *48 DLR 61.*

(31) Plea of self defence. Defence evidence was contradicting statement of accused recorded by him under section 342 CrPC. Plea of self defence taken by accused thus was not satisfactorily established. Grave and sudden provocation—Proof—Accused stated that he killed deceased on grave and sudden provocation as at time of occurrence he saw deceased and his (accused) sister in compromising position in a cotton field and he lost his control and gave injuries to accused. Occurrence having taken place in light of the day in cotton field of one foot height there was no reasonable probability of defence version that deceased was seen in compromising position with his sister in the field. No injury on person of sister of accused having been found there was no circumstantial guarantee or judicial certainty of defence version being true. Sentence—Accused suspected deceased of having illicit relations with his sister—Family honour being involved in the case, there were mitigating circumstances in favour of accused for lesser penalty. Sentence of death thus was altered to imprisonment for life *(Ref 8 DLR WP 128). 1989 PCrLJ 750.*

(32) Right of private defence—In exercise thereof the accused shot a person to death (Section 300, Exception 11 read with section 96 of the Penal Code). While the first revolver shot is in exercise of right of private defence the second shot immediately thereafter must he held as exceeding the right of private defence. Held: That having regard to the evidence on record it is clear that the appellant fired the shots in self defence but he exceeded the right of self defence in firing twice at the deceased. The first effective revolver shot at the deceased would have been sufficient to disable him from pursuing his attack on the appellant. The offence committed by the appellant, therefore, falls under section 304 (Part 1) of the Penal Code. Jail appeal timebarred may be converted into revision. *23 DLR WP 12.*

(33) Right of private defence—The case which the accused sought to set up was thus one of self defence, and there being no other evidence except his own statement in support. It became the duty of the Trial Court as laid down by the Federal Court in case of Safdar Ali *[5 DLR (SC) 107]* to place the allegations for the prosecution and those for defence in juxtaposition against the background of the proved facts and circumstances and thereafter to consider whether the case set up by the accused was not a reasonable one. If it should be found to be reasonably possible, then the effect of creating a reasonable doubt regarding truth of the prosecution case could not be without effect upon the finding as to the guilty of the accused. *16 DLR (SC) 33.*

(34) Right of private defence, not raised—Evidence of record can be relied on for the purpose to what extent. In case where the accused persons themselves do not specifically plead self defence, the plea can only be allowed on the basis of very clear evidence available on the record, which would go at least to the extent of showing that it was reasonably possible that the accused persons have acted in self defence. In the absence of proof of aggression by the opposite party the plea of self defence is not available and ordinarily cannot be thought to be established by mere existence of slight injury on the persons of accused. *15 DLR (SC) 107.*

(35) Right of private defence—Bare possibility of the accused's acting in exercise of the right of private defence, not enough to record a favourable verdict in his favour. By hinting at a bare possibility of accused's acting in exercise of right of private defence a Court would not be justified in discarding the evidence of the eye-witnesses examined by the prosecution. It was not sufficient for the accused to suggest a mere hypothesis or a remote possibility in order to rebut the prosecution case. In order to gain a favourable verdict it was necessary for the accused persons to set up facts upon which they relied as exculpatory circumstances sufficient to cast a reasonable doubt over the prosecution case. Right of private defence—Evidence and circumstances where established the fact that each party came armed to fight with the other—no question of right of private defence arises. It is reasonable to infer that inferring upon that conflict each party knowingly and deliberately took upon itself the risk of the encounter. Hence in the circumstances such as those of the present case no question of right of private defence would arise and the common object stated in the charge having failed, each person would be held responsible for his individual acts. *14 DLR (SC) 316.*

2. Basis of the right of private defence.—(1) The right of private defence is a highly prized and valuable right granted to the citizen to protect himself and his property by effective resistance against unlawful aggression. *AIR 1976 SC 937.*

(2) No man is expected, when he is attacked by criminals, to flee away. *AIR 1963 SC 612.*

(3) No one is expected to exhaust all other available steps before exercising his right of private defence. *AIR 1959 Pat 22.*

(4) 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 right of private defence must never be vindictive or malicious. *AIR 1968 SC 612.*

(5) Law does not require a person whose property is forcibly tried to be occupied by trespassers to run away and seek the protection of the authorities. The right of private defence serves a social purpose and that right should be liberally construed. Such a right not only will be a restraining influence on bad characters but it will encourage the right spirit in a free citizen. There is nothing more degrading to the human spirit than to run away in the face of peril. *AIR 1968 SC 702.*

(6) The right of private defence is essentially a defensive right circumscribed by the statute available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed of as a pretext for vindictive, aggressive or retributive purpose. The right 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. This would be so even if the person exercising the right of private defence has the better of his aggressor provided he does not exceed his right. *AIR 1971 SC 1491.*

3. Burden of proof.—(1) Where an accused person claims that his act which would otherwise be an offence is not offence as it was done in exercise of the right of private defence, the burden is on him to prove the same. *AIR 1979 SC 577.*

(2) After separating the chaff of falsehood from the gains of truth it is found that the prosecution has failed to prove their case against Wali and Khalil and the convict Syed exercised his right of private defence for which he is entitled to get the benefit of section 96 of the Penal Code and they are found not guilty of the charge of murder. *Syedur Rahman and 2 others Vs State (Criminal) 3 BLC 299.*

(3) The onus of proving right of private defence lies on the accused claiming exercise of such right. *Sarwar Kamal and others Vs. State 48 DLR 61.*

(4) The accused must prove, as facts, the existence of the circumstances which gave rise to the right to private defence claimed by him. If he has merely acted under mistaken notions as to the existence of such a right, he will not be entitled to the benefit of the exception. *AIR 1976 Orissa 79.*

(5) It is not necessary that the accused should have specifically pleaded, before the trial began, that he acted in the exercise of the right of private defence. Even in the absence of such plea he is not precluded from making out such a defence on the basis of the prosecution evidence. *AIR 1979 SC 577.*

(6) The accused may or may not take the plea of private defence explicitly. So also he may or may not adduce evidence in support of it. But he can succeed if in his plea if he is able to show that he acted in self defence. *1982 Raj Cri C 220.*

(7) It is open to the Court to consider a plea as to exercise of right of private defence if the same arises from the materials on the record. *AIR 1979 SC 577.*

(8) No questions of the right of private defence would arise unless and until the prosecution has proved what would but for the exercise of the right be an offence. *AIR 1980 SC 660.*

(9) Where the evidence let in by the accused for proving his right of self-defence though not sufficient and satisfactory to establish the right is sufficient, taken with the prosecution evidence to raise a doubt as to his guilt, he must be given the benefit of it. *AIR 1941 All 402.*

(10) The burden of proving the existence of circumstances bringing the case within the exception lies on the accused and the Court shall presume the absence of such circumstances, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the Court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a 'prudent man'. The evidence may not be sufficient to discharge the burden under S. 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself. *AIR 1964 SC 1563.*

4. Standard of proof necessary.—(1) The standard of proof required to discharge the burden of proof resting on an accused person who pleads a right of private defence is not as strict and heavy as the standard of proof necessary for the prosecution to establish that the accused committed the offence. *AIR 1979 SC 577.*

(2) The accused must at least make out a case out of which a plea of the right of private defence might arise. *AIR 1952 Cal 621.*

(3) The accused must set forth, fairly and squarely, the exact circumstance in which he acted to show that he was justified in doing what he did. *AIR 1955 NUC (Pepsu) 3280.*

(4) Though the circumstances of a case may not be such as to sustain the plea of private defence so as to entitle the accused to acquittal, they may legitimately be taken into account in determining the sentence to be passed against the accused. *AIR 1974 SC 1258.*

(5) In the case of self defence the accused acts against aggression while the plea of insanity is taken by a person who is alleged be the aggressor. Hence the question whether the burden of proof is discharged or not would call for a closer and stricter seruiny in the latter case than in the former. *1983 CriLJ 1675.*

5. Burden of proof how may be discharged.—(1) Even without his adducing evidence, the accused can show from the prosecution evidence itself and from the materials on record that his act was done in the exercise of his right of private defence. *AIR 1968 SC 702.*

(2) Though the burden must be discharged either by adducing evidence or by relying on circumstances appearing in the prosecution evidence, it is clear that in either case, evidence there must be, and a plea of private defence cannot be founded on mere surmise or conjecture or the mere legal ingenuity of the pleaders. *AIR 1927 Cal 324.*

(3) There are two important principles in every criminal trial which weigh heavily in favour of an accused person : first that the accused is entitled to the benefit of every reasonable doubt and secondly that where an accused person offers a reasonable explanation of his conduct even though he cannot prove his assertions, they should ordinarily be accused unless the circumstances indicate that they are false. *1963 (1) CriLJ 700 (DB) (Orissa).*

6. Injuries on the accused—Presumption.—(1) The question of accrual of the right of private defence to a person does not depend upon an injury being caused to him. *AIR 1966 All 244.*

(2) Where the accused have sustained injuries the burden is not necessarily shifted to the prosecution to prove that it was the accused's party which was the aggressor and that the injuries on the person of the accused were caused by the complainant's party purely in self-defence. *AIR 1974 SC 1550.*

(3) The reasonable inference which can be drawn by the failure of the prosecution witnesses to explain the injuries on the bodies of the members of the accused's party is that, they had falsely suppressed the injuries on the accused which were definitely received by them at the time of the occurrence. On that account the Court will subject their evidence to a careful scrutiny regarding the participation of the injured persons in the occurrence. But the Court will not reject their evidence, relating to the genesis of the occurrence and the substratum of the prosecution story. *1979 CriLJ 1007 (All).*

(4) Accused whose wounds were minor had fired gun shots resulting in death—Injuries not explained by prosecution—Accused held to have exceeded right of private defence. *1983 Raj Cri Cas 380.*

7. Plea of private defence.—(1) An omission to set up the plea in the report to the Police will not preclude him from pleading it at the trial. *AIR 1957 Madh Pra 153.*

(2) The absence of defence evidence showing that the accused acted in the right of private defence is by itself no ground for discharging the plea of right of private defence because if such a plea receives support from any evidence direct or circumstance, on the record, it is not necessary to have defence evidence in support of it. *Firoz Vs. State (1956) 8 DLR (WP) 128.*

(3) Evidence on record can be relied on for the purpose—In the absence of proof of aggression by the opposite party, the plea of self defence is not available, and ordinarily cannot be thought to be established by the mere existence of slight injuries on the persons of the accused. *Ali Zaman Vs. State (1963) 15 DLR (SC) 107.*

(4) It is true that an accused person is not bound to place all his cards on the table at the first opportunity that arises for such a thing to be done but it is equally true that if an accused person does not take a plea of the right of self-defence at the earliest opportunity, the plea may be rejected by the Court on the ground that it was not taken earlier. *Firoz Vs. State (1956) 8 DLR (WP) 128.*

(5) When the accused's plea of self-defence is inconsistent with the facts and circumstances of the case it must be rejected. *1972 CriLJ 390 (Mad).*

8. Accused denying act charged, if can plead private defence in the alternative.—(1) When the accused denies having committed the act alleged the plea of private defence, if raised an can only be in alternative. *AIR 1951 Cal 212(213).*

(2) An alternative plea of defence is seldom successfully. *AIR 1954 Nag 127.*

(3) If there is sufficient evidence to show that the accused acted in self-defence he cannot be denied the benefit of the plea of self-defence even though he has denied committing the offence at all and pleaded the right of private defence in the alternative. *AIR 1969 Bom 20.*

9. Court's duty where plea of private defence is raised.—(1) A Court should not in its zeal to suppress crime of violence, overlook the importance of the previsions of law as regards the right of private defence. *AIR 1927 Lah 194.*

(2) The Court must make all reasonable allowance in favour of the accused and not apply the law in such a manner that persons would become cowards. The mental conditions of the assailant must also be taken into consideration. *1961 (1) CriLJ 653.*

(3) Where the incident of shooting A and B by C was an interacted one, not divisible in parts and it was found that C had a right of private defence against B, it was held that the same right of private defence was available against A also. *AIR 1971 SC 1432.*

(4) It is now well-settled that even if the accused is not able to substantiate his defence by producing evidence yet if his version gets support from the prosecution to the extent of being reasonably possible, then the accused is certainly entitled to an acquittal. *Karim Vs. State (1960) 12 DLR (WP) 92.*

(5) The case which the accused sought to set up was thus one of self-defence, and there being no other evidence except his own statement in support it became the duty of the trial Court as laid down by the Federal Court in the case of Safdar Ali *5 DLR (SC) 107* to place the allegations for the prosecution and those for the defence in juxtaposition against the background of the proved facts and circumstances and thereafter to consider whether the case set up by the accused was not a reasonably possible one. It should be found to be reasonably possible, then the effect of creating a reasonable doubt regarding truth of the prosecution case could be avoided, and this could not be without effect upon the finding as to the guilt of the accused. *Shamshad Vs. State (1964) 16 DLR (SC) 33.*

(6) By hinting at a bare possibility of accused's acting in exercise of right of private defence a court would not be justified in discarding the evidence of the eye-witness examined by the prosecution. It was not sufficient for the accused to suggest a mere hypothesis or a remote possibility in order to rebut the prosecution case. In order to gain a favourable verdict, it was necessary for the accused persons to set up facts upon which they relied as exculpatory circumstances sufficient to cast a reasonable doubt over the prosecution case. *Syed Ali Bepari Vs. Nibaran Mollah and others (1962) 14 DLR (SC) 316.*

10. No right of private defence against lawful acts.—(1) Where A is acting lawfully, B cannot, though he had a claim of right, prevent A by force from doing the act and has no right of private defence. *AIR 1963 Cal 3.*

(2) A seized B's cattle under S. 10 of the Cattle Trespass Act, 1871, on the ground that they caused damage to his crops and gave out that he was taking the cattle to the pound. B has no right of private defence and cannot rescue the cattle by force, inasmuch as A's act in taking the cattle to the pound is not an offence however mistaken he may be about his right to the crop of land. *AIR 1965 SC 926.*

(3) A knowing that B's cattle have not damagd his crops, seizes them and drives them to the pound, with the intention merely of causing loss and expenditure to B. A's seizure is illegal and will amount to theft. B has a right of private defence. But if the seizure by A, though not justified, was done under a bona fide mistake, A's act is not an offence and B would have no right of private defence against the seizure. *AIR 1963 Orissa 52.*

(4) A commits theft or robbery and is running away. B chases him for the purpose of apprehending him, B's act is justified in law and A has no right of private defence against B. *AIR 1951 All 3(8) (FB).*

11. Resistance to an illegal search or arrest or seizure of property.—(1) Where a Commercial Tax Inspector illegally seized the account books of A, and A and his men resisted the seizure and in doing so caused injury to the Inspector. A's Act was held justified on the ground of the doctrine of the right of private defence. *AIR 1960 AndhPra 110.*

12. Right of private defence if available to aggressor.—(1) A right of private defence cannot be claimed by a person who is himself the aggressor against the person who is exercising his right of private defence against the aggressor. *AIR 1979 SC 1230.*

(2) Where A armed with a gandasa made a violent attack on B who was unarmed, the fact that certain persons came to B's rescue would not give A any right of private defence against the rescuers. *AIR 1943 Lah 163.*

(3) Initial firing by accused—Police firing in self-defence—Each of accused again firing towards police—Initial firing, held, was with common intention to overpower police—Firing by police held did not give accused right to act in self-defence . *AIR 1963 AllWR (HC) 746(749).*

(4) The question as to who the aggressor in any particular case depends upon the facts of the case. The number of injuries inflicted on a party is not always a safe criterion for determining the question of aggression. *AIR 1959 All 690.*

(5) An accused must not be the creator of the necessity for self-defence. *AIR 1926 Pat 433.*

13. Trespass and right of private defence.—(1) Where A has trespassed upon the immovable property of B and has been in possession for a period within which the owner B could have had time to seek redress from the authorities. B cannot take the law into his own hands and attempt to dispossess A by force. If he does so he would be the aggressor and A's act in defending his possession would be one in the exercise of the right of self-defence. *AIR 1975 SC 1674.*

(2) Force used by owner of land to acquire possession would be an act of private defence. *AIR 1969 Orissa 250.*

(3) Where the trespasser was in possession but in his absence the true owner regained possession the trespasser cannot have a right of private defence. *AIR 1961 All 42.*

14. "Free fight".—(1) Where two individuals or two parties fight with one another using unlawful force against each other, the fight has been characterised as "a free fight". In a "free fight" where parties are determined to vindicate their right or supposed right by the use of unlawful force, no question of the exercise by any party of the right of private defence can arise. *AIR 1978 SC 414.*

(2) In a case where two parties are having a free fight without disclosing as to who is the initial aggressor it may be dangerous as a general rule to clothe either of them or his sympathiser with a right of private defence. *AIR 1971 SC 1491.*

(3) A 'free fight' is one where both sides mean to fight from the start, go out to fight and there is a protected battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends upon the tracts adopted by the rival commanders. *AIR 1954 SC 695.*

(4) Where one party is the aggressor and the other party is merely defending its rights in the exercise of its right of private defence it is not a case of free fight. *AIR 1954 SC 695.*

(5) The party acting in self-defence cannot be said to be determined to fight for vindicating its right by the use of unlawful force. *AIR 1950 FC 80.*

(6) A pre-planning is not necessarily inconsistent with the exercise of the right of private defence. There is no principle of criminal law which prevents people from getting themselves prepared if necessary when they anticipate an attack upon their subsistence right, by a set of people. *AIR 1947 Pat 51.*

(7) Where a party of five or more persons fight another person or party with the common intention of defending their right, they do not constitute an unlawful assembly and do not commit any offence but if they fight with the common intention of vindicating their right by the case of unlawful force, they will constitute an unlawful assembly. *AIR 1965 SC 257.*

(8) The appropriate test whether a fight is a free or not is to see whether the parties voluntarily enter into fight with mutual intent to harm each other. *AIR 1965 Raj 74.*

(9) When on the date of occurrence both the parties went to enforce their right or supposed right in the disputed land and for this purpose they armed themselves in full expectation of an armed conflict and were determined to have a trial of strength; under such circumstances it will be impossible to say that the accused party were acting on the defensive merely or, in other words, were acting in the exercise of any right of private defence of person or property. And when form the existing relation between the parties it is clear that both the parties were prepared to fight on a flimsy ground and a conflict arose, it is reasonable to infer that each party knowingly and deliberately took upon itself the risk of the encounter. Under such a circumstance the question of right of private defence would not arise and the common object stated in the charge although failed, each person would be responsible for his individual acts. *Syed ali Bepari Vs. Nibaran Mollah and others (1962) 14 DLR (SC) 316.*

15. Unlawful assembly and private defence.—(1) An assembly of five or more persons acting in self-defence is not an unlawful assembly, but that where they use unlawful force (i.e., where they do not act in self-defence) they would constitute unlawful assembly. Section 141 must be read with this section. *AIR 1970 SC 27.*

Section 97

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 moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

Cases and Materials

1. Scope.—(1) The right of private defence is a very valuable right. It has a social purpose. That right should not be construed narrowly. The second clause of section 97 defines scope of the right of private defence of property, subject to the general limitations. Every person has a right to defend the movable or immovable property 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 any of these offences but omits to mention such offences as house breaking and dacoity. But we must not forget that dacoity is a form of robbery. House trespass and house breaking are forms of criminal trespass. The question of possession is of supreme importance in respect of private defence of property. He who is in possession of property must be left in undisturbed possession of the same until and unless evicted therefrom by the due course of law. The right of private defence can be exercised against aggressors as a rule whether the aggressors be the rightful owner of the property or persons merely setting up a fanciful title. It is not the province of the Criminal Court to inquire into titles and protect them irrespective of actual possession. The most common instance in which the right of private defence is pleaded is in connection with rioting over possession of disputed land. In deciding these cases the crucial points is to determine whether the accused was a member of an unlawful assembly and the determination of this question depends upon the further question of possession. In a case of rioting there should be a definite finding as to which of the two parties was in peaceful possession on the date and which party was trying to protect by the use of force. The prosecution must prove its possession affirmatively and if it does not so prove that the land on which the riot took place was in actual possession of the complainant as alleged in the charge, the accused cannot be convicted of rioting *(23 CWN 693)*. Extortion has not been mentioned in the section but on the principle extortion becomes robbery if there is a threat of instant violence and the right of private defence can be exercised. Cheating has been omitted because that he is being cheated and when he finds out he can go to the time that he is being cheated and when he finds out he can go to the authorities for redress. Criminal misappropriation and criminal breach of trust have been omitted because the person wronged is not in the presence of the offender and could not exercise the right of private defence. Dishonestly receiving stolen property has also been omitted because the time for the exercise of the right of private defence arises when the property was being taken and it is for the authorities and not for the private person to take appropriate action.

(2) Private defence of property—When such defence is lost—The place of occurrence was a part of a joint property and the parties have been litigating over the land for a long time—It is true that there was no evidence to show that the order of temporary injunction in favour of the appellant was vacated but there was unimpeachable evidence that 'Kaun' was grown in the land by the deceased—There is nothing to show that 'Kaun' was sown after the order of injunction—The appellant lost the right of private defence of property when he allowed the deceased to grow 'Kaun' on the disputed land. *Md. Chand Mia alias Chand Miah and others Vs. The State 9 BLD (AD) 155.*

(3) Mere plea of right of private defence cannot be a ground for quashing the criminal proceeding. Where disputed facts are involved evidence will be necessary to determine the issue—Criminal proceeding is liable to be quashed only if the facts alleged in FIR or complaint petition, even if admitted, do not constitute any criminal offence, or the proceeding is barred by any specific provisions of law. Long standing litigation and order of temporary injunction against the complainant party must be considered along with other evidence during the trial. Application for quashing the proceeding has been rightly refused. *10 BLD (AD) 1.*

(4) Appellants convicted under section 302 read with section 149 of the Penal Code and sentenced to transportation for life—Defence plea was that the incident took place when the victim opened fire upon the appellants causing injuries to four of them, that they exercised their right of private defence of life and property and they filed a counter case against Bazlur Rahman's men—Trial Court sentenced them as aforesaid. The prosecution case was that the victim had grown paddy in his land has been supported by PWs 1-5 and 7-10 but defence suggestion was that the incident took place no doubt but it took place in another plot—The onus to establish the plea of defence is upon them as specifically provided in section 105 of Evidence Act and the Court will presume the absence of any circumstances which bring the action of the accused within the exceptions described in Section 300 of the Penal Code—Accused did nothing to discharge the onus and their plea was rightly rejected by the Court below. *10 BCR (AD) 86.*

(5) Right of private defence—The finding being that either the cattle had caused damage to the crops or were caught before they could cause such damage leads to the logical inference that the right to seize the cattle under section 10 of the Cattle Trespass Act arose in favour of the accused. Having seized the cattle they were taking them to the cattle pound. If in doing so they were resisted and attacked they had the right of self defence. *18 DLR (WP) 31.*

(6) Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction—(a) by a Court in Bangladesh—Right of private defence—Extent cannot be weighed by golden scales—Court views with indulgence acts of a person who in heat of moment pursues his defence a little further than is absolutely necessary. Mere fact that complainant party suffering greater number of injuries than those suffered by accused not sufficient to hold accused as aggressor. Prosecution failing to explain injuries on the person of accused—Such omission makes prosecution version highly doubtful and lends support to accused's plea of self defence. Safe administration of criminal justice—Court should draw its own inference flowing from evidence and circumstances and not be deterred by reason of incompleteness of tale given by each party. *PLD 1966 Lah 8.*

(7) Right of private defence—Accused's goats trespassing into the field let by landlords to tenants—Servants of landlord rounding goats—Accused's resisting, killed two of the servants—Offence—Where an owner of cattle uses force to get his cattle, which are wrongfully taken to pound, released, he is not guilty of any offence as he has a right to protect his cattle in the exercise of the right of private defence. *6 DLR (WP) 179.*

(8) Right of private defence—Eight persons on trial for offence under sections 147 and 148 of the Penal Code who pleaded exercise of right of private defence. If the accused had a right of private defence but exceeded that right there can be no conviction under sections 147-148 of the Penal Code. *6 DLR 120.*

2. For more cases see under section 99.

Section 98

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.

Cases

1. Scope.—(1) The section makes it clear that a person does not lose his right of private defence of property merely because the opposite party is under a misconception. *AIR 1959 All 790.*.

(2) Where A enters upon property under a misconception as to his possession thereof, B, the person in actual possession, would have a right of private defence against A, and as has been seen in Section 96. A cannot have any right of private defence against the exercise by B of his right of private defence which is a lawful act on his part. *1967 KerLT 463.*

(3) B was in possession of land as tenant of A. A tree which was on the lane was blown down by the wind and B cut the fallen tree and stacked it for the purpose of using it himself. A tried to remove the wood so stacked and B obstructed it under a misconception that he was entitled to it as having been planted by his father. It was held that A had a right of private defence against B. *AIR 1914 Nag 7.*

(4) If a drunken man breaks the law and attacks either the person or the property of other people, any member of the public is entitled to exercise the right of private defence against such attack, even though the drunken man himself may be entitled to protection of the law. *AIR 1927 Rang 121.*

Section 99

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 acting 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 acts, or if he has authority in writing, unless he produces such authority, if demanded.

Cases and Materials : Synopsis

1. *Scope of Sections 97 and 99.*
2. *Right of private defence arises only against acts which are offences.*
3. *Private defence of body.*
4. *Private defence of property—General.*
5. *Private defence against criminal trespass.*
6. *Private defence against theft and robbery.*
7. *Private defence against obstruction to easement.*
8. *Shooting animals on other's lands.*
9. *Private defence against mischief.*
10. *Place where right of private defence of property may be exercised.*
11. *Filthy abuse and threat.*
12. *Preparation and use of weapons for private defence.*
13. *Maintenance of right and enforcement of right.*
14. *Private defence against acts of public servant.*
15. *Act done by the direction of public servant.*
16. *"Public servant."*
17. *"Good faith".*
18. *"Act done".*
19. *Time to have recourse to the protection of public authorities—Section 99, third paragraph.*
20. *"Protection of the public authorities" (S. 99 Pr. 3)—Meaning of.*
21. *Right does not extend to causing more harm than necessary—Section 99, fourth paragraph.*
22. *Section 99, fourth paragraph must be read with Ss. 100, 103 and 104.*
23. *Aggressor and right of private defence.*
24. *Presumption from injuries.*
25. *Assembly of men and private defence.*
26. *Against whom right can be exercised.*
27. *Existence and exercise of right of private defence—Question of law or fact.*
28. *Onus of proof.*
29. *Court's duty—addressing assessors*

1. Scope of Section 97 and 99.—(1) The right of private defence is subject to the restrictions contained in this section. The right of private defence of body or of property can be exercised against a public servant in the following cases (a) when the act of the public servant reasonably causes apprehension of death or of grievous hurt; (b) when the public servant does not act in good faith under colour of his office; (c) when the person exercising the right neither knows not has any reason to believe that the assailant is a public servant or acts by the direction of a public servant. There is no right of private defence: (i) 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 or by the direction of a public servant acting in good faith under the colour of his office, though that direction may not be strictly justifiable by law; (ii) in cases in which there is time to have recourse to the protection of the public authorities, 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. The use of self defence must always be proportionate to the quantum of force used by the assailant and which it is necessary to repel. The right of private defence is only a right of protection and not of aggressor. If under the guise of such a right the limits prescribed by law for the exercise of that right are exceeded and more harm than is necessary is caused

then the act would become an offence. The extent of force which would be justifiable depends upon the circumstances of each case. The nature of attack, the danger apprehending imminence of danger and the real necessity of inflicting harm by retaliation for the purpose of self defence are matters to be taken into consideration in deciding whether the right of private defence has been exceeded. An important consideration which always arises in order to determine whether the action of the accused is covered by the right of private defence is: first, what is the nature of the apprehended danger; secondly, whether there was time to have recourse to the public authorities, always remembering that where both the parties are determined to fight and go upto the land fully armed in full expectation of an armed conflict in order to have a trial of strength, the right of private defence disappears *(AIR 1938 Patna 518, 39 CriLJ 785)*. The burden of proof in on the accused. They must have to prove that there was no time to have recourse to the protection of public authorities *(AIR 1945 Nagpur 269)*. Where a free fight takes place and both parties enter into and engage in a fight of their own free volition, none of them can plead self defence. A person has a right to resist sodomy and defend his person to the extent of causing death. The law gives a person the right to cause death in order to save himself or another from the commission of rape. In a well-ordered civilised society it is generally assumed that the State would take care of the persons and properties of individual citizen and that normally it is the function of the State to afford protection to such person and their properties. 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. To begin with, the person exercising a right of private defence must consider whether the threat to his person or his 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 and 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 *(1963 CriLJ 495)*. Section 99 of the Penal Code is an attempt on the part of the legislature to reconcile the two rival needs—one of lending protection to the public servant in the exercise of their public duties which may sometimes be of a little difficult nature, even when there might be some errors in the discharge of those duties and the other, need of preventing the exercise of powers by the public servant from degenerating into arbitrariness and protecting the public from the arbitrary and capricious acts of public servant and to strike a proper balance between them. It is on account of those considerations that the protection has been granted to only those acts which are not strictly justifiable in law and has been denied to those acts which are ultra vires and have no legal basis.

(2) In the instant case an order of temporary injunction was in force but no action was taken to have this order vacated by the deceased Afzal. Afzal violated the injunction by sowing 'kaun' in the land which grew for over two months and thereby forcibly dispossessed the appellant. The appellant had a right of private defence of property which he could have exercised when Afzal first went to grow the "Kaun" but he did not do so. But after two months he went to plough up the land to destroy the crop for the purpose for re-establishing his possession. This is not permitted by law as during this period he could have resort to public authorities. Right of private defence of his property will not be available as section 99, paragraph 3 of the Penal Code stands in his way. This paragraph is quoted below: "There is no right of private defence in cases where there is time to have recourse to the

protection of the public authorities". Hence, in the facts of this case, the plea is not available. *(Ref: 9 BLD 155 AD). 42 DLR (AD) 3.*

(3) Right of private defence and property—Complainant party unarmed—Accused exercise his right of private defence of person and property by inflicting more harm than it was necessary for conviction—And sentence upheld. The right of private defence is a legal right which one can exercise for the defence of person and property. But this right is to be exercised under certain restrictions or limitations. Sentence of 7 years RI not at all excessive under section 304 Part 1. *1 BSCD 239.*

(4) Right of private defence—Use of force in exercise of the right of private defence to the property must not be disproportionate to the act which calls for exercise of such a right—Killing a trespasser in the right of private defence cannot be justified when no apprehension of injury to life is imminent from the trespasser. The landlord without taking possession of his tenanted land in due course of law obtaining consent of the tenant for such possession entered on the land. When the landlord was ploughing the land the tenants instead of reentering (to which they were entitled as they had not acquiesced in such entry) attacked the landlord and deliberately shot him dead. Held: The tenants in the present case are no doubt clothed with the right of private defence of property but the law does not permit to kill a man outright in exercise of the right of private defence of property. In a case where the trespasser is unarmed and there is no threat of grievous injuries to the person who is resisting the trespass he is not entitled to use such force as may result in the killing of a person. If he does so he cannot claim that he was doing so in the right of private defence and has exceeded in his right. There is no doubt that the landlord is also to be blamed for taking the law in his own hands which amounts to reduction of sentence of the tenants. *22 DLR (SC) 129.*

(5) Bloody fight between two parties in terms of enmity with each other—Each party in an incident like this throwing the responsibility on the others—In occurrences of this nature responsibility for individual injuries to be fixed on a careful examination of the evidence on the person responsible for it, none being held in constructive liability. *17 DLR (SC) 186.*

(6) Self defence—Illegal detention of A by police, amounts to illegal confinement—A slipping away—Police pursuing to catch A, who resists—Police resorting to violence to meet A's resistance—No right of self defence available to Police—When detention of a person by the police amounts to an illegal confinement, and even if the man slipped away from the custody of Police the latter had absolutely no right to pursue him in order to catch hold of him. If any one of them who did so, was resisted then the Police resorted to violence to meet that resistance, the plea of self defence would not be available to the police in the circumstances. When a person inflicts hatchet injuries on a dead man, he cannot be charged for the offence of murder *(Ref: PLD 1954 (Lah) 170). 12 DLR (SC) 266.*

(7) Public servant's act must not be wholly without jurisdiction, but only not strictly justifiable by law and he must act in good faith. Mere apprehension of breach of peace—Arrest not justifiable—Existence of emergency necessary—Good faith requires due care and attention—Right of private defence against arrest—In order that the first and second paragraphs of section 99 of the Penal Code may apply, it is essential that the act against which the right is sought to be exercised should be one that is not altogether without jurisdiction but only such as is not strictly justifiable by law and that the public servant was acting in good faith. Where therefore the arrest is not justified under section 99 Penal Code the persons concerned would have the right of private defence which extends to the infliction of any harm, short of death provided they did not cause more harm than was necessary for the defence. *6 DLR (WP) 149.*

(8) Right of private defence whether available against a public servant when acting under a mistake. The protection afforded under section 99 to public servant is not lost even if they make any mistake in the exercise of their functions. *3 DLR 205.*

(9) Right of private defence—Where right of private defence is pleaded, essence of case, Held: should be to ascertain who was aggressor and whether accused acted in exercise of his right of private defence or otherwise—Plea of self defence, Held: further, amounted to presumption that harm which accused had inflicted on alleged aggressor was not an offence because circumstances entitled him to exercise of right of self defence. Accused receiving two dagger blows at the hands of deceased which were declared as grievous—Attack by deceased on person of accused and giving him dagger blows bringing latter in imminent danger of death or such bodily injury which could prove fatal if accused had not reacted—Trial Court disbelieving presence of only eye-witness produced by prosecution—Thereafter, statement of accused left in the field to the effect that he committed murder of deceased in exercise of right of private defence—Fact that accused fired only one shot at deceased brought case within ambit of second clause of section 100 of the Penal Code—But trial Judge did not extend benefit of section 97 of the Penal Code to accused for the only reason that since accused had failed to adduce evidence in his defence. Held, keeping in view circumstance of the case there was hardly any justification for trial Judge to hold accused to adduce evidence to prove that he had committed murder of deceased in exercise of his right of private defence—First information report also showed that it was deceased who opened attack and medical evidence fully corroborated plea of accused—Accused reported matter to police prior to lodging of report by deceased party—After disbelieving presence of eye witness only evidence before trial Judge was that of accused which fully established that he acted in exercise of right of private defence—Conviction and sentence set aside in circumstances. *1987 PCrLJ 2164.*

(10) Private defence of property against a Corporation—Official deputed to remove encroachment on the road—Not available unless such act amounts to mischief. *9 PLD 451 Lah.*

(11) Deceased asked by Assistant. Sub Inspector of Police to produce accused before him—Deceased meeting accused and asking him to surrender as he was wanted by police—Accused asking deceased not to come forward—Despite warning deceased advancing towards accused and firing shot from his gun, which hit deceased, who fell down and died—Case not falling under section 100, but under circumstances of case, sentence of transportation of life substituted for that of death. Section 100 must be read with sections 99 and 101 of the Penal Code. The effect of reading sections 99 and 101 of the Penal Code together would not render an individual entirely helpless in the matter of his unlawful arrest *(Ref: AIR 1941 Sind 82). PLD 1967 (Lah) 588.*

(12) Right of private defence of person even extends to causing of death when there is a reasonable apprehension that the intended assault by the aggressor would cause death or grievous hurt. But no right of private defence of person is available against an unarmed man. *Dalim and another Vs. The State, 15 BLD (HCD) 133.*

(13) Where the arrest is not justified under sec. 99, the persons concerned would have the right of private defence which extends to the infliction of any harm, short of death, provided they did not cause more harm than was necessary for the defence. *Ahmed Vs. Crown (1954) 6 DLR (WP) 149.*

(14) Self-defence—Illegal detention of A by police amounts to illegal confinement—A slipping away—Police pursuing to catch A, who resists—Police resorting to violence to meet A's resistance—No right of self-defence available to police. *Feroz Khan Vs. State (1960) 1 DLR (SC) 266 : (1960) PLD (SC) 344.*

(15) Section 97 is, as the section itself provides, subject to the restrictions enacted in S. 99. *AIR 1964 SC 205.*

(16) Both Sections 97 and 99 are subject to the subsequent sections of Chap. 4. *AIR 1952 SC 162.*

(17) The right of private defence of person or property is to be exercised subject to the following limitations : (i) if there is sufficient time for public authorities the right is not available; (ii) more harm than necessary should not be caused; and (iii) there must be reasonable apprehension of death or of grievous hurt to the person or damage to property concerned. *AIR 1976 SC 1674.*

(18) It is possible that in appropriate cases in exercising the right of private defence a person may even kill. The right is no longer restricted to person himself being under attack of being subjected to assault. Even a stranger can act to prevent a crime. *AIR 1983 Delhi 513.*

2. Right of private defence arises only against acts which are offences.—(1) The right of private defence arises only against acts which constitute an offence except in certain specified circumstances. *AIR 1974 SC 496.*

(2) The right of private defence does not arise merely because an act is unlawful or wrongful. The act must amount to an offence of a particular kind. *AIR 1949 All 180.*

(3) An act which may not be one's liking but is not punishable under the provisions of the Penal Code will not give rise to a right of private defence. *AIR 1948 All 205.*

(4) When in execution of a degree obtained by X against A, X was given delivery of possession by the Court, which however gave permission to A to remove his crops. A cannot resist the entry of X into the land, as his entry would be a lawful one and not an offence. *AIR 1927 Lah 193.*

(5) A reasonable apprehension of death or grievous hurt is enough to give rise to the right of private defence. It is not necessary that the apprehension must have materialised. *AIR 1975 SC 1674.*

3. Private defence of body.—(1) The right of private defence of the body comprises not only the right to defend one's own body, against an offence against the human body but also the right to defend the body of any other person. *AIR 1952 SC 165.*

(2) An unlawful arrest or unlawful apprehension will be an offence against the human body. *AIR 1955 NUC (All) 2782.*

(3) Dispute with the accused over payment of amounts claimed by deceased and others in respect of digging of well in accused's land—Accused while returning home in closed jeep, stopped on the way by persons including deceased—Persons unarmed—Accused firing the three shots from the jeep at the persons fearing physical harm and killing deceased—Right of private defence of body available to accused—But accused had exceeded right of private defence. *AIR 1980 SC 660.*

(4) Where a boy raised a cloud of dust in the street and the accused, a passerby, chastised him by slapping him, it was held the act of the boy was causing injury to the body of the passerby and that the accused's act in slapping the boy was in the exercise of the right of private defence. *AIR 1944 Mad 168.*

4. Private defence of property—General.—(1) If a person has a bare title to a property his remedy in respect of any wrong to the property would be to seek redress in a Court of law and not to enforce it by the use of force himself. *AIR 1949 All 274.*

(2) In cases of private defence of property the question as to who was in actual possession is of paramount importance. The right to possession or constructive possession is not generally of much importance. *AIR 1968 SC 702.*

(3) "A trespasser acquires the right to defend his possession against physical attack only if he has come to it by the acquiescence, express or implied, of the rightful owner and his possession has become peaceful and settled". *AIR 1961 All 38.*

(4) Before the trespasser's possession has become a "settled possession" and while he is in the process of acquiring possession, the trespasser can be ejected by the owner by the use of the necessary force, in the exercise of the right of private defence. *AIR 1971 SC 1213.*

(5) A judgment-debtor cannot, by a surreptitious act of planting in land delivered by the Court to an auction-purchaser, give himself such possession as would give him the right of private defence against the auction-purchaser's act in reaping the harvest. *AIR 1942 Mad 58.*

(6) Land in tenant's possession must be held to be in his possession though it is submerged under water. The landlord has no right to lease out fishing rights in the water on the land and if the lessee attempts to fish therein, the tenant would have a right of private defence against such attempt. *AIR 1918 Pat 239.*

(7) A useful summary of the right of private defence of property enacted in Ss. 97 and 99 given. *AIR 1949 All 274.*

5. Private defence against criminal trespass.—(1) A trespass made without any criminal intention is not a criminal trespass and there is no right of private defence against such trespass. *AIR 1969 Bom. 20.*

(2) A enters on a land (about the possession of which there is dispute) under an order of a Magistrate under Section 145 of the Criminal Procedure Code. A does not commit criminal trespass and there is no right of private defence against such entry. *AIR 1958 All 432.*

(3) A enters on property in possession of B under an illegal order of delivery of possession by an unauthorised person with a view to intimidate B, the person in possession. A's entry is a criminal trespass and B has a right of private defence against A. *AIR 1968 SC 702.*

(4) A, in execution of his degree against B, obtained delivery of possession through Court. When a few days after, A came to the land he found that B had come back on the land, held that A's entry in the bona fide exercise of his right was not a criminal trespass and that B had no right of private defence against A. *AIR 1914 Cal 286.*

(5) Where the accused fixed up a live electric wire in his latrine for the purpose of preventing strangers from using the latrine and a stranger woman entered the latrine and died from contact with the wire and it was argued that the act of the accused in fixing up the live wire was an act in the exercise of his right of self-defence, it was held that no question of private defence arose in the case and that the accused was guilty of the offence under S. 304-A of the Code. *AIR 1964 SC 205.*

6. Private defence against theft and robbery.—(1) Every person has right of private defence against a person or persons attempting to commit the offence of theft or robbery. *AIR 1927 Lah 355.*

(2) A was a landlord who was the owner of a tree on the land in the possession of a tenant B. The tree was blown up in the wind. The tree was thereupon out by B with a view to appropriate it himself. It was held B's act would be an offence of theft, that A had a right to enter on the land for recovering the tree, and could exercise the right of private defence if B resisted the removal. *AIR 1914 Nag 7.*

(3) An illegal seizure of cattle and attempt to remove them will constitute theft, and the owner of the cattle has a right of private defence against such act. *AIR 1947 Lah 380.*

7. Private defencec against obstruction to easement.—(1) Where A puts a construction on his own property which has the effect of obstruction the light and air to B's windows. B cannot use force and remove the obstruction in the exercise of any right of private defence. *AIR 1958 MadhPra 341.*

8. Shooting animals on other's lands.—(1) If a person kills a wild animal or wild bird on the property of another person the dead creature does not belong to the killer but to the owner of the land, and such owner can lawfully demand, and if refused, seize the dead creature from the possession of the killer and such persons as help him (the owner) to exercise his right would be doing no illegal act and will be protected under Sections 97 and 99 of the Code. *AIR 1924 Pat 564.*

9. Private defence against mischief.—(1) The following acts may amount to mischief :—

(a) the cutting of trees on another man's property. *AIR 1940 Pesh 6.*

(b) the destruction of wall. *AIR 1953 All 338.*

(c) the destruction of a dam across a channel or water-course lawfully put in by another person or presons. *1962 KerLT 868.*

(d) the unlawful obstruction of water-course by putting up a dam across it. *AIR 1933 Sind 142.*

(e) allowing one's cattle to graze in another man's field. *AIR 1956 Sau 107.*

(2) Taking of another's cattle grazing in one's field to the cattle pound after seizure will be a lawful act and the owner of the cattle cannot use force and rescue them. If he tries to rescue them by force his act will be an offence against which the person taking the cattle to the pound will have a right of private defence. *AIR 1956 Sau 107.*

(3) The seizure by A of B's cattle which have not caused damage to A's property, and taking them to the pound will be an unlawful offence and the owner of the cattle can rescue the same by the use of necessary force and A has no right of private defence against such rescue. *AIR 1965 72.*

(4) Where X drove a loaded cart across a field belonging to Y who had raised crops on it, X was held to have committed criminal trespass and mischief and that the Y had a right of private defence in exercise of which he could use force to prevent X from causing loss. *AIR 1959 All 690.*

(5) In an industrial dispute, even an illegal demand by the workers cannot give rise, by itself, to any right of private defence to the owner or manager of the institution unless there is an apprehension of injury to person or property. It is only when workers start hurling brickbats and damaging property, there would be a right of private defence or person or property. *AIR 1979 SC 577.*

10. Place where right of private defence of property may be exercised.—(1) Where a body of persons armed with lathis and accompanied by bullocks and ploughs started 7 furlongs away from the property belonging to X to go to the property with the avowed object of upturning the crop which had been sown by X, and X and his party met the coming body of persons and prevented them by use of force from reaching his property, the mere circumstance that the property was situated at a distance from the place where X met the aggressive party did not prevent the right of private defence from coming into existence. *AIR 1954 All 771.*

11. Filthy abuse and threat.—(1) The use of fifthy abusive language cannot be considered to be an act in the exercise of the right of private defence. *AIR 1959 Orissa 155.*

(2) There are many threats which people use as a form of abuse which are never intended to be taken seriously and still others which the persons uttering them have not the capacity to put into immediate execution. *AIR 1952 Orissa 37.*

(3) An oral protest from a distance to an act being done by the accused on his property does not amount to an invasion of his property so as to give him a right of private defence against the person protecting. *AIR 1946 Rat, 84.*

12. Preparation and use of weapons for private defence.—(1) Where a person receives information of an intended attack on his person or property there is nothing wrong in his getting ready with weapons and men for the purpose of defence against the attack. *AIR 1954 Punj 232.*

(2) Where one L stood before a jeep driven by A for preventing it from moving and A drove the jeep over L causing injuries, held it was atrocious for anybody to think of using a motor-car as a weapon for the exercise of self-defence, and that A had exceeded his right if any existed. *AIR 1958 Ker 8.*

(4) Where an aggressor B attacks A with a weapon. A is perfectly justified in snatching the weapon from his hand and hitting B to inflict on him the necessary harm. *AIR 1951 Orissa 245.*

13. Maintenance of right and enforcement of right.—(1) The enforcement by a party of a right by force is not lawful even if the right has been ordered in his favour by a Court of law. *AIR 1964 Punj 90.*

(2) Where neither party is in possession and each of them fights for the enforcement of the right or supposed right, it will not be an enforcement of right of private defence. *AIR 1926 Oudh 148.*

14. Private defence against acts of public servant.—(1) Where a public servant does an act strictly in accordance with law, he commits no offence at all and there cannot be a right of private defence against such act. *AIR 1965 SC 871.*

(2) If the act which would otherwise be an offence is one which does not cause an apprehension of death or grievous hurt, still if the act is illegal, as being without jurisdiction and outside the powers of the public servant, the public servant is not protected and there will be a right of private defence against such act. *AIR 1969 Raj 121.*

(3) In the course of lawful search by a police constable, he illegally laid hands on a woman. It was held the police constable acted illegally and there was a right of private defence. *AIR 1926 All 147.*

(4) The words "colour of office" also refer to an irregular as distinguished from an illegal act; they show that the act is within jurisdiction but that jurisdiction is exercised irregularly as on insufficient grounds. *AIR 1953 Mad 936.*

(5) Explanation I goes with the first paragraph of Section 99 and it is intended to protect persons who may have acted in ignorance of the fact that the person they were dealing with was a public servant. *AIR 1953 Mad 936.*

15. Act done by the direction of a public servant.—(1) Where a warrant did not authorise a public servant to make a particular arrest, and under his direction a peon attempted to make an arrest, the person arrested has a right of pirate defence against such arrest. *AIR 1932 All 227.*

16. "Public servant".—(1) As to who is a "public servant" see Section 21 ante and also the undermentioned cases. *AIR 1974 SC 1158.*

(2) Where a vakil was appointed by the Court to secure an attachment, it was held that at the time of securing the attachment, the vakil was a public servant, that an omission to record the reason for the appointment did not make the order illegal, and that if the vakil acted in good faith and under colour of his office, there was no right of private defence against such act. *AIR 1935 All 490.*

17. "Good faith".—(1) "Good faith" in criminal law has not the same meaning as it may have in civil law. In the former case, it means due care and attention. *1964 RajLW 126.*

(2) A public servant not acting with due care and attention cannot be said to be acting in good faith. *AIR 1946 Lah 456.*

(3) The fact that a public servant acted with a good intention or that he believed himself entitled to act as he did does not establish good faith if he had not acted with due care and attention. *1964 RajLW 126.*

(4) A sowed a crop on the land. B and his party got into the field to cut the crops. A's servants went there with the station-house officer and some constables. The officer ordered the B party to leave off cutting the crops. But they did not do so. Then a constable without warning fired at one of the reapers and killed him, held that the constable did not act in good faith. *(1898) ILR 21 Mad 249.*

(5) A police officer was ordered by the Magistrate to maintain the "status quo", but the police officer, not understanding the meaning of the words "status quo", attempted to demolish a wall, held that he could not be considered to have acted in good faith in as much as he ought to have taken care to ascertain the meaning of the words. *AIR 1946 Sind 17.*

18. "Act done".—(1) Acts purported to be done by A, a public servant under the prospective general directions of B, a superior public servant (who was empowered to do certain acts under certain conditions) without the knowledge and the exercise of direction by B, cannot be considered to be "acts" done by B and if the acts are illegal by reason of the conditions not being fulfilled, A will not be protected. *AIR 1921 Mad 569.*

19. Time to have recourse to the protection of public authorities—Section 99, third paragraph.—(1) The third paragraph of Section 99 enacts that a person has no right of private defence if he has time to have recourse. *AIR 1977 SC 619.*

(2) The third para. of S. 99 must be read with the first paragraph of Section 105 which enacts that the right of private defence commences where a reasonable apprehension of danger commences. *AIR 1963 Mys 33.*

(3) Before the apprehension commences a person is not called upon to apply for protection to the public authorities. *AIR 1968 Mys 33.*

(4) When the complainant's party invaded the field on July 1, 1962, Jamuna's relations must naturally have been taken by surprise. Law does not require a person whose property is forcibly tried to be occupied to run away and seek protection of the authorities. *AIR 1968 SC 702.*

(5) If the act of mischief has already begun there is more than an apprehension of danger to the property and the right of private defence has come into exercise. If the right of private defence has already arisen, it is not expected that a person entitled to exercise it should have recourse to the protection of public authorities. *AIR 1934 All 829.*

(6) Where a Union Board trespassed into the property of the accused and laid a drain therein, the accused was held entitled to destroy the drain in so far as it encroached upon his land and was not bound to submit to the act of trespass. *AIR 1953 Cal 457.*

20. "Protection of the public authorities" (S. 99 (Pr. 3))—Meaning of.—(1) The expression "the protection of the public authorities in S. 99, Para. 3 means such protection as can preserve the status quo. *AIR 1964 Orissa 262.*

(2) It is implied in this provision that the police are in duty bound, where recourse is had to them for protection, to take steps to protect the property and person of the complainant. *AIR 1973 All 85.*

21. Right does not extend to causing more harm than necessary—Section 99, fourth paragraph.—(1) If there is no right of private defence at all, there can be no question of exceeding that right. *AIR 1971 SC 1491.*

(2) No person exercising his right of private defence can inflict more harm on the assailant than is necessary for the purpose of defence. *AIR 1974 SC 1570.*

(3) It is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself of 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 the legitimate purpose. *AIR 1963 SC 612.*

(4) While applying the test under S. 99 P.C. to the effect that no harm is to be caused other than what is necessary for the purpose of defence, the number of injuries caused by the accused is not the only consideration. *1983 PakLD 225.*

(5) The means which a threatened person adopts or the force which he uses should not be "weighed in golden scales". *AIR 1977 SC 473.*

(6) In the exercise of his right of private defence a person 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 and the right of private defence legitimately exercised, it would not be fair to require that he should modulate his defence step by step according to the attack, before there is reason to believe that the attack is over. *AIR 1963 SC 612.*

(7) The right of private defence does not extend to chasing and killing a person who is running away from the scene. *AIR 1972 SC 2544.*

(8) The previous relationship between the deceased and the accused, and the deceased's aggressive temperament and disposition shown in his conduct of trespassing into the accused's house in order to assault here while she was retracing her steps, must go a great way to cause belief in the accused of an impending danger to life accompanied with little change of escape. *AIR 1952 Orissa 37.*

(9) Where a party A was reaping crops under police protection and had no arms except their sickles and the accused came armed and shot down a member of the A party engaged in reaping, their Lordships of the Supreme Court held that more harm than was necessary was caused and that the accused had exceeded their right of private defence. *AIR 1965 SC 257.*

(10) A was in possession of a field and ploughing it and C, D and E criminally trespassed into the field and C tried to catch the reins of A's bullocks. Thereupon A hit C with a spade. E then went near A and was also hit by A. It was held that no distinction could be made between the cases of C and E on the ground that C had used force and E did not; the injuries to both C and E were caused in the same trespass with the same common object and A could not be held to have exceeded his right of self-defence. *AIR 1955 Sau 2.*

(11) Where some armed persons went to harvest certain crops forcibly and during the assault which they made on the owner of the crop the accused who was on the side of the owner, gave a fatal blow to one of the members of the intruding party reasonably apprehending grievous hurt or death of the owner, the accused could not be said to have exceeded the right of private defence. *AIR 1972 SC 244.*

(12) A person exercising his right of private defence is not required to inflict an injury on the assailant of the same nature as was caused to him by the assailant. The only restriction is, as stated

above, that he should not use more force than is necessary and should not inflict an injury which is out of all protection to the threatened injury to himself. *AIR 1954 Mad 319.*

(13) Where, in exercising his right of private defence, the accused exceeds the right given to him by the law and cause the death of his opponent, his act will not amount to murder and he cannot be convicted under Section 302 but only under S. 304. Such a case has been expressly provided for by S. 300, Exception 2. *AIR 1976 SC 2273.*

22. Section 99, fourth paragraph must be read with Sections 100, 103 and 104.—(1) The provisions of Ss. 100, 103 and 104 do not mean that in every case covered by the excepted classes the causing of death would be justifiable. *AIR 1922 Nag 141.*

(2) The question always is whether the causing of death was necessary for the defence. In this view Ss. 100, 103 and 104 must be read subject to last paragraph of Section 99, though S. 99 also must be read subject to the restrictions in Ss. 100, 103 and 104. *AIR 1980 Oudh 408.*

23. Aggressor and right of private defence.—(1) A person who is an aggressor cannot be said to defend his person or property and consequently be entitled to a right of private defence against a person who defends himself against the aggressor. *AIR 1979 SC 1230.*

(2) Where A, an aggressor, attacks B and C. D and E come to B's help, A cannot be said to be acting in private defence against the rescuers. *AIR 1943 Lah 163.*

(3) When accused went to a house fully armed to commit an offence and when detected by the deceased and tried to be apprehended, killed the deceased with the weapon which he had brought, held that the detection and apprehension by the deceased did not give the accused a right of private defence and that he was guilty of the offence of murder. *AIR 1941 Lah 81.*

(4) When A picked a quarrel with B and attacked him and was running away for safety and B followed him to take revenge and A turned round and defended himself, it was held that A's act was an act of self-defence. *AIR 1925 All 313.*

24. Presumption from injuries.—(1) The fact that the accused has injuries on his person is a circumstance showing that he was exercising the right of self-defence and that the other party was the aggressor. *AIR 1972 SC 1838.*

(2) The absence of any injury on the person of the accused is a strong indication that there was no attack on him and that he was not acting in self-defence. *AIR 1975 SC 216.*

(3) Where a reading of two reports by counter parties indicate that both parties were anxious to make out a case of self-defence and were trying as much as possible to explain the injuries found on the other side, it becomes difficult to accept either of the versions as containing whole truth. While what happened cannot be determined with certainty the accused were entitled to benefit of doubt. *AIR 1980 SC 864.*

(4) The number of injuries on the accused does not necessarily prove that the party causing them were the aggressors. *AIR 1955 J and K 9.*

(5) The question whether an accused in exercising his right of private defence, exceeded that right, cannot be decided on the basis merely of the number of injuries which he inflicted on the complainant. *AIR 1952 Cal 217.*

(6) Where serious injuries were inflicted on the deceased which were not necessary for protecting property from him and the indiscriminate attack was continued even after the deceased fell down and

only minor injuries were received by the accused, it was held that the right of private defence was exceeded. *AIR 1971 SC 2143.*

25. Assembly of men and private defence.—(1) An assembly of persons , whatever be their number, acting in the exercise of the right of private defence cannot be said to commit an offence. *AIR 1955 NUC (All) 3285.*

(2) If the common object of an assembly of 5 more persons is doing an act in the exercise of the right of private defence which would exceed the right, then the assembly will be an unlawful assembly. *AIR 1933 Oudh 41.*

(3) Where it is not known which of the members exceeded that right and there is no common intention to cause death, none of the accused can be held guilty of the offence. *AIR 1970 SC 27.*

(4) Where 5 or more persons (accused) makes a common plea of self-assembly would be an unlawful assembly if they purport to inflict harm acting in concert in the purported act of self-defence to which they were not entitled. *AIR 1960 Mys 294.*

(5) Where an unlawful assembly attacks a person, the latter is entitled to take all necessary steps to defend himself. *AIR 1936 Pat 622.*

(6) Where a body of persons are determined to vindicate their rights of supposed rights by unlawful force and when they engage in a fight with men who are equally determined to vindicate their rights by unlawful force, no question of private defence arises. *AIR 1926 Pat 433.*

26. Against whom right can be exercised.—(1) When a person is being attacked by a party of aggressors and he is not in a position to distinguish which person in the party is the real assailant and which person is merely an onlooker, he is not deprived of the right of private defence merely because a person in the attacking party has not attacked him. *AIR 1971 Raj 68.*

(2) Where an attack is made by an unlawful assembly, the right of private defence can be exercised against any members of the assembly irrespective of the fact whether he made any attack. *AIR 1971 Raj 68.*

27. Existence and exercise of right of private defence—Question of law or fact.—(1) Whether the accused had a right of private defence under the particular circumstances is a question of law. *(1913) 14 CriLJ 295.*

(2) Whether the act done by the accused was in the exercise of right of private defence is a question of fact. *1966 CriLJ 358.*

28. Onus of proof.—(1) The burden of establishing circumstances leading to exercise of right of private defence rests on the defence. But the nature of the burden resting on the defence is not so onerous as the burden resting in prosecution. The burden resting on the defence can be discharged as in any other case, by adducing direct evidence or by establishing probabilities with regard to circumstances pleaded by accused. Even if the defence fails to discharge burden the matter does not end there and the prosecution cannot automatically succeed. *1982 CriLJ 170.*

(2) An accused pleading the right of private defence of property must prove his possession of the property at the time. *AIR 1955 NUC (All) 4169.*

(3) Where the prosecution fails to prove its case as to how the offence was committed the accused need not prove either his right of private defence or that he did not exceed it. *AIR 1925 Pat 175.*

29. Court's duty.—(1) Where a right of private defence is pleaded, the essence of the case should be to ascertain who was the aggressor and whether the accused party acted in the exercise of their right of private defence or otherwise. *AIR 1965 Ker 44.*

Section 100

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.

Cases and Materials : Synopsis

1. *Scope of section.*
2. *"Under the restrictions mentioned in the last preceding section."*
3. *"Voluntary causing of death."*
4. *Assault.*
5. *"Reasonably causing apprehension of death or grievous hurt."*
6. *Thirdly—Assault with his intention of committing rape.*
7. *Fourthly—Assault with the intention of gratifying unnatural lust.*
8. *Fifthly—Assault with the intention of kidnapping or abducting.*
9. *Sixthly—Assault with the intention of causing wrongful confinement.,*
10. *Plea of private defence and burden of proof.*

1. Scope of the section.—(1) Section 100 of the Penal Code lays down six cases where the right of private defence of the body extends to the voluntary causing of death to the assailant. Section 103 is analogous to section 100 and enumerates certain offences against which the right of private defence of property extends to the voluntary causing of death to the wrongdoer. The two sections together make up the complete law of justifiable homicide according to the Penal Code. These sections speak of offences which are heinous in nature or notoriously dangerous. Section 100 allows this enlarged form of right in cases of an assault reasonably causing apprehension of death or grievous hurt or to kidnap or abduct or to wrongfully confine a person under circumstances which may reasonably cause a person to apprehend that he will be unable to have recourse to the authorities for his release. It is seen that adultery is not included in the category. The killer of an adulterer caught in the act by a husband generally takes under section 300, Exception 1. It will be seen that the division of justifiable homicide into sections 100 and 103 i.e. those in the defence of the body and of property is artificial, or the right of private defence is allowed, to extend to cause death only in case of robbery or house breaking by night, of mischief by fire to a house and offences in which "in addition to the danger to the property, the person is also subject to the danger of death and grievous hurt". Mischief by fire is not only peculiarly dangerous, but requires to be stopped at once by the most summary and effective means.

Theft and extortion become robbery when they are attended with violence and as robbery or its aggravated form dacoity is generally committed by surprise, the law permits every man to resist such an offence even by going to the extreme, if necessary. The limitation that no more harm should be caused than is necessary under the circumstances of the case is of prime importance in almost all cases. It is to be noted that all that is necessary in order to justify one in taking the life of another is that there must be reasonable apprehension of any such danger as are enumerated in the section. Though the taking of human life is not justifiable by way of prevention yet it is not essential that an actual felony should be committed in order to justify killing. If the circumstances are such that after reasonable cautions the party suspects that the felony is about to be immediately committed he will be justified in making the resistance.

(2) The law relating to self-defence makes the accused the judge of his own danger, and permits him to repel the attack even to the taking of life. The courts are to judge him by placing themselves in the same position in which he was placed. *Karim Vs. State (1960) 12 DLR (WP) 92.*

(3) Right of private defence not available when the position invoking such plea is in such an advantageous position over his deceased opponent that the latter was in the condition of being completely overpowered and disarmed by him. *State Vs. Manzoor Ahmed (1966) 18 DLR (SC) 444.*

(4) However unexpected the occasion for striking in self-defence and whatever the loss of self-control under provocation, a person who causes the death of another by smashing his skull with repeated blows on the head with a club must be taken to intend causing death or such bodily injury as is likely to cause death, and the same intention must be attributed to a person who kills another by stabbing him in the heart or by blowing his brains out by voluntarily exploding a gun. *Quadir Baksh Vs. Crown (1953) 5 DLR (WP) 82.*

(5) Land owned by co-owners—One co-owner forcibly stop other co-owners from ploughing the land—Latter has right of private defence both of body and property. *(1956) PLD (Pesh) 71.*

(6) In the exercise of self-defence a man can only take another person's life in self-defence if he could show that he was the victim of such an assault as would have reasonably given him cause to apprehend that death or grievous hurt would otherwise be the consequence. *State Vs. Manzoor Ahmed (1966) 18 DLR (SC) 444.*

(7) No right of self-defence when in a case the injuries which resulted in the death of the deceased were inflicted upon him at a time where he has already been over-powered, thrown on the floor and disarmed, for there could be thereafter no cause for apprehending either death or grievous hurt. *State Vs. Manzoor Ahmed (1966) 18 DLR (SC) 444.*

(8) Even in a sudden quarrel and a sudden fight if unfair advantage is taken by using knife on a helpless opponent directly to cause fatal injury on the neck—Held : the plea of self defence cannot be justifiably raised. *State Vs. Manzoor Ahmed, (1966) 18 DLR (SC) 444.*

(9) Even in case of strong provocation by the opponent the killing is not justified. *State Vs. Manzoor Ahmed (1966) 18 DLR (SC) 444.*

(10) Law does not confer the right of self-defence on a person who goes and seeks an attack on himself by his own threatened attack on another, an attack which was likely to end in the death of the other. The right of self-defence conferred by law for an individual is a very narrow and circumscribed right and can be taken advantage of only when the circumstances fully justify the exercise of such a right. Likewise, the right of self-defence is available to those who act honestly and in good faith. In no

case, can it be employed as a shield to justify aggression. An accused cannot invoke self-defence. Furthermore, once the provocation is given by an offender himself he cannot subsequently urge that his rival had acted in a provocative manner. *Azmat Khan Vs. The State, (1969) 21 DLR (WP) 337.*

(11) From the evidence placed on record we find that the appellant thought that he was no match for a duel and decided to escape by retreating. He was chased by the deceased and his companions armed with deadly weapons. After traversing some distance he found it difficult to escape, turned round and fired a shot. In the face of his finding it can be said that the appellant was justified in defending himself against attack. *Azmat Khan Vs. The State, (1969) 21 DLR (WP) 337.*

(12) To attack and surround a retreating person is not an act protected by the right of private defence of person or property. *Esaruddin Mondal Vs. Abdus Sobhan Sarkar, (1976) 28 DLR 341.*

(13) Right of private defence against unauthorised arrest—Exercisable only when there is immediate danger of restraint—Mere order to arrest no equivalent to legal arrest. *Hamida Banu Vs. Ashiq Hossain (1963) 15 DLR (SC) 65.*

(14) In view of the Explanation to Exception 4 of sec. 300, Penal Code it would be immaterial which party offers the provocation or commit the first assault. But before this exception is applied the essential conditions laid down in it must exist. This exception applies only to those cases, where on a sudden quarrel, both the parties begin to fight on an equal footing. In such cases, it is immaterial, which party offers the provocation or commits the first assault, because the combat is mutual. It does not, however mean that if on a sudden quarrel a person attacks another with some weapon, then the person attacked, if he kills his assailant, cannot avail of the plea of self-defence. In a case of this nature the person attacked cannot be held guilty of any offence because under the provision of section 100 of the Code, he is perfectly justified in killing his assailant. But if both the persons simultaneously take out their weapons and attack each other then Exception 4 to section 300 of the Code would apply. *Karim Vs. State, (1960) 12 DLR (WP) 92*

(15) When the accused had scuffles with the deceased and the fear of retaliation from the deceased party overpowers the mind, it is not possible for him to weigh the position in golden scales. In such situation when he is faced with assaults from his rival party it is not unnatural that he would strike a decisive blow to defend himself and to free himself from clutches of his adversaries. In the instant case, accused Ruhul Amin gave only one knife blow to deceased Moktar Ali and then ran away. The attending circumstances indicate that he gave the knife blow only to free himself from the grip of deceased Moktar Ali and ran away for safety. This conduct of the accused satisfies the legal requirement of the right of private defence. The accused cannot be said to have exceeded the right of self-defence. *Ruhul Amin Mondal Vs. State 49 DLR 250.*

(16) The section lays down the extent of the right of private defence against six specified kinds of assault. *AIR 1960 SC 67.*

(17) The word "harm" used in the expression "any other harm" means physical injury. *AIR 1966 SC 1773.*

(18) This section has to be read with S. 101 and the effect of so reading it is that where the offence committed by the other party is not of any of the descriptions enumerated in this section, the right of private defence of the individual against whom the offence is committed extends only to causing to the assailant any harm short of death. *AIR 1946 Sind 17.*

(19) The right of private defence of person comes to an end as soon as the aggressors leave the scene of occurrence. In a right of private defence of person and property, the Court is to see what it is, what is its extent and where it begins and where it ends. *28 DLR 341.*

(20) Right of private defence not available when the person invoking such plea is in such an advantageous position over his deceased opponent that the latter was in the condition of being completely overpowered and disarmed by him—In the exercise of self defence a man can only take another person's life in self defence if he could show that he was the victim of such an assault as would have reasonably given him cause to apprehend that death or grievous hurt would otherwise be the consequence. No right of self defence when in a case the injuries which resulted in the death of the deceased were inflicted upon him at a time where he has already been overpowered, thrown on the floor and disarmed, for there could be thereafter no cause for apprehending either death or grievous hurt—Even in a sudden quarrel and a sudden fight if unfair advantage is taken by using knife on a helpless opponent directly to cause fatal injuries on the neck. Held: the plea of self defence cannot be justifiably raised—Even in case of strong provocation by the opponent the killing is not justified. Here in this case a fight possibly arose in between the deceased and the accused respondent over some incriminating letters and photographs relating to love affairs with a girl with whom the deceased was earlier betrothed and "Magne" of the girl was formally celebrated and as those incriminating letters and photographs were in possession of the accused respondent the deceased tried to take them back. Fight with fist might have ensued and as a result the deceased was overpowered, thrown to the floor and disarmed, the killing by respondent accused with the knife in this circumstance is not at all justified although he might have received provocation nor he can raise a plea of self defence when there is no apprehension of death or grievous hurt. Plea of alibi without calling evidence in support of it is no plea at all—Mere suspicion will not be sufficient to justify conviction—Circumstantial evidence—Care and caution which Court must take in arriving at a conclusion based on circumstantial evidence—Witness may lie but not circumstances—Reasonable doubt, explained *(Ref: AIR 1978 SC 141). 18 DLR (SC) 444.*

(21) The law as to arrest is perfectly clear. When a person pleads the use of force in self defence against unlawful arrest he must show that he was in immediate apprehension of actual arrest in the form required by law namely, by restraint upon his person. Criminal trial—Every case is an authority on the facts of that case. *15 DLR (SC) 65.*

(22) The question whether the accused acted in the exercise of the right of private defence arises in the case of the prosecution itself. To secure a conviction for murder, the prosecution had to establish in this case not only that the appellant inflicted on the deceased the injuries of which he died, but also that he was the aggressor and acted with the intention or knowledge requisite for the offence of murder. If in determining whether this burden was discharged by the prosecution the version of the accused appears to be reasonably possible, then a reasonable doubt pervades the whole case and the appellant becomes entitled to an acquittal. Special defence plea under section 105 Evidence Act does not relieve the prosecution from proving its case beyond reasonable doubt. If defence adduces evidence which on the circumstances of the whole case raises a reasonable doubt, the accused is entitled to acquittal—Defence failing to prove special pleading but succeeded in raising reasonable doubt, accused entitled to acquittal—Court's duty to examine the entire evidence and circumstance in the case whether led by defence side or the prosecution side to arrive at a definite conclusion—Section 105 of the Evidence Act has been enacted in order to make it clear that it is not the duty of the prosecution to examine all possible defences that might be taken on behalf of the accused, and to prove that none of those defences would be of any assistance to him—In a criminal case it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence. If after examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these

circumstances the accused is entitled to benefit of doubt not as a matter of grace but as of right, because the prosecution has not proved its case beyond reasonable doubt. It is as necessary to place the defence version and its supporting evidence and circumstances in juxtaposition to the prosecution case for the proper examination of the extent to which the charge may be held to have been proved, as it is to examine prosecution case side with the defence case, in reaching a decision on the accused's special pleading. "The verdict must be given not on any special pleading but upon the result of the whole of the case" *(Ref: 1966 CrLJ 481). 5 DLR (FC) 107.*

(23) Private defence, right of—Question to be taken into account to find whether reasonable apprehension of death or grievous hurt existed; kind of weapon, manner of its use and surrounding circumstances—Apprehension of injury must however always be natural and probable. *1970 PLD Pesh 6.*

(24) Private Defence, right of—Prosecution failed to prove that occurrence had taken place in the manner stated by it—Defence version, on the other hand, appeared more plausible—Accused were first attacked by two deceased and two prosecution witnesses and it was in exercise of their right of private defence that accused had caused injuries to them. Held: accused were entitled to the statutory benefit of section 100 of the Penal Code—which was extended to them. *1989 PCrLJ 2028.*

(25) Private defence, right of—Deceased a young sturdy man taking accused to his room on pretext of getting him a job—Deceased was living single and his wife had died about 12 years back, plea of accused that the deceased wanted to commit sodomy on him forcibly and therefore, he snatched Chhuri from hands of deceased and stabbed him in order to save his honour and life, was probable—Accused, held, had complete right of private defence in circumstances—Accused was given benefit of doubt and acquitted. *1989 PCrLJ 504.*

2. "Under the restrictions mentioned in the last preceding section".—(1) In appropriate cases, in exercising the right of private defence, a person may even kill. The only postulate is that the act of killing will have to be tested on the principles as to whether the person concerned should legitimately have gone to the extent of killing in exercising his right of private defence. *AIR 1983 Delhi 513*

(2) In order to be entitled to a right of private defence under this section, it must be shown that the accused had no time to have recourse to public authorities. *AIR 1952 SC 165.*

(3) The accused cannot be held to have committed any offence intentionally killing the assailant if the assault could not have prevented by anything short of killing but he cannot be protected under this section if it is shown that he used much more force than was necessary. *AIR 1974 SC 1570.*

(4) Where in the course of a fight between two parties, a person belonging to one party runs away but a member of the other party chases and overtakes him at a considerable distance form the scene of fight and kills him, the member must be held to have exceeded his right of private defence. *AIR 1939 Lah 393.*

(5) Accused, causing numerous injuries but majorities of them on non-vital parts of body which showed a deliberate effect of not causing more harm than was necessary to save the victim—Neither good faith was locking nor harm done to save was disproportionate to the threatened harm—No case of revenge established—Held that the plea of private defence could not be negatived by any bar contained in S. 99 and as such the accused were entitled to complete right of private defence. *1983 Pak LD 225 SC.*

3. "voluntary causing of death".—(1) Where A inflicts, in the exercise of his right of self-defence, a harm on the assailant B, and it cannot be said to be more harm than is necessary for the

defence, and A does not intend or know or have reason to believe that the harm inflicted is likely to cause death, it cannot be said that A voluntarily causes the death of B though in the particular case death occurs as a consequence of the harm. *AIR 1940 Pat 595.*

4. "Assault".—(1) Before the extended right of private defence of person arises under this section there has to be the offence of assault and this assault has to be of one of the six types mentioned in the six clauses of the section. *AIR 1960 SC 67.*

(2) Where a creditor made a demand on his debtor, when he came out of a talkie at 9 p. m., to repay his debt and told him that he would not allow him to go till his money was paid, it was held that the action on the part of the creditor did not amount to an assault and that this section did not apply. *AIR 1950 All 91.*

(3) The right arises as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offences though offence may not have been committed. *AIR 1970 Orissa 50.*

5. "Reasonably causing apprehension of death or grievous hurt".—(1) When the accused had scuffles with the deceased sometime before the occurrence and the fear of retaliation from the deceased party overpowers the mind of the accused, it is not possible for him, whose mental excitement can be better imagined than described, to weight the position in golden scales. In such a situation when he is faced with assaults from his rival party it is not unnatural that he would strike a decisive blow to defend himself and to free himself from the clutches of his adversaries. In the instant case, accused Ruhul Amin gave only one knife blow to deceased Moktar Ali and then ran away. The attending circumstances indicate that he gave the knife blow only to free himself from the grip of deceased Moktar Ali and ran away for safety. This conduct of the accused satisfies the legal requirement of the right of private defence. The accused cannot be said to have exceeded the right of self- defence. *Ruhul Amin Mondal Vs. The State, 16 BLD (HCD) 91.*

(2) Clauses 'First' and 'second' of the section do not require as a condition precedent that grievous hurt must be actually caused by the assailant. *AIR 1975 SC 1674.*

(3) The test is not whether there was only any actual danger but whether there was reasonable apprehension that the danger existed. *AIR 1952 SC 165.*

(4) The act of killing would be justified only if the act was committed, because of an honest and well-founded belief in the imminence of the danger. *AIR 1978 SC 414*.

(5) The right given by the section is a right essentially of defence and not of retribution. *AIR 1963 SC 612.*

(6) When the facts showed that the accused could have easily affected his escape by going into the inner room and closing the door, it was held that there could be no reasonable apprehension of danger to his life or of grievous hurt. *AIR 1959 Punj 332.*

(7) A man cannot justify killing another by pretence of necessity if he is himself responsible for bringing that necessity upon himself. *AIR 1966 Guj 221.*

(8) Where it was the accused who began an unwarranted and aggressive assault, such action cannot be said to have been done in the exercise of the right of private defence. *(1965) 31 Cut LT 804 (DB); 1983 Pak LD 204 (SC).*

(9) The accused will have no right of private defence unless he apprehends physical violence from the other party. The law does not recognise the possibility of death or causing any harm by witchcraft. *AIR 1963 Guj 78.*

(10) The following are illustrative cases where the accused was held to have a right of private defence under this section: *(1984) 1 Crimes 185; 1981 CriLJ 1125; AIR 1952 SC 165; AIR 1971 Punj 94; 1970 CriLJ 931; AIR 1964 Mad 418; ILR (1962) Cut 891; AIR 1960 Ker 258; AIR 1959 Pat 22; (1958) 24 CutLJ 215; 1957 KerLT 500; AIR 1957 Orissa 130; 1956 Madh BLR (Cri) 457 ; AIR 1956 Punj 122; AIR 1954 Saw 34; AIR 1953 Pepsu 66; AIR 1952 Bhopal 2.*

(11) The following are illustrative cases where it was held that the accused had no right of private defence or had exceeded such right: *AIR 1983 SC 575; AIR 1981 SC 1379; AIR 1981 SC 451; (1971) 2 SC CriR 116; AIR 1969 SC 956; AIR 1953 Bhopal 1; AIR 1953 Mys 45; AIR 1951 Assam 48; 1933 PakLD 251.*

6. Thirdly—Assault with the intention of committing rape.—(1) The right of private defence of body extends to the voluntary causing of death under this clause if the offence which occasions the exercise of the right is an assault with the intention of committing rape. *(1969) 71 PunLR 591; AIR 1934 Lah 620.*

(2) Where the accused, on seeing the deceased, whom he had befriended and brought up in his household from infancy, lying on the top of his wife and trying to violate her, took a gandasa lying nearby and struck the deceased a number of blows on the head as a result of which he died, the action of the accused was covered by the provisions of this clause. *AIR 1993 All 213.*

7. Fourthy—Assault with the intention of gratifying unnatural lust.—(1) In the absence of any reliable evidence that the deceased committed an assault with the intention of gratifying unnatural lust, this clause will not apply. *AIR 1950 All 91.*

(2) If the person committing the assault referred to in this clause is disabled by a first blow, from committing it, the right of private defence ceases and any further injury caused will be exceeding the right of private defence. *AIR 1962 Guj 39.*

8. Fifthly—Assault with the intention of kidnapping or abducting.—(1) For the purpose of this clause, it is not necessary that the kidnapping or abduction should be of the categories dealt with by Ss. 363 to 369. All that the clause requires is that there should be an assault which is an offence against the human body and that assault should be with the intention of abducting. *AIR 1960 SC 67.*

(2) Where the accused was seized and dragged by the assailants against his will, it amounted to abduction under S. 362 and consequently the accused possessed the right of private defence of his body under this clause. *AIR 1980 Pat 347.*

(3) Where a party of raiders raided the house of a person during the night and assaulted the inmate with the intention of carrying away his daughter, it was held that S. 100 came into operation and the right of private defence extended to the voluntary causing of death of the raiders. *AIR 1959 J and K 5.*

9. Sixthly—Assault with the intention of causing wrongful confinement.—(1) Where the accused, who was wrongfully confined in a room, fired his gun through the window and killed a person he could not clam right of private defence under this clause as there was no assault upon him at all at the time he fired his gun. *1966 All WR (HC) 249.*

(2) 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 and S. 100, Sixthly, deprives the accused of any defence which he might otherwise have possession. *AIR 1946 Sind 17.*

10. Plea of private defence and burden of proof.—(1) The plea under this section is not available to the accused in the absence of circumstances leading to a reasonable apprehension in the mind of the accused that death or grievous hurt would be the consequence. *(1967) 34 CutLT 8.*

(2) Murder trial—Plea of self defence under S. 100—Burden is on accused to prove that his case comes under S. 100. *1982 CriLJ NOC 201.*

(3) Prosecution having failed to explain satisfactorily the two injuries on the back of the accused Shahjahan measuring 4″ × 1″ × cavity deep and 3.5″ × 1.5″ × muscle deep supported by medical certificate, the plea of right of private defence of life of the accused Shahjahan cannot be brushed aside. *State Vs. Shahjahan (criminal) 53 DLR (AD) 58.*

Section 101

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.

Cases and Materials

1. Scope.—(1) When dealing with question relating to the right of private defence of the body, sections 100 and 101 must be read together. Under this section any harm short of death can be inflicted in exercising the right of private defence in any case which does not fall within the provisions of the preceding section which deals with the offences in which the harm is likely to be very serious, and hence justifies the killing of the assailant.

(2) Where A was wrongfully arrested but the case was one not falling under S. 100, "Sixthly", it was held that the right of self-defence did not extend to the voluntary causing of death, and that A was not protected by this section in causing death while resisting the arrest. *AIR 1946 Sind 17.*

(3) Dispute with the accused over payment of amount claimed by the deceased and others in respect of digging of well in accused's land—Accused while returning home in closed jeep stopped on the way by unarmed persons including the deceased—Accused firing three shots from the jeep at the person fearing physical harm and killing deceased—Accused exceeded his right available to him under S. 101. *AIR 1980 SC 660.*

(4) Where there existed a dispute between the accused party and the complainant party over the possession and allotment of a Ahata and the accused party who were then in possession the Ahata on finding that the members of the complainant party who were not armed had assembled in the chock near the Ahata, started firing at them, even before the complainant party could advance towards the disputed Ahata and as a result two persons of the complaint party died, it could not be said that the accused apprehended grievous hurt and were within their right in killing two persons. The case falls under Section 101 and the accused had exceeded their right of private defence. *1983 PakLD 251 (SC)*

(5) The burden which rests on the accused to prove that any of the general exception is attracted, does not absolve the prosecution from discharging its initial burden and it never shifts save when a statute displaces the presumption of innocence. *AIR 1974 SC 1570.*

(6) The extent of the right of private defence given by this section is subject to the restrictions in Section 99. *AIR 1979 SC 577.*

(7) Accused were found aggressors and armed with various weapons—Victims unarmed—Incident taking place on the land belonging to victims—injuries found on person of accused—**Held** that the deceased had a right of private defence which accused could not claim such right—Aggressors (accused) even if they receive injuries have the right of private aggression cannot have the right of private defence. *AIR 1981 SC 1379.*

Section 102

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.

Cases : Synopsis

1. *Scope and application.*
2. *Commencement of right.*
3. *"Reasonable apprehension of danger to the body".*
4. *"Attempt or threat to commit the offence".*
5. *Continuance of right.*

1. Scope and application.—(1) This section lays down that 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 offence though the offence may not have been committed and it continues as long as such apprehension of danger to the body continues. Where the victim after first two blows on the head on the very start fell on the ground and rest of the injuries were caused to him thereafter, there could have been no apprehension on the part of the petitioners that the victim would cause them any injury or would be able to do them any harm. In these circumstances, it is a clear case in which the petitioners have exceeded the right of private defence allowed to them by law. Actual continuing danger not contemplated—Question will not be whether there was an actual continuing danger but whether there was a reasonable apprehension of such danger. Right of private defence commences and continues as long as danger to body lasts.

(2) Private defence, right of—Cannot continue after assaulter has been disarmed—Not merely exceeding right of private defence but making it a pretext to cause death—Offence, murder. *8 DLR 11 (Note portion).*

(3) Right of private defence of body commences when there is reasonable apprehension of danger, and actual blows not necessary. Under the law, the moment a person apprehends danger from his assailant, he need not wait to be attacked first, and then to deliver a counter blow in exercise of the right of self defence because, if he did it, it is possible that as a result of the assailant's blow he may not have an opportunity at all to defend his person. In the present case it was not necessary for the deceased to wait until the accused had first stabbed him with the dagger which he was carrying in his hand. He was perfectly justified in delivering a blow with a spade before he was stabbed. The question of exceeding the right to private defence does not arise in the case. *8 DLR 55 (WP).*

2. Commencement of right.—(1) The right of private defence of body commences as soon as a reasonable apprehension of danger to the body arises and it continues as long as such apprehension continues. *AIR 1980 SC 660.*

(2) The right of private defence rests on three ideals: First, that there must be no more harm inflicted than is necessary for this purpose of defence; secondly, that there must be reasonable

apprehension of danger to the body from the attempt or threat to commit some offence; and thirdly, that the right does not commence until there is a reasonable apprehension. *AIR 1971 SC 1208.*

(3) Where during a communal riot a mob had actually broken into one part of accused's house and were knocking at his doors and shops had been looted and persons killed in the adjoining locality, it was held that the threat to break into accused's house was implicit in the conduct of the mob, and gave rise to the right of private defence to the accused even though no actual assault was directly made on the accused. *AIR 1952 SC 165.*

(4) Right of private defence of body commences when there is reasonable apprehension of danger and actual blows not necessary. *Md. Qaiyum Vs. State (1956) 8 DLR (WP) 55; 15 DLR (SC) 65.*

3. **"Reasonable apprehension of danger to the body.**—(1) The right of private defence rests on the principle that where a crime is endeavoured to be committed by force, it is lawful to repel that force in self-defence. *AIR 1973 SC 473.*

(2) It is the apprehension of danger to the body and not the actual injury received that should be the criterion in judging whether that act of the accused is justified. *AIR 1973 SC 473.*

(3) The violent and threatening attitude of the party of the deceased would give rise to a reasonable apprehension to the accused to believe that he was in danger of receiving a grievous hurt at least. *AIR 1952 SC 165.*

(4) The right of private defence continues as long as the apprehension of danger lasts. *AIR 1961 SC 1541.*

(5) The right of private defence ceases as soon as the reasonable apprehension of danger ceases. *AIR 1973 SC 473.*

4. **"Attempt or threat to commit the offence".**—(1) Every attempt or threat to commit the offence would not entitle a person to take up arms. He must pause and reflect whether the threat is intended to be put in execution immediately. *AIR 1925 Nag 260.*

5. **Continuance of right.**—(1) The right of private defence of body continues so long as the apprehension of danger to the body continues. *AIR 1970 Orissa 50.*

(2) Where the apprehension of danger is past but a person nevertheless continues his attack he exceeds the right and will not be protected by the section. *AIR 1974 SC 1570.*

(3) The apprehension that arises in the mind of a person who is attacked continues where his opponent is in possession of the weapon with which the former was attacked. The right of private defence, therefore, continues so long as the opponent has the weapon in his hand. *1974 CutLR (Cri) 348.*

Section 103

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.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Recourse to protection of public authorities.*
3. *Right does not extend to causing more harm than necessary.*
4. *Robbery.*
5. *"Fourthly"—Theft, mischief or house trespass.*
6. *"As may reasonably cause apprehension".*
7. *Watchmen.*

1. Scope of the section.—(1) Under section 103 of the Penal Code, the right of private defence of property would extend to the causing of death; if theft, mischief or house trespass is done under the circumstances as may reasonably cause apprehension that death or grievous hurt would be the consequence, if the right of private defence is not exercised. Where there is no evidence to justify the conclusion that there was any reasonably cause for apprehension of death or grievous hurt and the deceased committed also no offence of theft, mischief or house trespass it should be held that the accused had no right of private defence so as to cause death. The weapon used, the manner of using it, the nature of assault and other surrounding circumstances should be taken into consideration in determining the question of reasonable apprehension. A man acting under an apprehension of death cannot be expected to judge precisely the force of his own blow. The law always makes just allowance for the sentiment of a person placed in a situation of peril who has no time to think. Therefore, if a person has genuine apprehension that his adversary is going to attack him and reasonably believes that the attack will result in grievous hurt, he can go to the length of causing the latter's death in the exercise of the right of private defence even though the latter has not inflicted any blow on him *(PLR 1957 Dac 237).*The owner of a property is entitled to defend his possession by force against any attempt by trespassers to take forcible possession of it (*PLD 1957 Dac 281).* A house trespass committed under circumstances reasonably causing apprehension of death or grievous hurt alone can give the extended right conferred by clause IV. The right of private defence continues only so long as criminal trespass continues or only so long as there is a reasonable apprehension of hurt being caused. Robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker and if in the course of such resistance death is caused, it may be justified. If the right of self-defence is exercised reasonably and properly but the measure of self-defence must always be proportionate to the quantum of force used by the attacker and which it is necessary to repel. The right of private defence of property to the extent of causing death arises not only when the house is broken into but even when an attempt is made to break into the house. *(AIR 1926 Cal 1012).* A person employed to guard the property of his employer is protected by sections 97, 99, 103 and 105 of the Penal Code if he causes death in safeguarding his employer's property when there is reason to apprehend that the person whose death has been caused was about to commit one of the offences mentioned in section 103 or to attempt to commit one of those offences. A person in possession of a

property is protected by section 103 under the restrictions mentioned in section 99 of the Penal Code, if he causes death in safe-guarding his property where there is reason to apprehend that the person whose death has been caused was about to commit one of the offences mentioned therein. It is not the law that an original owner in peaceful possession must run away, if there is an actual invasion of his right. He is, on the other hand, entitled to defend himself and his property by force, if he sees an actual invasion of his right which invasion amounts to an offence under Penal Code.

(2) The appellant had no licence of the gun and the ammunition that he was carrying and could not, therefore, be said to be legally entitled to the property which the deceased and his companions intended to take in their possession for the purpose of taking in to the police station. As the act of the deceased and his companions could not amount to theft no offence of robbery was committed and, therefore, no right of private defence of property accrued to the appellant.*(1951) PLD (Lah) 279.*

(3) The appellant seized cattle which had trespassed into the land cultivated by him and was taking them to the pound when he was overtaken by their owner who was armed with formidable weapon and attempted to remove the cattle from the possession of the appellant who defended the possession by causing to the owner injuries which resulted in his death. The appellant was convicted under section 302 P.C. In appeal before the High Court he took the plea of private defence of property and person. Held: Removal of cattle from the lawful possession of a person even by the real owner of the cattle, amounts to theft—Under section 104 P.C. the person from whose possession the cattle were removed had the right to defend his possession of the cattle by causing to the wrongdoer any harm other than death. If the owner of the cattle came armed with a formidable weapon to rescue his cattle the person in possession of the cattle would have the right, under section 103, P.C. extending to the causing of death of the owner. *Nawab Vs. State (1960) 12 DLR (WP) 42=(1960) PLD (Lah) 149.*

(4) This section enacts that in the exercise of the right of private defence, a person may voluntarily cause any harm extending even to death in certain specified cases, namely, robbery, house-breaking by night or mischief by fire committed on any building, tent or vessel or an offence of theft, mischief or house-trespass under such circumstances as may reasonably cause an apprehension that death or grievous hurt will be the consequence, if the right of private defence is not exercised. *AIR 1959 All 233*

(5) The extension of the right under S. 103 is also subject to the restrictions under S. 99. There is, therefore, no right of private defence of property where there is time to have recourse to the protection of the public authorities and the right does not extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence. *AIR 1965 SC 257.*

(6) Person in rightful possession—Entitled to defend his possession even to the extent of causing death of member of aggressive party. A person in rightful possession of the property is entitled to defend his possession of the same under sections 103 of the Penal Code even to the extent of causing death of the member of the aggressive party, subject to the restrictions mentioned in sections 99 of the Penal Code and to prevent mischief to his land and the crop thereon within the meaning of section 425 Penal Code *(Ref: 1971 CrLJ 1595). 1968 CrLJ 1667.*

2. Recourse to protection of public authorities.—(1) Section 97 confers a clear and distinct right on every person to resist an aggression. Recourse to the help of the State can, therefore, be insisted upon only when there is sufficient time to obtain such help. *AIR 1948 Lah 117.*

(2) An owner is entitled to defend the property from trespassers who suddenly open an attack and attempt to take forcible possession, and if he knows or honestly believes that in defending his property

he is likely to be in danger of receiving grievous injuries he is justified under this section even in attacking the trespassing party and in causing death to any of its members. *AIR 1948 Lah 117.*

3. Right does not extend to causing more harm than necessary.—(1) The right of private defence of property, being subject to the restrictions obtained in S. 99, in no case extends to the inflecting of more harm than it is necessary to inflict for the purpose of defence. *AIR 1964 SC 205.*

(2) Where even after victims had fallen down on the ground and were rendered harmless and were not in a position to offer any resistance, the accused continued to assault them, it was held that the plea of the right of private defence could not be accepted. *AIR 1983 SC 488.*

4. Robbery.—(1) Robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker and if in exercise of that right, death is caused it may be justified if the right is reasonably and properly asserted in defence of property. *AIR 1979 SC 577.*

5. "Fourthly"—Theft, mischief or house-trespass.—(1) The fourth clause of this section deals with specifically cases of theft, mischief or house-trespass and it means that when the act was such as to cause a reasonable apprehension that death or grievous hurt would be the consequence if the right of private defence is not exercised, then the causing of death or grievous hurt would be justified. *AIR 1966 Pat 464.*

(2) If the party which is attacked offers no resistance at all there is no right of private defence against them and if any one of them is killed by the attacking party, they may be liable to be convicted of murder under S. 302 read with S. 34. *AIR 1965 SC 257.*

(3) Accused A and B, armed with a sharp cutting weapon and a bow entered the compound of the house of the deceased, an old man residing in a lonely spot, and in spite of the repeated challenges from the house-owner and his daughter-in-law did not disclose their indent. Thereupon the deceased hit an arrow which struck B. A then rushed towards the deceased and gave him blows with his weapon which caused injuries resulting in his death. It was held that the deceased was justified in reasonably entertaining an apprehension of death or grievous hurt at the hands of the intruders and was within his rights in attacking them. The accused had no right of self-defence against deceased who was acting in exercise of his right of private defence. *AIR 1962 Guj 203.*

(4) Accused laying a trap consisting of live electric wire against trespass, into his latrine—Trespasser dying as a result of touching wire—Accused guilty under Section 304A P.C. *AIR 1964 SC 205.*

6. "As may reasonably cause apprehension".—(1) The right of private defence of property is extended to the voluntary causing of death or grievous hurt under the fourth clause only when the offences mentioned therein are committed under such circumstances as may reasonably cause apprehension of death or grievous hurt to the defender. *AIR 1979 SC 44.*

(2) The clause requires only reasonable apprehension of the danger and not actual danger. *(1949) 1 Pepsu LR 129.*

(3) The right of self-defence is not dependent on the actual criminality of the person resisted; it depends solely on the wrongful, or apparently wrongful, character of the act attempted. If the apprehension is real and reasonable, it makes no difference that it is mistaken. *AIR 1962 Guj 203.*

(4) In case wherein plea of private defence is raised the question always is whether, having regard to the facts noticed by the accused and to the circumstances in which he was placed at the time of the

event, there was reasonable cause for apprehension justifying the accused in exercising his right of self-defence. *AIR 1942 Mad 295.*

7. Watchmen.—(1) As the right of private defence comprises not only the right to defend one's own property, but also the property of other persons, persons employed as watchmen to guard the property of the employer will be protected by Ss. 97, 99, 103 and 105 when they cause death in safeguarding the employer's property, if they act under the circumstances and conditions laid down by these provisions. *AIR 1945 Pat 150.*

(2) Under this section the watchmen cannot inflict more harm than it is necessary to inflict for the defence of the property. If he causes more harm than was necessary he exceeds his right of self-defence and if death is caused, he may be guilty of an offence of culpable homicide under S. 304. Penal Code or even of murder. *1954 Madh BLJ 596.*

Section 104

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.

Cases : Synopsis

1. *Scope and applicability.*
2. *"Causing of any harm other than death".*
3. *Recourse to the protection of the public authorities.*

1. Scope and applicability.—(1) This section is analogous to section 101. Under this section, the accused are entitled to cause any harm to the wrong-doer other than death (*AIR 1965 Orissa 99).* This section does not apply to a case where death has been caused in exercise of the supposed right of private defence. Thus where the deceased was committing criminal trespass on the land which he was ploughing, the act of shooting at him by the accused could not be said to have been done in exercise of the right of private defence and therefore the accused would not be liable for his act to the fullest extent *(PLD 1960 Lah 880).* Section 104 can have no application by way of defence to a charge under section 504 for using abusive language *(11 Cr LJ 213).*

(2) This section and S. 105 lay down the limitations on the right of private defence granted by Ss. 96 and 97. *AIR 1965 Orissa 99.*

(3) Cattle seized for being impounded—Right of defence against owner—Owner armed with formidable weapon—Extent of right of defence. The appellant seized cattle which had trespassed into the land cultivated by him and was taking them to the pound when he was overtaken by their owner who was armed with formidable weapon and attempted to remove the cattle from the possession of the appellant who defended the possession by causing to the owner injuries which resulted in his death. The appellant was convicted under section 302 Penal Code. In appeal before the High Court he took the plea of right of private defence of property and person. Held: The appellant was in lawful possession of the cattle under section 10 of the Cattle Trespass Act—Illustration (1) and (k) to section 379 Penal Code show that the removal of cattle, from the lawful possession of person even by real owner of the cattle, amounts to theft; the removal by the owner was with dishonest motive of carrying wrongful gain

to himself at least with respect to the fee which he would have had to pay in retrieving the cattle for the pound. Under section 104 of the Penal Code, the person from whose possession the cattle was removed had the right to defend his possession of the cattle by causing to the wrong-doer any harm other than death. If the owner of the cattle came armed with a formidable weapon to rescue his cattle, the person in possession of the cattle could have a reasonable apprehension that while attempting to defend his possession he may receive grievous hurt at the hands of the owner and that in such circumstances the person in possession of the cattle would have the right under section 103 Penal Code extending to the causing of death of the owner. *12 DLR (WP) 42.*

(4) Right of private defence of property extending to the causing of any harm other than death—Murderous assault on person exercising such right—Further right of private defence of person extending to the causing of death available under section 100 Penal Code. *1955 PLD (Lah) 170.*

(5) Private defence, right of—Extent—Law does not permit a person under pretext of private defence of property to kill a man outright—Accused arriving at scene of occurrence with determination to kill deceased, without protesting or raising any objection about trespass of property by deceased, and shooting at him and killing him on land in dispute—Accused, held acted far beyond what law permitted him to do and cannot be permitted to claim that he acted in exercise of private defence and exceeded in it—Conviction under section 302/34 upheld. *PLD 1970 (SC) 212.*

2. "Causing of any harm other than death".—(1) Right of private defence of property extending to the causing of any harm other than death—Murderous assault on person exercising such right—Further right of private defence of person extending to the causing of death available under sec. 100, P. Code, *PLD (1955) (Lah) 170.*

(2) In this section the expression "harm" can only mean physical injury. *AIR 1966 SC 1773.*

(2) The section can have no application by way of defence to the charge brought against an accused under S. 504 of the Code for using abusive language. *(1910) 11 CriLJ 213.*

(3) In the case of theft, mischief or criminal trespass not of the description enumerated in S. 103 if death is caused, the right is exceeded. *AIR 1973 SC 665.*

(4) If the circumstances of the case show that the occasion to use force had not arisen at all the use of any force would be unjustified and the plea of right of private defence cannot avail the accused. *AIR 1956 Sau 107.*

(5) Where in defending the property, the injuries caused were few and mere scratches and bruises, it was held that the accused had not exceeded the right of private defence. *AIR 1957 Manipur 34.*

3. Recourse to the protection of the public authorities.—(1) The right of private defence of property under this section is subject to the restrictions mentioned in S. 99. One of the restrictions is that there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities. *1955 AllWR (HC) 101.*

(2) The question whether or not there is time for recourse to the protection of public authorities is one of facts defending upon the evidence in each case. *(1948) 48 CriLJ 503.*

(3) There can be no recourse to public authorities in cases where by the time the police arrive :

(a) the offence would have been committed by the complainant. *AIR 1940 Pesh 6.*

(b) the occupation would be changed into actual possession. *(1949) 1 Pepsu LR 129.*

(c) there would be deprivation of crops. *1961 BLJR 824.*

(d) there would be disappearance of the whole of the grass in cases where cattle are let loose by the complainant. *(1947) 48 CriLJ 503.*

(4) Where the land ploughed but not sown by the accused is re-ploughed by the complainant, there is no danger of irreparable loss being caused to the accused by the ploughing and he has no right of private defence of property but can approach the public authorities, and complain about the wrongful act of the complainant. *1955 AllLJ 264.*

(5) If a person allows, without reasonable cause, a few days to elapse and then opposes the trespassers by force, it was held that he would not be justified in doing so as there would be, in such a case, ample time to have recourse to the public authorities. *AIR 1914 Cal 623.*

Section 105

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.

Cases : Synopsis

1. *Scope.*
2. *Right of private defence of property against theft.*
3. *Right of private defence of property against criminal trespass or mischief.*
4. *Right of private defence of property against house-breaking by night.*

1. Scope.—This section defines the commencement and continuance of the right of private defence of property just as section 99 does in the case of defence of body. In both the cases the right commences with the reasonable apprehension of danger. The Penal Code does not give any right of private defence of property in regard to an offence under section 403 or 411 which has been committed. This section applies to cases of theft only. The right of private defence of property against theft continues till the offender has effected his retreat with the property. From a perusal of section 105, Penal Code, it is clear that the duration of the right of private defence of property against theft continues (1) till the offender has effected his retreat with property, or (2) the assistance of the public authorities is obtained, or (3) the property has been recovered. The primary object of this provision of law appears to be that the owner of stolen property may not be deprived of it when the same may be recovered by the owner by using force against theft but this right of using force is subject to the aforementioned three conditions *(1968 Cr LJ 79).*

(2) The right of private defence against the specified offences against property commences as soon as a reasonable apprehension of danger to the property commences. It is not necessary that an offence or an attempt to commit an offence should have been actually committed. *1972 Pat LJR 158.*

(3) There is no right of private defence against a civil trespass. *1937 Mad WN 176* (The Code confers a right of private defence not as against mere trespass but as against crime.)

(4) There is no right of private defence in respect of offences under S. 403 or 411. *AIR 1914 Lah 579.*

(5) Right of private defence of body and that of property—Distinction between—Under section 105 of the Penal Code the right of private defence of property commences when a reasonable apprehension of danger to the property begins. If the provisions of the two sections (i.e. section 97 and 105 Penal Code) are considered together, it follows that the right of private defence of property commences when an act which is an offence of theft, robbery, mischief or criminal trespass is committed or an attempt to commit such an act is made. It is worthwhile to compare the language of section 105 with that of section 102 which deals with commencement and continuance of the right of private defence of person. It provides that the right of private defence of the body commences as soon as reasonable apprehension of danger of the body arises from an attempt to threat or commit the offence though the offence may not have been committed. So under this latter section a mere threat of an attack on the person gives rise to the right of private defence of person. In the case of an attack on property, however, something more than a mere threat is necessary. A threat may amount to an attempt but it must be of such an imminent nature that but for the intervention of someone it will result in the commission of the act itself. *16 DLR 700.*

(6) Right of private defence of property—Cases to exist where the offender has effected retreat with the property. The right of private defence of property against the offender continues till the offender has effected his retreat with the property and once this has happened the right ceases to exit. Although the third alternative in para 2 of section 105 of the Penal Code provided that the right of private defence of property continues until the property has been recovered, yet this third alternative cannot override and render nugatory the first alternative. Under section 105 of the Penal Code as soon as the offender has effected retreat with the property no right of private defence of that property against theft subsists and the clause "till the property has been covered" is subject to the clause "till the offender has effected his retreat with the property." *16 DLR (WP) 104.*

(7) Condition that the right continues till the property is recovered from the offender—Interpretation of—Accused reaching home with stolen property—Complainant had no right to forcibly take possession of property in question. The contention was that section 105 Penal Code, also envisages that the right continues till the property is recovered from the possession of the thief and his further contention is that the primary object of giving this right of private defence to the property is that the stolen property must be recovered from the illegal possession of the thief and therefore, even if the thief has reached his home with the property and if the owner finds the thief with the stolen property even in his house he has a right to snatch the property from the possession of the thief by using necessary violence even if he had taken shelter in his own home because his home should not be treated as a citadel for him. It was held that the third condition that 'the right continues till the property is recovered from the offender' is not independent of the first condition, namely, 'till the offender has effected his retreat with the property'. If such a liberty is given to the owner so as to use violence even after the offender has successfully effected his retreat for recovering the stolen property, then serious disorders are likely to arise and therefore the law makers have put a restraint on his private defence to recover the stolen property, from the offender till one of the conditions as mentioned above is completed. There is no doubt that this view is likely to benefit the offenders in certain circumstances,

but this consideration cannot guide the Courts to interpret the statute differently from what it obviously means. In the instant case, therefore, the complainant had no right to forcibly take possession of the she-camel from the accused party after the accused had reached his home with the stolen property and if the accused party by using force succeed in finding an escape with she-camel from their para, they cannot be said to have committed any offence in the eye of law *(Ref 1967 Orissa 46). 1968 CrLJ 79.*

2. Right of private defence of property against theft.—(1) The third condition that "the right continues till the property is recovered from the offender" is not independent of the first condition, namely, "till the offender has effected his retreat with the property". *AIR 1968 Raj 11.*

(2) Where accused's property is removed by persons having no bona fide right, and is recovered from them, the right of private defence of property ceases after the recovery of the property but not before. *AIR 1933 Rang 340.*

(3) A right of private defence of property is not available where the offender has been arrested and the danger to the property has been averted. *AIR 1951 Kutch 11(12).*

3. Right of private defence of property against criminal trespass or mischief.—(1) Under the first para of this section there arises a right of private defence of property as soon as a reasonable apprehension of danger to the property commences. *AIR 1973 All 85.*

(2) Where certain persons armed with hatchet and lathi forcibly took two carts loaded with sugarcane through the field while transporting it to a public passage and when they had yet to cover a short distance to reach that passage, the owner of the field protested against the conduct of those persons in damaging the standing crops on his field, it was held that the fact that they could not leave the field without committing further trespass did not give them any right for insisting that they must continue the criminal trespass and beat the owner to death. *AIR 1961 SC 1541.*

(3) A trespasser cannot be said to continue the trespass after he is physically disabled from getting out. *AIR 1956 Sau 77.*

(4) A trespasser cannot be said to continue the trespass after he has run away. *AIR 1961 All 38.*

(5) Where one of several co-sharers in constructive possession of joint land commits the offence of criminal trespass and mischief by digging a part of the land for appropriating it for his exclusive use in spite of opposition by the other co-sharers who are also in constructive possession, the opposing co-sharers will have every right to prevent such an act of digging by the former co-sharer. *AIR 1934 All 829.*

4. Right of private defence of property against house-breaking by night.—(1) The duration of the commission of house-breaking by night must be limited to the time during which criminal trespass continues which forms an element of house-trespass which is itself essential to house-breaking and cannot be extended so as to include any prior or subsequent time. *1882 Pun Re (Cr) (No. 2) p 2.*

(2) The owner of a house is justified in using a weapon against a house-breaker so long as he remains on his premises but he is not justified in running after the thief and killing him with that weapon in the open lawn after the house-trespass has ceased. *(1868) 10 Suth WR (Cri) 9.*

Section 106

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.

Cases

1. Scope.—(1) The law of private defence is founded on two cardinal principles: (a) Everyone has the right to defend one's own body and property as also another's body and property. The law does not require him to be cowardly; (b) This right cannot be used as a pretence for justifying aggression, i.e. for causing harm to another person nor for inflicting more harm than is necessary to inflict for the purpose of defence. Law allows resort to repel force forwarding off an injury but not for taking revenge. The right of private defence is not available to one who resorts to retaliation for any past injury, but to one who is suddenly confronted with the immediate necessity of averting an impending danger not of his creation. Right of private defence is designed to serve social purpose. When enacting sections 96 to 106 of the Penal Code excepting from its penal provisions, certain classes of acts, done in good faith for the purpose of repelling unlawful aggression, the Legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens when faced with grave danger. The law does not require a law abiding citizen to behave like a coward when confronted with an immediate unlawful aggression. There is nothing more degrading to human spirit than to run away in face of danger. The right of private defence is thus designed to serve social purpose and deserves to be fostered within the prescribed limit *(1971 SCD 1183).*

(2) Right of private defence of life—When not available—Whether the two shots fired by the deceased were blank fires or were aimed at the assailants, the fact is that none of them actually hit—Though the accused suggested that four of them received gun shot injuries they did not adduce any evidence in support thereof—The PWS deposed that before the deceased fired the shots he was hit at his abdomen by appellant Budhai's Halanga—He was at once surrounded from behind by the appellants who then subjected him to indiscriminate assaults leading to his death within an hour—The informant and several other persons of his party were also assaulted with ramdaos and halangas—In these facts, the right of private defence of life was not available since from the side of the deceased party the appellants had no reasonable apprehension of death or grievous hurt. *Tayeb Ali and others Vs. The State 9 BLD (AD) 110.*

(3) The right of private defence of the body extends to the voluntary causing of death if the offence which occasions the exercise of the right is an assault which may reasonably cause the apprehension of either death or grievious hurt. *50 DLR (AD) 126.*

(4) The provisions relating to the law of private defence of person and property in this country codified in Ss 96 to 106 are complete in themselves and the words used in the sections must be looked to for finding the extent and limits of the right. *AIR 1959 Pat 22.*

(5) While Section 100 of the Code extends the right of private defence of the body against an assault, under the conditions mentioned therein to the voluntary causing of death of the assailant, this section extends that right, further, to running the risk of harm to an innocent person if that right cannot be effectually exercised without running that risk. *(1974)1 KantLJ 130.*

(6) The right under this section cannot be used as a pretence for causing harm to another person nor for causing more harm than is necessary for the purpose of the defence. *1971 MPLJ 450.*

(7) In this section the expression 'harm' can only mean physical injury. *AIR 1966 SC 1773.*

CHAPTER V
Of Abetment

Chapter introduction.—Chapter V relating to abetment applies to offences made punishable under newly added Sections 121A, 124A, 225A, 225B, 294A and 304A. See PC amending Act 27 of 1870 (Section 13) as amended by Act XI of 1891.

Section 107

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 authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here, B abets by instigation the apprehension of C.

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

Cases and Materials : Synopsis

1. ***Scope of the section.***
2. ***Mens rea necessary.***
3. ***Abetment by instigation.***
4. ***Abetment by conspiracy.***
5. ***Combined attack by several persons.***
6. ***Conspiracy by foreigner in foreign territory to commit offence in Bangladesh.***
7. ***Abetment by aid—General.***
8. ***Aid by act.***
9. ***By illegal omission.***
10. ***Proof of abetment.***
11. ***Accessory after the fact.***
12. ***Receiving unstamped instrument.***
13. ***Bribery cases.***
14. ***Kidnapping cases.***
15. ***Gambling cases.***

16. *Cases relating to enticement, abduction, adultery, etc.*
17. *Effect of acquittal of principal offender.*
18. *Procedure.*
19. *Attempt to abet and abetment of abetment.*

1. Scope of the section.—The definition of 'abetment' given here applies to all Acts now in force in Bangladesh. Abetment is constituted: (a) by instigating a person to commit an offence ; or (b) by engaging in a conspiracy to commit it ; or (c) by intentionally aiding a person to commit it or intentionally aids by any act or illegal commission the doing of that thing Crime may assume any of the following shapes:—

(i) One person may persuade another to do an illegal act or aid in the commission of an offence. This is known as abetment.

(ii) Two or more persons may agree to do an unlawful act or a lawful act by unlawful means. This is known as conspiracy. It is not necessary that the abettor should concert the offence with the person who commits it ; he may as well engage in the conspiracy in pursuance of which the offence is committed.

(iii) Two or more persons may directly participate in the commission of an illegal act. The word 'instigate' and "aids the doing of an act" require a little explanation.

The former means to goad or urge forward or to provoke, incite or urge or encourage to do an act. 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. A person is said to aid the doing of an act who either prior to or at the time of its commission does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof. Abetment cannot refer to any act done after the commission of the offence. "Instigation" to commit offence may be done by letter or telephone or through a third party. Mere presence without proof of any act or omission done to facilitate the offence or at least without proof of a common intention is not an abetment *(42 CrLJ 603).* It is open to the prosecution to bring a charge of abetment generally. The charge will amount to notice to the accused that they have to meet a case of abetment in one or more of the different ways indicated in section 107, Penal Code *(AIR 1938 Cal 125).* But a specific charge must be framed for abetment of an offence. A general charge of instigating various persons to commit dacoity is bad. Separate acts of abetment must be distinctly specified. There is no bar in law to convict a person of abetment without a distinct charge if the circumstances bring the case under section *237 CrPC (47 CrLJ 968).* It is however to be noted that the accused can be convicted of abetment where only the principal offence has been charged, if the same facts support a charge for abetment as well as charge for the principal offence, but not if the addition of a charge for abetment would introduce new facts which the accused had no opportunity to meet *(47 CrLJ 1118).* If the accused had notice of the facts, which constituted abetment, although the charge was one for main offence and if there has been no prejudice to the accused by the omission to frame a separate charge for abetment, he can be convicted for abetment even though the charge for the main offence fails *(PLD 1963 Dhaka 608).* It is however to be noted that if the principal offence has not been made out there can be no question of abetting the principal offence *(PLD 1960 Dhaka 723).*

(2) The offence of abetment—the gist of the offence is doing of a thing or instigation of doing a thing or aiding of doing a thing. The offence of abetment is complete when the offence is committed due to the abetment. *Mofazzal Hossain Vs. The State, BSCD, Vol II, p 139.*

(3) The law clearly provides that the punishment to be awarded to the abettor must not be higher than that of the principal accused. *Ashrafuddin Sekandar (Major Rtd.) and others Vs. The State— 3 MLR (1998) (AD) 164.*

(4) No charge of abetment against any accused can be framed without sufficient incriminating materials on record. *The State Vs. Khondaker Md. Moniruzzaman 1 MLR (1996) (AD) 369.*

(5) The intentional aiding of the doing of a thing by omission constitutes abetment. *Ashraf Ali Vs. State (1957) 9 DLR 41.*

(6) Abetment must be an act facilitating the commission of the offence. It must be some act done either prior to or at the time of the commission of the offence, and it cannot refer to any act done after the commission of the offence. *Abdul Latif Mridha Vs. Crown (1956) 8 DLR 238.*

(7) Abetment of an offence is not a minor offence of the substantive offence within the meaning of section 238 Cr.P.C. The substantive offence and its abetment are two distinct offences and each has got its ingredients. The ingredients that must be proved for the abetment of an offence are quite different from those required to establish the substantive offence. A charge for the substantive offence as such gives no intimation of a trial to be held for abetment. *Tamiza Khatoon Vs. State (1972) 24 DLR 57.*

(8) The appellants Abul Lais and Cherag Ali's lands were contiguous to the land of Rajjab Ali (deceased). In a dispute over an 'ail', between Abul Lais and Cherag Ali on the one side and Rajjab Ali on the other side, Rajjab Ali was found accusing Abul Lais of having removed the 'ail', and began removing earth from his land and placing the same in Abul Lais's land with a view to restoring the 'ail' to its original site. At this, Cherag Ali held Rajjab Ali's loin with both hands from behind (the purpose being to prevent Rajjab Ali from encroaching upon Abul Lais's land by removing earth) and Abul Lais who was in front, facing Rajjab Ali suddenly dealt a blow on Rajjab Ali's Chest with a pen knife in his pocket. Rajjab Ali was then removed to his house where he died soon after. The Trial Court convicted Abul Lais under section 302 P.C and Cherag Ali under section 302/109 P.C and sentenced both to transportation for life. In an appeal before the High Court it was Held: As there was no evidence to suggest that Cherag Ali knew that Abul Lais had a knife in his pocket and would cause an injury of the deceased, there can be no abetment of the offence to bring Cherag Ali's act within the mischief of section 107 P.C. *Abul Lais Vs. The State, (1970) 22 DLR 418.*

(9) "Abetment" what it means—Anything done under duress or coercion does not constitute abetment. *State Vs. Makbul Hossain (1974) 26 DLR 419.*

(10) The deceased was chased by persons armed with knives and when the deceased fell down, the order to beat was given by Abdul Bepari who had been convicted under sections 302/107 by the Sessions Judge. It was contended on behalf of Abdul Bepari that he by giving an order 'to beat' cannot be said to have abetted the murder of the deceased. Held: Order to beat had been passed when the assailants were all armed with knives and Abdul Bepari must have known what the consequences of his order would be. It cannot be urged on his behalf that when he gave the order to assault he did not intend the murder of the deceased. *State Vs. Bahar Ali and others (1959) 11 DLR 258 = (1959) PLD (Dac) 832).*

(11) Merely because an ante-dated document is executed by a person the receiptent under the said document cannot be as a matter of course convicted for abetment unless there be clear evidence in that behalf—Of course the fact that a person is a recipient under a forged deed is a circumstance showing that he is a party to the said offence but it is never conclusive—The Courts below could not appreciate the

difference between substantive offence of forgery and abetment thereof will be clear from the findings and order made by the trial court. The trial Court found that accused persons committed an offence under Ss 467/109 but while passing the order convicted all of them U/S 467, PC. Evidently both were wrong but the lower appellate Court and the High Court Division overlooked this apparent error and instead of correcting the same they themselves followed the line of trial court. *Joy Chandra Sarker & others Vs. The State, BSCD, Vol VI p. 30.*

(12) This section defines "abetment" as comprising: (a) instigation to commit the offence; (b) engaging in conspiracy to commit the offence; and (c) aiding the commission of an offence. *AIR 1940 Bom 126.*

(13) Abetment necessarily means some active suggestion or support to the commission of the offence. *AIR 1921 Pat 286.*

(14) Abetment does not itself involve the actual commission of the crime abetted. It is a crime apart. *AIR 1925 PC 1.*

(15) On the death of the principal offender, possibility of proving the guilt seems bleak.

2. Mens rea necessary.—(1) If the 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. *AIR 1957 All 184.*

(2) 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. *AIR 1953 Madh B 155.*

(3) An accomplice is a guilty associate in crime or who sustains such a relation, to the criminal act that he could be jointly indicted with the principal. *AIR 1936 Nag 245.*

(4) Where money was obtained by extortion by way of bribe, the person who gave the money would not be an abettor of the offence of taking bribe. *AIR 1969 SC 17.*

(5) Where A and B, soldiers, were practising at target shooting without due care in a place near a public road, and B's shot killed C, the Court while convicting A and B for an offence under Section 304—A found it unnecessary to call in aid S. 34 or S. 107. *AIR 1962 Bom 243.*

3. Abetment by instigation.—(1) The word "instigate" literally means to goad, urge forward, provoke, incite, or encourage to do an act. A person is said to instigate another when he actively suggests or stimulates him to the act by any means, or language, direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement. To constitute instigation it is not necessary that express words should be used to indicate what should be done by the person to whom the directions are given. *1977 CriLJ NOC 96.*

(2) While there has to be a reasonable certainty in regard to the meaning of the words used in order to decide whether there was incitement, it is not necessary in law to prove the actual words used. *AIR 1957 All 177.*

(3) The question whether the presence of the person concerned is such that it directly encourages the offender is not a matter of presumption arising from his relationship to the offender. It depends upon the evidence in each case. *AIR 1960 Bom 393.*

(4) It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetted was the instigation and nothing else, for it is humanly impossible for any tribunal to decide exactly how much the instigation actually weighed in the mind of the person abetted. *AIR 1938 Mad 996.*

(5) In the following cases the accused was held guilty of abetment by instigation:—

(a) Instigating raider or leader of raid, in which death is caused amounts to abetment of murder—All who joined the raid or personally directed it held to be guilty of murder under S. 302/109. *AIR 1934 Cal 221.*

(b) Widow deciding to commit Sati (= suicide)—Members of funeral procession of her husband applauding her resolve by shouting Sati Mata Ki Jai—Held kind of instigation to commit Sati (= suicide). *AIR 1958 Raj 169.*

(c) Where a hut was set on fire by one of the members of the unlawful assembly in consequence of the order given by the accused, the conviction of accused under Section 436 read with S. 109 was not illegal. *AIR 1958 SC 813.*

(6) In the following cases the accused was held not guilty of abetment:—

(a) Unlawful assembly consisting mostly of servants and tenants—Master nowhere near scene of occurrence—Mere fact that members were servants or tenants of master is not enough to make master liable. *AIR 1946 All 457.*

(b) Presiding over meeting where revolutionary songs are sung. *AIR 1932 Cal 549.*

4. Abetment by conspiracy.—(1) The distinction between the 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 criminal conspiracy the very agreement or plot is an act in itself and is the gist of the offence. *AIR 1962 SC 876.*

(2) Where a criminal conspiracy amounts to an abetment under Section 107, it is unnecessary to invoke the provisions of Sections 120A and 120B, as the Code has made a specific provision for the punishment of such a conspiracy. *AIR 1960 Pat 459.*

(3) It is not necessary that the abettor should concert the act with the person who actually commits it. It is sufficient if he engages in the conspiracy in pursuance of which the act is done. *AIR 1950 All 412.*

(4) A person constitutes himself an abettor by intervention of a third person without any direct communication between himself and the person employed to do the thing. *AIR 1946 Sind 1.*

5. Combined attack by several persons.—(1) Where several persons combine to attack another person each can be said to be abetting the conduct of the others within the meaning of this section. *AIR 1936 All 437.*

(2) Where two persons set out to accomplish a particular act and agree that if the necessity should arise, they would resort to the use of fire-arms with which they provide themselves, and on the necessity arising one of them indulges in shooting, the other must be treated as having abetted the shooting, as this takes place in pursuance of the common intention which inspired the two persons. *AIR 1919 Oudh 160.*

6. Conspiracy by foreigner in foreign territory to commit offence in Bangladesh.—(1) Where A, a foreigner, conspired with B in foreign territory to instigate C in India to forge an entry in a Khata and B, in pursuance of the conspiracy, handed over the Khata to C in India, it was held that the abetment by conspiracy by A was complete when the Khata was handed over to C, and that the abetment was therefore made in India and the Court in India had jurisdiction to try A for the offence of abetment of forgery. *(1912) 13 CriLJ 426.*

7. Abetment by aid—General.—(1) An essential ingredient of the offence of abetment by aid is that the act or omission which constitutes the aid must have been done intentionally. *AIR 1977 SC 666.*

(2) An essential ingredient of the offence of abetment by aid is that the aid must have been given either prior to or at the time of the commission of the offence abetted. *AIR 1978 RajLW 1.*

(3) Aiding in the preparation for the commission of an offence does not amount to aiding in the commission of the crime and hence will not amount to an abetment of the crime or even of an attempt to commit the crime. *AIR 1925 Oudh 158.*

(4) A, a Superintendent of Police, gives B four hundred-rupee notes and asked him to go to the office of C, a private detective (who was suspected of attempting to commit robbery) to make it feasible for C to rob B. It was held that A cannot be said to have aided the commission of the offence of robbery, inasmuch as A had no communication with C whatever in matter. *AIR 1936 Rang 242.*

8. Aid by act.—(1) If a person joins another in the commission of a crime by which he is to benefit and which it would not be possible to commit but for his aid, he is guilty of the commission of the crime and not merely of its abetment. *AIR 1951 East Punj 418.*

(2) The presence of a person of authority which aids the commission amounts to abetment. *AIR 1950 Trav-Co 9.*

(3) However insignificant the aid may be, it would be abetment if it was given with the requisite intention or knowledge. The test is not to determine whether the offence would or would not have been committed if the aid had not been given, but whether the act was committed with the aid of the abettor in question. *AIR 1966. Bom 393.*

(4) Knowledge that an offence is being or would be committed is necessary to constitute the offence of abetment by aid. *AIR 1956 Bom 265.*

(5) In the following cases the accused was held to have aided by an act the commission of an offence:—

(a) A purchased in Calcutta drugs from B, the manufacturers for sale at Nasik—Drugs of sub-standard quality—B abetted A in commission of offence under S. 13(a), Drugs Act. *AIR 1962 Bom 21.*

(b) Widow deciding to commit sati (= suicide)—Members of funeral procession shouting "Sati Mata Ki jai" and taking her with bier to cremation ground—Members also preventing police from interfering—Aiding widow to commit suicide. *AIR 1958 Raj 169.*

(c) Accused holding victim's hands to facilitate stabbing by another. *AIR 1955 Trav Co 266.*

(d) One of the accused standing close with open knife when other accused committed rape was held guilty of abetment of rape by aid. *AIR 1953 Ajmer 12.*

(e) A posing as a big merchant cheating B and gathering money from him—C a close acquaintance of A accompanied A to settle the transaction and allowed himself to pass as 'Munim' of A, C was held guilty of abetment of cheating. *AIR 1952 Ajmer 60.*

(f) Accused holding X and permitting B to stab X. *AIR 1950 Kutch 5.*

(g) Hodling victim in grib while another deals fatal blow. *AIR 1950 Trav-Co 41.*

(6) In the following cases the accused was held not to have aided by act:

(a) Accused found guilty under Ss. 148 and 302—When accused 2 to 6 were found guilty under Ss. 302 and 34 they could not be guilty under S. 302 read with Section 109. *AIR 1956 TC 230.*

(b) Two accused catching deceased—Third accused having no axe with him at that moment snatching it from one of the other accused and inflicting fatal blow on deceased—First two accused cannot be held guilty of abetment of murder. *AIR 1955 NUC (Sau) 5754.*

9. By illegal omission.—(1) The presence of a person of authority at the place of occurrence which aids the commission of the offence without doing anything to prevent it will amount to abetment. *AIR 1950 Trav-Co 9.*

(2) A mere failure to warn does not amount to abetment. *AIR 1955 HimPra 15.* (Wife not warning husband of paramour's plot to kill him.)

(3) A connivance does not amount to abetment. *AIR 1967 Pat 312.*

(4) In the following cases the accused was held guilty of abetment:—

(a) Civic guard accompanying police constable during his attempt to extort. *AIR 1948 Cal 47.*

(b) Truck driver allowing unlicensed person to drive and sitting by his side. *AIR 1947 Nag 113.*

(c) Mere failure to prevent the commission of an offence is not by itself an abetment, when there is nothing to show that the accused instigated the commission of the offence or helped in any way to do it. *AIR 1941 Cal 456.*

(5) In the following cases the accused was held not guilty of abetment:—

(a) Mere omission does not amount to abetment—Servant put in charge of writing accounts—Non-making of accounts is not abetment. *(1954) ILR 33 Pat 901.*

(b) The mere omission to bring to the notice of the higher authorities offences committed by other persons. *AIR 1938 Mad 996.*

(c) Volunteers at a meeting presided by A sounding bugle—Police asking bugler not to sound bugle—A taking no steps to stop the bugler—No abetment. *AIR 1933 Cal 36.*

10. Proof of abetment.—(1) A mere finding that the person accused of the substantive offence could not have acted in the way he did, without the approval and connivance of the person accused of abetment, is not sufficient to prove abetment. *AIR 1921 Pat 304.*

(2) Where an accused is charged with abetment by instigation, there must be proof of the actual words used by way of instigation. In the absence of such proof a conviction for abetment cannot be sustained. *AIR 1936 Pat 608.*

(3) Persons who are particeps criminis in respect of the actual crime charged whether as principals or as abettors when called as witnesses for the prosecution have been treated as falling within the category of accomplice and their evidence requires corroboration. *AIR 1968 Punj 416.*

11. Accessory after the fact.—(1) If the offence has already been completed before anything was done by the alleged abettor, any subsequent action which might in any way help the main offender will not be abetment within S. 107. *AIR 1921 Pat 286.*

(2) In the following cases it was held that there was no offence of abetment:—

(a) endorsing cheque fraudulently issued. *1956 MBLR (Cri) 444.*

(b) Public servant's omission to inform superior of offence by fellow official. *AIR 1938 Mad 996.*

12. Receiving unstamped instrument.—(1) Merely accepting or receiving an unstamped or insufficiently stamped instrument is not an abetment of the execution of such instrument and, therefore does not constitute an offence under this section read with Section 62(1)(b) of the Stamp Act, 1899. *(1904) 1 CriLJ 874.*

(2) A person paid a sum of money to his creditor who, on being asked for a receipt said that he could not give a stamped receipt as he had no stamp and the person accepted the unstamped receipt promising to affix a stamp himself. The person was prosecuted for abetment for abetment of an offence under S. 61, Stamp Act, 1899. It was held that he was not guilty as he did not aid the offence by any act on his part nor illegally omit to do anything which he was bound by law to do. *(1885) ILR 8 All 18.*

13. Bribery cases.—(1) After the introduction of S. 165A by the Criminal Law Amendment Act. whether or not the offence of bribe-taking is committed by the public servant the offerer is guilty under S. 165A. *AIR 1956 Manipur 9.*

(2) The fact that the public servant demanded the bribe does not affect the guilt of the giver. *AIR 1952 Orissa 289.*

(3) In the case of a trap witness engaged for the purpose of decoying a public official by offering marked currency notes, the criminal intention of obtaining some favour from the public servant is wanting. *AIR 1957 Ker 134.*

(4) Abetment by aid requires that the alleged act of aid must have been done with the intention of aiding the commission of the offence. This principle applies also to cases of alleged acts of aid in taking bribe. *AIR 1977 SC 666.*

14. Kidnapping cases.—(1) The offence is completed as soon as the minor or lunatic is taken out of the guardianship of the guardian. *AIR 1926 Pat 493.*

(2) Any aid or help rendered to the kidnapper thereafter will not be an abetment of the offence. *AIR 1953 Raj 127.*

(3) Kidnapping on 15-4-52—Abetment alleged on 9-2-52—No proof of abetment on that date—Charge bad. *AIR 1955 Cal 100.*

15. Gambling cases.—(1) A obtained the lease of a house from the owner. He had no object at the time of letting it out, in his turn, to gambling parties. But subsequently he permitted the house to be used by gambling parties, who created a nuisance to the neighbours by their disorderly and noisy behaviour amounting to an offence under Section 290 of the Code. It was held that A was guilty of abetment of the offence, though he was absent from the place on the date of the offence. *(1891) ILR 14 Mad 364.*

16. Cases relating to enticement, abduction, adultery, etc.—(1) Where a man has been convicted of enticing away a married woman under Section 498, the woman herself cannot be convicted of abetment of the offence. *(1903) ILR 26 Mad 463.*

17. Effect of acquittal of principal offender.—(1) Where an abettor and principal are tried together, and the principal is acquitted, it does not follow that the abettor also must be acquitted. *AIR 1958 SC 813.*

(2) In cases where the abetment consists of instigation or conspiracy, it is immaterial for the conviction of the abettor whether the person instigated commits the offence or not. *AIR 1967 SC 553.*

(3) In cases where the abetment consists of instigation or conspiracy it is immaterial whether the persons conspiring together actually carry out the objects of the conspiracy. *AIR 1959 SC 673.*

(4) Where the indictment charges that A, B and C combined, confederated, and agreed together to do a certain thing and A and B are acquitted of the charge, it is inconsistent with the finding that there could have been any combination, confederation or agreement between them, and C alone cannot be held guilty of the charge. *AIR 1956 SC 33.*

(5) Where the person charged with the substantive offence is acquitted on the ground that he had not committed the offence no question of intenionally aiding by any act or omission the commission of that offence arises. Therefore, whether the acquittal of the principal is right or wrong, the person alleged to have abetted by aid cannot be convicted of abetment. *AIR 1959 SC 673.*

(6) As a general rule a charge of abetment fails when the substantive offence is not established against the principal but there may be exceptions. *AIR 1970 SC 436.*

(7) 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 abettor's guilt depends upon the nature of the act abetted and the manner in which the abetment was made. *AIR 1967 SC 553.*

18. Procedure.—(1) If the accused had notice of the facts which constituted abetment and if there had been no prejudice to the accused by the omission to frame a separate charge for abetment, he can be convicted for abetment even though the charge for the main offence fails. *AIR 1956 Andh 31.*

(2) Where the facts alleged in a complaint disclose an offence of abetment by conspiracy, for taking cognizance of the said offence, no consent or sanction under S. 196, Criminal P. C., is necessary. *AIR 1962 SC 876.*

(3) Where an accused is charged for committing an offence and the facts disclosed in the allegations show that he is guilty of abetment of the offence, the Court can alter the charge to one of abetment if no prejudice is caused to the accused thereby. The alteration can be done at any stage of the trial if the facts disclosed during the trial show that the accused is guilty of abetment. *AIR 1962 Bom 21.*

19. Attempt to abet and abetment of abetment.—(1) Assistance in the preparation for the commission of an offence which is ultimately not committed cannot amount to an abetment or attempt to abet. *AIR 1925 Oudh 158.*

(2) Where A instigates B to offer a bribe to a public servant. A is guilty of an abetment of abetment under Explanation 4 to S. 108. *AIR 1934 Pesh 110.*

Section 108

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 [? Now 'nine'. See Ss. 82-83] 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 for murder.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *No question of abetment after offence is completed.*
3. *Explanation 2.*
4. *Explanation 3.*
5. *Explanation 4.*
6. *Explanation 5.*
7. *Procedure.*
8. *Complaint.*

1. Scope of the section.—(1) The offence of abetment is a substantive offence. Therefore, the fact that the principal cannot be brought to trial does not prevent a charge of abetment against the abettor. Even the acquittal of the principal is no bar to conviction of the abettor. In order to constitute an abetment intention is essential. Where it is alleged that a person's motor car was used for an abduction, unless there is some evidences that the motor car was so used with his knowledge or under his orders, the mere fact that his motor car was used certainly does not bring him within the definition of abetment. Where, therefore, abduction was never committed, section 109 can have no application.

(2) Abettor—Principal accused acquitted of the offence—Whether abettor will also be acquitted of the same offence depends upon the nature of a particular case—Charge of abetting a known person or unknown person. *Abdus Shukur Vs. State (1964) 16 DLR (Dac.) 147.*

(3) No hard and fast rule that when the person who was charged with substantive offence is acquitted the abettor must also be acquitted—That depends upon evidence. *Shamak Vs. State (1965) 17 DLR 222.*

(4) Right of private defence being available in the present case the fact that the man abetted caused the death of a person will protect both the abettor and the man abetted from penal consequence—If, however, the man abetted kills the other man which exceeds his right of private defence of property, to that extent, he is liable of being found guilty. *Zainal Abedin Vs. The State, (1970) 22 DLR 69.*

(5) If there is no abetment at all as defined in S. 107, i. e., by instigation, conspiracy or aid, there is no question of any abetment of an offence. *ILR (1956) 1 All 10 (DB).*

(6) There is no question of any abetment of offence where the act abetted is not an offence. *1968 CriLJ 555 (All).*

(7) It is not an offence to escape from unlawful custody and persons abetting the escape are not guilty of abetment of any offence. *AIR 1914 Cal 272.*

(8) Abetment is an offence made punishable by Spl. Court *(1 BLC 300). 45 DLR (AD) 48.*

(9) An abettor in principle ought not to be awarded a higher punishment that the meted out to the principal offender. *(46 DLR 212. 1 BLC 300). 50 DLR (AD) 108.*

2. No question of abetment after offence is completed.—(1) After the offence is completed, any support, aid or help to the offender is not an abetment of the offence. *(1898) 2 Cal WN 81.*

(2) Where a forged receipt had been brought into existence and it was intended by the parties that it should be attested by X and X attested it subsequently, it was held that in view of the said intention, the offence of forgery could not be said to be complete until it was so attested and that, therefore, X was guilty of abetment. *AIR 1942 Mad 92.*

3. Explanation 2.—(1) 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. *AIR 1967 SC 553.*

(2) The acquittal of the principal is not necessarily a bar to the conviction of the abettor. *AIR 1924 Cal 257.*

4. Explanation 3.—(1) It is also not necessary that the person abetted should have the same guilty intention or knowledge as that of the abettor or any guilty intention or knowledge. *(1971) 73 Bom LR 245.*

(2) Where X having given his daughter M who was only aged 8 years in marriage to Y, again gives her in marriage to Z during the lifetime of her first husband, it was held that he was guilty of abetting an offence under S. 494 of the Code, even though M had not the knowledge and intelligence necessary to enable her to commit an offence under S. 494 of the Code. *(1902) 6 Cal WN 343.*

(3) The fact that the principal cannot be brought to trial does not prevent a charge of abetment against the abettor. *AIR 1952 Cal 759.*

(4) Where accused No. 1 got poisoned from accused 2, her lover, and administered it to her husband to make him less quarrelsome towards her, but the poison itself was prepared by accused 2 and 3 knowing that it contained 'Dhatura poison' it was held that the act of accused No. 1 amounted to an offence under S. 337 whereas that of Nos. 2 and 3 amounted to an offence under S. 307 read with S. 109 and S. 328 read with S. 109 respectively. *AIR 1916 Bom 98.*

(5) This explanation is not confined to abetment by instigation alone but applies also to abetment by intentional aiding. *AIR 1933 All 513.*

(6) Where B demands a bribe and A gives the bribe only with a view to trap B. A will not be guilty of abetment as there is no mens rea on his part. *AIR 1957 Ker 134.*

(7) A person who bribes a public servant in order to avoid pecuniary injury, personal molestation or to have his business done promptly and well is an accomplice. *AIR 1950 Nag 1.*

(8) The giver of a bribe would not be an abettor if he gave it in response to a demand accompanied by threats. *AIR 1969 SC 17.*

5. Explanation 4.—(1) An abetment of an offence is an offence even if the abetment abetted is not committed and is ineffective. *AIR 1950 Mad 827.*

(2) S approached K, the Bench Clerk of a Magistrate, to incite K to instigate the Magistrate to take a bribe and acquit an accused person. K, after consulting the Magistrate and with a view to causing detection, placed a Police Inspector behind a screen in his house, and took the money from S, when the

Inspector seized the money and S was charged with offences under Ss. 161 and 109 of the Code. It was held that it made no difference in the guilt of S as an abettor of an abetment of an offence, that K did not commit the offence abetted namely the bribing of the Magistrate. *AIR 1919 Cal 654.*

6. Explanation 5.—(1) A person may constitute himself an abettor by the intervention of a third person without any direct communication between himself and the person employed to do the thing. *AIR 1950 All 412.*

7. Procedure.—(1) Section 198, Criminal P. C. , does not apply to a case of a charge for abetment of an offence under S. 494 of the Code. *AIR 1926 All 189.*

8. Complaint.—Not court shall take cognizance of any offence punishable under this section upon complaint made by the order of Government *(section 196, CrPC).*

Section 108A

[1]**[108A. Abetment in [2][Bangladesh] of offences outside it.**—A person abets an offence within the meaning of this Code who, in [2][Bangladesh], abets the commission of any act without and beyond [2][Bangladesh] which would constitute an offence if committed in [2][Bangladesh].

Illustration

A, in [2][Bangladesh], instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting murder].

Cases

1. Scope of the section.—(1) A child marriage celebrated outside India not being an offence under the Code (but under a special Act) its abetment in India is not an abetment within the meaning of this section. *AIR 1938 Nag 235.*

(2) Where the act attributed to the accused does not constitute "abetment" as defined in S. 107, this section will not apply. *(1900) ILR 24 Bom 287.*

(3) Where a subject of a foreign territory is charged with abetting an offence commited in India and the alleged abetment consists entirely of what the accused did or said at a place within foreign territory, he cannot be tried in a Court in India for such abetment. *AIR 1919 Lah 459.*

Section 109

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.

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1. This section was added by the Indian Penal Code (Amendment) Act, 1898 (Act IV of 1898), s. 3.
2. The world "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Schedule (w. e. f. 26th March, 1971).

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.

Cases and Materials: Synopsis

1. *Scope.*
2. *This section and Section 114.—*
3. *There must be an abetment.*
4. *The abetment must be of an act which is an offence.*
5. *The Act abetted must be committed in consequence of the abetment.*
6. *Master and servant.*
7. *There must be no other express provisions.*
8. *Distinction between Section 109 and Section 34, Penal Code.*
9. *"Any offence."*
10. *Person who cannot commit substantive offence if can be guilty of abetment.*
11. *Several persons charged with abetting an offence by X—Some acquitted—Effect.*
12. *"Be punishable with the punishment provided for the offence."*
13. *Sanction if necessary in cases of abetment.*
14. *Charge of abetment of offence—Court's duty.*
15. *Acquittal of principal offender—Liability for abetment.*
16. *Conviction for abetment before apprehension of principal offender.*
17. *Alteration of conviction for principal offence to one of abetment.*
18. *Sentence.*
19. *Practice.*
20. *Procedure.*
21. *Charge—Form of.*
22. *Complaint.*
22. *Complaint*

1. Scope.—Section 109 has no application where the offence is never committed *(35 CrLJ 52)*. For the application of section 109, it is necessary that the act must be an offence either under the Penal Code or under any special law. Muslim family Law Ordinance is one of the special laws. Active abetment at the time of commission of an offence is covered by section 109. Section 114 applies where a person abets the offence sometime before it is committed and is subsequently present at its commission *(38 CrLJ 790)*. Where the abetment was committed at the time when offence was being committed the section applicable is section 109 and not section 114 *(AIR 1948 All 168)*. Abetment need not be by instigation. It may be by conspiracy, the proof of which is generally a matter of inference *(AIR 1944 Lah 380)*. Offences under sections 109 and 120B are distinct. 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 Penal Code. There may be an element of abetment in a conspiracy, but conspiracy is something more than an abetment *(16 CrLJ 456)*. A charge of abetment may be tried either by the Court within whose jurisdiction the abetment or

the main offence was committed *(section 180 CrPC)*. 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 *(1961 CrLJ 302)*. The offence of kidnapping is complete the moment the minor is taken from the keeping of his guardian. There can, therefore, be no abetment or taking after the minor has been completely removed *(17 CrLJ 498)*. A married woman cannot abet her own abduction under section 498 Penal Code. A person meeting dacoits before a dacoity and bringing for them food is guilty of abetment of dacoity *(35 CrLJ 863)*.

(2) There is no distinction between 'principal in the first degree' and 'principal in the second degree'. Under section 111 of the Penal Code an abettor is liable for a different act if that was probable consequence of the abetment. This is applicable to the accused guarantor. *Islami Bank Bangladesh Ltd. Vs. Md. Habib and others (Criminal) 55 DLR (AD) 19.*

(3) If the principal offender is not punished under any of the sections, no question of inflicting punishment for abetment of offence in respect of those sections can arise. *Alam (Md) & another Vs. State (Criminal) 54 DLR 298.*

(4) Abetment is an offence under the Penal Code. A person may be charged for abetting an offence made punishable under a special act even though abetment may not have been mentioned as an offence under the special law. *Tajul Islam Vs Gobinda Prashad Das and others (Criminal) 54 DLR 436.*

(5) Abatement is an offence under the Penal Code and a person may be charged for abetting an offence punishable under a special law even though the word 'abetment' may not be mentioned as an offence under the Special Act. *Hussain Mohammad Ershad, former President Vs. The State , 14 BLD (AD) 178.*

(6) Abetment of offence—Mere presence of the accused near the place of occurrence does not constitute the offence of abetment. Intentional aiding and active complicity is the gist of the offence in the absence of which the charge of abetment must fail. *Mostain Mollah Vs. State 44 DLR 295.*

(7) Common intention having been not proved against Belal, it is difficult to hold good the charge of abetment upon him. *Belal Ahmed Vs. State 40 DLR 154.*

(8) Non-consideration of a vital element of law while convicting the accused has caused serious prejudice resulting in failure of justice to the accused. *Belal Ahmed Vs. State 40 DLR 154.*

(9) In order to constitute an abetment, intention is essential. Where the accused have no knowledge of the fraud, they could not have intended the commission of an offence. *Crown Vs. Matilal Sen (1953) 5 DLR 66.*

(10) Identity of the accused not established—Abetment charge must fail. *State Vs. Makbul Hossain (1974) 26 DLR 419.*

(11) It is an offence by itself and unless it is specifically made punishable in a Special Act a person cannot be called upon to answer a charge of abetment in the absence of any specific provisions in the Special Act itself merely by reference to the Penal Code—Section 6(5) of the Muslim Family Laws Ordinance, 1961 indicated that the person who contravenes the provisions of the Ordinance is alone liable for prosecution and none else. *Abdul Halim Pattader and others Vs. M. Rahmat Ali and another 1 BLD (HCD) 377.*

(12) For sustaining a charge of abetment, some evidence of an overt act or omission necessary—Mere motive is not sufficient evidence of abetment. *Muradali Vs. The State, (1970) 22 DLR 158.*

(13) Petitioner charged for, and convicted of, the principal offences u/s 325 and 323 but the Trial Court and the appellate court found on evidence that he himself did not commit the offences, but

merely abetted it—As there was no charge for the abetment u/s 109, whether he could be convicted for abetment—Whether his conviction for the principal offence was sustainable—Omission supplied by the Appellate Division at special leave stage. *Eiar Ali Shaikh & ors. Vs. The State; BSCD, Vol VI, p. 30.*

(14) Justifiability of awarding of the maximum punishment of 10 years under second part of Sec. 304—Appellant was convicted under second part of Sec. 304 for giving order to the principal accused to fire from his rifle in consequences of which the offence was committed—Principal accused has not preferred any appeal and his substantive sentence of 10 years was upheld by the High Court Division—It is difficult to reopen the question of sentence as u/s. 109 PC—Both the principal offender and the abettor are entitled to the same sentence—Since the appellant has served out the sentence, no useful purpose will be served in entering into the question of sentence in the case. *Md. Eshaque Tahshilder Vs. The State, 43 DLR (AD) 203.*

(15) When the principal accused is acquitted the abettor need not necessarily be acquitted. Whether the abetter can be convictor not in such cases depends on the circumstances of the particular case. *ILR (1974) 1 Punj 449.*

(16) If the main offences under Ss. 161. 165A, 409, 420 of P. C. are not made out, the question of abetment, conspiracy or attempt in relation to them does not arise because offences under Ss. 109, 120B and 511 go with the aforesaid offences. *1984 CriLJ 545.*

(17) According as the offence abetted is bailable or not—Offences of murder and kidnapping are co-extensive and there can be no conviction for both the offences. If abduction is followed by murder, no charge can be framed under section 364 of the Penal Code and the charge must be one under sections 302/109 or for murder pure and simple. Conduct of the accused—No evidence to suggest the intention of the accused to kill the victim while taking him along with them—Facts, evidence and circumstances do not bring the case under sections 302/109 Penal Code. *42 DLR 118.*

(18) Abduction or kidnapping of a girl below 16 years—Intention necessary to constitute the offence. There is no overt act proved against accused Ananda in any conspiracy resulting in the abduction of the victim girl by Swapan—Prosecution failed to prove the charge of abetment against Ananda. *41 DLR 533.*

(19) Evidence on record does not justify the order of conviction under sections 302/109 and 148 of the Penal Code, upheld by the High Court Division. PW 4 admitted that he and the deceased were accused in smuggling cases. The finding of the Additional Sessions Judge upon proper appreciation of evidence of PWs 6, 8-10 including PW 4 casts a long shadow on the subsequent prosecution case of alleged killing of Jamshed. *40 DLR (AD) 38.*

(20) Abduction of the deceased followed by murder, proved: Charge should be under section 302 if the abductors were murderers; if not, the charge should be under sections 302/109. In such a case no scope for laying a charge under section 364. Supreme Court's judgments are binding on all Subordinate Courts including the High Court. *29 DLR (SC) 269.*

(21) Circumstantial evidence—Circumstances leading to the death of the victim cannot be brushed aside to find the innocence of the appellants—No other conclusion than the guilt of the accused appellants can be drawn. *7 BCR (AD) 157.*

(22) Circumstantial evidence—Other evidence adduced does not make the Court believe and hold that the appellants made insertion in the sale deeds as alleged—Consideration money by itself would not show that the accused persons dishonestly inserted excess area of land in two documents—Appeal allowed. *7 BCR (AD) 128.*

(23) The conviction of appellant Nos. 2-4 upon the evidence on record for the offence of murder with the application of section 34 or 109 Penal Code is not sustainable in law. *40 DLR (AD) 147.*

(24) If at the trial the story as given against the illegal offender is omitted from the one given in FIR it has always been viewed with great suspicion. FIR enables the court to see what was the prosecution story at the initial stage and to check up the subsequent embellishment. There is no rule of law that once a witness has been discredited on one point, no credit is to be given to another. If a natural witness is declared hostile, his evidence may be accepted if corroborated. The evidence of boatman PW 2 cannot be discarded. The story of taking five victims by a jeep upto school and the victims did not raise any alarm seeking help cannot be accepted as true with easy mind. In fact, the story suffers from inherent improbability. The prosecution case must be true and not merely may be true. Between 'may be true' and 'must be true' there is inevitably a long distance to travel and the distance must be covered by legal, reliable and unimpeachable evidence. Probability however strong and suspicion however grave can never take place of proof. The trial Court in the instant case failed to analyse the evidence on record leading to an erroneous decision occasioning failure of justice. *40 DLR 97.*

(25) Murder and its abetment—Ingredients of—Mere taking away of the victim from his house without any overt act animus in the form of any hostile attitude or initial intention to kill will not justify conviction for such offences—The theory of 'last seen' must carry along with it a high degree of probability excluding all other theories save and except the hypothesis of the accused. Criminal trial—Theories of both guilt and innocence—In the face of two theories, one against the accused and the other favouring them, the one that favours the accused must be accepted. *10 BLD 179.*

(26) High Court Division's acceptance of the evidence of PWs. 1, 2 and 4 just as they have narrated a story is not correct without scrutinising at all upon a correct principle of assessment of evidence in a criminal case whether the testimony of the witness were at all worthy of credence. The alleged murder of Jamshed in the manner and at the time and place as stated by PW 4 Mobarak will itself appear to be doubtful if some facts and circumstances are taken into consideration. The Additional Sessions Judge upon a good piece of appreciation of evidence completely disbelieved the witnesses PW 4, PW 6 and PW 8-10 and found that there was much scope to doubt about the prosecution story that Musa was at all present on the river bank and that there was much scope to believe that Musa's name was subsequently introduced. Not much credibility can be attached to the prosecution case after the disaster it has met with in the hands of the Additional Sessions Judge. We have come to the conclusion that the evidence on record does not justify the order of conviction under sections 302/109 and 148 Penal Code which has been upheld by the High Court Divisions. *8 BCR (AD) 17.*

(27) Charge sheet having not been accompanied by sanction and the learned Special Judge having not written for sanction as required under section 6(5) of Act No. 40 of 1958, the cognizance is not valid. *7 BCR (AD) 189.*

(28) Abduction of the deceased followed by murder, proved: charge should be under section 302 if the abductors were murderers; if not, the charge should be under sections 302/109. In such a case there was no scope for laying a charge under section 364. Supreme Court's judgments are binding on all Subordinate Courts including the High Court. *29 DLR (SC) 269.*

(29) When a party comes prepared to commit an offence and to commit a murder of somebody they do not require further incentive in the shape of orders. Dispensation of justice—Law, not moral conviction, applies. Evidence, assessment of—Caution to be exercised. *25 DLR 398.*

(30) Husband contracted a second marriage during subsistence of his first marriage without permission of the Arbitration Council as required under section 6(5) of the Ordinance No VIII of 1961. Held: The husband (along with those who intentionally aid in the performance, solemnisation and registration of such marriage) is liable to be prosecuted. It may, however, be observed that every such case shall be decided on evidence as to whether there has been any abetment or not by persons prosecuted under section 6(5) of the Ordinance read with section 109 of the Penal Code. *23 DLR 118.*

(31) Abetment for sustaining a charge of abetment, some evidence of an overt act or omission necessary. Mere motive is not sufficient evidence of abetment. *22 DLR (WP) 158.*

(32) Abducted person when found murdered trial should be under sections 302/109—The prosecution came out with a story of abduction followed by murder and the murder was in fact proved on post mortem examination, the appellants ought to have been placed on trial on a charge under section 302 read with section 109 of the Penal Code for abetting the murder of deceased Latif regard being had to the discovery of a relevant fact such as parts of a human head in consequence of confessions made by the appellants. *1 BCR 13.*

(33) In order to constitute an abetment of an offence under sections 406/109 Penal Code intention is essential. A person having no knowledge of the fraud cannot have intended to aid the commission of any offence. *5 DLR 331.*

(34) Muslim Family Laws Ordinance—Accused contracting another marriage on 17-8-75 during the subsistence of existing marriage—After dissolution of local bodies by President's Order 7 of 1972—on amendment in the definition of "Arbitration Council " "Chairman" and "Union Council" having been made and no person having been appointed to discharge the function of Chairman under the Ordinance, sections 6 and 7 of the Ordinance have been rendered nugatory—There was no competent authority from whom the accused was required to make permission for the second marriage and he cannot be convicted of an offence under section 6(5) of Muslim Family Laws Ordinance. The provision of abetment has got no application with Muslim Family Laws Ordinance. *1 BLD 165.*

(35) Special Act—Abetment—Abetment is an offence by itself and unless it is specifically made punishable in a special Act, a person cannot be called upon to answer a charge of abetment merely by reference to Penal Code—The purpose of section 6(5) of Family Laws Ordinance, 1961 seems to be that the person who contravenes the provision is only liable and nobody else. *1 BLD 377.*

(36) Death sentence—Recognition—TI parade not held excluding the possibility of collusion. Charge of abetment—statement of accused pointing out the house of deceased out of apprehension of being by kidnappers all armed—Not sustainable—High Court arrived at the finding upon due consideration of evidence, facts and circumstances and there having been no contravention of any legal principle no justification for interference with the order of acquittal. *1 BSCD 242.*

(37) Evidence—Reasonable doubt—Assessment of Evidence. Accepting the prosecution cases, the trial Court convicted and sentenced the petitioner under section 468/109 as also under section 419/109 which was affirmed by the High Court in the appeal. While examining the applicability of the principle enunciated in the case of *Safdar Ali Vs. The Crown* reported in *5 DLR (FC) 107* on the question of appreciation of evidence. The Appellate Division found that the High Court Division took note of all the salient features of the present case including the circumstances which might lead to reasonable doubt and applied its mind to all the important aspects of the case. *1 BSCD 249.*

2. This section and Section 114.—(1) This section is a general provision applicable to all abetments whether prior to or at the time of the commission of the offence. Under this section the accused need not be present at the time of the offence. *AIR 1971 SC 885.*

(2) Where the accused aids and abets the commission of a crime at the very time when the crime is committed the abetment will come under this section. *AIR 1938 Cal 625.*

(3) The effect of Ss. 109 and 114 of the Code is to supersede all the English Law relating to principles of the first and second degree and accessory before the act and there is no reason for saying that a man must be absent in order to be an abettor under S. 109. *AIR 1937 Pat 317.*

(4) A person who instigates others to beat the deceased and they inflict several injuries on him resulting in his death cannot escape responsibility for abetment of murder. *AIR 1933 Lah 928.*

3. There must be an abetment.—(1) The mere presence without more, during the commission of an offence, is not sufficient for conviction under this section. *AIR 1934 Rang 22.*

(2) A conspiracy necessarily involves a guilty intention and an act done in pursuance of a conspiracy will be an abetment of the act. *AIR 1947 Cal 162.*

(3) Allottees of Government waste lands agreeing to pay price of trees standing thereon—Permission by Mamlatdar for cutting trees standing on those lands—Illegal cutting of excess trees on allotted lands as also on the Government lands—Asst. Gram Sevak (accused No. 2) proved privy from allotment to the illegal cutting of the excess trees—Accused held guilty under S. 167/109 and also under S. 427/109, Penal Code. *AIR 1973 SC 1388.*

(4) A representing himself to be a merchant entering into bogus transaction with B and extracting money—C accompanying A in the guise of his munim to settle transaction—C guilty of abetment of cheating. *AIR 1952 Ajmer 60.*

(5) Agricultural assistant and a contractor were prosecuted for preparing false documents in order to facilitate misappropriation of funds meant for contour bounding scheme. It was clearly established that a substantial part of the contracted supply was not made. This finding was sufficient to warrant conviction of the two accused under Prevention of Corruption Act and S. 109 P. C. for abetting the act. *AIR 1981 SC 721.*

4. The abetment must be of an act which is an offence.—(1) Unless the act abetted would be an offence if committed, the abetment is not punishable under this section. *(1971) 2 SCJ 264.*

(2) Where no particular person was found to have committed the offence which the accused could be said to have abetted his conviction under S. 109 cannot be sustained. *AIR 1939 Mad 976*

5. The act abetted must be committed in consequence of the abetment.—(1) Unless the act abetted is actually committed, this section will not apply. *AIR 1938 Mad 130.*

(2) Where A instigated B to escape from lawful custody and B escaped in consequence of the instigation, A was held guilty under S. 109. *AIR 1961 Ker 331.*

(3) Where A orders his men to beat B and B is beaten by the men as a consequence of the order. A would be guilty of abetment of the offence. *AIR 1976 SC 2588.*

(4) Claim or work not executed—Verified and accepted—Payments made in consequence—Officers who verified the claims wrongly were certainly guilty of abetting. *AIR 1967 SC 752.*

6. Master and servant.—(1) If the servants have committed an offence the master could not be made liable without proof that he has given his authorisation for the doing of the act. The master can be made liable only if mens rea is proved. *1969 KerLJ 215.*

(2) Where the accused was nowhere near the scene of occurrence the mere facts that the unlawful assembly consisted mostly of his servants or tenants and that its common object was to do something

which was in the interests of the accused, cannot lead to the conolusion that the accused must necessarily have ordered or instigated the formation of this unlawful assembly or the commission of this crime. *1983 CriLJ NOC 134.*

7. There must be no other express provisions.—(1) Where the accused abetted an offence which was committed before an express provision for punishment of such abetment was inserted in the Code and the trial was after the express provision was inserted in the Code, it was held that the accused could not be punished under the newly inserted express provision but only under this section. *AIR 1960 SC 409.*

(2) There is no express provision for the punishment of abetment under S. 494 of the Code ; consequently the abetment is punishable under S. 109 read with S. 494 of the Code. *AIR 1952 Mad 193.*

8. Distinction between Sections 109, 120B and Section 34, Penal Code.—(1) Section 34 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. S. 109, on hte other hand, may be atteracted even if the abettor is not present when the offence abeted is committed. 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. *AIR 1971 SC 885.*

(2) A conviction under S. 109 can be sustained only if the part played by abettor as accessory to the fact could be distinguished from the part played by the principal in the first degree. *AIR 1924 Cal 257.*

9. "Any offence".—(1) The words "any offence" in this section denote any offence punishable under the Code or under any special local law. *AIR 1952 Madh B 17.*

(2) Where A instigates B to commit only an assault on C but B kills C. A cannot be convicted for abetting murder. *AIR 1972 SC 1764.*

10. Person who cannot commit substantive offence, if can be guilty of abetment.—(1) Although an offence under the Suppression of Immoral Traffic Act could only be committed by a male, and not by a female, a female could be guilty of abetment of such offence under Section 109 of the Code. *AIR 1932 Cal 457.*

11. Several persons charged with abetting an offence by X—Some acquitted—Effect.—(1) Where A and B are charged with abetment of an offence committed by C and B is acquitted for want of evidence, the acquital does not affect the conviction of A if there is proof of his abetment. *(1912) 13 CriLJ 542.*

12. "Be punished with punishment provided for the offence".—(1) A person who is punished as the principal for a certain offence cannot also be punished for abetment of the same offence. *AIR 1940 Cal 351.*

(2) The words "punishment provided for the offence" means punishment provided for the offence either under the Penal Code or by any special or local law. *AIR 1929 Rang 203.*

13. Sanction, if necessary, in cases of abetment.—(1) Officer guilty of abetment of offence of cheating—No sanction necessary. *AIR 1967 SC 752.*

(2) Prosecution of Tahsildar for certain offences read with Ss. 109 and 120B, P.C.—Allegation of preparation of false record of service of notice and inspection—Tahsildar acting in the discharge of his

official duties—Prosecution without sanction under Section 197 Criminal P.C.—Not permissible. *1984 Mah LR 247.*

14. Charge of abetment of offence—Court's duty.—(1) Charges of abetment are easily made against persons and are difficult to refute. Consequently, the evidence should be considered and analysed and a conclusion arrived at before the accused can be convicted of abetment. *AIR 1938 Pat 34.*

(2) A conviction for abetment is not proper when the accused is not notified at any stage that he would be tried for abetment and prejudice is caused to him thereby. *AIR 1970 SC 436.*

(3) Where the material facts were that A gave orders for attack on B and thereupon C and D caught hold of B fast, while E and F beat B as a result of which he ultimately died, there should have been a straight charge under sec. 304 against E and F and a charge under sec. 109 against A,C and D. *Rabbani Mondal Vs. Crown (1950) 2 DLR 73.*

15. Acquittal of principal offender—Liability for abetment.—(1) Where A was charged for the offence of rape and B was charged for abetment of the offence and A was acquitted on the ground that the prosecutrix might have had voluntary intercourse with A. B was also acquitted of the offence of abetment. *(1982) 1 BomCR 894.*

16. Conviction for abetment before apprehension of principal offender.—(1) Abetment by itself is a substantive offence and the abettor can be convicted even before the principal is apprehended and put on trial. *1969 KerLJ 215.*

17. Alteration of conviction for principal offence to one of abetment.—(1) Charge and conviction—Accused charged with main offence only—Omission to frame separate charge of abetment—Accused having notice of facts constituting offence of abetment—No prejudice caused to accused by omission—Held, accused can be convicted for abetment even though charge for main offence fails. *1984 CriLJ 426.*

18. Sentence.—(1) In a case where two or more persons act in concert by virtue of a common intention and of a criminal conspiracy, their entire activities cannot, in the very nature of things, be brought out in evidence. Obviously, such daring offences would necessarily have called for active planning and co-operation of both these accused together and probably of others. Therefore no distinction can be made between them even as regards sentence. *AIR 1957 SC 381.*

(2) Conviction of accused under Prevention of Corruption Act and under S. 109. P.C. Accused were given two years' imprisonment. Accused young and immature. The occurrence took place in 1963, Since then till 1980 the accused suffered an ordeal of criminal trial. Held, the ends of justice would be met by reducing two years sentence to one year. *AIR 1961 SC 721.*

19. Practice.—*Evidence*—To substantiate a charge under section 109, Penal Code, it is necessary to prove:

(1) Abetment.

(2) The act abetted was committed in consequence of the abetment.

(3) Intentional aid by some act or illegal omission.

It is irregular to convict and punish a person for abetment of theft and at the same time to convict and punish him for receiving the stolen property.

20. Procedure.—(1) Cognizable, if offence abetted is cognizable and noncognizable if offence abetted is noncognizable—Warrant or summons as warrant or summons may issue for offence abetted—Bailable or nonbailable as offence abetted is bailable or nonbailable—Compoundable or not as offence abetted is compoundable or not—Triable by Court by which offence abetted is triable.

(2) The accused No. 2 was charged for abetting the offence of criminal trespass committed by accused No. 1 by encouraging him to continue to remain in unauthorised occupation of the house from which he was asked to quit. No notice to quit was served on them and there was no specific allegation about the nature of the abetment said to have been committed by them. Subsequently the accused was acquitted as the complaint against the abettor was barred by limitation. It was also held that against abettor period of limitation starts from the date of alleged dispossession and not from date of service of notice to vacate. *1980 AllLJ 939.*

21. Charge—Form of.—(1) Formal charge under Section 109 is not necessary when the facts needed to constitute the offence are set out in the charge. The omission to mention S. 109 is not matterial. *1974 MadLJ (Cri) 471.*

(2) *Form*: The charge should run thus:

I, (name and office of the Magistrate/ Judge, etc.) hereby charge you (name of the accused) as follows:

That XY (if the person is not known say that an unknown person) on the—day of at—, committed the offence of,—and that you at—, abetted the said XY (or person unknown) in the commission of the said offence which was committed in consequence of your abetment, and you have thereby committed an offence punishable under section 109 and—of the Penal Code, and within my cognizance (or within the cognizance of the Court of Session.)

And I hereby direct that you be tried by the said Court on the said charge.

When the abettor is charged with the person committing the offence, the charge should run thus:

That you—on or about the—day of—, at—, abetted the commission of the offence of—by—which was committed in consequence of your abetment and that you have thereby committed an offence punishable under section 109 and—of the Penal Code and within the cognizance of my Court (or the Court of Session).

And I hereby direct that you be tried by the said Court on the said charge.

22. Complaint.—Under section 195(4) of the CrPC a complaint in writing is necessary for the prosecution of a person who abets any of the offence referred to in sub-section (1) of section 195A of the CrPC applies only to a prosecution for conspiracy punishable under section 120B and not for abetment by conspiracy punishable under this section. *(49 Cal 573).*

Section 110

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.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Practice.*
3. *Procedure.*
4. *Charge.*

1. Scope of the section.—(1) This section applies where the abetted person does the very act abetted but with a different intention from that of the abettor. If the act if done with the intention or knowledge of the abetted person constitutes one offence, and if done with the intention or knowledge of the abettor, another offence, the abettor would be liable only for the latter offence. *AIR 1950 All 418.*

(2) Where the abettor only intends that simple hurt to A should be caused but the persons abetted attacking A in such a way that their offence amounts to culpable homicide, the abettor will nevertheless be liable only for simple hurt under Section 323/110 and not for culpable homicide under Section 304/110. *AIR 1935 Oudh 473.*

(3) Where the common intention of the member was to cause only grievous hurt, but one of them committed murder it was held that the members other than the one who committed the murder would be punishable only under Section 326 read with Section 149 and not under Section 302 read with S. 149. *AIR 1936 Pat 481.*

2. Practice.—*Evidence—Prove:* (1) that the accused abetted the commission of the offence.

(2) That the intention of the accused (abettor) in the abetment of the commission of the offence.

(3) That the person abetted committed the offece.

(4) That the intention and knowledge of the person abetted in committing the offence was—which is different from the intention and knowledge of the abettor in abetting the offence.

3. Procedure.—Cognizable, if offence abetted is cognizable and noncognizable if offence abetted is noncognizable—Warrant or summons as warrant or summon may issue for offence abetted—Bailable or nonbailable as offence abetted is bailable or nonbailable—Compoundable or not as offence abetted is compoundable or not—Triable by Court by which offence abetted is triable.

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate, etc) hereby charge you (name of the accused) as follows:

That you, on or about—at—with the intention of—abetted in the commission of the offence of—punishable under section—Code and the said A however committed the said offence in pursuance of the abetment but with a different intention or knowledge from that of yours and that you have thereby committed an offence punishable under section 109 of the Code read with section—Code and within my cognizance and thereby direct that you be tried on the said charge.

Section 111

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.

Cases and Materials : Synopsis

1. Scope and applicability.
2. "When an act is abetted".
3. "Probable consequence".
4. Under the influence......pursuance of conspiracy".
5. Practice.
6. Procedure.
7. Charge.

1. Scope and applicability.—(1) Section 111, Penal Code lays down that when the act 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, then alone the abettor would be liable for the act done. In order to hold a person guilty by application of section 111, the prosecution should not only establish that the act committed was done at the instigation of that person but also it was the probable consequence of the abetment. *AIR 1962 Madhya Pradesh 91.*

(2) The term 'abetment' has been defined in Section 107 of the Code. It includes not merely instigation, which is the normal form of abetment but also conspiracy and aiding and these three forms of abetment are dealt with in the proviso to this section. *AIR 1940 Bom 126.*

(3) This section does not apply where the act abetted is not a criminal act. *AIR 1931 Pat 52(54)*.

(4) Where an act is abetted but the person abetted does the act with the intention of causing greater injury than what is intended by the abettor and the actual injury caused is not the probable consequence of the abetment this section does not apply. To such a case Section 110 applies and the abettor would be liable only for what he himself intended. *AIR 1935 Oudh 473.*

(5) Right of the private defence—Offence committed as a result of abetment—Right of private defence being available in the present case the fact that the man abetted caused the death of a person will protect both the abettor and the man abetted from penal consequences *(Ref AIR 1936 All 437). 22 DLR 69.*

2. "When an act is abetted".—(1) The section does no more than declare the law according to the common law of England under which the abetment of an act refers to the abetment of a criminal act. Thus, peaceful picketing is not an offence but it becomes an offence if it is carried on by criminal means. The moment the persons overstep the line between that which is lawful and that which is unlawful action becomes a criminal offence. *AIR 1931 Pat 52.*

3 . "Probable consequence".—(1) To make the accused liable under the section the prosecution must show not only that the assault on the complainant was a probable consequence of the conspiracy

to assault the complainant but also that it was done in pursuance of that conspiracy. *AIR 1925 PC 305.*

(2) The crux of the problem in an enquiry is whether the abettor, as a reasonable man, at the time of his instigation or intentionally aiding the principle, would have foreseen the probable consequence of his abetment. *AIR 1957 AndhPra 23.*

4. "Under the influence......pursuance of conspiracy".—(1) Where an act is abetted and the abetment takes the form of instigation of an act and a different act is done, that different act must be a probable consequence and committed under the influence of the instigation and where the abetment takes the form of aiding or conspiracy the different act must be a probable consequence and also must be done with the aid or in pursuance of the conspiracy. *(1912) 13 CriLJ 305.*

5. Practice.—*Evidence*—Prove: (1) That the accused abetted the commission of a particular act.

(2) That the act actually committed was done under the influence of such abetment.

(3) That the act done was a probable consequence of the abetment.

6. Procedure.—Cognizable, if offence abetted is cognizable and noncognizable if offence abetted is noncognizable—Warrant or summons as warrant or summons may issue for offence abetted—Bailable as offence abetted is bailable or not bailable—Compoundable or not as offence abetted is compoudable or not—Triable by Court by which offence abetted is triable.

7. Charge.—The charge should run as follows:

I, (name and office of the Magistrate) hereby charge you (name of the accused) as follows:

That you on or about—the day—at—abetted A in the commission of the offence of—punishable under section—etc., Penal Code and the said A however committed an offence namely which was different from the offence abetted and you have thereby committed an offence punishable under section 111 read with section—of the Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Section 112

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.

Cases and Materials

1. Scope of the section.—(1) This section presupposes that the person abetted commits two acts namely, the one abetted and also a different one and that the latter constitutes a distinct offence. In such

cases if the abettor can be held liable for latter act under section 111 then he is liable to punishment for each of the offences under this section. *AIR 1957 AndhPra 231.*

2. Charge.—I, (name and office of the Magistrate, etc.) hereby charge you (name of the accused) as follows:

That you on, or about—at—abetted A in the commission of distinct offence to the offence abetted punishable under section—constituting distinct offences and that you have committed an offence punishable under section 112 of the Penal Code read with section—of the Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Section 113

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, causes 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.

Materials

1. Scope of the section.—(1) This section should be read in conjunction with section 111.

(2) Sections 111, 112 and 113 make it abundantly clear that if a person abets another in the commission of an offence and the principal goes further thereafter and does something more which has a different result from that intended by the abettor and makes the offence an aggravated one the abettor is liable for the consequence of the act of his principal. The crux of the problem in an enquiry of this sort is whether the abettor as reasonable man at the time of his instigation or intentionally aiding the principal would have foreseen the probable consequence of his abetment. *AIR 1957 AndhPra 231.*

(3) Where the act of the person abetted is not the probable consequence of the act abetted or the abettor has not the knowledge that his act was likely to cause the effect caused he will not be liable for the effect caused by the act of the person abetted. *1892 AllWN 233 (DB).*

2. Practice.—*Evidence*—Prove: (1) That the accused abetted the commission of an offence.

(2) That the act eventually done was in pursuance of the abetment.

(3) That the act done was a probable consequence.

3. Procedure.—Cognizable, if offence abetted is cognizable and noncognizable if offence abetted is noncognizable—Warrant or Summons as warrant or summons may issue for offence abetted—Bailable as offence abetted is bailable or nonbailable—Compoundable or not as offence abetted is compoundable or not—Triable by Court by which offence abetted is triable.

4. Charge.—The charge should run as follows :

I, (name and office of the Magistrate, etc.) hereby charge (name of accused) as follows :

That you, on or about—at—abetted A in the commission of the offence of—punishable under section—of the Code with the intention to cause a particular effect and the said A however committed the offence in consequence of the abetment causing a different effect from that intended by the abettor and thereby you have committed an offence punishable under section 113 of the Code read with section—of the Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Section 114

114. Abettor present when offence is committed.— Whenever any person, who if 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.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *This section and Sections 34 and 149.*
3. *This section and S. 148.*
4. *Act abetted different from act committed—Abettor present.*
5. *"Act or offence".*
6. *Practice.*
7. *Procedure.*
8. *Charge.*

1. Scope of the section.—This section is applicable only where the act at the doing of which the abettor is present would itself amount to an offence. Section 114 is not applicable to a case where the abetment is made at the time when the offence takes place and the abettor helps in its commission. Active abetment at the time of committing the offence is covered by section 109. Section 144 is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved and then the presence of the accused at the commission of the crime is proved in addition. When any person, who if absent would be liable to be punished as an abettor, is present when the act abetted is committed, he shall be deemed to have committed the offence. The mere presence as an abettor of any person will not render him liable for the offence committed. Where one of the accused stands guard with knife at the time when the offence of rape was committed by the other accused the former is guilty under sections 376/114 *(AIR 1953 Ajmeer 12)*. In order to bring a case within section 114, Penal Code the abetment must be complete apart from the presence of abettor; in other words, the act of abetment must have taken place at the time prior to the actual commission of the offence and it is only when the abettor happens to be present at the time of the commission of the offence itself., that the operation of section 114 would be attracted. As neither any community of intention nor any abetment prior to their presence at the spot has been established on the record against the accused it has to be found that they cannot be found guilty of the offence committed by calling in aid under section 114 of the Penal Code.

(2) This section applies to those cases only in which not only is the abettor present at the time of the commission of the offence abetted but the abetment is completed prior to and independently of his presence. The real test to see whether or not S. 111 applies lies in words of the section "who if absent would liable to be punished as an abettor". *AIR 1955 Trav-Co 266.*

(3) Where the abetment is completed prior to the commission of the offence and the abettor is also present at the commission of the offence the abettor is deemed to have committed the offence himself. *AIR 1956 SC 177.*

(4) In the absence of proof of any one of the two ingredients namely,—

(i) abetment prior to the commission of the offence; and

(ii) the abettor's presence at such commission,

this section will not apply. *AIR 1974 SC 45.*

(5) Where accused A, a mortgagee, abetted the execution in his favour of a forged sale-deed in respect of the mortgaged property by another accused A, B was liable to be convicted under S. 467 read with S.114. *AIR 1981 SC 1417.*

2. This section and Sections 34 and 149.—(1) Sections 34, 114 and 149 of the Code provide for criminal liability viewed from different angles as regards actual participants, accessories and persons actuated by a common object or a common intention. *AIR 1956 SC 116.*

(2) There is much difference in the scope and applicability of S. 34 and S. 149 though they have some resemblance and are to some extent overlapping. Section 34 by itself does not create any offence, whereas Section 149 does. *AIR 1956 SC 116.*

(3) This section like Section 34 does not create the offence but unlike Section 34 it does not envisage active participation in the crime. *AIR 1956 SC 116.*

3. This section and Section 148.—(1) If A proved to have instigated B to join an unlawful assembly, armed with a deadly weapon, and afterwards joined the unlawful assembly himself, he might be punishable under Section 144 read with this section even though he was himself not armed with a deadly weapon. *(1901) CalWN 250.*

4. Act abetted different from act committed—Abettor present.—(1) Where A abets B to do act which is a particular offence, and B does another act which amounts to a different offence and which is not the probable consequence of the abetment, A would not, if absent at the commission of the offence by B, be liable for the offence committed by B. His presence at the commission of the offence by B would not make any difference, and would not render him liable under this section for the offence committed by B. *(1912) 13 CriLJ 715.*

5. "Act or offence.—(1) The "act or offence" mentioned in this section is a substantive offence. Section 398 of the Code does not relate to a substantive offence. It only regulates the measure of punishment when certain facts are found to exist in the commission of the substantive offence. A charge under this section read with Section 398 is therefore not substantive. *AIR 1928 Bom 52.*

6. Practice.—*Evidence:*— prove: (1) That the committing of the principal offence.

(2) That the accused was present whilst it was being committed.

(3) That the accused was an abettor of the offence (section 108)

It is necessary to prove acts which would constitute abetment if the accused was absent and then to show that the accused was present.

7. Procedure.—(1) Cognizable if offence abetted is cognizable, and noncognizable if offence abetted is noncognizable—Warrant or summons as warrant or summons may issue for offence abetted—Bailable as offence abetted is bailable or nonbailable—Compoundable or not as offence abetted is compoundable or not—Triable by Court by which offence abetted is triable.

(2) A conviction for abetment can be made where the accused is charged only for a substantive offence, if the accused is not prejudiced by the omission to frame a separate charge for abetment. The same principle will apply to cases where a person is charged with committing a substantive offence and a conviction is given for the said offence by applying S. 114, if the accused is not prejudiced thereby, there being sufficient material on the record to put him on notice that he might be convicted for the one or the other offence. The same principle will also apply when the accused is charged with an offence read with S. 114 and a conviction is given for committing the substantive offence. *AIR 1953 SC 131.*

(3) In generality of cases the omission to frame a charge is not per se fatal. It cannot be accepted as sound the very broad proposition that where there is no charge the conviction would be illegal, prejudice or no prejudice. *AIR 1956 SC 116.*

8. Charge.—The charge should run as follows :

I, (name and office of the Magistrate, etc.) do hereby charge you (name of the accused) as follows:

That on or about—at—you abetted A in committing an act or offence and you were present at the time of the act or offence committed in pursuance of your abetment, you have committed an offence punishable under section 114 read with section—of the Code and within my cognizance.

I hereby direct that you be tried on the said charge.

The absence of charge is not fatal if there is no prejudice, the abettor can be convicted for the substantive offence.

Section 115

115. Abetment of offence punishable with death or [3][imprisonment] for life if offence not committed.—Whoever abets the commission of an offence punishable with death or [3][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 [3][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.

Cases and Materials

1. Scope of the section.—(1) When offence punishable with death or imprisonment for life is abetted, different situation may arise:

3. Subs. by Ord. No XII of 1985, for "transportation".

(i) Where the every offence abetted is committed in consequence of the abetment;

(ii) Where the offence abetted is not committed;

(iii) Where the offence abetted is not committed but an act in the attempt to commit the offence abetted, causes hurt to any person.

The first class of cases falls under Ss. 109 and 110 of the Code and not under this section. The second class of cases falls under the first paragraph of this section. The third class of cases falls under The second paragraph of this section. *AIR 1931 Cal 757.*

(2) Where B is charged with an offence punishable with death or imprisonment for life and A is charged with abetment of such offence and B is acquitted. A cannot obviously be convicted under S. 109 of the Code inasmuch as the acquittal of B is equivalent to a finding that the offence is not committed by B. But A will nevertheless be liable under this section for abetment which by itself is an offence under this section. *AIR 1967 SC 553.*

(3) It cannot be held that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence is acquitted......If a person instigates another or engages with another in a conspiracy for the doing of the act which is an offence, he abets such an offence and would be guilty of abetment under Section 115 or S. 116, Penal Code, even if the offence abetted is not committed in consequence of the abetment. 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. *AIR 1967 SC 553.*

2. Practice.—*Evidence:*— Prove: (1) That the accused abetted the offence punishable with death or imprisonment for life.

(2) That the offence committed was not committed in pursuance of the abetment.

(3) That there is no specific provision in the code for punishment of such abetment.

(4) That the abetment is for causing hurt to any person.

(5) That the hurt was caused in consequence.

3. Procedure.—Cognizable if offence abetted is cognizable and noncognizable if offence abetted is noncognizable—Warrant or Summons as Warrant or summons may issue for offence abetted—Not bailable Compoundable or not as offence abetted is compoundable or not—Triable byCourt by which offence abetted is triable.

4. Charge.—The charge should run as follows :

I, (name and office of the Magistrate, etc.) hereby charge you (name of the accused) as follows :

That you, on or about the—day of—at—, abetted the commission by one XY of an offence punishable with death or imprisonment for life, which said offence was not committed in consequence of the abetment, and thereby committed an offence punishable under section 115 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

5. Arrest.—Police may arrest without warrant of arrest for the offence abetted.

Section 116

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 the 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.

Cases and Materials : Synopsis

1. ***Scope and applicability.***
2. ***This section and Section 165A.***
3. ***"Abets an offence".***
4. ***Abetment of an offence of bribery.***
5. ***Punishment.***
6. ***Practice.***
7. ***Procedure.***
8. ***Charge.***

1. Scope and applicability.—(1) It gives the abettor the benefit of reduced punishment because of the failure of his attempt. *AIR 1955 Bom 61.*

(2) Where an advocate of a High Court by writing letters to pleaders in the district asked them to do an act which in contravention of S. 36 of the Legal Practitioners' Act (18 of 1879), it was remarked by the High Court that the advocate could be convicted under S. 116 P.C. for abetment of an offence u/s. 36 of the Legal Practitioners' Act. *(1865) ILR 17 All 498.*

(3) Bribe—giver-Real point to see in regard to a charge under sec. 161/116 is not guilty intention or *mens rea* of the public officer, but the *mens rea* of the bribe-giver. *Kalipada Bawali Vs. King (1952) 4 DLR 543.*

2. This section and Section 165A.—(1) This section deals generally with the abetment of all offences punishable with imprisonment while S. 165A deals specifically with the abetment of offence under Ss. 161 and 165. It has thus the effect of limiting the applicability of S. 116 to offences other than those falling under Ss. 161 and 165 with respect to the abetment of offences under Ss. 161 and 165. S. 165A is not a mere statement of the offence of abetment under S. 116. *AIR 1959 SC 8.*

(2) Section 165A provides an enhanced punishment irrespective of the fact whether the offer of the bribe was accepted or not. *AIR 1959 SC 8.*

3. "Abets an offence".—(1)) The offence of abetment is complete when the alleged abettor has instigated another or engaged with another to commit an offence. It is not necessary for the offence of abetment that the act abetted must be committed. *AIR 1967 SC 353.*

(2) The word "offence" in the section refers to a specific offence. The mere assembling of several persons with the general intention of committing theft, and not for the purpose of committing any specific theft, or theft of any specific property cannot be considered to an abetment of an offence of theft punishable under this section read with S. 379 of the Code. *1879 Pun Re No. 18 P. 47(49) (FB).*

4. Abetment of an offence of bribery.—(1) Illustration (a) to S. 116 is an example of an offence of bribery under S. 161. *(1895) ILR 17 All 493.*

(2) The person offering a bribe would be guilty of abetment irrespective of the question whether the public servant was in a position to do the favour or not. *AIR 1953 SC 179.*

(3) An offence of abetment under Section 116 becomes cognizable or noncognizable according to the main offence abetted. By the Prevention of Corruption Act, the offence under S. 161 which was originally noncognizable has been made cognizable. Hence, an abetment of an offence of bribery under S. 116 in respect of a public servant also becomes a cognizable offence. *AIR 1956 Raj 37.*

5. Punishment.—(1) Where the offence of bribery is committed, the abettor of the offence is under S. 109, punishable with the same punishment as that provided for the offence itself. Law does not make any difference between the giver and the taker of the bribe in such cases. *AIR 1945 All 207.*

(2) The offence of offering a bribe must be severely punished. *AIR 1957 Raj 1.*

(3) If, there are serious defects in proof of the offence the accused wil! be given the benefit of doubt and acquitted. *AIR 1950 Ajmer 44.*

(4) The second part of this section provides for enhanced punishment where the abetment or the person abetted is a public servant and it is his duty to prevent the commission of such offence. Where it is not the duty of the public servant to prevent the offence, the first part of the section would apply and a conviction under second part would be improper. *AIR 1948 All 17.*

6. Practice.—*Evidence*—Prove: (1) That the offence abetted, though not committed in consequence, is one punishable with imprisonment, or that the accused, or the person abetted, is a public servant;

(2) That it was his duty to prevent the commission of such offence.

7. Procedure.—Cognizable, if offence abetted is cognizable and non-cognizable if offence abetted is non-cognizable—Warrant or Summons as warrant of summons may issue for offence abetted—Not baliable—Compoundable or not as offence abetted is compoundable or not—Triable by Court by which offence abetted is triable.

8. Charge.—The charge should run as follows:

I, (name and office the Magistrate, etc.) hereby charge you (name of the accused) as follows :

That you, on or about the—day of—at, abetted the commission by one XY of an offence of—punishable with imprisonment, which said offence was not committed in consequence of the abetted, and thereby committed an offence punishable under section 116 of the Penal Code and with in my cognizance (or the cognizance of the Court of Session).

And I hereby direct that you be tried on the said charge.

Section 117

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 a 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.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *"Abets the commission of an offence".*
3. *This section and S. 121.*
4. *Applicability of the section to special or local laws.*
5. *Practice.*
6. *Procedure.*
7. *Charge.*

1. Scope of the section.—(1) Though this section contemplates the abetment of the commission of an offence by the public generally, or by any number or class of persons exceeding ten it does not necessarily follow that the offence is to be committed by all the ten or more persons at one and the same time or that there should be an unlawful assembly. Hence it does not necessarily involve an offence under S. 143 of the Code. *AIR 1941 Sind 186.*

(2) Exhorting the Sikhs to form jathas for the purpose of going to a certain place and collecting funds for a committee which was declared as unlawful by the Government, is not an offence under, the Criminal Law Amendment Act, but is an offence under this section as the accused instigated people to become members of a jatha under the orders of the said committee which jatha would be an unlawful association within the meaning of of the Criminal Law Amendment Act. *AIR 1926 Lah 115.*

2. "Abets the commission of an offence".—(1) A mere omission by a person to prevent an act being done is not an abetment unless the omission constitutes an illegal omission i.e., an omission to do a thing which it is the duty of the person to do. Thus where the president of a meeting does not interrupt or prevent the singing of revolutionary songs, sung by a person at the meeting, the president cannot be said to be guilty of abetment under this section unless there is anything to show that he positively encouraged the singer or had previously agreed that such songs should be sung. *AIR 1932 Cal 549.*

(2) Instigating railway workers in the event of a strike to lie down on the railway line is an offence even though the strike is only a contingent matter. The illustration to the section shows that an instigation to attack a procession which is going to be held is an offence under the section. Therefore, it is immaterial whether the accused is urging an immediate strike and instigating the workers to lie across the line or is merely instigating their doing so in the event of a strike. *AIR 1933 Mad 279.*

(3) Where the commission of an offence is instigated by means of a leaflet, it would constitute an abetment only if either the public has read the leaflet in question or the leaflets are exposed to the public gaze. Where, therefore, leaflets inciting the public to violence were affixed at a public place at

dead of night but were removed by the police before the public could see or read them, it was held that no offence under this section was committed. *AIR 1932 Cal 760.*

3. This section and Section 121.—Where the instigation to wage war against the Government is of the public generally, the offence will fall both under this section and under S. 121. It cannot be argued in such a case that because the offence falls under this section, the accused is liable to be punished only under this section and not with the more drastic punishment under S. 121. *(1910) 11 CriLJ 264.*

4. Applicability of the section to special or local laws.—(1) The one enactment has not the effect of repealing the other but the two co-exit without conflict. By virtue of S. 26 of the General Clauses Act, 1897, however, the offender could not be punished twice for the same offence. The offence under the Salt Act can, therefore, be punished under S. 117 of the Code. *AIR 1931 All 23, 24.*

(2) Section 117 is not superseded by S. 74 of the Salt Act which refers to the direct abetment of particular acts and an accused person who is guilty of having instigated more than ten persons to commit an offence under the Salt Act is liable under S. 117 of the Code. The gravamen of a charge under S. 117 is the instigation to general lawlessness, not the particular offence of which the commission is instigated. *AIR 1932 Mad 371.*

5. Practice.—*Evidence*—Prove: (1) Abetment of the offence in question by the accused.

(2) That such offence was to be committed by the public, or by more than ten persons.

6. Procedure.—(1) Cognizable if offence abetted is cognizable—Warrant, if in offence abetted warrant can issue—Bailable according as the offence abetted is bailable or not—Compoundable if offence abetted is compoundable—Triable by Court competent to try offence abetted.

(2) Where the Court is dealing with a charge of abetment of a specific offence which offence is a summons case, then the abetment is also a summons case. *AIR 1931 Bom 199.*

(3) An offence under this section is compoundable if the offence abetted is compoundable. *AIR 1941 Sind 186.*

7. Charge.—(1) A charge under both Ss. 117 and 120B is not open to objection. Where one person is arrested with revolutionary leaflets in one place and another person for distribution of the same kind in a different place, there is no object to introduce a charge under S. 120B of the Code, to justify a joint trial. It may or it may not be a duplication to have S. 117 as well as S. 120B, but there can be no objection to charge under both Ss. 117 and 120B *AIR 1933 Cal 603.*

(2) *Form: The* charge should run as follows :

I, (name and office of the Magistrate, etc.,) hereby charge you (name of the accused) as follows :

That you, on or about the—day—,at—, abetted the commission of an offence of—by numbering more than ten persons, by (state the act done by the accused in instigation), and thereby committed an offence punishable under section 117 of the Penal Code, and within my cognizance (or the cognizance of the Court of Session).

And I hereby direct that you be tried on the said charge.

Section 118

118. Concealing design to commit offence punishable with death or [4][imprisonment] for life.—Whoever intending to facilitate or knowing it to be likely

4. Subs. by Ord. No. XLI of 1985, for "transportation".

that he will thereby facilitate the commission of an offence punishable with death or [4][imprisonment] for life,

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: 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 also 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.

Cases and Materials

1. Scope of the section.—To attack the provisions of the section it must be shown that here was an omission of an act which the acused was legally bound to perform and which facilitated the commission of an offence. *1 Agra HCR 37.*

(2) A person who is aware of the intention of the commission of a serious offence like murder and does not lay information to the nearest Magistrate or the Police Station, is guilty of an offence. Such a person is practically a consenting party to the crime and an accomplice. *AIR 1956 Hyd 99.*

(3) Where it is not proved that accused's intention in omitting to report a plot, under S. 39, Criminal Procedure Code was with a view to aiding the waging of war, the accused cannot be convicted of the offence of abetment of waging war. *(1913) 14 CriLJ 610.*

2. Practice.— *Evidence*—Prove: (1) The existence to the design of committing an offence.

(2) That such offence was one punishable with death or imprisonment for life.

(3) That the accused concealed the existence of such design (a) by his act or illegal omission; or (b) by his knowingly false representation.

(4) That he did so voluntarily.

(5) That he thereby intended to facilitate or knew that he would thereby facilitate the commission of such offence.

(6) That the offence concealed has been committed (if the case falls under the first clause).

3. Procedure.—Not bailable, if the concealment is of an offence punishable with death or imprisonment for life and the offence is committed—Bailable, if the offence is not committed—in other respect the procedure is the same as in the case of the offence abetted.

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—with the intention of facilitating, or with knowledge that you will thereby facilitate the commission of the offence of—(specify the act) (or omit to do—specify

the omission) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under section 118 of the Penal Code, and within my cognizance (or the cognizance of the Court of Session).

And I hereby direct that you be tried on the said charge.

Section 119

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,

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 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 [3][imprisonment] for life, [shall be punished] 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 provision of this section.

Cases and Materials

1. Scope of the section.—(1) In order to constitute an offence under this section the ingredients of the offence are :

(i) there must exist a design to commit an offence;

(ii) the accused must be a public servant;

(iii) it must have been the duty of the accused as a public servant to prevent the commission of the offence.

(iv) the accused must have concealed the existence of such a design by his act or illegal omission or must have knowingly made a false representation respecting such design; and

(v) he must have done so voluntarily and must have intended to facilitate or must have known that he would thereby facilitate the commission of the offence. *(1957) 2 AndhWR 298.*

(2) No person can be convicted to an offence without a charge, unless it is a case falling under S. 238 or 286, Criminal P.C., Therefore, where the accused was charged under S. 409, Penal Code and the facts constituting an offence under S. 119, Penal Code, were neither stated in the charge-sheet nor was the accused, at any time, put on notice of the same, the charge under S. 409, being disproved against him, he would be taken by surprise if he is convicted for an offence under S. 119 and a conviction without a charge would be against law. Ss. 119 and 409 are in different Chapters of the Code. The ingredients of the offences are not the same. A charge under S. 409, therefore, cannot cover any of the ingredients excepting the ingredient of being a public servant which by itself is not offence. Such a case is not one contemplated by either Section 221 or 222, Criminal P.C. *(1957) 2 AndhWR 298.*

2. Practice.—*Evidence*—Prove: (1) The existence of the design to commit an offence.

(2) That the accused was a public servant.

(3) That it was the duty of the accused, as such public servant, to prevent the commission of that offence.

(4) That the accused concealed the existence of such design—(a) by his act or illegal omission; or (b) by his knowingly false representation.

(5) That the accused did so voluntarily.

(6) That the accused thereby intended to facilitate, or knew that he would thereby facilitate, the commission of such offence.

(7) That the offence concealed has been committed (if the case falls under the first cause).

3. Procedure.—Cognizable or compoundable according as the offence abetted is either cognizable or compoundable—Bailable and triable by the Court by which the offence abetted is triable—Not bailable if the offence is punishable with death or imprisonment for life—Bailable if the offence be not committed.

4. Charge.—The charge should run as follows:

I, (name and offence of the Magistrate, etc.) hereby charge you (name of the accused) as follows :

That you, being public servant, to wit—, whose duty it was to prevent the commission of the offence of—, with the intention of facilitating, or with the knowledge that you will thereby facilitate, the commission of the offence of—did (specify the act) to conceal the existence of the design to commit the said offence, and thereby committed an offence punishable under section 119 of the Penal Code, and within my cognizance (or the cognizance of the Court of Session).

And I hereby direct that you be tried on the said charge.

Section 120

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 : If offence be not 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.

Cases and Materials

1. Scope of the section.—(1) The offence under this section is bailable or not bailable according as the offence (the commission of which is intended to be facilitated by the concealment of the design to commit it) is bailable or not; but it is bailable if the offence be not committed. Otherwise the procedure relating to an offence under this section is exactly the same as in the case of offence abetted. *1977 CriLJ NOC 117.*

2. Practice.—*Evidence*—Prove: (1) The existence of the design to commit an offence.

(2) That such offence was punishable with imprisonment.

(3) That the accused concealed the existence of such design. (a) by his act or illegal omission, or

(b) by his knowingly false representation.

(4) That he did so voluntarily.

(5) That he thereby intended to facilitate, or knew that he would thereby facilitate, the commission of such offence.

If the case falls under the first clause, prove:

(6) That the offence concealed has been committed.

3. Procedure.—Cognizable, if arrest for the offence abetted may be made without warrant but not otherwise; rest, according to the procedure for the offence abetted—Bailable, according as the offence abetted is bailable or not—Bailable if the offence be not committed—Triable by the court by which the offence abetted is triable.

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—with intention of facilitation or with knowledge that you will thereby facilitate the commission of the offence of—(specify the act) or omitted to do—(specify the omission) to conceal the existence of the design to commit the said offence and thereby committed an offence punishable under section 120, Penal Code and within my cognizance (or cognizance of the Court of Session).

And I hereby direct that you be tried on the said charge.

[1][CHAPTER VA

Criminal Conspiracy

Chapter introduction.*—The liability of an abettor of a crime is generally co-extensive with the principal offender. What constitutes abetment has been comprehensively dealt with in Chapter V of the Code. If one engages with one or more 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 the thing, abets the doing of the thing. Thus there can abetment by conspiracy. Abetment by conspiracy was in the Code from its commencement. At that time, criminal conspiracy by itself as a substantive offence was not conceived. This chapter was introduced in 1913 whereby criminal conspiracy as defined in section 120A is punishable in the manner provided in section 120B.*

So long as a crime generates in the mind, it is not punishable. Thoughts even criminal in character often involuntary are not crimes. But when the thoughts take the concrete shape of an agreement to do or caused to be done an illegal act or act which is not illegal by illegal means then even if nothing further is done, the agreement is designed as criminal conspiracy. However, the proviso to section 120A makes it clear that a bare agreement of the aforementioned nature would not amount to an offence of criminal conspiracy unless some act besides the agreement is done by one or more parties to the agreement in pursuance thereof. It is the next overt step which may otherwise be of a preparatory nature such as buying arms to implement the criminal conspiracy that makes it punishable. The act of purchasing arms pursuant to an agreement to do an illegal act or an act which is not illegal by illegal means shall constitute an offence. In the earlier days English Common Law frowned upon combination of workers to achieve common object. Common Law looked upon combination as criminal in character. Combination Acts gave it a statutory backing. The view then prevalent was conspiracy is committed by all who agree to commit a crime, even if they make no move whatever to carry out their agreements. Society has moved far away from those days.

Section 120A

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:

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1. Ch. VA was inserted by the Indian Criminal Law Amdt. Act, 1913 (VIII of 1913), s. 3.

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.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *"When two or more persons agree".*
3. *Agreement not unlawful when entered into becoming illegal by subsequent legislation.*
4. *Persons joining conspiracy at a later stage.*
5. *"To do, or cause to be done, an illegal act, or an act which is not illegal by illegal means".*
6. *Proviso—Conspiracy to commit offence—No overt act is necessary.*
7. *Proviso—Overt acts, evidentiary values,*
8. *Explanation.*
9. *Explanation—"Object of such agreement".*
10. *Proof of conspiracy.*
11. *Conspiracy and abetment by conspiracy.*
12. *Conspiracy and common intention (Section 43).*
13. *Conspiracy and unlawful assembly.*

1. Scope of the section.—(1) Section 120A is the penal section. 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 to the common design. Each conspirator plays his separate part in one integrated and united effort to achieve 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 until it is broken up. The conspiracy may develop 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 person co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy *(AIR 1970 SC 45)*. The essence of conspiracy is that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between mode of proof of the offence of conspiracy or that of any other offence; it can be established by direct evidence or by circumstantial evidence. But section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. *(AIR 1965 (SC) 682.)*

(2) *Ingredients.*—The ingredients of this offence of criminal conspiracy are :—

(a) That there must be an agreement between the persons who are alleged to conspire.

(b) That the agreement should be—

(i) for doing an illegal act, or

(ii) for doing by illegal means an act which may not itself be illegal.

(3) In section 120A, the gist of the offence is a bare engagement or association to break law even though illegal act does not follow, while the gist of the offence under sec. 34 is the commission of the

original act in furtherance of common intention of all the offenders and that only means that there must be unity of criminal behabiour resulting in something for which an individual would be punishable if it were done by himself alone. *Md. Yaqub Vs. Crown (1955) 7 DLR 75.*

(4) Criminal conspiracy between husband and wife is not an offence under the English law and also where the English law has been extended. *Laila Jhina Miaji Vs. Queen (1958) 10 DLR 6.*

(5) In a case it has been held that when it is established that the Magistrate recording the confession took due care to ascertain that the confession was made voluntarily, the fact that Magistrate did not fill in Col 8 of the prescribed form does not render the confession inadmissible. *State Vs Lieutenant Colonel Syed Farook Rahman (Criminal) 53 DLR 287.*

(6) If a charge is framed in respect of only falsification of accounts and on no other offence, then under the provisions of sec. 196A of the Code of Criminal Procedure, no Court would take cognizance of the offence of criminal conspiracy to commit an offence of falsification of accounts unless the Government consented to the initiation of the proceedings. *Tofail Ahmed Vs. Crown (1951) 3 DLR 453.*

(7) For "Difference between sec. 34 and 120A" see under sec. 34. *Abdul Latif Vs. Crown (1956) 8 DLR 238.*

(8) A criminal conspiracy as defined in this section is itself a substantive offence. *AIR 1977 SC 2433.*

(9) The offence of conspiracy is complete when two or more conspirators have agreed or cause to be done an act which is itself an offence, in which case no overt act need be established. *AIR 1970 SC 549.*

2. "When two or more persons agree".—(1) The essence of the offence of criminal conspiracy as defined in the section is that there must be an agreement between two or more persons to do one or other of the acts described in the section. *AIR 1965 SC 682.*

(2) A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different group of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. *AIR 1970 SC 45.*

(3) For an agreement, it is evident, there should be at least two persons. One person cannot conspire or agree with himself. Thus, when a person is prosecuted for an offence of criminal conspiracy along with some other persons, he alone cannot be convicted of the offence when all the co-accused are acquitted of the charge. *AIR 1956 SC 469.*

(4) A person prosecuted for an offence of criminal conspiracy cannot alone be convicted unless there be proof that there were in the conspiracy persons, known or unknown, other than the co-accused who were acquitted. *AIR 1967 SC 1326.*

(5) It is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough that the Court is in a position to find that two or more persons were actually concerned in the conspiracy. *AIR 1956 SC 469.*

(6) Where the offences charged are such that they could have been perpetrated by different persons acting in the same manner but independently a definite conclusion regarding the existence of a conspiracy cannot be drawn. *AIR 1967 SC 1326.*

(7) It is not necessary that each member of the conspiracy must know all the details of the conspiracy. *AIR 1962 SC 1821.*

(8) It is not necessary that all the persons should agree to do a single illegal act. The conspiracy may comprise the commission of a number of acts and the accused persons can be held guilty of the offence conspiracy to do illegal acts though for individual offences all of them may not be liable. *AIR 1961 SC 1762.*

(9) Though a mere agreement brings a conspiracy into existence it does not end there. The conspiracy will persist so long as the persons entering into the conspiracy remain in agreement and are acting in accord in furtherance of the object for which they entered into an agreement. *AIR 1970 SC 549.*

(10) Where there is only one single conspiracy spread over a number of years, formed with only one object to cheat the members of the public, the fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy does not split up the single conspiracy into several conspiracies. *AIR 1957 SC 340.*

(11) Where the conspiracy was a general conspiracy to keep in issuing import licences for motor vehicle parts in the names of fictitious companies and to share the benefits arising out of the licences, it was held that the mere fact that licences were issued in the names of eight different companies did not establish the existence of eight different conspiracies, each with respect to the licences issued to one particular fictitious company. *AIR 1967 SC 450.*

3. Agreement not unlawful when entered into becoming illegal by subsequent legislation.—(1) Where an agreement to do certain acts was not illegal at the time it was entered into but became illegal by the coming into force of the Foreign Exchange Regulation Act and the parties continue to act subsequently to the Act in furtherance of the agreement, they would be guilty of criminal conspiracy. *AIR 1970 SC 549.*

4. Persons joining conspiracy at a later stage.—(1) It is no doubt true that the offence of criminal conspiracy is complete as soon as an agreement to commit an offence is made between the conspirators. But S. 120B does not limit its operation to those who are parties to the agreement at the moment of its formation but also applies to those who continue to be parties during the entire period during which the conspiracy continues. *AIR 1964 Bom 133.*

5. "To do, or cause to be done, an illegal act, or an act which is not illegal by illegal means".—(1) It is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to that object. *AIR 1937 Cal 99.*

(2) Where the agreement is to commit an offence, it will amount to a criminal conspiracy, irrespective of the fact that the means decided upon to carry out the object to the conspiracy are legal or innocuous. *AIR 1970 SC 549.*

(3) Mere evidence of association is not sufficient to infer conspiracy. *AIR 1935 Cal 580.*

(4) Packages containing prohibited articles despatched from post office outside India—Consignors residing in India—Consignors and consignees held not guilty of contravention of The Order. *AIR 1959 Pat 207.*

(5) Accused in pursuance of conspiracy inciting police constables to desert their posts and withhold their services and rise in mutiny—Charge of conspiracy to commit offence under S. 3. Police (Incitement to Disaffection) Act, 1922—Accused held guilty. *AIR 1951 Pat 60.*

6. Proviso—Conspiracy to commit offence—No overt act is necessary.—(1) Where the conspiracy is to commit an offence, no overt act is necessary to constitute the conspiracy or criminal conspiracy. It is immaterial that any of the acts agreed to be done in furtherance of the commission of the offence do not by themselves amount to offence. *AIR 1970 SC 549.*

7. Proviso—overt acts, evidentiary value.—(1) When the agreement is to commit an offence, the agreement itself becomes the offence and no overt act is necessary in such a case. Where, however, the agreement is to do an illegal act which is not an offence or a legal act by illegal means. Some overt act is necessary to bring the conspiracy within the purview of the criminal law. *AIR 1962 SC 876.*

8. Explanation.—(1) Under this section, in order that an agreement may constitute a criminal conspiracy, it is necessary that an illegal act is agreed to be done and where the illegal act is not an offence, some overt act is done in pursuance of the agreement. It is, however, not necessary that the illegal act should itself be the ultimate object of the conspiracy; it may be only incidental to that ultimate object. The Explanation to the section is meant for this purpose. *AIR 1933 All 690.*

9. Explanation—"Object of such agreement".—(1) "The object of the conspiracy" used in Section 196, Criminal P.C., would include a plurality of objects and not merely a single object, and further no distinction can be made between the primary object and subsidiary object of a conspiracy. *AIR 1969 Punj 225.*

10. Proof of conspiracy.—(1) A conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can only be proved largely from the inferences drawn from acts or illegal omissions committed by the conspirators in pursuance of common design. *AIR 1980 SC 439.*

(2) Conspiracy can seldom be proved by means of direct evidence and has, almost invariably, to be inferred from circumstantial evidence consisting generally of evidence as to the conduct of the parties on certain occasions and in relation to certain matters. *AIR 1965 SC 682.*

(3) In order to prove a criminal conspiracy punishable under S. 120B, there must be direct or circumstantial evidence to show that there was an agreement between two or more persons to commit an offence. A conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. *AIR 1980 SC 1382.*

(4) The evidence must show a common concerted plan so as to exclude a reasonable possibility of the acts of the conspirators having been done separately and connected only by coincidence. *AIR 1979 SC 1266.*

(5) Section 10 of the Evidence Act, 1872, introduces the doctrine of agency in the matter of proof of conspiracy and if the conditions laid down in that section are satisfied, evidence of an act done by one conspirator is admissible against his co-conspirators. But the section will come into play only when the Court is satisfied that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence or an actionable wrong. *AIR 1974 SC 898.*

(6) Once a reasonable ground to believe that two or more persons have conspired together to commit an offence exists, anything said, done or written by one of the conspirators in reference to the common intention, after such intention was entertained, will be relevant against the others not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. *AIR 1974 SC 898.*

(7) The expression "in reference to their common intention" is very comprehensive and wider in scope than the words "in furtherance of common intention" in English Law and a statement or and act of a conspirator to be admissible against the other need not have been made or done in furtherance of the common intention as required by the English Law. *ILR (1956) Punj 499.*

(8) Anything said done or writing by a co-conspiration after the conspiracy was formed will be evidence against the other, whether it was said done or written before his entry into the conspiracy or after he left it. *AIR 1965 SC 682.*

(9) The thing said, done or written can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or to show that he was not a party to the conspiracy. *AIR 1965 SC 682.*

(10) Where conspiracy correspond with one another through photographs of letters instead of originals, the photographs will be admissible in evidence under S. 10, Evidence Act, to prove participation in conspiracy. The Court is satisfied that there is no trick photography and that the photography is above suspicion. *AIR 1968 SC 938.*

(11) That a person was anxious to escape observation by others or even was doing his best to conceal his whereabouts after the date of occurrence connected with the conspiracy is not sufficient to infer complicity of the person in the conspiracy *AIR 1930 Cal 647.*

(12) After all, the evidence of a co-conspirator is only the evidence of an accomplice and it is an established principle that the evidence of an accomplice may be presumed to be unworthy of credit unless it is corroborated in material particulars. *(1971) 2 SC CriLR 437.*

(13) The corroboration of an approver's evidence need not be of a kind which proves the offence against the accused. It is sufficient if it connects the accused with the crime. A specific instance of cheating proved beyond doubt against any of the accused would furnish the best corroboration of the offence of conspiracy to cheat. *AIR 1957 SC 340.*

(14) The rule of English Law as to the acquittal of an alleged conspiracy following from the acquittal of other in a joint trial when the conspiracy is said to be only between the two is based on the rule of repugnancy or contradiction on the face of the record. But in India in the absence of any statutory provision to that effect such a repugnancy is not by itself a sufficient ground for quashing a conviction. *AIR 1956 SC 469.*

(15) In the absence of a distinct finding that the evidence led on behalf of the prosecution was unreliable a person can be convicted on the same evidence of conspiracy when others have been given the benefit of doubt and acquitted. *AIR 1956 SC 469.*

(16) Evidence of motive is not evidence of conspiracy. *AIR 1937 Cal 756.*

(17) Charge of criminal conspiracy must be established beyond all reasonable doubts. *AIR 1984 SC 226.*

(18) Where in respect of serious defalcation of the properties of a co-operative society, entering into conspiracy by the accused to cause defalcation was one of the charges and that charge failed, conviction of the chairman of the Managing Committee of the society under on the basis of vicarious liability was improper when he was not charged under S. 120B and there was no direct evidence connecting the accused chairman, with the acts of commission and omission for which he was convicted. *AIR 1984 SC 151.*

11. Conspiracy and abetment by conspiracy.—(1) The distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as an agreement to commit an offence is concerned, is that whereas for abetment by conspiracy mere agreement is not enough and an act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired to be done in the offence of criminal conspiracy, the agreement is enough. *AIR 1962 SC 876.*

(2) There may be an element of abetment in conspiracy but conspiracy is something more than an abetment. *AIR 1961 SC 1241.*

12. Conspiracy and common intention (Section 34).—(1) Where conspiracy is disproved, common intention cannot be inferred on the same evidence. *AIR 1970 SC 648.*

(2) Criminal conspiracy—It is separate offence and separate sentence can be passed for it—It is not merely a principle of constructive criminal liability as is to be found under S. 34 or S. 149. *1981 AllLJ 991.*

13. Conspiracy and unlawful assembly.—(1) The accused (five in number) were found in a temple in the middle of the night with house-breaking implements and guns in their possession. It was held that they were guilty under Section 143, as they must have been there with a common object of an unlawful kind. But the facts did not suffice to support a conviction under Section 120B. *AIR 1938 Mad 726.*

Section 120B

120B. Punishment of criminal conspiracy.—(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [2][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.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *This section, S. 34, S. 107 and S. 109*
3. *"Whoever is a party to a criminal conspiracy."*
4. *Offence.*
5. *Procedural law.*
6. *Framing of charge.*
7. *Joinder of charges.*
8. *Persons charged under Section 120B—Some acquitted—Effect.*
9. *Conspiracy to commit several acts.*
10. *Place of trial.*
11. *Sanction for prosecution.*
12. *Proof of conspiracy.*
13. *Punishment.*
14. *Conviction under this section—Effect.*
15. *Practice.*
16. *Procedure.*
17. *Charge, form of.*

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2. Subs. by Ord. No. XLI of 1985, for "transportation".

1. Scope of the section.—(1) Section 120B deals with the punishment for criminal conspiracy. It is not that the agreement as such is punishable but "being party to conspiracy" is punishable. The emphasis is on the words "are parties". This section is worded in present tense and therefore cannot be exclusively read to mean whoever has been or had been party to criminal conspiracy shall be punished as if the offence was committed. In other words, it is intended to be treated as a continuing offence and whoever is a party to conspiracy during the period for which he is charged is liable under section 120B. A conspiracy from its very nature is generally hatched up in secret. It therefore is extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts surrounding circumstances, and antecedent and subsequent conduct, among other factors, constitutes relevant materials.

(2) If combined effect of all the proved facts taken together is conclusive in establishing guilt of accused conviction would be justified even though anyone or more of those facts by itself is not decisive. *AIR 1970 SC 648.*

(3) Criminal conspiracy to import gold by air in contravention of notification under S. 3(1) of Foreign Exchange Regulation Act, 1947 is punishable under S. 120B. *AIR 1970 SC 45.*

(4) Two or 3 persons accused of conspiracy were acquitted. The 3rd can be held guilty of conspiracy when the charge is that there were unknown persons in the conspiracy. *Abdus Sobhan Vs. Crown (1955) 7 DLR 566.*

(5) Where an offence is alleged to have been committed by two or more persons, the person responsible for commission of the offence should be charged with the substantive offence, while the person alleged to have abetted it by conspiracy should be charged with the offence of abetment under section 109 where the matter has gone beyond the stage of mere conspiracy and specific offences are alleged to have been committed. *Mr. Shamsul Hoque Vs. The State, (1968) 20 DLR 540.*

(6) It is rightly contended that joint trial of S and the public servants and subsequent acquittal of the public servants, and S's conviction under section 420 P.C. had deprived S of the right of cross-examining those public servants who would have been the natural witnesses for the prosecution if S alone tried in ordinary courts on the charge of cheating. *Sayeed Hai Vs. The State, (1968) 20 DLR (WP) 20.*

(7) Jobaida's jubilation might be the result of her moral support to the activities of her husband (leading to bloodshed and political change) but for that it cannot be said that she was in the conspiracy. *Jobaida Rashid Vs. State, represented by the Deputy Commissioner, Dhaka 49 DLR 373.*

(8) Assembly at Bangabhaban on the occasion of oath taking ceremony took place after the occurrence of the previous night and the presence of the petitioner at Bangabhaban on the following day cannot by itself be a sufficient ground for even an inference for a criminal conspiracy. Her jubilation might be the result of moral support in the activities of her husband but for that it cannot be said that she was in the conspiracy. *Mrs. Jobaida Rashid Vs. The State, 17 BLD (HCD) 352.*

2. This section, Section 34, Section 107 and Section 109.—(1) Criminal conspiracy 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. *AIR 1971 SC 885.*

(2) Offences of conspiracy (S. 120B) and abetment (S. 109) are quite distinct. *AIR 1970 Cal 110.*

(3) Section 34 is applicable when some criminal act is done jointly in furtherance of the common intention of all while a conspiracy is merely an agreement to commit a crime. *AIR 1969 Cal 481.*

(4) The distinction between the offence of abetment under the second clause of section 107 and that of criminal conspiracy under section 120A is this: In the former offence a mere combination of persons or agreement between them is not enough. An act or illegal commission must take place in pursuance of the conspiracy and in order to the doing of thing conspired for ; in the latter offence, the mere agreement is enough, if the agreement is to commit an offence *AIR 1962 (SC) 876.*

(5) Offences under section 109 and section 120B are distinct. Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy. There is no analogy between section 120B and section 109, Penal Code. There may be an element of abetment in a conspiracy ; but conspiracy is something more than an abetment. Offence created by sections 109 and 120B, Penal Code 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 *AIR 1961 (SC) 1241.*

3. "Whoever is a party to a criminal conspiracy."—(1) A mere agreement is sufficient under this section to constitute an offence. *AIR 1971 SC 885.*

(2) Although a conspiracy may be entered into in a foreign country, yet if the accused persons continued to be parties to the conspiracy when they were subsequently in India, they would be deemed to have committed the offence under this section in India so as to give jurisdiction to Indian Courts to try them for the conspiracy. *AIR 1964 Bom 133.*

(3) Where a conspiracy was formed in South Africa by the accused persons to cheat persons by dishonestly inducing them to deliver money in the Indian currency by using forged documents and the acts of cheating where committed in India, and it was argued that the conspiracy was completed in South Africa and that the Indian Courts could not try the accused for the conspiracy, it was held that the conspiracy continued, and the accused continued to be parties to the conspiracy and were guilty under this section. *AIR 1964 Bom 133.*

4. Offence.—(1) The offences contemplated by this section are not confined to offences under this Code but include offences under special or local law. *1969 MadLW (Cri) 274.*

(2) Allegations made in complaint not constituting an offence of bigamy punishable under S. 494—Proceedings for criminal conspiracy quashed. *1981 CriLJ 577.*

5. Procedural law.—(1) Prevention of Corruption Act. Criminal Law Amendment Act—Prosecution of ex-public servant and outsider—Jurisdiction of Special Court cannot be questioned. *(1974 CriLJ 92 Cal. Reversed.) AIR 1977 SC 1772.*

(2) Offence under S. 120B is made cogizable in respect of which the Police Officer may arrest without warrant, if the arrest for the offence which is the object of the conspiracy may be without warrant but not otherwise. *(1971) 1 MadLJ 196.*

(3) Special Police Establishment will be within its powers to investigate into offences under S. 120B, Penal Code read with any of the offences mentioned in S. 23(1) of the Foreign Exchange Regulation Act, 1947 and more so into the offence u/s 420, Penal Code. *(1970) 2 MadLJ 709.*

(4) There is no repugnance between S. 21 of the Foreign Exchange Regulation Act and S. 120B of the Penal Code—There can be simultaneous prosecution. *1969 MadLW (Cri) 274.*

6. Framing of charge.—(1) The conspiracy to commit an offence is by itself distinct from the offence to commit which the conspiracy is entered into; such an offence, if actually committed, would be the subject-matter of a separate charge. *AIR 1967 SC 1590.*

(2) The accused can be charged with both the offences, namely for conspiracy to commit an offence and the offence to commit which conspiracy is entered into. *AIR 1957 SC 381.*

(3) The offence of conspiracy is an entirely independent offence and though other offences are committed in pursuance of the conspiracy the liability of the conspirators for the conspiracy cannot disappear. *AIR 1963 SC 1850.*

(4) Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy. There is no analogy between Section 120B and Section 109, Penal Code. There may be an element of abetment in a conspiracy, but conspiracy is something more than abetment. Offences created by Section 109 and Section 120B, P. C., 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. *AIR 1961 SC 1241.*

(5) In a charge of criminal conspiracy to commit an offence the same certainty is not required in stating the object of the conspiracy as in a charge for the offence conspired to be committed. *AIR 1956 SC 241.*

(6) The charge for criminal conspiracy need not allege or indicate any plan or design for carrying out the object of the conspiracy. It is sufficient if the object is stated. *ILR (1956) Punj 499.*

(7) Section 222, Criminal P. C., does not require that the names of the conspirators should be mentioned in the charge though it is advisable to give those particulars also in order to give reasonable notice to the accused that he has been charged with having conspired with specified persons as also persons unnamed to commit a certain offence. *AIR 1956 SC 469.*

(8) In framing a charge for conspiracy the offences actually committed in pursuance of it should not be mentioned in the charge. But the mere mention of such offences will not vitiate the charge in the absence of prejudice to the accused. *AIR 1963 SC 1850.*

(9) Order framing a charge is an interlocutory order and no appeal lies therefrom. *AIR 1980 SC 962.*

(10) Accused charged for offences under Ss. 262, 263, 467, 471, 420 and 120B, P. C.—Proceedings for offences under Ss. 467, 471 and 120B quashed being not made out in complaint and not because they were covered by S. 195, Cr. P. C.—Order of High Court refusing to quash proceeding in toto—Held, proper. *AIR 1984 SC 1108.*

7. Joinder of charges.—(1) Where there is a conspiracy having a definite object in view and several offences are committed in pursuance of such conspiracy, the several offences will generally form part of the same transaction within the meaning of Section 220. Criminal P. C. *AIR 1963 SC 1850.*

(2) Where specific offences are committed in pursuance of a conspiracy, all persons who are parties to the conspiracy and are also concerned in the specific offences thus committed can be lawfully tried jointly at the same trial. *AIR 1960 SC 661.*

(3) Criminal conspiracy—Main object cheating by personation—One co-accused not charged with ultimate offence—Does not vitiate charge under S. 120B. *AIR 1977 SC 2433.*

(4) The validity of joint trial on charges for offences alleged to be parts of a conspiracy is to be determined by the initial accusations levelled by the prosecution against the whole body of accused persons and not on the ultimate result of the trial. *AIR 1960 SC 661.*

(5) Where an accused is charged with an offence under Section 161 read with Section 120B, viz., a conspiracy to give and receive illegal gratification with a motive to show favour to the giver and the evidence before the Court does not establish the motive the accused can nevertheless be found guilty of an offence under S. 165 read with S. 120B. *AIR 1947 FC 9.*

8. Persons charged under Section 120B—Some acquitted—Effect.—(1) Where A and B were charged under this section for conspiracy to commit an offence, and one of them A was acquitted, and it is not the case of the prosecution, there were other unidentified persons also in the conspiracy, the charge against B under this section must necessarily fail as a conspiracy necessarily presupposes an agreement between two or more persons. *AIR 1972 SC 1502.*

(2) A and B acquitted—C the third accused-conspirator was also acquitted as the evidence against him was held to be unreliable—He was, however, convicted of another offence which was charged against him alone. *AIR 1979 SC 1280.*

9. Conspiracy to commit several acts.—(1) There can be two separate conspiracies which are closely related to each other and refer to two separate stages of the same matter involving two distinct offences. *AIR 1979 SC 1791 (Pr 11).*

10. Place of trial.—(1) The Court having jurisdiction to try the offence of conspiracy has also jurisdiction to try an offence constituted by the overt acts which are committed in pursuance of the conspiracy beyond its jurisdiction. *AIR 1971 SC 885.*

11. Sanction for prosecution.—(1) Sanction of the Government is necessary under section 196A CrPC before instituting proceedings, but no sanction is needed where the object of the conspiracy was to commit cognizable offences punishable with rigorous imprisonment for more than two years.

(2) Where a public servant is prosecuted under Section 120B read with S. 161 no sanction under Section 197 of the Code of Criminal Procedure, 1898 is necessary because the acceptance of illegal gratification by a public servant cannot be said to be something done while acting or purporting to act in the discharge of his official duty. *AIR 1954 SC 455.*

(3) Where a charge-sheet filed by the Police before the Magistrate disclosed only the offence of forgery and impersonation, and made no reference to any criminal conspiracy, but the Magistrate, on a perusal of the records, framed a charge also under Section 120B and committed the accused, it was held that the Magistrate took cognizance of only the offences charged by the Police and not of Section 120B and that therefore, the committal was not vitiated by the want of consent under Section 196A, Criminal P. C. *AIR 1971 SC 2372.*

(4) For a case of conspiracy under Section 120B to commit offences under the Sea Customs Act no application by a person holding authorisation under S. 187A, Sea Customs Act, 1878 is necessary to accord consent under S. 196A(2). *AIR 1979 SC 1526.*

(5) Penal Code Ss. 120B. 419—Criminal conspiracy to cheat by personation—Sanction under S. 196A(2), Criminal P. C., not necessary. *AIR 1977 SC 2433.*

(6) S. 196(2), Criminal P. C. does not apply to a case of criminal conspiracy to suppress evidence of commission of offence or to screen offenders from legal punishments. *AIR 1980 AndhPra 219.*

12. Proof of conspiracy.—(1) Where A complains to B the superior officer of C that C demanded illegal gratification but B fails to take any action on such complaint B's inaction does not indicate the existence of any conspiracy between B and C. *AIR 1979 SC 705.*

(2) Trial for offences under Ss. 161 and 120B, Penal Code and S. 5(2), Prevention of Corruption Act—Head of Anti-Corruption Department is competent to swear affidavit on behalf of State claiming privilege in respect of documents in question. *1975 CriLJ 1411.*

13. Punishment.—The words "where no express provision is made in this Code for the punishment of such a conspiracy" refer entirely to the quantum of punishment to be inflicted in the event of conviction under this section and do not lay down any limitation against a charge under this section even when the accused has actually committed an offence in pursuance of the conspiracy. *(1924) 2 Mys LJ (PC) 11.*

(2) The only case where express provision is made in the Code for the punishment of conspiracy is Section 121A. *1972 CriLJ 707 (SC).*

(3) Under sub-section (1) the accused is liable to be punished in the same manner as if he had abetted the offence mentioned. The punishment depends upon whether the illegal act has or has not been carried out. If the illegal act has been carried out the punishment will be in accordance with Section 109, that is it will be the same as for the offence itself. *AIR 1957 SC 381.*

(4) Where two persons acted in concert by virtue of a common intention and conspiracy their entire activities cannot be brought out in evidence. Obviously daring offences such as offences under Sections 364 and 386 of the Code would have necessarily called for active planning and co-operation of both. It is not possible in such a case to make a distinction between them as regards the sentence. *AIR 1957 SC 381.*

(5) Separate sentences for offence under S. 167(81) Sea Customs Act and one under S. 120B, Penal Code—Not illegal. *AIR 1970 SC 45.*

(6) Accused chief person to carry out main work of conspiracy—Sentence cannot be reduced for the period already undergone. *AIR 1962 SC 1821.*

(7) Accused committing murders of officials—No evidence to show that they were under domination of others—Capital punishment held proper. *AIR 1935 Cal 513.*

(8) Offence under Section 120B of Penal Code r./w. S. 135 of Customs Act Offence jeopardises economy of country—Light view of the offence—Not to be taken delay in trial notwithstanding. *AIR 1981 SC 1675.*

14. Conviction under this section—Effect.—(1) A conviction under this section read with Section 109 or Section 121 has been held to be disqualification for election under the Village Panchayats Act as an offence under those sections involved "moral delinquency" within the meaning of Section 16(1) of the said Act. (1964) 2 MadLJ 426.

15. Practice.—Evidence—Prove: (1) That the accused agreed to do or caused to be done an act.

(2) That such act was illegal or was done by illegal means; Where the act itself is not illegal, prove further—

(3) That some overt act done by one of the accused in pursuance of the agreement.

16. Procedure.—If the offence falls under clause (1) of para 15 above: Cognizable, if the offence which is the object of the conspiracy is cognizable, but not otherwise—Warrant or Summons—as the offence for which conspiracy is entered into, bailable, otherwise not—Not compoundable—Court by which abetment of offence which is an object of conspiracy is triable.

If the offence falls under clause (2) of para 15 above—Not cognizable—Summons, Bailable—Not compoundable—Triable by any Magistrate.

17. Charge, form of.—The charge should urn as follows:

I, (name and office of the Magistrate, etc.) hereby charge you (name of the accused) as follows :

That you, on or about the—day of—, at—, agreed with (name of the co-conspirator) to do (or caused to be done) an illegal act, to wit (or an act to wit—which is not illegal by illegal means to wit)—and that you did some acts, to wit—besides the agreement in pursuance of the said agreement to commit the offence of—punishable with death (or imprisonment, etc.) and thereby committed an offence punishable under section 120B of the Penal Code, and within my cognizance (or the cognizance of the Court of Session). And I hereby direct that you be tried on the said charge.