CHAPTER XVI
Of Offences affecting the Human Body

Chapter introduction.—*This Chapter consists of 80 Sections dealing with all offences involving personal injury classed as offences affecting the human body, out of them Sections 299 to 302 deal with offences of culpable homicide not amounting to murder and murder. Under the Mohamedan system there were three kinds of punishment namely retaliation, defined punishment and discretionary punishment and the entire administration was entrusted to Kazi, resulting in punishment being dependent upon the notions of each Kazi. When the British assumed power, the need for uniform Criminal law was felt necessary and the result of their labours is the present Penal Code. Offences affecting life are contained in sections 299 to 311. The other offences, depending upon the injury caused, fall under sections 312 to 376, P.C.*

Classification of homicide.—"The term homicide is used to describe the killing of a human being by a human being. Such a killing may be lawful or it may be unlawful and criminal. Unlawful homicide includes murder, manslaughter, causing death by dangerous driving, killing in pursuance of a suicide pact, and infanticide". Homicide is the killing of human being by a human being. Homicide may be lawful or unlawful. Lawful homicide may again be classified under the heads: (a) excusable homicide, and (b) justifiable homicide; and unlawful homicide may be classified as: (1) culpable homicide not amounting to murder, (2) murder, (3) suicide, and (4) homicide by rash and negligent acts not culpable. All offences affecting human body are contained in 82 sections falling broadly into seven divisions namely:

1. *Culpable homicide, murder and allied: 299-311=13 Sections.*
2. *Miscarriage, infanticide, etc.: 312-318=7 Sections*
3. *Grievous hurt, etc.: 319-338=20 Sections.*
4. *Illegal restrains and wrongful confinement: 349-358=10 Sections.*
5. *Assault, criminal force etc.: 349-358=10 Sections.*
6. *Kidnapping abductions, etc.: 359-374=16 Sections.*
7. *Rape and unnatural offences: 375-377=3 Sections.*

"Killing of a human being brings to an end the life of a human being as defined in Fitzgames Stephens in his digest as causing the death of a human being by an act or omission but for which the person killed would not have died, when he died, and which is directly and immediately connected with his death. Under the Penal Code sees. 45 and 46 define 'life' and 'death'. Every killing of a human being is not criminal. Homicide may be lawful or unlawful. Lawful homicide may be justifiable as falling under Secs. 76, 79, 81, 100 to 103 or excusable as falling under Secs. 80, 82 to 85, 87, 88, 92. Unlawful homicide (Sec. 300) and Manslaughter or culpable homicide not amounting to a murder Sec. 299, 304-A, 305 and 306 of the Code.

Of Offences affecting Life

Section 299

299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause, Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A , by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush, A not knowing that he was there. Here although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B or cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Cases

1. For cases under this section see under section 300 below.

Section 300

300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

When culpable homicide is not murder.—*Exception 1.*—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given

by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a by-stander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

Cases and Materials: Synopsis

1. *Scope of the sections 299 and 300.*
2. *Culpable homicide and murder—Distinction.*
3. *"Whoever causes death".*
4. *"Death".*
5. *Child in mother's womb—Expl. 3 to S. 299.*
6. *Direct and distinct connection.*
7. *Obscure cause.*
8. *"By doing an act."*
9. *'Act' if includes illegal 'omission'.*
10. *Attack by several persons.*
11. *Section 34 and 300.*
12. *Sections 149 and 300.*
13. *Sections 35 and 300.*
14. *This section and S. 396.*
15. *Abetment and S. 300.*
16. *"With the intention of causing death".*
17. *Intention and knowledge.*
18. *Act intended against one causing death of another.*
19. *"With the intention of causing such bodily injury as is likely to cause death.*
20. *Divine influence.*
21. *Insanity.*
22. *Motive not essential for liability.*
23. *Nature of weapon and intention.*
24. *Bodily injury to person labouring under disorder—Explanation 1 to S. 299.*
25. *"Or with the knowledge that he is likely by such act to cause death".*
26. *Absence of knowledge and intent.*
27. *Second clause of S. 300—Explanation 1 to S. 299.*
28. *"Offender knows to be likely to cause death"—S. 300. Cl. 2.*
29. *"Sufficient in the ordinary course of nature to cause death"—Third clause of S. 300.*
30. *Fourth clause of S. 300—Doing imminently dangerous act with reckless indifference to its probable consequences.*
31. *Exceptions—General.*
32. *Exception 1.*
33. *Grave and sudden provocation.*
34. *Abusive language.*
35. *Infidelity of wife or mistress.*
36. *Suspicion of unchastity.*
37. *Misconduct of female relation other than wife.*
38. *Pangs of jealousy.*
39. *Provocation grave but not sudden.*
40. *Provocation sudden but not grave.*
41. *Test of provocation.*
42. *Burden of proof of provocation.*
43. *Provocation sought—Proviso 1 to Exception 1.*
44. *Loss of self-control by self-induced intoxication.*
45. *Provocation by lawful act—Proviso 2.*
46. *Provocation by public servant—Proviso 2.*
47. *Provocation by act done in exercise of right of private defence—Proviso 3.*
48. *Question of provocation one of fact—Explanation to Exception 1.*
49. *Exception 2—Excessive exercise of right of private defence.*
50. *Good faith.*

51. *"Exceeding the powers given to him by law".*
52. *Exercise of right of private defence must be without premeditation.*
53. *"Without any intention of doing more harm than is necessary for such defence".*
54. *Exception 3—Exercise of lawful powers—Excess of.*
55. *Killing under officer's order.*
56. *Killing under threat of others.*
57. *Exception 4.*
58. *"Sudden fight".*
59. *"Fight".*
60. *Exception 4 applies only if the culpable homicide is done without premeditation.*
61. *"Sudden quarrel".*
62. *"Without taking undue advantage".*
63. *"Acting in a cruel or unusual manner".*
64. *Exception 5.*
65. *Burden of Proof.*
66. *Alibi.*
67. *Appreciation of evidence.*
68. *Benefit of doubt.*
69. *Confession.*
70. *Evidence and proof of poisoning*
71. *Evidence of partisan witnesses who are relatives of deceased or prejudiced or inimical.*
72. *Medical evidence.*
73. *Identification of dead body to the doctor who held the post-mortem examination.*
74. *Expert evidence.*
75. *Evidence of approver.*
76. *Evidence of accomplice.*
77. *Examination of the accused under Section 313 of the Criminal P.C.*
78. *Presumption from possession of property of deceased.*
79. *Sufficiency of evidence.*
80. *Value of evidence.*
81. *Statement of oath.*
82. *Circumstantial evidence.*
83. *Injuries on the accused.*
84. *Time of death.*
85. *Absconding of accused.*
86. *Dying declaration.*
87. *Murder by poisoning.*
88. *Drunkenness.*
89. *Act done to person believed to be dead.*
90. *Practice and procedure.*
91. *Bail.*
92. *Duty and Powers of Court in undefended capital cases.*
93. *Appointment of amicus curiae.*
94. *Court's duty generally in capital cases.*
95. *Corpus delicti.*
96. *Framing of charge.*
97. *Charge should be explained to the accused.*
98. *Charge for murder—Conviction for hurt or grievous hurt or for other offence.*
99. *Several charges—Judge's duty.*
100. *Charge or murder—Conviction under S. 194 or s. 201.*
101. *Charges for murder and kidnapping.*
102. *Charge under S. 302/34—Conviction under S. 302.*
103. *Charge under S. 302/34—Conviction under S. 302/149.*

1. Scope of the sections 299 and 300.—(1) The section 299 defines culpable homicide. Homicide is the killing of human being by a human being. It is either lawful or unlawful. Lawful homicide can be divided into two classes: (I) Excusable homicide: This class includes the following cases as mentioned in sections 80, 82, 83, 84, 85, 86, 87, 88 and 92 of the Penal Code; and (ii) Justifiable homicide: This class includes cases where the death is caused and come under the provisions of sections 76, 77, 78, 79, 81, 100 and 103. Unlawful homicide may be classified as: (i) Culpable homicide not amounting to murder. (ii) Murder, (iii) Suicide, and (iv) Homicide by rash and negligent acts not culpable. To come within the definition of culpable homicide under section 299, the

act of the accused should cause death. "Death" means the death of a human being. The causing of the death of a child in the mother's womb is not homicide but it may amount to culpable homicide to cause the death of a living child, if any part of the child has been brought forth, though the child may not have breathed or been completely born. The death should be caused: (a) with the intention of causing death, or (b) with the intention of causing such bodily injury or is likely to cause death, or (c) with the knowledge that the act is likely to cause death. The question when a person can be said to cause death by his act to be answered in the light of Explanations 1 and 2 of section 299, Penal Code. The simpler case should be where death results directly from the act itself. "When death results from consequences naturally or naturally flowing from that act, then also there need be no hesitancy in saying that the act caused death (*AIR 1967 Mad 205)*. To constitute culpable homicide there must be knowledge that the act is likely to cause death. Knowledge implies consciousness, a mental act. a condition of the mind which is incapable of direct proof. The word "likely" means probably (*AIR 1966 SC 148)*. Section 299 is divided into three parts. The first part refers to the act by which the death is caused by being done with the intention of causing death. That part corresponds to the first part of section 300. The second part of section 299 speaks of the intention to cause such bodily injury as is likely to cause death. This has corresponding provisions in clauses. "Secondly" and "Thirdly" of section 300 of the Penal Code. Section 304, Part I covers cases which by reason of the exceptions under section 300 are taken out of the purview of clauses (1), (2) and (3) of section 300, but otherwise would fall within it and also cases which fall within the second part of section 299 but not within section 300, clauses (2) and (3). The third part of section 299 corresponds to clause 'Fourthly' of section 300. Section 304, Part II, Penal Code and section 304B of the Penal code covers those cases which fall within the third part of section 299 but do not fall within the fourth clause of section 300. Though there is difference between the second and third clauses of section 299, Penal Code namely, 'the intention to cause death' and the intention of causing such bodily injury as is likely to cause death; it is only one of degree. The former requires a particular intent. The latter is satisfied with knowledge only. 'Intention' is the state of mind of a person which reference to certain consequences which result from his desired movements or omissions. An act is said to be intentional which it is done with a desire that certain consequences shall follow from a person's physical acts or omissions. Intention thus is a subjective consideration. Where consequences are substantially certain or inevitable, no difficulty arises because one can then deem a consequence to be intended though not desired because the court must credit every sane man with the knowledge that if the result was inevitable, he must have foreseen it *(1963 CrLJ 363)*. In a case reported in *(1977 CrLJ 436 SC)* their Lordships held "the distinction between culpable homicide (section 299) and murder (section 300) has always to be carefully borne in mind while dealing with a charge under section 302" Under the category of unlawful homicides fall both cases of culpable homicides amounting to murder and those not amounting to murder. Culpable homicide is not murder when the case is brought within five Exceptions to section 300, Penal Code. But even though none of the five Exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of section 300, Penal Code to sustain the charge of murder. If the prosecution fails to discharge this omission in establishing any one of four clauses of section 300, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under section 299, Penal Code. To decide whether it is a case of murder or culpable homicide not amounting to murder, degree of knowledge is to be looked into. An intentional killing is always murder unless comes within one of the special Exceptions in section 300. If an Exception

applies, it is culpable homicide not amounting to murder *(AIR 1966 SC 148)*. The manner of causing the injuries as disposed by the prosecution witness, the nature of the inquires caused, the part of the body where they were caused, the weapon used by the accused in the commission of the offence and his conduct are relevant factors in considering whether the offence committed is one of murder or culpable homicide not amounting to murder *(1967 CrLJ 184 FB)*.The word "act" in all the clauses of section 299 and section 300 denotes not only a single act but also a series of acts taken as a single act. When a number of persons participate in the commission of criminal act the responsibility may be individual, that is to say, that each person may be guilty of a different offence or all of them may be liable for the total result produced. This depends on the intention and knowledge of the participants. The subject is covered by Sections 34, 35 and 38 of the Penal Code *(AIR 1966 SC 148)*.

(2) The ingredients of section 99 are: (a) the death of the person in question; (b) such death was caused by the act of the accused; (c) the accused intended by such act to cause death, or he intended by such act to cause bodily injury as was likely to cause death.

(3) The expression "likely to cause death" within the meaning of clause (b) of sec. 299—Murder and Culpable Homicide—Analysis—Distinction between the two offences—Provocation—When an act does not constitute murder but constitutes culpable homicide not amounting to murder—Appellate Division examines whether the High Court Division maintained the conviction of the two accused appellants for murder on correct appreciation of fact and proper application of law relating to murder and culpable homicide not amounting to murder. On 22-5-1980 deceased M was practising bicycle with his friend. P.W. 3A on the bank of a river. At that time his another friend, namely, appellant R went there. M asked R to pay Tk. 2/- which was due from him on account of cost of a picnic. R told M that the money would not be paid by him but would be paid by H his another friend, whereupon M passed the remark, "if you are unable to pay Tk. 2/- why did you join the picnic, you *Chotolak'*. At this B left the place saying that he would "show him" meaning that he would give a lesson and within a few minutes he came back, accompanied by H who carried a sized Sundari Wood in hand. In the meantime, M and P.W. 3 A were taking bath in their river. H called M to get up from the river, and when he got up, H asked him why he had called him *"Chotolak"*. But H. ignoring the explanation of M that the "remark" was not meant for him, at once struck M on his head with the sized Sundari Wood, as a result of which, M fell down senseless. He was ultimately brought to Khulna Sadar Hospital where after 3 days in the mid night following 25-5-80, he succumbed to the injury. In due course both H&R where prosecuted, the former for committing the murder of M and the latter for its abetment. The trial Court on consideration of the evidence of 12 witnesses including the Medical Officer who held post mortem examination on the dead body of M held H guilty u/s. 302 and R guilty u/s 302/109 of the Penal Code, convicted them accordingly and sentenced them to death. The Additional Sessions Judge made a Reference u/s. 374 of the criminal Procedure Code for confirmation of the sentence of death; the condemned prisoners also filed a Criminal Appeal challenging their conviction and sentence. The High Court Division at Jessore confirmed the conviction of the appellants but commuted their sentence to transportation for life.

Observed:— (i) In the instant case death resulted from the fracture of the frontal and parietal, bones caused by a single blow dealt by appellant H.

(ii) The trial Court did not refer to the law of definite murder and culpable homicide and marking the distinction between them but simply observed that the accused came with the sized wood "with a determination to kill the victim". The High Court Division took up the first question whether the act

of killing fell into Exception No 1 —That is whether appellant H was deprived of his power of self-control by any grave and sudden provocation and held that there was no such provocation. There after, High court Division considered the nature of the injury and the weapon used, and held that the act of causing death was done with intention of causing death. In support of this view High Court referred to the 'sized wood' which was 2 cubit long and 5 inches in breadth" and observed: "This sized wood 2 cubit long and 5 inches in depth is a weapon which was sufficient to cause death if a blow is inflicted by it on the head".

Held:—(i) Description of the sized wood as given by the High court Division hardly carries any meaning for a piece of wood has got breadth also besides length and depth. Breadth of the wood is taking here. Evidence show that the sized wood was a plank (তক্তা). A plank is generally 0.5″ to 1″ thick and if it is taken that the plank in question was 1″ thick, then its size was length-2 cubits, breadth-5 inches and thickness of "depth"-1 inch. Still a piece of wood of such a nature is not as deadly as say a daggar or a firearm from which intention to kill can be easily inferred. As to the nature of the injury caused therewith, though the parietal and frontal bones were fractured such a fracture is not very much likely to cause death. This injury is 'likely' to result in death. The abrupt finding of the High Court Division that the act of this offender was done with the intention of causing death is not supported by the fact of the case. The reasoning of the High Court division does not appear to us to be sound and logical. What weighing is that the injury in question was caused with the intention of causing such bodily injury as is "likely to cause death" within the meaning of Clause (b) of Sec. 299 and as such the act of causing the death is culpable homicide not amounting to murder.

(ii) In view of our finding above the question whether the objectionable 'remark' of the victim boy calling the accused *"Chotolok"* provided any "grave and sudden provocation" and whether the accused was deprived of his power of self-control by such provocation, need not be considered. But suffice it to say that "provocation" contemplated in Exception No.1 shall be not only be grave' but also it shall be sudden and if considerable time intervened in which the passion aroused by the provocation subsides, then there is hardly any scope for deprivation of power of self control. In this case the provocation given by the remark "Chotolok" was not directed at the principal assailant H. Secondly, a considerable time elapsed between the remark and the assault. Be that as it may, in view of the nature of the act of causing death we are clearly of the view that this act does not constitute murder but constitutes 'culpable homicide not amounting to murder' punishable under Part-I of Sec. 304 of the Penal Code. *Khan Abdul Hafiz vs. The State. BCR 1987 Ad 214.*

(4) When death is probable it is culpable homicide and when death is most probable it is murder. Mere killing of a person is not murder or culpable homicide, but it is so when caused with certain guilty intention. *State, represented by the Solicitor to the Government of the People's Republic of Bangladesh Vs. Ashraf Ali and others 46 DLR (AD) 241.*

(5) Injuries of the deceased whether injuries of such nature as to constitute 'murder'—The two injuries in the occipital region are the cause of death as the expert evidence shows, while the other injuries are simple in nature—It is difficult to hold that these injuries are simple in nature and that these injuries were caused with the intention to cause the death nor such injuries appear to be sufficient to cause death in the ordinary course of nature. But these injuries though caused intentionally, are of such a nature that these are "likely to cause death". This criminal act of causing the death do not fall into any of the four categories of criminal acts which constitute "Murder" as described in Sec. 300. This Criminal act was done with the intention of causing such injuries as are likely to cause death, as

described in s. 299—It constitutes culpable homicide not amounting to murder, punishable u/s. 304-Part I. *The State Vs. Montu & ors. (1992) 12 BLD (AD)=(1992) 44 DLR (AD) 287.*

(6) In the cse of culpable homicide the intention or knowledge is not so positive or definite. The injury caused may or may not cause the death of the victim. To find that the offender is guilty of murder, it must be held that his case falls within any of the four clauses of section 300, otherwise he will be guilty of culpable homicide not amounting to murder. Facts of the case show that death was caused without premeditation. *Bandez Ali Vs. State 40 DLR (AD) 200.*

(7) Mere killing of a person or mere causing of a person's death is not murder or a culpable homicide but it is so when caused with certain guilty intention or guilty knowledge. Three classes of cases have been described in section 299 as "culpable homicide" and four classes of cases have been described in section 300 as "murder". The essential difference between mere "culpable homicide" and "murder" is the degree of probability of causing death. When death is probable, it is culpable homicide but when death is most probable, it is murder. *The State Vs. Ashraf Ali and others, 14 BLD (AD) 127.*

(8) Death of the victim by a single blow and the charge of murder does not lie, circumstance thereof. In the present case the prosecution did not allege enmity. No malice was suggested. The knife blow was inflicted in the midst of a quarrel over an 'ail' which could hardly furnish a motive to cause victim's death. So, Abul Lais's act of inflicting the fatal injury on the deceased falls within the mischief of the third and last clause of section 299 P.C. But in view of the weapon used being only a pen-knife it cannot be inferred from the circumstances that he knows that his act was so imminently dangerous to cause Rajjab Ali's death. Moreover, Abul Lais inflicted the injury on Rajjab Ali when he was being dispossessed by Rajjab Ali of a portion of land on which he had grown paddy. He had thus an excuse for inflicting the injury on Rajjab Ali which, no doubt, proved fatal. Hence he cannot be held guilty of murder, though he is undoubtedly guilty of culpable homicide not amounting to murder and is liable to be sentenced under the second part of section 304 P. C. *Abul Lais Vs. The State, (1970) 22 DLR 419.*

(9) When a culpable homicide is not murder. The first clause of section 300 is obviously relatable to the first clause of section 299, its second and third clauses to the second clause of section 299, and its fourth clause to the last clause of section 299. It is also evident that simply by reason of an offence being covered by any of the clauses of section 299 which would not doubt make it culpable homicide, the offence will not be 'murder' unless the ingredients of one of the four clauses of section 300 be attracted. If the offence does not attract the ingredients of one of the four clauses of section 300 it would not be 'murder' and will remain culpable homicide not amounting to murder. In view of the opening words of section 300 an offence of culpable homicide will also amount to murder if any of the five exceptions mentioned in the section be attracted to the facts of a particular case. *Makbul Hossain Vs. The State, (1970) 22 DLR 269.*

(10) Ingredients of murder and culpable homicide stated to elaborate the point. If the criminal act is done with the intention of causing death then it is murder clear and simple. In all other cases of culpable homicide it is the degree of probability of death from certain injuries which determine whether the injuries constitute murder or culpable homicide not amounting to murder and, if death is the likely result of the injuries it is culpable homicide not amounting to murder; and if death is the most likely result then it is murder. Appellant cannot be convicted and sentenced under section 302 as the alleged offence comes within the ambit of Exceptions 1 and 4, Section 300 of the Penal Code. It also appears that the accused had taken no undue advantage in the matter. *41 DLR 37.*

(11) A proposition of universal application cannot possibly be that the same evidence which has been adduced in support of an unsuccessful defence of self-defence can never be relied upon in whole or in part as affording provocation sufficient to reduce the crime from murder to manslaughter. Conduct which cannot justify may well execute. *10 DLR 174.*

(12) Culpable homicide which is not murder is man slaughter. If it is established that the injury resposible for causing the death was sufficient in the ordinary course of nature the offence would fall under the definition of murder and if the same was likely to cause death, offence would be one of man slaughter punishable under Para 1 of section 304, Penal Code. *1980 PCrLJ 489.*

(13) The law of homicide is contained in section 299 and 300 of the Penal Code. First part of section 300, Penal code deals with the first two clauses of section 299 while second part deals with the third clause *(1968 CrLJ 643).* If the case falls under section 300, then it is murder unless one of the exceptions to the section becomes applicable. Broadly speaking, the offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death. It will be murder if such injury is sufficient in the ordinary course of nature to cause death. When the question of intention arises such intention has to be gathered from what he does. An offence of murder may amount to culpable homicide and yet may not amount to murder. The difference between the two offences of culpable homicide and murder is not only fine but also real. Culpable homicide is a generic term. The offence will amount to murder if the conditions laid down in section 300 are satisfied. If the offence comes under section 299 or under one or other Exceptions to section 300, it will be culpable homicide not amounting to murder. Murder is unlawfully causing the death of another with malice. Death means death of a human being (section 46). It will be murder whether death is caused of a grown up person or a newly born child. Where the intention to kill is present, the act amounts to murder. Where such an intention is absent the act amounts to culpable homicide not amounting to murder. To determine what the intention of the offender is, each must be decided on its own merits. Intention can be rarely proved by direct evidence. When facts are so intertwined, determining whether it is culpable homicide and then finding out separately whether it amounts to murder may not be convenient. When question of intention arises, it must be borne in mind that person is presumed to intend the nature and probable consequences of his act until the contrary is proved. It is, therefore, necessary in order to arrive at a decision as to offender's intention to inquire what the natural and probable consequences of his acts would be, intention has to be inferred from what he does. But there are cases in which death is caused and the intention which can safely be imputed to the offender is less grave. The degree of guilt depends upon intention and the intention to be inferred must be gathered from the facts proved. Proof of knowledge throws light upon his intention. There need be no proof of knowledge that the bodily injury intended was likely to cause death. Before deciding that a cause of culpable homicide amounts to murder there must be proof of intention sufficient to bring it under section 300, where the injury deliberately inflicted is more than merely likely to cause death but sufficient in the ordinary course of nature to cause death the higher degree of guilt is presumed *(1960 CrLJ 303).* When death is caused, by what the medical books often call remote or indirect causes, it might be difficult to establish the mens rea necessary for the offence of murder *(1958 CrLJ 1021).* The accused did not intend to cause the death of the deceased and therefore Cl(1) of section 300, Penal Code is inapplicable. It may be added that intention also includes foresight of certainty. A consequence is deemed to be intended though it is not desired when it is foreseen as substantially certain *AIR 1969 Goa 116.* Section 300, C1 (2) deals generally with cases where the intention is to kill the subject of the assault even though the injury is not fatal in the ordinary course of nature but is fatal in case of the particular victim by reason of a

physical infirmity, such as an enlarged spleen, known to the culprit to be enlarged, or the emaciated condition of the victim known as such to the culprit. Repeated blows or even a single blow forcibly delivered with a heavy weapon would make the offence a murder but where a sudden blow is struck with a stick that is not heavy, the offence would be culpable homicide not amounting to murder *(39 CrLJ 1979)*. A person who administers a well known poison like arsenic to another must be taken to know that his act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and if death ensures, he is guilty of murder notwithstanding that his intention may not have been to cause death. No doubt a man is presumed to intend the natural and inevitable consequences of his own act, but the presumption of intention must depend upon the facts of each particular case and 'knowledge' as used in section 300(2), Penal Code is a word which imports a certainty and not merely a probability *(29 CrLJ 17)*. Attack on an old man of 75 causing many injuries resulting in death is a murder. The ingredients of section 300, clause (2) are, there is first the intention to cause bodily harm and next, there is the subjective knowledge that death will be the likely consequence of the intended injury. The mental attitude is made of two elements, (a) causing an intentional injury, and (b) which injury the offender has the foresight to know would cause death *(AIR 1966 SC 1874)*. The third clause speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. Emphasis here is on the sufficiency of injury to cause death. Sufficiency is the high probability of death depending upon the nature of weapon used or the part of the body where the injury is inflicted or both. If the probability of death is very great, the requirements of clause (3) are satisfied and the fact that a particular individual may by virtue of his having secured specially skilled treatment or being in possession of a particularly strong constitution has survived an injury which would prove fatal to the majority of persons subjected to it, it's not enough to prove that such an injury is not sufficient in the ordinary course of nature to cause death *(45 CrLJ 729)*. The nature of the material object used and the force used are useful guides in arriving at a decision as to whether the intention and knowledge required by this section can be attributed to the accused *(39 CrLJ 979)*. The prosecution must prove the following before it can bring a case under Cl (3) of this section: (1) It must be established, quite objectively, that a bodily injury is present; (2) The nature of the injury must be proved; these are purely objective investigations; (3) It must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kinds of injury was intended; (4) It must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature *(AIR 1966 SC 1874)*. The third clause discards the test of subjective knowledge. This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offender *(1966 CrLJ 361)*. Where the accused caused the death of another person by giving him unmerciful thrashing with sticks, smashing both bones of each forearm, the right elbow and right knee-cap and the occipital area on the right temporal area of the skull, it was held that he was guilty of murder *(20 CrLJ 157)*. Intoxication is no excuse for a man throttling to death a weaker man who is intoxicated. Voluntary drunkenness, though it does not palliate any offence, may be taken into account as throwing light on the question of intention. Cl (3) of section 300 differs from section 299(2) in a matter of degree only *(AIR 1929 Lah 157)*. Question of intention to cause death is immaterial. Similarly, proof of motive or ill-will is unnecessary. Where a blow is given by reason of which death ensues, it may be necessary to prove whether it was necessarily fatal or, in the language of the Code, sufficient in the ordinary course of nature to cause death. The 4th clause cannot be applied until it is clear that clauses 1, 2 and 3 of the section each and all of them fail to suit the circumstances.

It does not apply to a case in which death has been caused by an act done with the intention of causing bodily injury to a particular person. In such a case the question whether the offence is murder or not must be decided by reference to the first three clauses of the section and the Exceptions *(5 CrLJ 306)*. The main ingredient of this clause is that the person committing the act in question should have had the knowledge that the act done is so imminently dangerous that it must in all probability cause the death or such bodily injury likely to cause death and that the act was committed without any excuse for causing death or such bodily injury as is likely to cause death. The explosion of a bomb in a recorded room must have been known to the accused—an exceptionally intelligent man to cause the death of numerous persons, and the fact that the accused had no intention of killing any particular individual does not take the case outside C1(4) *(31 CrLJ 290)*. Sending hand grenade bombs in parcel would show the knowledge that in all probability it was likely to cause death. It is unusual to expect death in a case where a person is cleaning a loaded revolver or a gun without a safety catch. In any case under C1(4), the degree of probability or likelihood or the act resulting in fatal harm, is of the highest level. The distinction between section 299(3) and section 300(4) is a matter of degree only. If the act must in all probability cause death or such bodily injury as is likely to cause death, the offence will fall under section 300(4) and if the act is likely to cause death, the offence will fall under section 299(3), knowledge being common to both sub-clauses although knowledge required in section 300(4) is of a higher degree of probability *(30 CrLJ 141)*. A person who plunges his knife into the neck of another must be deemed to know that the injury he will cause by such act, is likely to cause death and therefore attract C1(4) (*AIR 1954 Mad 323)*. This section should be read a long with sections 85 and 88 of the Penal Code which deal with intoxication and drunkenness as a defence or plea of mitigation of a criminal offence. An accused will be protected only when on account of insanity he was incapable of knowing the nature of the act, that is whether it is right or wrong, or that it was illegal. Mere absence of motive when committing the murder cannot prove insanity (*AIR 1968 Orissa 223)*.

The five exceptions specified in this section are special exceptions in addition to the general exception enumerated in Chapter IV. The special exceptions enumerated are—(a) Provocation (a) Right of private defence; (c) Exercise of legal powers; (d) Absence of premeditation and heat of passion; and (e) Consent. The burden of proving any of the exceptions lies upon the accused (Sections 16 and 105 of the Evidence Act) but the general burden to establish the guilt of the accused is always on the prosecution and that never shifts. *(AIR 1962 SC 605)*. To bring a case under Exception 1 to section 300 of the Penal Code the act of causing death should have been done by the offender under the influence of some feeling depriving him of all self-control endangered by a provocation which is both grave and sudden. There must not be time for provocation to cool down (*AIR 1972 SC 502)*. The question whether provocation is grave and sudden or not is one of fact and has to be considered in the circumstances of each case. The text of "grave and sudden" provocation under Exception 1 must be whether a reasonable person belonging to the same class of society as the accused placed in the similar situation, would be so provoked as to lose his self-control. It must be sudden such loss of self-control must be shown to have been caused by the gravely and suddenly provocative acts of conduct to the victim *AIR 1946 All 262*. Use of merely abusive or vulgar language is not a grave provocation *(25 CrLJ 298)*. Return challenge by deceased coached in strong indecent language is not sudden and grave provocation. A provocation however grave which is not sudden but is a chronic one will not satisfy the requirements of this Exception. Where the provocation is sought by the accused, it cannot furnish any defence against the charge of murder. Where the interval between the provocation and the assault is too long the benefit will not be available. The retaliation must be provocation or manner of retaliation

should not be grossly disproportionate to the offence given. The accused wife committed adultery and persisted in living in adultery and abused her husband. Held, the killing fell under Exception 1 *(14 CrLJ 208)*. Mere attempt to commit unnatural offence, mere verbal abuse would not amount to grave and sudden provocation *(AIR 1962 Guj 39)*. Exception 2 provides for the case of a person who exceeds the right of private defence. The law in this regard honours the human instinct of self-preservation which is a natural right. The first requirement of this Exception is that the accused must have had a right of private defence of body or of property and he must have exercised it. Four cardinal conditions must have existed before the taking of the life of a person is justified on the plea of self-defence: Firstly, the accused must be free from fault in bringing about the encounter; Secondly, there must be present an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity; Thirdly there must be no safe or reasonable mode of excape by retreat; and Fourthly, there must have been a necessity for taking life *(1959 CrLJ 901)*. The right commences as soon as a reasonable apprehension of danger arises and ceases when the apprehension ceases or on the offence being committed. If, however, the person acts in good faith, without premeditation of death and without any intention of doing more harm than was necessary then the offence will be culpable homicide but all these conditions must be present where the accused had a right of private defence. There is no right of private defence when both parties sought to enforce their right to a piece of land and both go armed to enforce there right determined to retrain possession. Section 300, Exception 2 does not apply to claim the benefit of Exception 2. The accused must show that they had no intention of doing more harm than was necessary. To hold the Exception 2 to section 300 does not apply, it is not sufficient that more harm was done than was necessary for the purpose of private defence. Even when the right of private defence is exceeded and even when more harm was done than was necessary for the purpose of private defence, it is important to note that these two provisions have reference to that act of causing death which amounts to culpable homicide. There is, of course, no occasion for applying this clause to cases where the death is otherwise justifiable, as for example, under section 103. It is only when the right conferred by sections 96 to 105, PC is exceeded that there is room for its operation. In view of the facts that (a) the accused was in actual effective possession of the disputed land and the crops standing therein, (b) the deceased persons were not unarmed, (c) the deceased party went to the field with a determination to remove the crop from the possession and control of the accused, (d) the occurrence was not a one-sided affair, there was some fight in the course of which blows were exchanged and both sides received injuries inflicted by the accused party on the deceased person both in severity and number were far greater than those received by the accused party. It was held that though the accused had a right to defend their possession and property, the force used by them was recklessly excessive and as such they were rightly not given benefit of Exception 2 to section 300. Where peaceful citizens were attacked by a body of men armed with deadly weapons and the citizens in their turn used similar weapons and one of the aggressors died, it cannot be said that the right of private defence was exceeded *(34 CrLJ 765)*. There is a right to turn trespassers out by use of some force *(AIR 1979 SC 44)*. Exception 3 protects a public servant, or a person aiding a public servant acting for the advancement of public justice, if either of them exceed the powers given to them by law and cause death. It gives protection so long as the public servant acts in good faith; but if his act is illegal and unauthorised by law, or if he glaringly exceeds the powers given to him by law, the exception will not protect him. The only superior to be obeyed is the law and no superior is to be obeyed who dares to set himself above the law. To invoke Exception 4 it must be established that the accused committed the offence (a) without premeditation, (b) in a sudden fight, (c) in the heat of passion upon a sudden

quarrel and (d) without offender's having taken undue advantage or acted in a cruel or unusual manner (*AIR 1956 SC 99*). The term "fight" occurring in Exception 4 to Section 300 is not defined in the Code. It takes two to make a fight. It is not necessary that weapon should be used in a fight. An affray can be a fight even if only one party in the fight is successful in leading a blow on his opponent. In order to constitute fight it is necessary that blows should be exchanged even if they do not all find their target. A fight is a combat between two or more persons, whether with or without weapons. The word 'sudden' implies that the fight should not have been prearranged. If, on any sudden quarrel, blows pass without any intention to kill or injure another materially and in the course of the scuffle, after the parties are heard by the context, one kills the other with a deadly weapon, it is culpable homicide and not murder. The premeditation may be proved by direct or circumstantial evidence. To attract Exception 4 it must be shown that the offender did not take undue advantage or act in cruel or unusual manner. Where in a domestic quarrel between the son-in-law and father a third party asked to stop the fight and that he will settle the dispute; and the accused thereupon stabbed the unarmed third party causing his death, it was held that this Exception will not apply (*AIR 1956 SC 99*). If one of the accused persons brings himself within Exception 4, there is no room left for the application of section 34 against his co-accused *(41 CrLJ 383)*. Exception 5 should be read along with sections 87 or 93 of the Penal Code. The consent by the deceased under Exception 5 must be unconditional and without reservation. It must further be unequivocal consent which does not involve the choice of alternatives to which the person taking the life more or less has driven the person. The accused was very much disappointed by his third successive failure in the annual examination for the twelfth class and decided to take his life. He told his literate wife about his decision and she asked him to kill her first and then kill himself. Accordingly, the accused killed his wife but was arrested before he could kill himself. It was held that the deceased did not give her consent under fear of injury or under a misconception of a fact. Therefore the accused was guilty under section 304, first part and not under section 302(*AIR 1956 Pat 190*).

(14) Section 300—As the deceased Sohag did not give any provocation to condemned prisoner Firoj when admittedly there was no altercation or quarrel between them and when the deceased's two children and other deceased persons were unarmed as evidenced the condemned prisoner took an advantage over them and in such circumstances the case does not come within the purview of exception one or exception four, section 300 of the Code. *State Vs. Firoj Maih and another (Criminal) 5 BLC 1.*

(15) The alleged provocation cannot be treated as grave and sudden as it had taken place 12 hours before the murder which does not attract the first Exception to section 300 of the Code and the actions taken by the deceased against the condemned convict come within the scope of second proviso to the first Exception of section 30 of the Penal Code. *State vs. Siddiqur Rahman (Criminal) 2 BLC 145.*

(16) Murder case—Incident in broad day light—Consistent direct evidence of the complainant and nine other eye-witnesses against the accused appellant who struck the victim with a knife and after continuous assault for three hours, giving finishing touch with an axe—victim's death resulted from the injuries including bone fracture—The act of killing whether constituted murder—Inflicting the injuries accused appellant acted in very cruel and unusual manner which brings his action within the ambit of Clause (4) of Sec. 300—Accused appellant rightly convicted for murder—High Court's decision upheld.

Observed:—The incident took place during broad day light; the deceased was tied with a rope and hung by the legs from a tree at mid-day and was kept in hanging condition for 3 hours during which he

was subjected to assault and torture. While some other persons namely the acquitted accused assaulted him with lathis, the appellant struck him with a knife and that after he was brought down from the tree he was given the finishing touch, with an axe, by the appellant again. As a result of this assault with an axe, his leg bone was fractured and according to the evidence of the Doctor P.W. 1 death resulted from these injures particularly, the fracture in the leg which were ante-mortem and homicidal in nature. The Doctor found multiple injuries on the dead body of the deceased, such as, 2 incised wounds on the right leg, 1 incised wound on the right forearm, 1 incised wound on the nose and 1 incised wound on the left leg causing fracture of the bone. It is the injury causing fracture of the bone which, according to the medical evidence, is mainly responsible for the death. Evidence of the complainant and all other eye-witnesses is that this injury on the leg was caused by the appellant by striking him with an axe after he was brought down the tree in unconscious state. It is found that the fatal injury was caused at the end of continuos assaults for three hours while the victim was hanging from the tree. In the light of these circumstances, it is to be determined whether this act of killing constitutes murder.

Held:—Even if the contention that the appellant had neither any intention to cause the death nor any intention to inflict bodily injury most likely to cause the death still we find that the accused had the knowledge that the injuries he caused were so dangerous that they would in all probability, cause the death and that inflicting these injuries he acted in a very cruel and unusual manner. This brings his action with Clause (4) of Sec. 300 of the Penal Code, The appellant is therefore found to have been rightly convicted for murder. *Md. Ayub Ali Vs. The State BCR 1987 AD 66.*

(17) Culpable homicide, when not murder—Culpable homicide is not murder if it is committed without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. *Md. Bandez Ali Vs. The State. 1986 BLD (AD) 5.*

(18) Culpable homicide—Conviction for murder—When it amounts to murder even if it is held that fatal injury was caused in sudden quarrel and without any premeditation yet it cannot be held that the offender did not act in cruel manner or did not take advantage over the deceased—There was no resistance from the deceased or anybody from his side—In the circumstances, there is no ground to interfere with the conviction for murder. *Shahidulla @ Shahid & ors. Vs. State 1985 BLD (AD) 10.*

(19) Exception I:—The expression "Provocation"—Explained—Victim's remarks calling the accused "Chotolok"—Whether "provided any provocation and whether the accused was deprived of his power of self control by such provocation". Suffice it to say that "provocation" contemplated in Exception No. 1 shall not only be 'grave' but also it shall be sudden, and if considerable time intervenes in which the passion aroused by the provocation subsides then there is hardly any scope for deprivation of power of self-control. In this case, the provocation given by the remark "Chotolok" was not directed at the principal assailant, H. Secondly, a considerable time elapsed between the remark and the assault. Be that as it may, in view of the nature of the act of causing death, we are clearly of the view that this act does not constitute murder but constitutes culpable homicide not amounting to murder' punishable under Part 1 of Sec. 304 of the Penal Code. *Khan Abdul Hafiz & anr. Vs. the State 5 BSCD 40.*

(20) Exception 2:—Private Defence—In a case covered by Exception No. 2 'intention' is there, but the intention is not to do "more harm than is necessary for the purpose of private defence". *Abdul Khaled Biswas & anr. Vs. The State 5 BSCD 40.*

(21) Per Shahabuddin Ahmed. J:—The prosecution relied upon the suo motu FIR lodged by the Investigating Officer in which a reference was made to the effect that had received a report of post

mortem examination which antimortem and homicidal in nature—But the FIR itself is inadmissible in that neither the person who lodged and recorded it was examined as a witness nor any other person was examined to say that he had seen the FIR being written by the Investigating Officer or he knew the I.O's handwriting—In the circumstances, it was highly improper on the bar of the trial Court to hold death of the victim was "murder" or calpable homicide as defined in sec. 300 and 299 of the Penal Code. *Keshab Chandra Mistry and ors. Vs. The State. 1985 BLD (AD) 301=BCR 1985 (AD) 298.*

(22) Acquittal of the accused-respondents of a charge of murder on the ground of insufficiency of evidence and improbability of the prosecution—The victim died from the kick of the principal; accused who was charged with murder but the essential ingredients of murder, such as guilty intention, or guilty knowledge within the meaning of Sec. 300 are lacking—At best, the act of the accused in giving the fatal kick constitutes culpable homicide not amounting to murder punishable u/s. 304 Part II, PC in that the offender knew that the kick of the chest was likely to cause death of the victim—The principal accused since guilty u/s 304, Part II, PC the appeal against his acquittal set aide sentencing him to R.I. for 4 years and 6 months with fine. *Abdul Hakim Vs. Mokles Mridha and ors. 1986 BLD (AD) 178.*

(23) Prosecution is not bound to prove the motive of murder. *Gour Chandra Guha Vs. The State. 5 BSCD 40.*

(24) Culpable homicide—All murders are culpable homicides but all culpable homicides are not murder. Excepting the General Exceptions attached to the definition of murder an act committed homicide amounting to murder—If the criminal act is done with the intention of causing death then it is murder clear and simple—If death is the likely result of the injuries it is culpable homicide not amounting to murder; and if death is the most likely result, then it is murder. *The State Vs. Tayed Ali & ors. 1987 BLD (AD) 265=1988 40 DLR (AD)6=BCR 1987 AD 312.*

(25) Murder—Applicability of Exception—Delay in the death of the victim, whether brings the case to be one under the exception—The mere fact that the victim luckily survived for two weeks on account of treatment is no ground to put premium of the offence committed by the accused—There having been no material on record to sustain the contention that the case is covered by Exception homicide not amounting to murder. *Md. Abdul Majid Sarker Vs. The State (1988) 40 DLR (AD) 83=1988 BLD (AD) 71.*

(26) Culpable homicide—Culpable homicide is committed by an act not only done with the intention of causing death but also with the knowledge that death is likely to be caused thereby. To hurl a fala at the chest of a person is certainly an act done either with the guilty intention or with the guilty knowledge as defined in law. *Esarudin Mondal Vs. Abdus Sobhan Sarker (1976) 28 DLR 341.*

(27) Death caused by a solitary stab wound with small knife when does not amount to murder. Medical evidence describing the injury as sufficient in the ordinary course of nature to cause death does not necessarily mean that the injury was caused with the intention or knowledge to cause death. Solitary injury caused on the arm of the deceased by a small knife and abstention from repeating attacks rules out accused's intention to cause death or knowledge that death would be caused. *Addl. Advocate-General, Karachi Vs. Md. Siddique (1969) 21 DLR (WP) 190.*

(28) Words "bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death" appearing in section 300 (Thirdly) is the amplification of the second ingredient of culpable homicide given in section 299 namely "or with the intention of causing such bodily injury as likely to cause death". Clause (Thirdly) of section 300, P.C. actually appears to be an amplification of the

second ingredient of culpable homicide given in section 299, P.C. *Addl. Advocate-General, Karachi Vs. Md. Siddique, (1969) 21 DLR (WP) 190.*

(29) The evidence is that the bickering between the victim and her mother-in-law was a chronic affair and it was not for the first time that the quarrels have caused the loss of self-control so to entitle the accused to the benefit of grave and sudden provocation. *Abdullah Shaha Vs. The State. (1968) 20 DLR (WP) 64.*

(30) Accused seeing his uncle's wife and deceased making love lying on same bed, causing fatal injuries resulting in the death of the victim. Held: It is a case of grave and sudden provocation. In the facts of evidence it is not possible to avoid the conclusion that fatal injuries to the deceased were caused by the appellant in a fit of grave and sudden provocation bringing his case under Exception 1 to section 300. *Muhammad Sadiq Vs. State, (1966) 18 DLR (WP) 34.*

(31) Accused, an old person of 60—Provocation by boy of 17—Exchange of abuse between accused and boy—Accused killing boy with knife blows. Held: In oriental way of life, the authority of age is a tangible factor in social affairs. There is a degree of provocation to the older person appearing in such behaviour by the young boy which would naturally lead to loss of temper and even perhaps, a resort to violence by way of chastisement. *Abdur Rahim Vs. State (1961) 13 DLR (SC)1.*

(32) Provocation which will make the exception applicable—Defence duty to prove the nature of altercation. The evidence discloses that there was an altercation between the deceased and the accused before the assault on the deceased was made and it was thereupon contended that there was a sufficient provocation to the accused to bring his act within the Exception 1 to section 300, P.C. Held: The factum of a mere altercation cannot suffice to bring the said exception into operation. To that end it is necessary to show the exact nature of the altercation. It is well-settled that in order to entitle one to the protective benefit of this exception if has to be distinctly shown not only that the act was done under the influence of some feeling which took away from the person doing it under all control over his action but that feeling had an adequate cause. *State Vs. Darajuddin Mondal 13 DLR 256.*

(33) Going at night armed and with suspicion in search of sister (or wife) and finding the latter in compromising position with a man and then killing both—Plea of grave and sudden provocation, a valid plea. *Muhammad Saleh Vs. State (1965) 17 DLR (SC) 420.*

(34) Provocation—Plea of—Where evidence of provocation is present in a case, irrespective of the fact whether the defence took notice of it or not, the Judge must direct the injury to return a verdict of manslaughter if he finds that the killing was due to provocation. *Jaseph Bullard Vs. Queen (1958) 10 DLR 174.*

(35) Provocation—Provocation and act done in consequence thereof must bear reasonable relationship. *1951 PLD (Lah) 318.*

(36) Grave and sudden provocation—Accused's wife outraged by deceased—Wife escaping and informing her husband, a police constable—Accused going and shooting dead the assaulted—Accused's act purely one of punishing the deceased—Accused, held guilty under section 304, P.C. *1950 PLD (Lah) 109.*

(37) Sudden quarrel—Injury on head caused with heavy hatchet—Skull fractured into twelve pieces—Intention—Offence is murder. *1950 PLD (Lah) 90.*

(38) When right of private defence extends to the causing of death of the person making the assault. Right of such defence merely on the existence of circumstances entitling to it. A victim who is subject

to an assault which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault, to the voluntary causing of death or of any other harm to the assailant. In the case of a right of private defence even if the defence had failed to prove affirmatively that there existed circumstances which entitled him to a right of private defence but succeeded in proving merely the circumstances which were likely to give rise to a right of private defence, it is enough and the accused are entitled to acquittal if they have not exceeded their right of self defence. *Jalal Ahmed Vs. The State, (1969) 21 DLR 164.*

(39) Taking undue advantage or acting in a cruel manner. Whether a person can be said to have taken undue advantage or acted in a cruel manner depends upon the circumstances of each particular case, and no general formula can be involved which may be applicable to all cases that may arise. The principle, however, is clear that where a man being dangerously armed fights under an unfair advantage , the killing is murder and not merely manslaughter, even though mutual blows pass. If in the course of a sudden fight one party resorts to a dangerous weapon, like a knife or a dagger, the other party being wholly unarmed, and causes moral injuries to his adversary, the offence committed is nothing but murder. *Abdul Majid Vs. Crown (1955) 7 DLR (FC) 11.*

(40) Where there is nothing in the case indicating that the accused acted otherwise than as the circumstances would render natural i.e., that under the pressure of the hopeless situation in which he found himself, he struck with the knife with object of relieving himself from the threat of serious injury to himself, in a predicament of such a nature the trapped man cannot be reasonably said to have taken undue advantage of *Abdul Majid Vs. Crown (1955) 7 DLR (FC) 11.*

(41) The word "cruelty" as used in Exception 4 to section 300 carries its ordinary sense of the heartless use of force to cause injury to a person who has no power of resistance. *Abdul Majid Vs. Crown (1955) 7 DLR (FC) 11.*

(42) Where the eye-witnesses without exception said that immediately after the verbal quarrel the accused and the deceased grappled with each other and then the accused struck the deceased with a knife, the offence committed did not amount to murder, but culpable homicide not amounting to murder being covered by Exception 4 to section 300, P.C. *Abdul Majid Vs. crown (1955) 7 DLR (FC) 11.*

(43) The offence may be unpremeditated and may also have been committed in a sudden quarrel, but an attack by three assailants on a single-handed unarmed victim in which one of the assailants struck the victim with a sharp-edge weapon which went right through his body and caused his death was cruel and unusual in the circumstances of the case. *1950 PLD (Lah) 182.*

(44) Ingredients which must be satisfied to attract the provisions of exception 4 of section 300 P.C. To attract the provisions of Exception 4 of section 300 P.C. it is not enough to establish that the attack was unpremeditated and that the act was committed in the heat of passion. It has no be proved further that the act committed was the result of "sudden fight" without the offenders "having taken undue advantage" over the victim. Besides, it must also be proved that the offender did not act in a cruel and unusual manner. Before an accused can pray in aid of the provisions of Exception 4 of section 300 P.C. all its ingredients must be satisfied. *Ekram Hossain Vs. State (1961) 13 DLR 431.*

(45) Sudden fight—Sec. 300, Exception 4—"Sudden fight" must be done to which person responsible for causing death was a party. *1955 PLD (Lah) 356.*

(46)The weapon used was a lethal one and the injury grave in nature was caused on the vital part of the body. The act was done with the intention of causing such bodily injury intended to be inflicted

as was sufficient in the ordinary course of nature to cause death. It falls clearly within the 1st, 2nd & 3rd clauses of section 300, Penal Code. *Md. Abdul Majid Vs. State 40 DLR (AD) 83.*

(47) The present case is covered by the exceptions to the section 300 of Penal Code. From the facts and circumstances of the case, we think that the criminal acts of the accused respondents which resulted in the death of the victim constitute culpable homicide not amounting to murder punishable under section 304, Part I of the Penal Code. On a consideration of the facts and circumstances of the case, it appears that the case is covered by exception-1 to section 300 of the Penal Code and accordingly the conviction of the appellants is altered form section 302 to 304, Part I of the Penal Code and the sentence of each of the appellants is reduced to RI for 10 years each thereunder. *Momin Malitha Vs. State 41 DLR 37.*

(48) Appellant cannot be convicted and sentenced under section 302 as the alleged offence comes within the ambit of Exceptions 1 and 4 section 300 of the Penal Code. From the evidence on record, it transpires that there was quarrel and golmal over the fencing on the disputed land and also altercation took place on the day of occurrence between the parties over removal of the fencing which ultimately culminated into a 'maramari' causing thereby bleeding injury on the person of the appellant's son Kalu on one hand and the death of victim Abdul Karim on the other. Besides, the injury on the person of the son of accused Momin Malitha could not be explained away by the prosecution. It also appears that the accused had no undue advantage in the matter. Be that as it may, on a careful consideration of the facts and circumstances of the case and the evidence on record and also the relevant provisions of law, we are of the view that the alleged offence committed by this appellant Momin Malitha comes within the ambit of the Exceptions 1 and 4 of section 300 of the Penal Code and as such this appellant cannot be convicted and sentenced under section 302 of the Penal Code. *Momin Malitha Vs. State 41 DLR 37.*

(49) Murder—Right of private defence—In the case of right of private defence of property one accused of murder must prove that the property in question was his property. When upon evidence it is found that the primary object of the accused was to make a forcible attempt to snatch away the paddy of the informant party question of defending such right cannot arise. It was nowhere suggested that the informant party carried any weapon or made any kind of assault on the accused while, on the other hand, the accused were found to have been armed with lethal weapons. In this case there was certainly premeditation on the side of the accused without which he would not have come armed with lethal weapons. *Dilip Vs. State 43 DLR 269.*

(5) Culpable homicide—The injuries, though caused intentionally, are of such a nature that these are "likely to cause death" and this does not constitute murder'—It constitutes culpable homicide not amounting to murder. *State Vs. Montu 44 DLR (AD) 287.*

(51) When the victim went to bed with her husband and was found subsequently dead there, he bears a serious obligation to account for her death. *Abdus Sukur Mia Vs. State 48 DLR 228.*

(52) When all that the accused intended was to strike his wife and the strike by mistake hit their newly born baby which had led to the killing, such of the accused falls within the purview of exception 1 of section 300. *State vs Abdul Howlader 48 DLR 257.*

(53) As there is a possibility that before the occurrence there might have been some sort of altercation between the accused and the deceased or loss of temper by the accused, it cannot be held that it was a premeditated murder. *State vs Abdul Khaleque 46 DLR 353.*

(54) The word murder appearing in section 396 of the Penal Code and the word murder appearing in section 300 of the Penal Code is not the same thing. In section 396 the liability of commission of

murder is conjoint while commission of murder as defined under section 300 is absolutely an individual liability. *Arzan @ Iman Ali Vs. State 48 DLR 287.*

(55) Accused Abdul Aziz Mina has acted in a cruel and unusual manner and also took undue advantage in inflicting 4 knife blows on the person of victim Jalal which ultimately caused his death. Therefore, the offence as committed by accused Abdul Aziz Mina does not in any way attract the provision of Exception 4 of section 300 but attracts the provision of section 300 that it is a voluntary infliction of knife blows with the intention of causing death and as such accused Abdul Aziz Mina cannot escape the liability of causing homicide amounting to murder. *Abdul Azia Mina and others Vs. State 48 DLR 382.*

(56) Grave and sudden provocation—Deprivation of the power of self-control—Test of grave and sudden provocation—The test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which the accused was placed, can be so provoked as to cause loss of its self-control—Provocation must be such as will upset not merely a hasty, hot-headed and hypersensitive person but would upset also a person of ordinary sense and calmness—Provocation contemplated by Section 300 of the Penal Code should be of such a character as to deprive the offenders of self-control *Majibar Rahamn Vs. The Sate 3 BLD (HCD) 145.*

(57) Culpable homicide—When it amounts to murder—Even if it is held that the fatal injury was caused in a sudden quarrel and without any premeditation yet it cannot be held that the offender did not act in a cruel manner and did not take advantage over the deceased—There was no resistance from the deceased or anybody from his side—In the circumstances there is no ground to interfere with the order of conviction for murder. *Shahidullah alias Shahid and others Vs. The State 5 BLD (AD) 10.*

(58) Culpable homicide when not murder—Culpable homicide is not murder if it is committed without any premeditation in a sudden fight in the heat of passion, upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. *Bandez Ali alias Md. Bandez Ali Vs. The State 6 BLD (AD) 5.*

(59) Murder—All murders are culpable homicides but all culpable homicides are not murders—excepting the general exceptions attached to the definition of murder and committed either with certain guilty intention or with certain guilty knowledge constitutes culpable homicide amounting to murder—If the criminal act is done with the intention of causing death then it is murder clear and simple—If death is the likely result of the injuries, it is culpable homicide not amounting to murder but if death is the most likely results, then it is murder. *The Sate Vs. Tayeb Ali and others 7 BLD (AD) 265.*

(60) Murder and culpable homicide—Plea of exception on the ground of grave and sudden provocation—When not tenable—The defence did not even produce any medical certificate to show the nature of the injury received by the accused and there was no suggestion that the appellant was assaulted by any one to rouse provocation in him—There is no reason to reduce the offence to one of culpable homicide not amounting to murder as he acted in a cruel manner. *Md. Humayun Kabir Vs. The State 7 BLD (HCD) 338.*

(61) Murder—Question of applicability of exception—Whether delay in the death of the victim brings the case under the exception—The mere fact that the victim luckily survived for two weeks on account of treatment is no ground to put a premium on the offence committed by the accused—There being no material on record to sustain the contention that the case is covered by exception, there is no reason to consider that the offence is homicide not amounting to murder. *Md. Abdul Majid Sarkar Vs. The State 8 BLD (AD) 71.*

(62) When it is clear form the evidence that the free fight between the parties took place following an altercation it stands out that death of the victim was caused without any premeditation in a sudden fight in the heat of passion and without the offenders having taken undue advantage or acted in a cruel or unusual manner. This attracts Exception 4 of section 300 of the Penal Code and brings the case u/s 304 Part 1. *Abul Kalam Azad Vs. The State, 14 BLD (HCD) 401.*

(63) As the incident took place as a result of election rivalry and each of the accused dealt only one blow for which it cannot be ascertained by which blow death was caused, the offence comes under section 304 Part 1 of the Penal Code instead of section 300. *State vs. Abdul Hye Miaj and others (Criminal) 1 BLC 125.*

(64) As the appellant assaulted the brother of the deceased who along with others went to take revenge on the appellant and there were scuffles between the appellant and Moktar, the deceased and out of fear of retaliation the appellant gave one knife blow only to free himself from Moktar and ran for safety which became fatal to Mokhtar but the conduct of the appellant is preventive and not retributive satisfying the legal requirement of the right of private defence. *Ruhul Amin Mondal vs. Stage (Criminal) 1 BLC 281.*

(65) Section 304-A relates to causing death by a rash or negligent act and expressly excludes form its purview "culpable homicide". Hence, the offence under S. 304A is not "culpable homicide". *(1881) ILR 3 All 776.*

(66) The provisions relating to murder and culpable homicide are probably the most complicated in the Penal Code and are so technical as frequently to lead to confusion. *AIR 1944 Bom 274.*

2. Culpable homicide and murder—Distinctions.—(1) A murder is merely a particular form of culpable homicide. Every murder is culpable homicide but not vice versa. *1972 CriLJ 1416 (Culpable homicide is genus and murder its specie).*

(2) Every act falling within S. 299 and not falling under S. 300 is culpable homicide not amounting to murder. *AIR 1966 SC 148.*

(3) What distinguishes culpable homicide from murder is the presence of special mens rea which consists of four mental attitudes stated in S. 300. Unless the offence can be said to involve at least one such mental attitude it cannot be murder. *AIR 1966 SC 1874.*

(4) When the injury is intentional and sufficient to cause death in the ordinary course of nature and death follows, the offence is murder. *AIR 1966 SC 148.*

(5) Where the intention of the accused was not to kill the deceased outright but to inflict injuries on his legs and arms so as to disable him, but the accused had the knowledge that the injuries would be likely to cause death of the deceased, the accused was convicted under S. 304, Part I and not under S. 302. *AIR 1956 SC 654.*

(6) The difference between clause (b) of Section 299 and clause (3) of S. 300 is one of the degree of probability of death resulting from the intended bodily injury. The word 'likely' in cl. (b) of S. 299 conveys the sense of 'probable' while words 'sufficient in the ordinary course of nature to cause death' in S. 300(3) convey that death will be most probable. *AIR 1977 SC 45.*

(7) It is the knowledge of the very dangerous character of the act and the running of the risk with out any excuse that aggravates the offence. *AIR 1968 SC 881.*

(8) Where, the knowledge extends only to a lesser degree of the injuries being likely to cause death the offence would be culpable homicide not amounting to murder. *AIR 1968 All 151.*

(9) If there was no intention to kill, then it can be murder only if—(a) the accused knew that the injury inflicted would be likely to cause death, or (b) that it would be sufficient in the ordinary course of nature to cause death, or (c) that the accused knew that the act must in all probability cause death. If the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under S. 304, Part II. *AIR 1956 SC 116.*

(10) The correct approach is to determine first whether the facts proved bring the case under any of the 4 clauses defining murder. If they do not come under the definition of murder, then the offence would be culpable homicide not amounting to murder under Sec. 299 and punishable under S. 304. If the facts come within the definition of 'murder' then the Court must determine whether facts come under any of the exceptions under S. 300. If they do, the offence would still be culpable homicide not amounting to murder under Section 299. *AIR 1977 SC 45.*

(11) A causes death by doing an act with the intention of causing death. This is culpable homicide, which (if the exceptions to S. 300 do not apply) amounts to murder. *AIR 1967 Goa 11.*

(12) A causes death by doing an act with intention of causing only bodily injury. The injury happens to be one which is likely to cause death but the culprit does not know this. This is culpable homicide not amounting to murder. *AIR 1968 SC 867.*

(13) A causes death by doing an act with the intention of causing only bodily injury but he knows that the injury is likely to cause the death of the person to whom the harm was done. This is murder. *AIR 1960 Andh Pra 141.*

(14) A causes death by doing an act with the intention of causing only bodily injury but he does not know that it is likely to cause death. The injury is, however, so serious that it is sufficient, in the ordinary course of nature to cause death. This is murder. *AIR 1955 Andh Pra 24.*

(15) A causes death by doing an act without intending to cause death or any bodily injury, but with the knowledge that he is likely by such act to cause death. This is culpable homicide not amounting to murder. *AIR 1968 SC 1390.*

(16) A causes death by doing an act with the intention of causing bodily injury which is likely to cause death but he does not know that he is likely to cause death. Nor is the injury such as can be said to be sufficient in the ordinary course of nature to cause death. This is not murder but only culpable homicide not amounting to murder. *AIR 1916 Bom 191.*

(17) Accused forming unlawful assembly with others and attacking opposite party—Lifting a child of 4 years and throwing him on ground—Child dying—Intention to kill child absent—Weapon though available not used—Throwing not with intention to cause any particular injury to child—Held, it was culpable homicide and not murder. *AIR 1983 SC 529.*

(18) Accused young college-going boy—Some altercation between his father and deceased—Accused inflicting one single blow—death occurred after six days—In the circumstances, Held, that the accused at the most could be attributed the knowledge that he was likely to cause an injury which was likely to cause death—Accused therefore liable to conviction only u/s. 304, Part II. *AIR 1982 SC 55.*

3. "Whoever causes death".—(1) The first stage in an inquiry into an alleged offence of culpable homicide is to see whether the accused has done an act by doing which he has "caused" the death of another person. *AIR 1979 SC 1876.*

(2) The expression "causing death" means putting an end to human life. *AIR 1920 Mad 862.*

(3) Where the accused has done an act and death can be said to have been caused thereby the accused will be deemed to have caused the death. *AIR 1937 Rang 396.*

(4) Before an act of the accused can be said to have caused death, it is necessary to show: i. That there is a direct and distinct connection between the act and the death, and ii. That the connection is not too remote. *AIR 1971 Mad 259.*

4. "Death".—(1) Death is the main ingredient which constitutes culpable homicide. The other necessary ingredient is the presence of one of the kinds of mens rea referred to in S. 299. If none of the elements of mens rea is present the offence is not culpable homicide. *1971 K\erLJ 182.*

(2) The words "human being" are not defined in the Code but obviously mean a "being belonging to the race of mankind". Where the accused assaulted a man believing him in good faith to be a ghost and the assault proved fatal it was held that he was guilty neither under S. 302 nor under S. 304. *AIR 1943 Pat 64.*

5. Child in mother's womb—Expl. 3 to S.299.—(1) Under the Explanation 3 to S. 299 complete emergence of child form the womb is not necessary. Even if any part of the living child has been brought forth, the causing the death thereof is homicide though the child may not have breathed or been completely born. *AIR 1940 Mad 294.*

(2) It was necessary that the child should have breathed after it had wholly or partially emerged from the mother's womb. *AIR 1916 Lah 184.*

6. Direct and distinct connection.—(1) The test to determine whether the accused has "caused" death is to see whether the cause of death is directly associated with the act.*(1980) 82 Pun LR 8.*

(2) Where injuries are inflicted on the deceased by the accused and the injuries set up, without the intervention of any considerable change of circumstances, blood-poisoning or tetanus or pneumonia or gangrene which may be the ultimate cause of death, it cannot be said that the act done by the accused is not the direct cause of death. *AIR 1968 Guj 296.*

(3) Although the injury inflicted may not be the direct cause of death, nevertheless, under Explanation 2 to S. 299, the person who caused the injuries must be held to have caused the death. *AIR 1936 Rang 526.*

(4) Where the injury is not the direct cause of death the question whether the treatment was proper or not does not arise in such cases, provided it was administered bonafide by a competent physician or surgeon. *AIR 1936 Rang 442.*

(5) The connection between the primary cause and the death should not be too remote. *AIR 1964 SC 900.*

(6) Where a person receives injuries on the head, but progresses well in the hospital and after a month and a half, when he had left the hospital, develops pneumonia and dies, it cannot be said that the injury caused was the cause of death. *AIR 1924 All 441.*

(7) Where the act of the accused ultimately causes the death of the victim, the accused will be guilty of causing the death and it makes no difference whether the act is in its own nature instantly mortal or whether it becomes the cause of death by reason of the deceased not having adopted the best mode of treatment. *AIR 1940 Mad 293.*

(8) The fact that the death could have been prevented by proper treatment cannot exonerate the accused from criminal liability. *AIR 1937 Rang 396.*

(9) The idea, that the victim of a murderous assault must take such great care of his health that he does not by any neglect or omission on his part hasten the advent of his death, is not countenanced by any provision of the Code. *AIR 1934 Oudh 405(409): 35 CriLJ 1113.*

7. Obscure cause.—(1) If a man by working on the fancy of another or by unkind usage puts another in such a passion of grief or fear that the party dies or contracts some disease whereof he dies it cannot be said that there is a direct and distinct connection between the act of the accused and the death. *Hale, PC, 429.*

8. "By doing an act".—(1) There was a preconceived plot on the part of the four accused to bring the deceased man to a hut and there to kill him, and then to fake an accident, so that the accused should escape the penalty for their act. The deceased man was brought to the hut. He was there treated to beer and was at least partially intoxicated, and he was then struck over the head in accordance with the plan of the accused. The deceased was unconscious after receiving the blow, but he was not then dead. The accused believing that he was dead, took out the body, rolled it over a low krantz or cliff and dressed up the scene to make it look like an accident. It was held that the crime was not reduced from murder to a lesser crime merely because the accused were under some misapprehension for a time during the completion of their criminal plot. *(1954) 1 All ER 376.*

9. 'Act' if includes illegal 'omission'.—(1) A, a young unmarried woman, became pregnant and her mother B did not take care to procure a midwife at the time of deliver and A died as a consequence of the want of such assistance; it was held there was no legal duty on the part of the mother to call in a midwife in the absence of proof that B had means to pay to midwife. Consequently, B was not guilty of manslaughter. *(1862) 31 LJ MC 102.*

(2) If a child is completely born and during such separate existence, is neglected by its mother and dies in consequence, its mother is guilty of manslaughter. *(1947) 48 CriLJ 605.*

10. Attack by several persons.—(1) Where several persons jointly attack the deceased and cause his death, all of them would be equally guilty of causing the death although it may not be possible to prove which of them inflicted the fatal blow, if they can be brought within Ss. 34, 35, 37 or 149. *AIR 1951 All 21.*

(2) Where it is proved that each of several persons caused an injury which was sufficient in the ordinary course of nature to cause death, each would be liable for murder. *AIR 1973 SC 2699.*

(3) Where, in the absence of proof of a common intention to murder, it is not established which of several persons committed murder and which the lesser offence, none of the accused can be held guilty of murder. *AIR 1972 SC 2462.*

(4) If one person is engaged in murderously beating another to death and cause injury which is sufficient to cause death and a stranger, without sharing the common intention, was to rush in and add some more blows so that the victim's death was more speedily brought about, then it is a case where both would be guilty of murder and the first man cannot be allowed a defence that it was the second assailant's stroke that finally ended the victim's life. *AIR 1958 Orissa 113.*

(5) Two persons attacking deceased—Deceased receiving one blow on head and dying—No evidence which person gave that blow—No conviction u/s. 304 but u/s. 325. *AIR 1965 Cal 89.*

11. Sections 34 and 300.—(1) It is no doubt possible for a single act to be done by several persons, as where they all lift a heavy stone and drop it on a person, but ordinarily several persons may do several acts, and S. 34 may be taken to deal with the doing of separate acts, similar or diverse by several persons in furtherance of the common intention. *AIR 1977 SC. 710.*

(2) Where a criminal act is done by several persons, the sole test of joint responsibility for the crime is the existence of a common intention. Such intention must therefore be proved as also the fact that the act was done in furtherance of the common intention. *AIR 1954 Hyd 54.*

(3) Whethre or not a criminal act is done in furtherance of a common intention is not a matter of legal presumption but is a question of fact. *AIR 1935 Rang 89.*

(4) Where the accused caught hold of deceased and scuffled with him while another accused took out knife and commenced assault but there was no evidence that the accused continued to hold the deceased till the assault was complete it could not be inferred that accused shared intention of another accused to murder the deceased. *AIR 1982 SC 1228.*

(5) Whether a criminal act is done in furtherance of common intention is to be inferred from the facts and evidence. *AIR 1978 SC 1492.*

(6) The evidence must be taken as a whole and the surrounding circumstances considered in finding whether there was a common intention and what was the common intention. *AIR 1935 Rang 89.*

(7) If on consideration of evidence as a whole and the surrounding circumstances, a common intention to kill is established, then all be guilty of murder. *AIR 1935 Rang 89.*

(8) The common intention referred to in S. 34 presupposes 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. The common intention may be inferred from surrounding circumstances and the conduct of the parties. *AIR 1955 SC 331.*

(9) An inference of common intention can be drawn where all or some, to the knowledge of all engaged in an unlawful enterprise e.g., robbery, are proved to have carried lethal weapons which have been used with fatal effect. *AIR 1971 SC 1112.*

(10) It is not necessary that there should be an express agreement between the persons concerned. *AIR 1935 Rang 89.*

(11) Where a murder is pre-arranged between several persons all are guilty though one of them actually causes the fatal injury, like shooting, etc. *AIR 1955 SC 331.*

(12) It is not necessary to make out premeditation in order to establish common intention at the moment of action. *AIR 1937 Nag 335.*

(13) The common intention may well develop on the spot between a number of persons. *AIR 1972 SC 2555.*

(14) Where one of several persons expresses his intention of causing the death of deceased and all of them then continue to take part in the criminal acts resulting in the death of the deceased, the inference is clear that the common intention was to murder the deceased. *AIR 1978 SC 1529.*

(15) Where the accused gives direction to his comrades to fire indiscriminately against the members of the hostile group he would be guilty if his direction brings about a shooting and death of any one or more out of the members of the hostile group. *AIR 1956 SC 177.*

(16) Accused in pursuance of prior concert to attack driver and cleaner of a truck coming in two trucks—Driver fatally attacked by accused coming in one truck while cleaner attacked by others coming in another truck—Accused attacking cleaner could be convicted for murder of driver under S. 300 with the aid of Ss. 34 and 149. *AIR 1981 SC 648.*

(17) If there was no common intention to cause death to the deceased but a fatal blow is struck by one of the several persons with such intention springing from his mind only, the other person are not within S. 34 and are not consequently liable for the murder. *AIR 1979 SC 1534.*

(18) Where A was charged under S. 302 read with S. 34 for having shared the common intention off our named persons and for having participated in the crime and the four persons were all acquitted, it was held that the element of sharing a common intention with the four persons disappeared and A could not be convicted with the aid of S. 34. *AIR 1977 SC 710.*

(19) Where one or some of several persons have the intention to murder but the person inflicting the fatal blow brings himself within any of the exceptions to S. 300, it cannot be any of the exceptions to S. 300, it cannot be said that there is a common intention to murder. *AIR 1940 Cal 147.*

(20) If the common intention is to commit one crime and another crime is committed by one of them, the other cannot be charged and convicted of the latter crime under S. 34. *AIR 1954 SC 706.*

(21) Where injury resulting in death has been caused by one or more of several persons and it cannot be said which of them caused it, all can be convicted only by the application of S. 34 or S. 149 or as abettors. *AIR 1938 Pat 258.*

(22) Several accused firing at deceased. There out of 5 shots fired hitting deceased. Held that in the absence of evidence to show that there was common intention to cause death or such injury as was likely to cause death none of the accused persons can be convicted under S. 304 or under S. 302. *AIR 1941 Mad 746.*

(23) Where the common intention to cause death is present it makes no difference that the Court cannot decide at what precise point in the course of the series of acts of violence the death took place. *AIR 1941 Pat 550.*

(24) A common intention to commit murder under certain circumstances is not sufficient to justify a finding that the accused and his companions had at the time of the actual occurrence the common intention of murdering the person. It will be necessary to consider what happened immediately before the act causing death. *AIR 1935 Cal 526.*

(25) Where the accused held the legs of the deceased under threats of instant death while others killed him, the accused cannot necessarily be said to have any of the intentions necessary to make him liable for the offence of murder. *AIR 1957 All 184.*

12. Sections 149 and 300.—(1) The liability under this section is a vicarious one. *AIR 1972 SC 2555.*

(2) Except under the provisions of this section a member of the unlawful assembly cannot be made liable for the offence committed not by him but by another members of that assembly. *AIR 1955 SC 274.*

(3) Where the common object is to commit murder, the fact that there is no proof as to who caused the fatal blow does not affect the liability of all the members of the unlawful assembly for the murder. *AIR 1973 SC 486.*

(4) If the offence committed by a person is in prosecution of the common object of this unlawful assembly or such as members of that assembly knew to be likely to be committed in prosecution of the common object, every member of this unlawful assembly would be guilty of that offence although there may have been no common intention and no participation by the other members in the actual commission of that offence. *AIR 1955 SC 274.*

(5) Sections 34 and 149 have a certain resemblance and may to a certain extent overlap, but S. 149 cannot at any rate relegate Sec. 34 to the position of dealing only with joint action by the commission of identically similar criminal acts , a kind of case which is not in itself deserving of separate treatment at all. *AIR 1925 PC 1.*

(6) It is improper to convict accused persons under S. 302 read with S. 34 by holding that "if a number of persons assault another with a strike mercilessly their intention can only be to murder that man or at least they should know that they are likely to cause death of the person concerned". This aspect of their being likely to cause death would be relevant under Section 149 and not under S. 34 for the obvious reason that under S. 34 it has to be established that there was the common intention before the participation by the accused. *AIR 1971 SC 1444.*

(7) Where, in pursuance of the common object of an unlawful assembly, A commits the offence of murder of B, A, and all the members of the assembly would be guilty of the same offence by virtue of S. 149 of the Code. *AIR 1973 SC 486.*

(8) Where the members of the unlawful assembly knew that a murder is likely to be committed in pursuance of the common object, every member of the assembly would be guilty of murder. *AIR 1961 SC 1541.*

(9) When the common object is not as high as murder but only to rescue certain persons from the lock-up, all the members would be guilty of murder as the use of violence is implied in the object and they must have known that murder is likely to be omitted. *AIR 1956 SC 241.*

(10) The distinction between the first part of S. 149 and the second part of that section is this: the first part deals with all those offences which the members of the assembly can be said to have contemplated as being necessary to attain their common object. The second part deals with offences which the members could not have contemplated as being necessary to attain the common object, but which they knew would be likely to be committed. *AIR 1979 SC 1761.*

(11) Whether a common object, or the knowledge of the likelihood of a particular offence is proved in a particular case is a question of fact depending upon the way the attack was made, the protracted nature of the attack, the weapons used and other circumstances of the case. *AIR 1978 SC 1525.*

(12) Where a body of persons heavily armed set out to take a woman back, it may be held that the members of the assembly knew that murder was likely to be committed in prosecution of the common object and hence all will be guilty of murder if one of the parties commits murder. *AIR 1942 Lah 89.*

(13) Where a number of persons go armed with deadly weapons to attack a person or a party it may be assumed as a matter of commonsense that their common object was either to kill or to cause grievous hurt, or that the members of the assembly. *AIR 1953 All 189.*

(14) Where five or more persons assemble, armed with deadly weapons for striking any person who resist their acts and every one knows that the weapons may be used with deadly effect, all will be liable for the fatal injury caused by one of them. *AIR 1977 SC 1756.*

(15) Where there is no unlawful assembly at all at the time of offence there can be no conviction under Ss. 149 and 300. *AIR 1970 SC 27.*

(16) Perfectly lawful assembly may later on become a riotous mob and it may be that there may be a number of innocent persons therein. But as they are found in the mob of rioters the law will presume that they share the common object. *AIR 1934 All 776.*

(17) In cases of rioting, murder and arson the prosecution is not called upon to prove the part that each of the accused present took in the riot. It has only to prove that there was an unlawful assembly, that it committed murder, arson, etc., and that the accused was a member of the assembly. *AIR 1933 All 535.*

(18) Charge under Ss. 302/149 against 16 named persons—14 of them acquitted—2 cannot be convicted under Ss. 302/149. *AIR 1955 SC 274.*

(19) Ingredients of offence have to be made out by prosecution and not by accused. *AIR 1958 Pat 12.*

13. Sections 35 and 300.—(1) Where the common intention of A and B was to give only a beating to the deceased and not to kill him, but B uses a deadly weapon and A makes no attempt to prevent B form using it, a knowledge that death is likely to be caused can be inferred and both A and B would be guilty of murder. But if only fists were used or kicks administered, such knowledge could not be readily inferred. No hard and fast rule can be laid down on the subject. Each case will depend upon its own facts. *AIR 1949 All 342.*

(2) Where there was only a common intention to cause bodily injury and not death, but all persons taking part in the attack had knowledge that death was likely to be caused thereby, it was held that they all could not be convicted of murder. *(1912) 13 CriLJ 159 (All).*

14. This section and S. 396.—(1) A death caused by a dacoit in the course of dacoity would be murder, for the exceptions which mitigate the crime are inapplicable to the crime of dacoity. *(1971) All LJ 833.*

(2) If a dacoit in pursuance of and in the progress of the commission of a dacoity commits murder, all of the companions who are participating in the commission of the dacoity may be convicted under S. 396 although there may be no participation by them in murder beyond the fact of participation in the dacoity. *AIR 1954 Pat 109.*

15. Abetment and S. 300.—(1) Where two persons go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion, encouraging or promoting that death, will be guilty of abetting principal offender. *(1843-1845) 1 C&K 210.*

(2) Conspiring to kill—No evidence who dealt the fatal blow—All guilty of abetment of murder. *AIR 1930 Pat 164.*

(3) Accused ordering to beat—Death caused—Guilty of abetment of murder. *AIR 1928 Cal 752.*

16. "With the intention of causing death."—(1) Whoever causes death by doing an act with the intention of causing death is guilty of culpable homicide amounting to murder. *AIR 1958 SC 465.*

(2) Murder—Accused giving blow on head of deceased—5 injuries suffered by deceased on head region—Each injury caused blow intended to kill—Conviction of accused for murder—Valid. *AIR 1981 SC 1167.*

(3) A man's intention must, in the generality of cases, be gathered only from his acts. *AIR 1958 SC 672.*

(4) In deciding the question of intention of causing death, the nature of the weapons used, the part of the body on which the blow was given, the force and number of blows are all factors from which an inference as to the intention can, as a fact be, drawn. *AIR 1979 SC 1504.*

(5) Where the accused killed a woman under the conviction that she was a witch responsible for the illness of his wife and daughter, the intention to cause death is clear and the offence is murder. *AIR 1921 Pat 63.*

(6) Where the accused, believing a woman to be a witch, beat her by way of exorcising the spirit, and the woman died of the beating, it was held that the accused was guilty, not under this section but under S. 304 of the Code. *AIR 1918 Upp Bur 24.*

(7) Where an exorcist subjected a woman believed to be possessed by evil spirits to prolonged suffocation by smoke during the course of ritual, in addition causing burns by heat brought too near her

body and the woman died on account of the measures taken by the accused, it was held that the accused had to be credited with the knowledge that the measures taken by him were likely to cause death and could be convicted under S. 304, Part II and not under S. 302. *AIR 1964 Mad 480.*

(8) When the injuries are inflicted on vital parts of the body like the abdomen, etc., by a lethal or sharp-edged weapon the inference is generally irresistible that the culprit intended to kill the deceased. *AIR 1972 SC 2574.*

(9) Accused stabbing with considerable force in the middle of the back of the deceased so to penetrate spinal cavity—Held, accused intended to kill. *AIR 1958 Ker 207.*

(10) The fact that the injuries inflicted did, in fact, cause death will not justify the Court in reasoning backward from the result to an intention to cause the death. *AIR 1931 Cal 261.*

(11) When the accused causes injuries to the deceased with the intention of causing death, and believing him dead places him on a Railway line, but it is the train running over him that really causes the death, both the acts must be ascribed to the original intention of causing death had the offence will be murder. *AIR 1945 Pat 470.*

(12) Intention only to cause beating—Offence falls under S. 304. *AIR 1953 Punj 261.*

(13) Where there was a quarrel between the accused and the victim and the accused incensed by the situation gave blows on vulnerable part of the victim's body resulting in his death, the offence would not fall under Section 300. *AIR 1981 SC 642.*

17. Intention and knowledge.—(1) Intention and knowledge are alternative ingredients of both Ss. 299 and 300. *AIR 1943 Nag 145.*

(2) Intention and 'knowledge' are two different things. *AIR 1956 SC 488.*

(3) Intention and knowledge are not identical. *AIR 1960 Andh Pra 141.*

(4) Knowledge is an awareness of the consequences of an act. *AIR 1958 SC 488.*

(5) Knowledge, as contrasted with intention would more properly signify a state of mental realisation in which the mind is a passive recipient of certain ideas and impressions arising in it or passing before it. *AIR 1955 All 321.*

(6) In order to possess and to form an intention must be a capacity for reason. And when, by some extraneous force, the capacity for reason has been ousted, the capacity to form an intention must have been unseated too. But knowledge stands upon a different footing. Some degree of knowledge must be attributed to every sane person. *AIR 1940 All 486.*

(7) 'Knowledge' again has reference to the particular circumstances in which a person is placed. His intention must be judged, not in the light of the actual circumstances but in the light of what he supposed to be the circumstances. Thus, a man is not guilty of culpable homicide if his intention was directed to what he supposed to be a lifeless body or a ghost. *AIR 1926 Lah 554.*

(8) Intent and knowledge both postulate the existence of a positive mental attitude. *AIR 1976 SC 1519.*

(9) There may be knowledge without intention, as where a military commander orders his troops into action well knowing that many of them will loss their lives, but certainly not desiring and therefore not intending the consequence. *AIR 1956 SC 488.*

(10) The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences should ensue. Except in cases where mens rea is not

required in not order to prove that a person had certain knowledge, he must have been aware that certain specified harmful consequences would or could follow.' *AIR 1970 Raj 60.*

(11) A man will be presumed to intend the natural consequences of his act, or the consequences which he knows will result from his act. *AIR 1967 Goa 11.*

(12) In order to establish the mens rea of murder it is sufficient to prove that, when the accused performed the relevant acts, he knew that it was probable that those acts would result in grievous bodily harm to somebody, even though he did not derive to bring that result about, for that purpose, 'grievous bodily harm' meant "really serious bodily harm" and was not limited to harm of such a nature as to endanger life. *(1974) 2 All ER 41.*

(13) The proposition that a man will be presumed to intend the natural consequences of his act is not a proposition of law but a proposition of ordinary good sense. *AIR 1970 Raj 60.*

(14) The intention to cause death or the requisite knowledge cannot be assumed. *AIR 1955 NUC 1646 (Sau).*

(15) Where the accused held the legs of the deceased under threats of instant death while others killed him, it was held that the rule that the intention of the accused should be presumed from the natural consequence of his conduct did not apply and the accused could not be said to have any of the intentions necessary to make him liable for the offence of the murder. *AIR 1957 All 184.*

(16) Observations that intention can be presumed from knowledge or that knowledge can be presumed form the consequences and that the culprit was therefore guilty can be reconciled only on the assumption that in the particular case, the intention or the knowledge was found as a fact from the evidence and circumstances. *AIR 1943 All 344.*

(17) Questions of knowledge and intention are essentially questions of fact. *AIR 1950 Lah 169.*

(18) It is seldom that direct evidence of an intention or knowledge is forthcoming. *AIR 1945 PC 42.*

(19) 'Intention or knowledge' must be gathered only from the facts and circumstances of each case and recourse must be had to natural presumptions (i.e. presumptions of fact) which the Courts are entitled to draw. *AIR 1972 SC 2574.*

(20) The number of injuries caused is only one of the circumstances which the Court may take into account for coming to a finding about the intention or the knowledge of the offender. *AIR 1974 SC 1803.*

(21) Where the accused, following trivial quarrel gave a solitary blow of knife on chest to the deceased who was not a party to quarrel and there was no attempt to inflict second blow, the accused could not be said of having intention to cause that particular injury. *AIR 1983 SC 284.*

(22) The knowledge referred to in the section is personal knowledge of the culprit and cannot be shared by co-culprits. *AIR 1939 Oudh 207.*

(23) 'Knowing' means something more than having reason to believe. It implies a fact which can be known and imports knowledge of something actual by means of authentic or authoritative information although it does not import actual evidence of the sense. A person cannot know of a warrant of arrest unless it had actually been issued although he may have reason to believe that it was issued. *AIR 1944 PC 54.*

18. Act intended against one causing death of another.—(1) The intention of causing death does not mean the intention of causing death of any particular person. *(1912) 13 CriLJ 145.*

(2) Where several persons attack two men A and B but kill only B, whether their object was to get at A more than at B, or whether they went at B mistaking him for A, they will be taken to have intended to kill B. *AIR 1920 Bom 371.*

(3) Where there was no animosity between the accused and the deceased who attempted to intervene in the dispute between the accused and other persons, and a blow with barcha attempted on other person fell on the deceased and proved fatal the accused could not be said to have intention to cause that particular injury to the deceased which in fact was found to have been caused. *AIR 1982 SC 1466.*

19. "With the intention of causing such bodily injury as is likely to cause death."—(1) The "intention" referred to is an intention to cause bodily injury which is or happens to be an injury which is likely to cause death. *1937 Mad WN 556.*

(2) It is not the death itself not the effect of the injury that is required to be intended by the offender. *AIR 1940 Rang 259.*

(3) The question whether a bodily injury inflicted was one likely to cause death of the victim is one of fact to be decided by the court on the evidence and circumstances of the case. It will depend upon the part of the body on which the injury was inflicted, the nature of the weapon used, the force of the stroke, etc. *AIR 1978 SC 1420.*

(4) A stab on the thigh which is not a vital part of the body would not, for instance, ordinarily be considered to be an injury likely to cause death. But a blow on the head is one which is likely to cause death. *AIR 1928 Pat 169.*

(5) Where there were 24 injuries on the person of the deceased and 21 of them were incised and were either on his head or the neck or the shoulders and on the forearms and were caused with a deadly weapon, it was held that the accused must be fixed with the intention of causing such bodily injuries as were likely to cause death. *AIR 1958 SC 672.*

(6) A blow inflicted with a sharp-edged weapon with such violence as to sever the upper arm of a person is one which is intended to cause such bodily injury as is likely to cause death. *AIR 1938 Rang 156.*

(7) Accused fired gun at deceased causing wound in abdomen—No medical evidence that injury was cause of death—Offence under S. 326 and not under S. 300. *AIR 1954 J&K 19.*

20. "Devine influence."—(1) Where the accused cut a woman with a sword several times and spread hay round her when she was almost in unconscious state and set fire to the hay which resulted in the death of the woman and the accused pleaded that he was under a divine influence which made him do the act for the purpose of exorcising the devil possessed by the woman, it was held that the act of the accused came within the 4th clause of S. 300 and that the so-called divine influence could not be validly pleaded as a defence to what would otherwise be murder. *1937 Mad WN 93.*

(2) Where the parents of a child threw their child to crocodiles in the superstitious belief that it would be ultimately saved (having lost several children), it was held that it was culpable homicide not amounting to murder. It is submitted that the decision is not correct. It was found in the case that there was no intention to cause death but they had knowledge that it would be likely to cause death of the child. The case clearly falls within S. 300 2ndly. *AIR 1921 Cal 501.*

21. Insanity.—(1) A person who, thought of unsound mind knows that in killing another he is committing a wrongful act is not entitled to the benefit of S. 84 of the Code. *(1906) 4 CriLJ 88.*

(2) A person who has deliberately committed an act and knew very well that what he was doing was wrong cannot escape liability on the ground that prior to the crime he had shown signs of eccentricity. *AIR 1961 SC 998.*

(3) A person deliberately committing an act cannot plead fury. *AIR 1950 Mad 592.*

(4) The fact that the murder was committed for a very trivial reason does not by itself, proved insanity. *AIR 1979 SC 1828.*

(5) The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. *AIR 1964 SC 1563.*

(6) Whether the accused was in such a state of mind as to be entitled to the benefit of S. 84 can only be established from the circumstances which presided, attended and followed the crime. *AIR 1972 SC 2443.*

(7) It is for the accused who invokes the plea of insanity to establish that fact. *AIR 1966 SC 1.*

(8) There must be evidence to show that at material time accused was suffering from some definite or recognisable from of mental disease i.e. legal insanity. *AIR 1953 Pepsu 17.*

17. Motive ont essential for liability.—(1) Motive is something which prompts a man to form an intention. *AIR 1956 SC 488.*

(2) The element of motive is not a necessary ingredient of the offence of murder. *AIR 1973 SC 337.*

(3) The absence of motive or the inadequacy of it, on the other hand, is immaterial where there is direct, clear and convincing evidence of the crime. *AIR 1979 SC 1828.*

(4) Absence of motive is not sufficient to show that the accused was mad at the time he committed the offence. *AIR 1968 Orissa 223.*

(5) Motive of human action is inscrutable and is primarily known to the accused himself. *AIR 1955 NUC (Pat) 243 (DB).*

(6) It may not be possible for the prosecution in every case to explain the motive of the crime. *AIR 1955 Pepsu 81.*

(7) In a case of murder of wife by husband there are many considerations which have to be looked into and it is very difficult to know the exact motive. *AIR 1943 SC 1091.*

(8) When a murder case has to be rested on circumstantial evidence motive is of some importance. *AIR 1956 SC 411.*

(9) Where, no motive is proved the Court would be on its guard and scrutinise and weigh the evidence with particular care and caution. *AIR 1975 SC 118.*

(10) When the evidence against the accused is clear the Court need not consider the question of motive. *AIR 1975 SC 1252.*

(11) The absence of motive may also be material when the question of sentence is to be considered. *AIR 1952 Tripura 7.*

(12) Presence of motive for the crime is a circumstance against the accused. *AIR 1977 SC 472.*

(13) Presence of sufficient motive may, when evidence is equally balanced, afford a basis for holding the accused guilty. It may also help in proving the intention of the accused. *AIR 1978 SC 383.*

(14) Court should not first consider the evidence establishing motive for the murder. The proper course to adopt is to examine the evidence as to the commission of the crime. The motive may never be discovered, and the suggestion of a wrong motive may lead the Court astray. *AIR 1931 Oudh 119.*

(15) It cannot be assumed from the absence of motive that the accused acted in exercise of the right of private defence. *AIR 1947 Lah 244.*

(16) From the absence of motive it cannot be assumed that he was insane. *AIR 1965 Ker 92*

(17) The motive behind a crime (in this case one punishable under S. 302, P. Code) is a relevant fact of which evidence can be given. The absence of a motive is also a circumstance which is relevant for assessing the evidence. The circumstances proving the guilt of the accused are, however, not weakened at all by this fact that the motive has not been established. *AIR 1966 SC 1322.*

(18) Motive for murder cannot be inferred from the mere fact that deceased after having returned home after long period had claimed his share in family property from accused father and brothers. *AIR 1971 SC 2016.*

23. Nature of weapon and intention.—(1) The nature of the weapon used may show the intention or the knowledge of the culprit in using the weapon. *AIR 1937 Mad 634.*

(2) Where a man strikes another with a lethal weapon on a vital part of the body an intention on his part can be inferred to cause an injury which he knew to be likely to cause death. *AIR 1925 Lah 373.*

(3) Where the weapon used is an ordinary bamboo strike or some such thing the intention or knowledge necessary to constitute murder may not be inferred. *AIR 1928 Rang 64.*

(4) As a rule the use of a knife to stab or a pistol to shoot may show, though not necessary, an intention to do grievous bodily harm. *AIR 1935 Pesh 155.*

(5) Every case must be decided on its own merits. It depends upon the way the weapon is used and the part of the body selected for the purpose and not only on the nature of the weapon. *AIR 1935 Pesh 155.*

(6) The use of a pocket knife in a sudden fight does not necessarily mean that the accused intends to cause death or that he knows it to be likely that death would follow. But the violent use of the knife on a vital part of the body would imply the knowledge that the act was so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. *AIR 1935 Pesh 155.*

24. Bodily injury to person labouring under disorder—Explanation 1 to S. 299.—(1) A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that order, shall be deemed have caused his death. But if the accused had no knowledge of that infirmity and the injury caused is not likely to cause death of a normal person and there is no intention to cause death he is not guilty of culpable homicide under S. 299. *AIR 1953 Punj 173.*

(2) Where death has been caused it is no defence that the deceased was suffering from a complaint which would have caused his death in any event. Section 300(2) of the Code makes it clear that the offender is not responsible for death in such a case unless he knew that the condition of the deceased was such that his act was likely to cause death. *AIR 1918 Sind 60.*

(3) Where there is an intention to cause death or knowledge that he is likely by such act to cause death, the Explanation is of no avil and the fact of an infirmity not known to the accused does not matter. *AIR 1937 Rang 429.*

25. "Or with the knowledge that he is likely by such act to cause death".—(1) The words "or with knowledge that he is likely by such act to cause death" occurring in S. 299 would include

cases where there is on intention to kill or to cause such bodily injury, as is likely to cause death, but the act is done with the knowledge on the part of the offender that he is likely by such act to cause death. If death is caused by such act, the doer of the act will be guilty under S. 299. But it would not amount to murder in the absence of the element in S. 300 being satisfied. *1979 WLN (UC) 307.*

(2) Where a person inflicts serious injuries with a weapon on vital part of the body of another, he would be deemed to have known that injuries inflicted were likely to cause death. *AIR 1940 Rang 259.*

(3) Where the accused, exited by the exchange of abuse between him and the deceased, took a weapon lying nearly and struck the deceased, and the weapon was such that it could not ordinarily result in causing fatal injury, it was held that the accused could not be said to have known that the injury was likely to cause death. *AIR 1952 Pepsu 112.*

(4) Where in an altercation between two parties the accused fired his gun in the air to scare away the opposite party, but a stray pellet struck one of the opposite party which caused his death, it was held that the accused did the act with knowledge that it was likely to cause death. *AIR 1955 Punj 13.*

26. Absence of knowledge and intent.—(1) Where there is neither the intention nor the knowledge referred to in the section, no offence is made out under S. 299 and consequently under S. 300. *AIR 1935 Cal 580.*

27. Second clause of S. 300—Expl. 1 to S. 299.—(1) The essence of the crime of murder under clause 2 of the section is that there must be the intention of causing such bodily injury as the offender knows is likely to cause death. *AIR 1966 SC 1874.*

(2) All cases falling within C1. 2 of S. 300 would also fall under c1. 1 of S. 300 and the clause has been enacted to repel the argument that the intentional causing of death is murder only when the injury is sufficient in the ordinary course to cause death. *AIR 1953 All 203.*

28. "Offence knows to be likely to cause death"—S. 300 C1. 2.—(1) Under c1. (2) of S. 300, A will be guilty of murder if he does an act intending to cause bodily injury and knows that the injury is likely to cause death of the person to whom the harm is caused. This would include cases of special knowledge of the constitution, the constitutional defects and ailments of the deceased. *(1971) 37 Cut LT 667.*

(2) If a large number of persons go to assault one man with dangs it may be held that death is likely to ensue, but this resumption does not apply with the same force where a large number of persons are assaulting a similar body of a large number of persons, even though some of them are armed with dangs and sticks. *AIR 1931 Lah 513.*

(3) The language of clause 2 is not limited to a case where the victim is sick man. It is enough if the accused knew that the injury was likely to cause the death of the victim. *AIR 1942 Pat 420.*

(4) C1. 2 applies only to special cases in which there existed a weakness or defect in the person injured such that an injury which would not ordinarily kill a person of ordinary health, is likely to kill him and the offender knows it is likely to kill him. *AIR 1946 Nag 120.*

(5) The weapon used, the part of the body aimed at and the violence of the blow may all lead to the inference of the accused having intended such bodily injury as he knew to be likely to cause death of the victim. *AIR 1959 All 255.*

(6) Where the accused inflicted many blows on the body of a person in order to drive away the evil spirit which the accused believed possessed such person, it was held that the accused was not guilty of murder but was punishable under S. 304, part 2. *AIR 1928 Lah 917.*

27. "Sufficient in the ordinary course of nature to cause death"—Third clause of S. 300.— (1) The third clause of S. 300 makes it clear that if the act is done with the intention of causing bodily injury to any person and such injury is "sufficient in the ordinary course of nature to cause death" the offence amounts to murder. *AIR 1979 SC 1711.*

(2) It is not necessary that the culprit should have also intended to cause death or that the injury should be sufficient in the ordinary course of nature to cause death. *AIR 1966 SC 1874.*

(3) It is not necessary that the culprit should have knowledge that the injury was sufficient to cause death provided that the intended injury was as a matter of fact, sufficient in the ordinary course of nature to death. *AIR 1975 SC 179.*

(4) Once the intention to cause the bodily injury actually found to be present is proved, the only question is whether, as matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. *AIR 1979 SC 1224.*

(5) When the accused gave a solitary blow on a non-vital part without knowing that the blow may cut a vital part causing an injury likely to cause death in normal course it cannot be said that the injury caused was the one which was intended. In such case, Illustration (1) to S. 300 thirdly is not attracted and the accused would be guilty under s. 304, Part II. *AIR 1981 SC 1441.*

(6) Where there was only one injury but it was on a vital part of the body and was caused with such an amount of force that the parietal and temporal bone as also the fossa underneath were fractured and even the lathi with which the injury was caused must be presumed to have intended to cause the injury that was actually inflicted. *AIR 1965 Mys 150.*

(7) If the injury caused is "likely" to cause death, but is not sufficient in the ordinary course of nature to cause death the offence is not murder but merely culpable homicide not amounting to murder. *AIR 1968 SC 867.*

(8) Where there is an intention to cause bodily injury and death ensues, the question will ordinarily arise whether the injury which the accused intended was sufficient in the ordinary course of nature to cause death or was merely "likely" to cause death. *AIR 1979 SC 1006.*

(9) Whether the injury which the accused intended was sufficient in the ordinary course of nature to cause death or was merely 'likely' to cause death will depend upon the weapon used, the number of blows struck, the force with which the weapon was used and the part of the body injured. *AIR 1966 SC 148.*

(10) The question whether an injury is one which is sufficient in the ordinary course of nature to cause death is fundamentally one of fact. *AIR 1977 SC 2308.*

(11) The question whether an injury is one which is sufficient in the ordinary course of nature to cause death is a matter of evidence. *AIR 1959 All 255.*

(12) A case will fall within clause 3 when the degree of probability of death is very great and certainly so where death is the inevitable result of the intended injuries, whether the culprit intended death or not or even did not know that death would result. *AIR 1966 SC 148.*

(13) Each case has to be decided in the light of probability of death and not in the light of the intelligence or knowledge of the culprit, for to do so would place an intolerable and unjustifiable burden on the prosecution. *AIR 1939 Lah 245.*

(14) Where the accused inflicted stab injuries on vital part which penetrated to a depth of 1 and 3/4 inch pierced the left lung and had cut the forth rib of the deceased who came to the spot as peace maker,

through and through, it could be said that considerable force was used by the accused and the injury was sufficient in the ordinary course of nature to cause death, consequently the case fell clearly within 3rd limb of S. 300. *AIR 1980 SC 2110.*

(15) An injury sufficient in the ordinary course of nature to cause death is not necessarily fatal. *AIR 1967 All 495.*

(16) An injury sufficient in the ordinary course of nature to cause death is not necessarily an injury which inevitably and in all circumstances must cause death. *AIR 1953 Assam 45.*

(17) Time lag and negligence of the deceased in getting treated properly are no criteria in determining the question whether the injury is sufficient, in the ordinary course of nature, to cause death. *AIR 1979 SC 80.*

(18) Injury to a vital part of the body is not a necessary ingredient to determine whether a case falls under clause 3 of S. 300 or not. *AIR 1946 Nag 120.*

(19) Where the accused smote the deceased on the leg above the ankle with his dah cutting through the bones and arteries, the injury was held sufficient in the ordinary course of nature to cause death. *AIR 1940 Mad 745.*

(20) Where A gave a blow on the head of B who was standing in verandah and B fell down and a wound was thereby caused to B on the head which was sufficient in the ordinary course of nature to cause his death, and he died, it was held that A was guilty of murder. *AIR 1955 HimPra 20.*

(21) Accused giving lathi blow on the head of deceased. Attack premeditated and not accidental—Injury inflicted sufficient in the ordinary course of nature to cause death and actually resulting in death—Case falls under C1. 3rdly of S. 300. *AIR 1972 SC 952.*

(22) Even if none of the injuries by itself is sufficient in the ordinary course of nature to cause death of the deceased, cumulatively they may be so. *AIR 1977 SC 1998.*

(23) Accused poured acid on the body of the deceased—The burns were to the extent of 35 per cent of the body—Death—Accused, held, intended to cause such injuries and the injuries were sufficient in the ordinary course of nature to cause death. *AIR 1974 SC 2328.*

(24) Accused administering lathi blows on person of deceased—Latter surveying for three weeks—Injury not incurable—Held injury was not sufficient in the ordinary course of nature to cause death. *AIR 1955 SC 439.*

30. Fourth clause of S. 300—Doing imminently dangerous act with reckless indifference to its probable consequence.—(1) The existence of a right of private defence is a sufficient excuse for incurring the risk of causing death, and in such a case the enquiry whether the accused had knowledge of the kind mentioned in S. 300 becomes unnecessary. *AIR 1939 Rang 225.*

(2) Clause 4 comes into play only if no other clause applies. *AIR 1955 Pepsu 165.*

(3) In case of intentionally causing bodily injury to a particular person, the question whether such an act is murder has to be decided with reference to the first three clauses of Section 300. The fourth clause is designed to provide for rare classes of cases, like putting in jeopardy lives of many persons as envisaged in Illustration (d) of the section and the like. *AIR 1964 Pat 334.*

(4) The broad distinction between this clause and the first three clauses is that in the latter the important thing is an intention to kill or to cause bodily injury, while this clause says nothing about intention. *AIR 1914 Lah 98.*

(5) Where A first assaulted B with a dah and was trying to assault B a second time, B, in the exercise of his right of private defence, cut A with his own dah causing his death, it was held that B had not committed any offence and had not exceeded his right of private defence. *AIR 1939 Rang 225.*

(6) Where a person sets fire to the clothes of another, the former must have known that he was running the risk of causing the death of the latter or such bodily injury as is likely to cause his death. His act will fall within clause "fourthly" of S. 300. *AIR 1968 SC 881.*

(7) When a police constable fired his rifle at another constable as a result of which the victim died on the spot it was held that the case squarely falls within clause fourthly of the definition of murder in S. 300 and not of any lesser offence. *AIR 1983 SC 614.*

(8) Where the accused held the legs of the deceased while others killed him and there was nothing to show that these others committed the act in furtherance of a common intention between them and the accused, it was held that the act of the accused himself was not so imminently dangerous that it must in all probability have caused the death of the deceased and that this clause did not apply. *AIR 1957 All 184.*

(9) Where a spear thrust was given by the accused with such force that it went deep into abdominal cavity, penetrated the peritoneum and lacerated the large intestine and the bladder, it can be assumed that the accused knew that the injury must in all probability cause death. *AIR 1959 All 255.*

(10) Where a grown-up person stabs another person on the stomach in the region of the umbilicus inflicting a wound 3" long and causing the intestines to protrude through it and the injury is found by medical officers to be a very serious injury with very little chance of survival and death also occurs as a result of that injury, it would almost amount to judicial misconduct to hold that there was no intention to cause such bodily injury as the assailant knew to be likely to cause the death of the victim or that he had no knowledge that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. *AIR 1959 Ker 230.*

(11) The fourth clause of S. 300 applies to cases where the act of the nature referred to in illustration (d) has been committed without the intention of causing an injury to any particular individual. It does not apply to a case where an accused person has fired his revolver at another deliberately. *AIR 1937 Cal 432.*

(12) Where an ill-treated wife who was in dread of her husband and who, in endeavoring to escape from her husband, got into panic on seeing him behind her and jumped into an open well with her baby in her arms and the baby died as a result of the jump into the well, it was held that the fourth clause of S. 300 did not apply because the act of her jumping into the well was not inexcusable. *AIR 1940 All 486.*

(13) Medical practitioner administering for treatment of disease medicine not at all prescribed as proper remedy for it in any system of medicine—Act falls UCl. (4) of S. 300. *AIR 1963 MadhPra 102.*

(14) Shooting single arrow on thigh (not vital part of body) of deceased—No knowledge of act being imminently dangerous—Death accidental. *AIR 1956 Madh B 207.*

31. Exception—General.—(1) Murder is an aggravated form of culpable homicide. The existence of any one of the four conditions in the section turns culpable homicide into murder while the exceptions reduce the offence of murder again to one of culpable homicide not amounting to murder. *AIR 1966 SC 1874.*

(2) The Code recognises no exception to a case of murder other than the five exceptions enacted in S. 300 and no Court will be justified in reducing a crime of murder into one of culpable homicide not amounting to murder without advertence to these exceptions. *AIR 1954 Trav-Co 396.*

(A) Burden of proof.—(1) The burden of proving the existence of circumstances bringing the case within any general or special exception or proviso in the Penal Code is upon the accused and the Court shall presume the absence of such circumstances. *AIR 1964 SC 1563.*

(2) If upon the facts of the case and the evidence let in by the prosecution itself it appears that the accused is entitled to the benefit of any of the exceptions, he cannot be deprived of it on the ground that he has not pleaded it nor proved it. *AIR 1974 SC 1351.*

(3) Neither the falsity of his defence, nor his ignorance nor any mistake or omission of the lower Courts or advocates should deprive him of the benefit of it. *AIR 1941 Sind 117.*

(4) Accused can rely on the facts brought out in the case and may thus discharge the burden of proving the exception, even when he has not pleaded or let in evidence thereon. *AIR 1964 SC 1563.*

32. Exception 1.—(1) In order to bring the case within this exception it is necessary that the following facts should be established:—

(i) The offender must have done the act whilst deprived of the power of self-control.

(ii) He must have been so deprived by reason of the provocation.

(iii) The provocation must have been grave and sudden.

(iv) The provocation must not have been sought by the offender.

(v) It must not have been voluntarily provoked by the offender as an excuse for doing the act.

(vi) The provocation must not have been given by anything done—

(a) either in obedience to the law, or

(b) by a public servant in the lawful exercise of his powers as such, or

(c) in the lawful exercise of the right of private defence. *(1972) 1 Mys LJ 306.*

(2) Something which is done suddenly and in the heat of passion caused by provocation is done impulsively and at a time when there is temporary suspension of reason and an act so done is not controlled or planned or perceived or deliberate. *1982 CriLJ 1229 (1233).*

(A) Deprivation of self-control.—(1) The whole doctrine relating to provocation depends on the fact that it causes or may cause a sudden and temporary loss of self-control whereby malice which is the formation of an intention to kill is negatived. *1973 CriLJ 521 (Assam).*

(2) There must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man so as to lead the jury to ascribe the act to the influence of that passion. *AIR 1962 SC 605.*

(3) It is not open to the accused to show that he was a person of a particularly excitable nature or of a particularly unstable mind or of a particularly volatile temperament. *AIR 1969 All 61.*

(4) Once the power of self-control has been lost, the accused, it has been held, cannot be expected to retain such a degree of control over himself as to exercise a choice over the weapons used by him for the attack or to show that his mode of resentment bore a reasonable relationship to the provocation which operated upon him. *AIR 1964 All 262.*

(B) Grave and sudden provocation.—(1) In determining what amounts to grave and sudden provocation the Court may take into account the habits, manners and feelings of the class or

community to which the accused belongs, but not of the particular idiosyncrasies of the offender. *AIR 1966 Ker 258.*

(2) What amounts to grave and sudden provocation depriving the offender of his self-control may thus vary according to circumstances and according to the general standard of self-control among the people of the class involved. *AIR 1972 SC 502.*

(C) Time to cool down.—(1) If it appears that there was sufficient time for the passion to cool down and for reason to get the better of the transport of passion and the subsequent acts were deliberate before the mortal wound was inflicted, the exception will not apply. *AIR 1974 SC 387.*

(2) It is impossible to lay down any hard and fast rule as to when a person should be said to have had time to cool down thus be deprived of the benefit of the exception. Much depends upon the individual characteristics of the accused and that element cannot be ignored in the determination of the matter. *AIR 1943 Lah 123.*

(3) It is not necessary always that the act of the accused should immediately follow the provocation. *AIR 1920 Lah 501.*

(4) If the accused continued to be under the influence of the provocation until he killed the deceased he will be entitled to the benefit of the exception. *AIR 1942 Mad 415.*

(D) Source of provocation.—(1) The provocation must have come from the victim. *1973 CriLJ 1220 (All).*

(2) The provocation must have come from the victim but it need not have come from the victim within the sight or hearing of the offender. *AIR 1932 Sind 168.*

(3) Information received from a reliable person and believed to be credible as to the existence of a provoking act and verified to be correct can amount to a sufficient provocation. *AIR 1943 Lah 123.*

(4) Where a provocation ripens into resentment and malice and the person aggrieved deliberately determines to take the life of a person, the exception will not apply. *AIR 1962 SC 605*

(5) There can never be any direct evidence as to what was the psychological effect upon the mind of a person in certain circumstances. The state of the mind of a person must be gathered from proved facts. *AIR 1947 Oudh 148.*

33. Grave and sudden provocation.—(1) It is not every slight provocation which will reduce the crime from murder to culpable homicide not amounting to murder. *AIR 1977 SC 1801.*

(2) The provocation mentioned in the section is something which is recognised as provocation in law and not merely something which arouses uncontrollable anger in a particular individual. *AIR 1939 Pat 443.*

(3) Where A, who has no authority of any kind over B, orders B to do a particular thing and B refuses to obey and A thrashes B to death, the exception cannot possibly apply to the case. *AIR 1928 Oudh 282.*

(4) The impact of provocation on human frailty is to be judged in the context of the social position and environments of the person concerned. The restraint which is generally shown by sophisticated persons used to modern living is hardly to be expected in the case of a villager who still regards a wife as his personal property and chattel amenable at all times to his desire for sexual intercourse. *AIR 1967 Punj 508.*

34. Abusive language.—(1) Mere abuse in filthy language would not amount to grave and sudden provocation. *AIR 1962 SC 605.*

(2) Words cannot ordinarily constitute provocation except in very special circumstances. *AIR 1962 SC 605.*

(3) Merely abusing a man's relation is not sudden and grave provocation. *AIR 1920 All 184.*

(4) It is a question of fact in each case whether the abusive language was a grave and sudden provocation. *AIR 1953 Bilaspur 27.*

35. Infidelity of wife or mistress.—(1) Where a man sees his wife in the act of adultery—in flagrante delicto—with another, he will be considered to have grave and sudden provocation and if under such provocation he acts without deliberation and kills the wife or the paramour or both, he would be within the exception. *1975 CriLJ 114.*

(2) The fact that the woman seen by the accused in the act of adultery is not his wife but his mistress was held not to make any difference for the purpose of provocation, the question of provocation being a psychological question. It was held not possible to apply considerations of social morality to such a question. *AIR 1943 Pat 443.*

(3) Where a person is merely betrothed to a girl or is having with her only an intrigue sanctioned by the custom of their community but in no way incurring the obligation of marriage unless and until the girl becomes pregnant by him, he cannot have grave and sudden provocation if he finds another person having sexual intercourse with the girl. *AIR 1939 Pat 443.*

(4) If notwithstanding the provocation, the accused has had time for deliberation and did not lose his self-control, the exception will not apply. *AIR 1962 SC 605.*

(5) Where the belief of the accused that illicit intimacy which might have existed earlier between his wife and the deceased had ceased to exist because of his change of residence was shattered when he found that the deceased had come to his new residence in his absence, it was held that this must have given the accused a mental jolt and as this knowledge came to him all of a sudden, it was sufficient to give him grave and sudden provocation. *AIR 1960 All 223.*

(6) The mere fact that a man is found in the house at night cannot amount to a grave and sudden provocation. *AIR 1952 Sau 3.*

36. Suspicion of unchastity.—(1) Suspicion of unchastity, however strong it may be, cannot be considered to be a sudden provocation and cannot reduce the offence of murder into one of culpable homicide not amounting to murder. *1971 RajLW 486.*

(2) Where S suspected G of carrying on an intrigue with his wife and finding one night that his wife was not by his side and, imagining that she must be having intercourse with G, went to G's house and seeing G sleeping with a woman (who, however happened to be G's wife) and thinking that the woman was his wife, killed them, it was held that the suspicion was not an extenuating circumstance and that the offence was premeditated and brutal. *AIR 1945 Lah 91.*

37. Misconduct of female relation other than wife.—(1) Where A was found by B to be in B's house at midnight and was seen by B to put his arms round B's sister, it was held that the provocation was grave and sudden. *AIR 1924 Lah 62.*

(2) Where a man comes home and finds a person actually misbehaving with his relation the provocation must be held to be grave and sudden. *AIR 1926 Lah 485.*

(3) Where a step-mother made improper overtures to her stepson and the latter killed her in a fit of resentment, it was held that the stepmother's act did not amount to a grave and sudden provocation. *AIR 1930 Lah 415.*

(4) Where the mother of the accused had run away with her paramour (the deceased) on several occasions, it was held that, in spite of the pangs of shame and humiliation which the accused must have been feeling, it could not be held that the provocation given by the mother in running away with her young daughter on the last occasion was grave and sudden as the matter had become chronic. *AIR 1932 Lah 438.*

(5) Fact that deceased was seen in jungle sitting by a female relative of accused may not amount to grave and sudden provocation. *AIR 1943 Lah 43.*

38. Pangs of jealousy.—(1) The mere fact that the accused was suffering from pangs of jealousy cannot furnish any ground for saying that he received any provocation at all. The fact that the deceased fell in love with the same woman with whom the accused was in love and the fact that the accused was not prepared to give up his illicit connection with the woman at the bidding of the accused cannot be said to be conduct giving grave provocation to the accused. *AIR 1934 Oudh 222.*

39. Provocation grave but not sudden.—(1) The provocation must be grave as well as sudden. *(1967) 2 AndhWR 395.*

40. Provocation sudden but not grave.—(1) Where the provocation though sudden is not grave, the exception does not apply. *AIR 1957 All 317(319).*

(2) A provocation cannot be said to be grave unless it is such as would, in a reasonable man, justify the loss of self-control to the extent of killing of the person giving the provocation. The resentment caused by the provocation and the act done in consequence thereof must have a reasonable relationship to the provocation. *(1962) 1 CriLJ 261.*

41. Test of provocation.—(1) The test of provocation contemplated by Exception 1 is whether a normal man as distinguished from an abnormal man or a man who is hypersensitive would lose his self-control to the extent of causing the injuries inflicted. *AIR 1962 SC 605.*

(2) In order to determine whether the provocation was such as to deprive the offender of his self-control, it is admissible to take into account the condition of the mind the offender was in at the time of provocation. *AIR 1962 SC 605*

(3) The instrument with which the homicide was effected should also be taken into account in deciding whether the provocation was grave and sudden. To retort in the heat of passion, induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument like a sharp and large knife. In short the mode of resentment must bear reasonable relationship to the provocation to reduce the offence to culpable homicide not amounting to murder. *AIR 1957 All 377.*

42. Burden of proof of provocation.—(1) In order to get the benefit of the Exception 1 the accused must prove that he committed the act by reason of grave and sudden provocation and that the provocation was such as to have deprived him of his self-control. The Court will presume the absence of grounds of exception. *AIR 1915 Cal 773.*

(2) The burden of proof is on the accused to show that he comes within the exception. *AIR 1915 Cal 773.*

(3) A tendency to assume that because the murdered person was the murderer's wife, he must have received provocation from her, and to supply by conjecture the absence of evidence on the point, should be discouraged. *AIR 1921 Mad 303.*

43. Provocation sought—Proviso 1 to Exception 1.—(1) The proviso to the exception makes it clear that the provocation must not have been sought by the accused. The provocation, it has been said, must come to the offender. *AIR 1969 All 61.*

(2) Where the accused knew that his sister was suspected of intimacy with another person and he leaves the house with an axe, goes to his sister's house, breaks into it, and murders them both, the provocation cannot be held to be sudden. *AIR 1937 Lah 562.*

(3) Where a provocation is given by the offender himself, he cannot subsequently urge that the opposite party had acted in a provocative manner. *AIR 1969 All 61.*

(4) Where A had already accused B to his knowledge and B challenges A to repeat the same and on A's repeating it kills him, the exception will not apply. *AIR 1923 Nag 251.*

(5) Accused following wife with a view to bring her back—She promised to go back to him next day—No provocation. *AIR 1938 Rang 441.*

44. Loss of self-control by self-induced intoxication.—(1) It may be that an excitable, pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely on his excitable state of mind if the violence used is beyond that which a reasonable or an average person would used to repel an act which can in law be regarded as provocation. *(1978) 45 Cut LT 604.*

45. Provocation by lawful act—Proviso 2.—(1) An arrest or attempted arrest by a private person, if not strictly justifiable by law, is not outside the provocation mentioned in the exception. *AIR 1933 Pat 508.*

46. Provocation by public servant—Proviso 2.—(1) Under the present proviso an act done by a public servant in the lawful exercise of his powers cannot be considered a provocation which mitigates the offence of murder. Unlike this proviso the exclusion of the right of private defence is not confined to things done in strict conformity with the law. *AIR 1933 Pat 508.*

47. Provocation by act done in exercise of right of private defence—Proviso 3.—(1) That A is exercising his right of private defence against B cannot amount to a provocation to B. *(1911) 12 CriLJ 477.*

48. Question of provocation one of fact—Explanation to exception 1.—(1) If, on the facts and circumstances of the case, the Court comes to the conclusion that there was grave and sudden provocation, the case will come under Exception 1. *AIR 1918 All 189.*

49. Exception 2—Excessive exercise of right of private defence.—(1) This exception deals with death caused by the excessive exercise of the right of private defence of person or property. *(1965)(2) CriLJ 440.*

(2) The voluntary causing of death in the exercise of right of private defence reduces what would otherwise be murder to the offence of culpable homicide not amounting to murder. *AIR 1978 SC 1538.*

(3) Illegal seizure of cattle purporting to be under S. 10, Cattle-trespass Act (1871)—Does not amount to theft—Owner of cattle has no right to use force to rescue them—Person seizing cattle held committed no offence in resisting attack by owner's party with arms and lathis. *AIR 1965 SC 926.*

(4) Culpable homicide will not be murder, is in the exercise in good faith of the right of private defence, the accused exceeds the powers given to him by law, and causes the death of the person against whom he is exercising such right of defence, (a) without premeditation and (b) without any intention of doing more than is necessary for the purpose of such defence. *AIR 1979 SC 1179.*

(5) The exception can only apply when the accused acted in defence. If he is himself the aggressor, obviously he cannot claim a right of private defence. *AIR 1979 SC 1230.*

(6) Where there is evidence, even on the side of the prosecution, showing circumstances from which an inference of the exercise of the right of private defence may be drawn, the accused may raise the plea of private defence and the Court is bound to consider the same. *AIR 1975 SC 1478.*

(7) Where there is no right of private defence at all the Exception cannot apply. *AIR 1965 SC 257.*

(8) Accused giving knife blow to deceased on finding the latter sitting on the chest of the accused's brother and giving fist blows—Accused held exceeded his right of private defence—Was convicted under S. 304 1st Part. *AIR 1971 SC 1491.*

(9) Murder—Plea of private defence by accused—Accused killing deceased by gun shot claiming that entrance of deceased with others armed with lathis in his house generated in his mind apprehension of being killed—Evidence showing that deceased never entered the house and did not do any act to cause reasonable apprehension of immediate danger to the accused—Plea of accused is unbelievable—Conviction for murder is proper. *AIR 1983 SC 575.*

(10) Where the accused had chased the deceased who was unarmed and stabbed him at two places and was poised to give a further blow which was foiled by the intervention of a third person and the accused pleaded that he had done this in right of private defence it was held that under the circumstances the accused had no right of private defence accrued to him and hence his case did not come in exception II. *AIR 1980 SC 108.*

(11) Murder—Plea of private defence—Accused continuing to assault deceased after he had fallen down and was rendered harmless—Plea of private defence was not available. *AIR 1983 SC 488.*

50. Good faith.—(1) In order that the offender may benefit by Exception 2, he must act in "good faith". *1976 CriLJ 611 (Orissa).*

(2) The question, in cases falling within the Exception, must be whether the accused acted honestly or whether he used the opportunity to pursue a private grudge and to inflict injuries which he intended to be inflicted regardless of his rights, that the section punishes a criminal act in excess of the right of private defence and it is impossible to regard due care and attention in the sense which is usually ascribed to it as an element in such criminality. *AIR 1940 Rang 129.*

51. "Exceeding the powers given to him by law".—(1) A person who exceeds his right of private defence and kills his assailant comes under the Exception and is guilty only under S. 304 and not S. 302. *AIR 1980 SC 660.*

(A) Intention and circumstances—importance of.—(1) The exception deals not with fact but with the intention of the accused and refers to circumstances in which a person does not take advantage of the right of private defence to kill with a vengeful motive, but exceeds the right of inflicting fatal injuries where the infliction was in fact unnecessary and where there was reckless criminality though the right of private defence was the only impulse operating on his mind. *(1974) 40 CutLT 495.*

(2) The question whether the accused, in any particular case, exceeded the right of private defence is one of fact. The standard to be applied in judging whether the right has or has not been exceeded is not that of a cool bystander. *1968 CriLJ 255 (Ker).*

(B) Illustrative cases.—(1) Accused was taking cattle to the pound. The deceased forcibly attempted to rescue the cattle from being so taken. Accused thereupon hit the deceased with a lathi and killed him. It was held that it was a case of exceeding the right of private defence. *AIR 1953 All 555.*

(2) Deceased committing offence under Section 430—Accused in preventing mischief inflicting injury resulting in death—Accused exceeds the right of private defence. *AIR 1960 Mad 240.*

52. Exercise of right of private defence must be without premeditation.—(1) A Court cannot presume absence of premeditation; circumstances must justify such an inference being drawn. *1978 CriLJ 578.*

(2) Where the accused armed with a deadly weapon proceeds upon a house-breaking expedition and uses the axe on the pursuer armed only with a lathi, in order to escape, it cannot be said that he was exercising his right of private defence without premeditation or without the intention of causing more harm than was necessary. *AIR 1947 Sind 107.*

(3) The deceased, none of whom was in possession of any dangerous weapon, were harvesting the crops on a plot of land with peaceful intention under the protection of the police. The accused who claimed the crops attacked the deceased with guns and other dangerous weapons and shot them from close range after sending away by a ruse the constables. It was held that the Exception did not apply as it could not be said that the accused had shot at the deceased without premeditation and without the intention of doing more harm than was necessary for the purpose of private defence. *AIR 1965 SC 257.*

53. "Without any intention of doing more harm than is necessary for such defence".—(1) The exception provides that under certain conditions the act of the accused in causing death by exceeding his right of private defence, will only amount to culpable homicide not amounting to murder. One of these conditions is that the accused should not have intended to cause more harm than is necessary for the defence, though obviously the harm caused must, in order to exceed the right of private defence, be more than was necessary for the defence. *(1969) 35 CutLT 322.*

(2) A few scratches given by an unarmed assailant on the back of the accused is not enough to give the accused a right of private defence to the extent of causing the death of the assailant. If he acts in a cruel and unusual manner, his intention to cause more harm than is necessary can be inferred. *AIR 1923 Lah 232.*

(3) Where the deceased, who was unarmed, started abusing the accused and went near him, it was held that the accused was not justified in taking a knife and killing him and in such a case Exception 2 would not apply. *AIR 1950 Trav-Co 12.*

(4) Deceased first giving blow with hind portion of spade on accused's back—Accused inflicting 39 injuries with sickle, three of them individual fatal—Intention to do more harm than necessary for defence found. *AIR 1965 Mys 150.*

54. Exception 3—Exercise of lawful powers—Excess of.—(1) Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention. *AIR 1937 Pesh 23.*

(2) Where there is no good faith as so defined the exception will not apply. *AIR 1945 Sind 38.*

(3) Where, for instance, an order to shoot is given by a public servant when there was absolutely no occasion to do so, his order is illegal and neither the public servant nor the person acting under the order can be said to have acted in good faith. *AIR 1950 East Punj 321.*

(4) Where a suspected thief who had been arrested by a police constable escaped from a running train and the constable pursued him and when he was not in a position to apprehend him, fired at him, but in that process he hit the fireman and killed him, it was held that the case was covered by this exception. *AIR 1955 All 370.*

55. Killing under officer's order.—(1) Shooting by the accused under an illegal order of his superior is, as has been already seen, no excuse. Both of them are equally guilty. But it may mitigate punishment. *AIR 1950 East Punj 321.*

56. Killing under threat of others.—(1) Section 94 ante provides that act done under threats, except murder, is not an offence under certain circumstances. A threat is not a mitigating circumstance in the case of murder. *AIR 1938 Pat 258.*

57. Exception 4.—(1) In order to bring a case within Exception 4 it must be proved that the act was done without premeditation. *1979 WLN (UC) 230 (Raj), 1983 PakLD 79 (81) (SC).*

(2) All the elements of exception 4 i.e., the act must have been done: (i) without premeditation; (ii) in a sudden fight; (iii) in the heat of passion; (iv) upon a sudden quarrel; and (v) without the offender taking undue advantage or without acting in a cruel or unusual manner must exist. *AIR 1979 SC 133.*

(3) Exception was applied only where all the elements existed. *AIR 1978 SC 315.*

(4) The exception is meant to apply to cases wherein, in whatsoever way the quarrel originated, the subsequent conduct of both the parties put them on an equal footing. *AIR 1926 Lah 219.*

(5) The number of wounds is not the criterion but the position of the combatants with regard to their arms and the use of those arms are considerations to be kept in mind when applying Exception 4 to any particular case. *AIR 1935 Pesh 59.*

(6) Where a person causes the death of another person in the exercise of the right of private defence of person, no occasion will arise to determine whether his case comes under Exception 4 as such a person does not commit the offence of culpable homicide as defined in Section 299. *AIR 1960 All 567.*

(7) Where the accused chased the deceased who was unarmed and stabbed him twice and was poised to give a further blow which was foiled by the intervention of a third person who gave a blow to the accused on his head and it was found that the deceased had not come armed for a fight and there was no mutual exchange of blows between the accused and the deceased it was held that the case did not fall within Exception IV. *AIR 1980 SC 108.*

58. "Sudden fight".—(1) "Fight" is not defined in the Code. It means a combat or an engagement between two persons or parties. It implies an exchange of blow. *1980 RajdhaniLR 120.*

(2) Where it is all a one-sided affair, only the accused causing injuries to his opponent who does not retaliate, there is no 'fight' at all and the exception will not apply. *AIR 1959 All 131.*

(3) Exchange of blows is not necessary to constitute a fight and that words may be as provocative as blows. *AIR 1946 Lah 41.*

(4) The fight must be with person who is killed and not with a third person. If A fights with B and C asks them not to fight, the attack on C by A cannot come within the exception. *AIR 1956 SC 99; 1955 PakLD 356 (DB).*

(5) Where there is a fight between A and B and C comes and hits B, the exception cannot apply. *1955 PakLD (Lah) 356; AIR 1955 NUC (Pepsu) 3280.*

(6) Sudden and unpremeditated fight—Both parties inflicting injuries by weapons—Death of one person—Case held covered by Exception 4 to S. 300. *AIR 1951 Raj 129.*

(7) Murder—Only one blow with knife—Accused having no dispute with deceased—Incident occurring on spur of moment—Held, accused was guilty of committing offence under S. 304. Part II—Conviction altered from Section 302 to 304. Part II. *AIR 1984 SC 759.*

59. "Fight".—(1) An affray can be a fight even if one party in the fight is successful in landing a blow upon his opponent. In order to constitute 'fight' it is necessary that blows should be exchanged even if they do not all find their target. *AIR 1955 Punj 191.*

60. Exception 4 applies only if the culpable homicide is done without premeditation.—(1) Exception 4 comes into play only if death is caused without premeditation. *AIR 1981 SC 1552.*

(2) It is necessary, in order to constitute an act a premeditated one, that the accused should have reflected with a view to determine whether he would kill or not, and that he should have determined to kill as a result of that reflection. *AIR 1951 Punj 137.*

(3) The important factor is not whether the killing was premeditated but whether the act which caused the killing was premeditated. *AIR 1939 Rang 225.*

(4) Where though the act of the accused was not premeditated in the sense that he preplanned to kill the deceased, he was actuated by pre-existing enmity to finish him when he found the deceased in a fallen and helpless position lying on the ground, it was held that he was guilty of murder. *AIR 1954 SC 706.*

(5) Sudden quarrel on spur of moment arising out of trivial reason—No premeditation or malice—Young man causing single blow by knife on chest of victim causing his death—Knowledge that he was likely to cause injury which was likely to cause death could, however, be inferred—Offence fell under Section 304, Part II and not under Para 1 or 2 of S. 300. *AIR 1983 SC 463.*

61. "Sudden quarrel".—(1) There must not only be a sudden fight but the quarrel also must be sudden. *AIR 1967 All 204(206).*

(2) It is not necessary that the plea of a sudden fight on a sudden quarrel should be taken by either side. It is, however, necessary that the facts of the case determined after a consideration of all the evidence must be capable of giving rise, with a reasonable amount of definiteness, to the conclusion that it was a case of sudden fight upon a sudden quarrel. *AIR 1967 All 204.*

62. "Without taking undue advantage".—(1) All the ingredients must be present for the Exception to apply. *AIR 1959 All 131.*

(2) The offender should not have taken undue advantage over the deceased. *AIR 1959 All 131.*

(3) The expression "undue advantage" means unfair advantage. *AIR 1959 Pat 66.*

(4) The question as to what is undue advantage in any particular case is a question of fact and not of law. *AIR 1956 SC 99.*

(5) Where Exception 4 is applicable at the beginning of a fight, it cannot be held that one of the participants has taken undue advantage over the other because the latter has acknowledged defeat and has turned tail and thereupon the former combatant pursues the advantage which he has gained. *AIR 1955 NUC (Lah) 5242.*

63. "Acting in a cruel or unusual manner".—(1) Where one party is dangerously armed and the other is unarmed, and the former uses his arms against the latter and kills him, when there is no serious provocation or attack by him, it must be held that the former acts in a cruel and unusual manner. *1969 CriLJ 1183 (Punj).*

(2) Where the accused struck with lathi only one blow on the head and one on the leg in a sudden and unpremeditated fight, it was held that the accused did not act in a cruel and unusual manner. *AIR 1929 Lah 719.*

(3) Where two contending parties, each armed with sharp-edged weapons, clash and in the course of a free fight some injuries are inflicted on one party or the other, it cannot be said that either of them acted in a cruel or unusual manner. *AIR 1957 SC 324.*

(4) Deceased in a fallen and helpless position lying on ground—Accused stabbing him with spear on his jaw—Held nature of stab was brutal and fatal which showed his deliberate intention—Accused held guilty of murder. *AIR 1954 SC 706.*

64. Exception 5.—(1) This Exception provides that culpable homicide is not murder if the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent. *AIR 1940 Mad 138.*

(2) The consent by the deceased must be given unconditionally and without any reservation. Where although the wife flatly refused to go back to her mother and said that if her husband insisted on her doing so she would rather be killed, the consent was held to be not of the type contemplated by S. 300. *AIR 1956 Mad 97.*

(3) Where the accused strangled his beloved aged 16 to death upon their decision to die together in despair because of their future separation, it was held that though the exception may not apply, the spirit of the exception may be applied and that the sentence should be one of transportation for life. *AIR 1929 Lah 50.*

(4) The accused was a student of class X. He had failed at the annual examination for three years in succession. His wife, aged 19, was a literate woman. The accused took his last failure so much to heart that he informed his wife of his decision to end his life. His wife asked him to first kill her and then kill himself. It was held that the consent given by the wife was not under any fear of injury or under a misconception of fact and the accused in killing the wife was guilty under S. 304, first part, and not under S. 302. *AIR 1958 Pat 190.*

(5) Where the accused killed his stepfather, who was an infirm old man with his consent in order to involve some of their enemies in trouble by charging them with murder, it was held that the case was covered by the 5th exception. *AIR 1918 Lah 145.*

65. Burden of proof.—(1) The fundamental principle is that the accused must be presumed to be innocent until the contrary is proved by credible testimony adduced by the prosecution. The accused is not found to go into the witness-box and is not to offer any explanation at all. The fact that does not open his mouth cannot be used against him. *AIR 1975 SC 573.*

(2) The counsel for the accused can point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence and the Court can accept it. *AIR 1954 J&K 19.*

(3) There is no onus on the accused to prove accident or necessity. *AIR 1949 Lah 85(87).*

(4) It is not for the accused to prove that he had no criminal intention or knowledge or to prove how the deceased met with his death. *AIR 1960 Andh Pra 153.*

(5) The burden of proving intention or knowledge is on the prosecution. *AIR 1964 SC 1563.*

(6) From the mere fact of there being injuries on the victim it cannot be concluded that the accused had the necessary indention or knowledge. *AIR 1966 SC 1874.*

(7) Where the burden of proving an issue is on the accused, as where he has to prove an exception or accident or extenuating circumstance, he is not required to prove it beyond a reasonable doubt or in default, to incur a verdict of guilty. The test is not whether the accused has proved beyond all reasonable doubt that he comes within the exception, but whether a reasonable doubt is thrown on the guilt of the accused. *AIR 1964 SC 1553.*

(8) An accused person even if he pleads an exception, is entitled to be acquitted if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in mind of the Court about the guilt of the accused. *AIR 1970 All 51.*

(9) In any case, where the guilt of the accused is clear from the evidence, the absence of explanation as to the injuries on the accused is not of much importance. *AIR 1971 SC 1232.*

(10) Dead bodies in a decomposed state—Doctor did not send the dead bodies to an anatomy expert—Failure of doctor cannot be a ground for drawing an inference adverse to accused—Accused cannot be made to suffer because of that omission—Accused and not the prosecution would be entitled to get benefit of any gap or lacuna in prosecution evidence. *AIR 1975 SC 258.*

(11) Accused not pleading accident or giving any explanation of his act—Still court can consider the circumstances on record and see if the requisite intention or knowledge has been proved against him *AIR 1970 Raj 60.*

66. Alibi.—(1) Where the evidence is very strong against the accused it is not possible to treat seriously his alibi evidence especially when that evidence is given by men belonging to his caste and when the person, with whom the accused alleged he was at the time in question, is not produced. *(1936) 37 CriLJ 932.*

(2) An accused who has failed to prove his plea of alibi is nevertheless not prevented from raising other defences. *AIR 1940 Rang 129.*

(3) The standard of proof which is required in regard to a plea of alibi is not different from the standard which is applied to the prosecution evidence and in both cases should be a reasonable standard. *AIR 1953 SC 415.*

67. Appreciation of evidence.—(1) Where in a murder case in view of medical evidence it was difficult to hold with any certainty that the occurrence had taken place as alleged by prosecution witness and defence version was false it was held that it would not be safe to convict the accused for murder. *AIR 1981 SC 1579.*

(2) Murder—Accused police officials—Injuries on soles and buttocks of deceased—Does not by itself suggest use of third degree method by accused particularly when there were many other injuries on other parts of body. *AIR 1983 SC 817.*

(3) Murder case—On his way to Court deceased surrounded by accused persons and assaulted with Kantas and lathis—Prosecution witnesses, though interested, were duly corroborated by dying declaration—Evidence of doctor, reliable—Accused persons were liable to be convicted—Fact that dying declaration was produced during trial was immaterial. *AIR 1980 SC 443.*

(4) Prosecution of accused for offence of murder of his wife—F.I.R. showing that it was a case of accidental death as a result of burn injury—Sole evidence of deceased's mother as to oral dying declaration found to be unreliable—No other legal evidence to found conviction of accused—Accused must be acquitted. *AIR 1980 SC 436.*

(5) Two metallic pieces were recovered from the body of the deceased but no exit wound found on the body though shot must have been fired from a close range. Held, the two metallic pieces must have been parts of pellets and not bullets and the deceased must have died as result of shot fired from a gun. *AIR 1981 SC 376.*

(6) Where the accused persons who had premeditated intention to assault deceased caused injuries with spears to the abdomen of the deceased and the incident was reported to karnam immediately after its occurrence the report could be treated as F.I.R. and the accused could be said to be guilty of the offence of murder. *AIR 1980 SC 2113.*

(7) Murder case—Part of Prosecution story as told by alleged eye witnesses, doubtful—Does not necessarily falsify the whole story—Rest of the story told by those eye-witnesses must be examined carefully before it can be relied on. *AIR 1981 SC 1579.*

(8) Charge of murder against police officers—Persons killed in fire opened by police officers—Night of incident was cloudy and it was drizzling—Various contradictions in evidence of witnesses—Witnesses deposing to incident nearly nine years later and making good the lapses of memory by giving free play to their imagination—Discrepancies between the complaint and evidence of complaint even though the complaint was lodged a month later after the incident led by prosecution. *AIR 1981 SC 1917.*

(9) Discrepancies can be normal or matetial. Normal discrepancies will always be there as they are: (a) due to errors of observation, (b) errors of memory due to lapse of time, (c) due to mental disposition such as shock and horror at the time of the occurrance and the like. Material discrepencies are those which are not normal and not expected of a normal person. *AIR 1981 SC 1390.*

(10) Charge of murder—Allegation of setting fire to deceased—No eye-witness—None of the three dying declarations implicating accused—Accquittal of accused, held, proper. *AIR 1982 SC 1052.*

(11) Charge of murder—Testimony of independent witness, police showing that names of accused were mentioned to him as assailants of deceased while beating of deceased was in progress–Information conveyed to such witness admissible as res gestae—such testimony corroborating other evidence supporting culpability of accused—Accused could be said to be guilty of offences. *AIR 1981 SC 1223.*

(12) Where there was already evidence of two eye-witnesses on record, non-examination of others, who had received injuries does not create any doubt in the prosecution. *AIR 1980 SC 184.*

(13) Appreciation of evidence in a case under S. 302—Sessions Judge attaching undue importance to minor discrepancies and taking suspicious approach to evidence of witnesses—Assessment of evidence was altogether unreasonable and therefore High Court was right in interfering and convicting the accused. *AIR 1983 SC 599.*

(14) The conduct of a doctor, in buying a box, packing the dead body of his wife into the box and throwing it from a running train into a river is the proof of motive of murder in view of illicit relationship with a murse. No rope was found in the house and the medical evidence does not show that the wife hanged herself—Conviction for murder is upheld. *AIR 1984 SC 49.*

(15) Accused found to have had gun and also lathi—Evidence that there was a gun shot fire and that accused was present at the occurrence—His statement under Section 342 that he used only a lathi cannot overweigh other evidence—His acquittal by High Court held not legal. *AIR 1979 SC 1509.*

(16) In appreciating the evidence against the accused the prime duty of a court is firstly to ensure that the evidence is legally admissible. *AIR 1972 SC 975.*

(17) As to approach of Court on appreciation of evidence see the following cases: *AIR 1979 SC 1019; AIR 1979 SC 1697; AIR 1978 SC 1204; AIR 1978 SC 1158; AIR 1978 SC 1142; AIR 1977 SC 381; AIR 1976 SC 2263; AIR 1978 SC 2147; AIR 1976 SC 1970; AIR 1975 SC 1814; AIR 1975 SC 1727; AIR 1975 SC 1506; AIR 1975 SC 1484; AIR 1975 SC 1026; AIR 1975 SC 2363; AIR 1974 SC 2294.*

(18) Failure of prosecution to prove motive—That accused was alone with deceased at the time of occurrence also not proved—Accused furnishing plausible explanation as to his subsequent conduct in running with the bloodstained clothes to police station—Conviction held was liable to be set aside. *AIR 1972 SC 922.*

(19) Murder case—Eye-witnesses found clever enough to make improverments in evidence—If amounts to a serious infirmity in the evidence which cannot be cured by subsidiary facts raising only a suspicion. *AIR 1956 Bom 471.*

(A) Acquittal of co-accused—Effect.—Acquittal of four out of nine accused—Case of convicted accused not several form of acquittal accused—Entire prosecution must be discarded. *AIR 1975 SC 1962.*

(B) Adultery.—Accused killing wife whom he suspected of having become pregnant by committing adultery with another person—Even on day of occurrence she was missing and while she was returning the husband saw her and cut her off with a sickle—Conviction under s. 302 altered to one under Section 304 and sentence reduced to 5 year's R. I. *1978 All CriR 440.*

(C) Behaviour of witness contrary to ordinary nature—Evidence Act. S. 114.—(1) Accused charged with murdering his wife by burning her—Question whether death was accidental—Strange behaviour of accused contrary to ordinary human nature was held to prove his himicidal intention. *1976 CriLR (SC) 502.*

(2) Mother and her two children who were missing were immediately found in a well. When taken out the childern were found dead—The mother was alive who asked as to how they fell into the well she remained silent. She was prosecuted for murder of her children and attempt to commit suicide. Besides that she remained silent. There was no other circumstantial evidence. The defence witness stated that she stated that because she was starving she jumped into the well. Held, in the circumstnce her remaining silent could not be pressed into service to commit her under Section 302. *1981 Raj Cri C 406.*

(D) Benefit of doubt.—(1) Prosecution evidence discrepant in material particular and self-contradictory—Accused were given benefit of doubt and acquitted. *1977 CriLJ 1516.*

(2) Murder—Neither prosecution nor defence coming out with the whole and unvarnished truth—Courts can only try to guess or conjecture to decipher truth if possible—This may be done within limits to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case. *AIR 1974 SC 1822(1826) : 1974 CriLJ 890.*

(3) Conviction of appellent under S. 302, 34 and 326, P.C. Appellent tried for murder along with 10 others—Ocular evidence unreliable—Benefit of doubt given to all except appellant—Case of appellant not distinguishable from others—Benefits cannot be refused to appellant—His conviction under Ss. 302/34 set aside, however, that under S. 326 confirmed. *AIR 1982 SC 1022.*

(E) Proof beyond reasonable doubt.—(1) Accused, a life convict was last seen with two deceased warders before he climbed up tower and proclaimed that he committed the murders—At his instance murder weapon was recovered and his blood-stained clothes were recovered from his person—Held, offence stood proved beyond reasonale doubt. *AIR 1977 SC 1965.*

(2) Where the appellant was charged with the murder of five persons the arrest of the appellant on the spot with a bloodstained dhoti on his person and the evidence of the three witnesses coupled with the arrest of the appellant on the very spot of the offence and the prompt lodging of the first information report left no doubt that the appellant committed the murders. *(1982) 3 SCC 373.*

(F) Case and counter-case.—In a murder trial where there is a counter case with reference to the same occurrence the posecution is bound to exhibit the ejahar in the counter case in order to help the Court appreciate the totality of the circumstances because there could be no proper appreciation without knowing both the rival versions. *1977 CriLJ (NOC) 227.*

(G) Circumstantial evidence.—(1) The accused strangulated a seventy year old woman living all alone and the force of strangulation was such as fractured a bone the injuries were held intentional and deliberate and the case fully falls under Section 302. Held: a complete chain of circumstantial evidence established guilt. *AIR 1979 SC 1711.*

(2) Where there was interval between death and recovery of the body not properly explained, it was held the chain of circumstantial evidence was not complete and accused was entitled to benefit of doubt. *AIR 1979 SC 1410.*

(3) Prosecution case wholly based on circumstantial evidence and dying declaration made to S. I and witnesses—Conviction based thereon held justified. *AIR 1979 SC 190.*

(4) Conviction based on circumstantial evidence—Circumstantial evidence relied upon must forge such a chain as to support the sole hypothesis that the accused commmitted the murder. *AIR 1977 SC 1116.*

(5) Held that all the tell-tale circumstances established by the prosecution had made the chain so complete there was no escape from the conclusion that within all human probability, the deceaed was kidnapped, murdered and his dead body thrown into well by none other but the accsed appellant. *AIR 1976 SC 2055.*

(6) Circumsances deposed by accomplice—No corroboration from independent witness—accused held could not be convicted on such evidence. *1983 UJ (SC) 214 (2).*

(H) Confessions.—(1) In order to convict an accused on the confessional statement it is the burden of the prosecution to prove firstly that the statement was voluntary and secondly that it was true. *AIR 1981 SC 2007.*

(2) Where there is only one accused who made a confession that he had killed the victim by assaulting him with a tangia the provisions of S. 30 of the Evidence Act are not applicable. *1982 CriLJ 2346.*

(I) Conflict in the evidence.—(1) Conflict between medical and eye-witness evidence—If and when fatal. *1976 CriLJ 821.*

(2) Murder—Appreciation of evidence—Conflict between oral testimony and evidence of doctor which does not fit in with ocular testimony—Conviction on basis of such oral testimony—Not proper. *1983 CriLJ 1706.*

(3) Patent inconsistency between medical evidence and other prosecution evidence—Physical disability of accused preventing him from firing gun as alleged by prosecution—Accused acquitted. *AIR 1980 SC 552.*

(J) Defence—Pleadings.—(1) Charge under S. 302 against accused persons A and B—Defence raised by B that his case fell under one of the exceptions to S. 302—Held A also would be entitled to the benefit if such defence even though he had not pleaded it but had deemed his presence altogether. *1976 CriLJ 457 (Raj).*

(K) Direct evidence.—(1) Straightforward evidence corroborated by dying declaration and medical evidence sufficient to confirm conviction and sentence of lower Court. *AIR 1980 SC 443.*

(2) Where the direct evidence of the occurrence was not worthy of credit the motive for the offence set up by the prosecution was found to be false and an afterthought and the circumstantial evidence did not unmistakably lead to the guilty of the accused but indicated suicide by the deceased held that the conviction of the accused for the offence could not stand. *1979 All CriR 373.*

(L) Doubt as to credibility of witness.—(1) Accused out to murder several persons one after another—Several shots fired—Fact that the witnesses were not meticulously precise and constant and regards the number of shots fired not materially affect the credibility of their evidence. Unless the contradiction between the ocular evidence and medical evidence is very great the ocular evidence need not be rejected and the prosecution case need not be held untrustworthy. *AIR 1977 SC 1066.*

(2) Evidence of witnesses cannot be discarded on ground that they did not react in a particular manner. *AIR 1983 SC 680.*

(3) The mere fact that some of the witness do not admit or express ignorance about certain collateral facts is hardly a ground to reject their ocular account when there is a general agreement among them with regard to substratum of the prosecution case. *AIR 1981 SC 897.*

(4) Witness testifying that he identified accused in light of torch with him—Corroborated by direct testimony of eye-witnesses—Version of witness could not be discarded merely on ground that there was no mention of torch in FIR. *AIR 1981 SC 1217.*

(5) Prosecution witness inculpating and accused—Name of accused absent from statement made to police by witness—Testimony of witness could not be relied on. *AIR 1981 SC 1223.*

(6) 'Independent witnesses'—Evidence of—Cannot be viewed with suspicion on ground that they are mere 'chance witnesses.' *AIR 1983 SC 680.*

(7) Where the statements of the only eye-witness to the crime who was removed from the scene of occurrence in an unconscious state was recorded soon after the recovery of consciousness and was confined only to questions put up by the Magistrate failure on his part to mention overt acts attributed to assailants would not detract for his credibility. *AIR 1981 SC 648.*

(M) Dying declaration.—(1) Dying declaration if found to be true can be acted upon without any corroboration. *AIR 1980 SC 559.*

(2) Conviction based on an oral dying declaration is not bad. *AIR 1979 SC 1497.*

(3) Evidence Act (1872), S. 32—Murder—Dying declaration recorded before police officer—Admissible and can be relied for conviction—It need not be recorded before Magistrate. *AIR 1983 SC 164.*

(4) Omission of the investigation officer to obtain the doctor's attestation on the dying declaration does not cast any adverse reflection on its veracity. *1983 PakLD 27.*

(5) Accused was burnt including a good part of the brain in addition to several injuries inflicted by lathi—Doctor not specifically stating that deceased after being burnt was conscious and could make a coherent statement—Dying declaration presenting suspicious circumstances—accused held entitled to be acquitted. *AIR 1982 SC 1021.*

(N) Evidence Act. S. 27—Effect.—(1) Discovery of head at the instance of accused under compulsion—Evidence has to be excluded. *1978 CriLJ NOC 114 (All).*

(2) Recovery of dead body by police on information given by accused on being questioned is not a conclusive circumstance but it merely raised strong suspicion against him. *AIR 1971 SC 2016.*

(O) Extra-judicial confession. —(1) Conviction cannot be based solely upon extra-judicial confession of accused, unless Court is satisfied beyond doubt that it is voluntary. *(1983) 2 Crimes 424(2).*

(2) Accused charged with murder—Convicted under Section 302—Circumstantial evidence relied upon by prosecution was not sufficient to prove charge of accused—Extra-judicial confessions could not prove guilt of accused—Accused acquitted of charges. *1984 CriLJ NOC 58.*

(P) Eye-witnesses.—(1) Mere fact that the accused had some motive for committing the crime and recovery of blood-stained clothes and weapon from accused's person and residence held not sufficient to sustain conviction for murder where Court found evidence of so-called eye-witnesses to be wholly undependable—Person claiming to be next door neighbour and to have seen the murder not speaking about this to any one till questioned by investigating officer—Evidence of such witness treated as unreliable. *AIR 1977 SC 1753.*

(2) Evidence of person claiming to be eye-witness—Such witness not having disclosed name of assailant for $1\frac{1}{2}$ days after occurrence—Explanation for non-disclosure unbelievable—Acquittal of accused by H.C. upheld by S. C. *AIR 1976 SC 2488.*

(3) Mere fact that the witness succeeded in escaping unhurt or that there are discrepancies in statements of witnesses is no ground for holding that they were not eye-witnesses. *AIR 1981 SC 697.*

(4) Statements of only eye-witness removed from scene of occurrence in unconscious state, recorded soon after recovery of consciousness, confined only to question put up by Magistrate—Failure on his part to mention overt acts attributed to assailants does not detract from his credibility. *AIR 1981 SC 648.*

(5) Name of eye-witness not mentioned in F. I. R.—His evidence cannot be rejected when he was not the person who lodged the F. I. R. *AIR 1981 SC 1241.*

(6) In a case under S. 300. evidence of an eye-witness, who was an unsophisticated adivasi woman can be relied upon in spite of minor and natural discrepancies therein. *AIR 1981 SC 1163.*

(7) Evidence of eye-witness cannot be rejected only on the ground that did not intervene to save the deceased. *1981 CriLJ 733.*

(8) Eye-witnesses deposing that all assailants were armed with sharp cutting weapons like knives and spears—Lacerated wounds and abrasions found on dead body—Held, no inconsistency between ocular and medical evidence as accused armed with spears had struck deceased with lathi portion of spears—Mere non-mention of this fact in FIR is immaterial when use of spear as lathi was mentioned by witnesses in statements recorded by Investigating Officer. *AIR 1983 SC 1081.*

(9) Where the High Court took broad view of the facts and acquitted three out of six accused persons by giving them benefit of doubt and the evidence of the eye-witness was not found to be absolutely false in regard to such accused persons, however, the number of injuries received by them clearly indicated that more them three persons participated in the attack, the evidence of the eye-witness could not be said to be false on material particulars so as to entitle the other accused persons to be acquitted. *AIR 1981 SC 1161.*

(10) Charges of murder and abduction—Two trials—Appreciation of evidence—Alleged, eye-witnesses, close relations of deceased, implicating named persons as assailants in earlier trial on their acquittal implicating a different set of persons as assailants in second trial conviction in second trial is improper. *AIR 1984 SC 911.*

(Q) Fingerprints—Tampering of—(1) Appreciation of evidence—Finger prints on a 'dibbi' recovered from accused—Article recovered on 9-9-73 and sent to fingerprint expert on 29-6-74—

Allegation that fingerprints were tampered—Fingerprints found on the article tallied with specimen of fingerprints of accused—Tampering, held, would mean superimposing some other fingerprints—Since the fingerprints tallied with the fingerprints of accused there was no tampering. *1977 CriLJ 684.*

(R) First Information Report.—All accused charged under S. 302—Name of one not mentioned in F. I. R.—His acquittal on benefit of doubt solely on the ground is illegal. *1976 CriLJ 250 (Orissa).*

(S) Grave and sudden provocation.—(1) Co-owner constructing wall on common land in the presence and in spite of the objections of the other co-owner—Latter shooting the former co-owner was held to do so under grave and sudden provocation and the case was held to fall under S. 304, Part I and not under S. 302. *1978 AllLJ 1216.*

(H) Hostile witness—adverse inference.—(1) Prosecution witness declared hostile—Statements by witness that accused was insane—Evidentiary value is little—Yet statement made by hostile witness is not totally rejectable—Court has to judge weight to be given to it. *1977 CriLJ 513.*

(2) Charge of murder—witness who was declared hostile being silent about person who caused injuries to deceased—First Information Report lodged by him could not be used to fill up the gap. *1984 ALLJ 275 (280) : 1984 All CriR 12 (DB).*

(U) Identification parade.—(1) The accused has a right to establish that the claim of the witness that he/she knows the accused from before is false. The accused can do so by cross-examining the witness himself. But another mode by which the accused can demonstrate the falsity of the assertion of the witness is by seeking a test identification by the witness. *1982 Raj CriC 389.*

(2) An identification parade held 44 hours after the occurrence cannot be said to a delayed one so as to blur the mental image stamped on the memory of the witness. *1980 CriLJ (SC) 205.*

(V) Intention to kill.—(1) Accused aiming blow with his walking stick on head of deceased must be held to have known that death was likely to be caused as the blow was on a vital part of the body—Conviction altered to one under S. 304, Part II. *AIR 1979 SC 1525.*

(2) Accused hitting deceased with sword-stick with such force as to impart his liver and aorta and causing his death was guilty of murder. *AIR 1979 SC 1224.*

(3) Held under all the circumstances of the case that the offence fell under S. 304. Part I (death resulting from act done with knowledge of likelihood of death being caused and with no intention to cause death). *AIR 1976 SC 2619.*

(4) Accused stabbing deceased—Accused held only to know that death was likely to result—Victim dying 9 years later and after an operation—Case will fall under S. 304 and not S. 302. *AIR 1976 SC 1519.*

(5) Two phased attack—First, outside the house and then dragging the victim to the house and then giving him a final blow which was fatal—Held, that the facts negative any intention to kill deceased—Conviction under S. 302 not sustainable. *AIR 1976 SC 1130.*

(W) Interested witnesses.—(1) Partisan witness—Witness, father of deceased and also inimical to accused—His evidence need not be rejected out of hand on this ground alone unless the evidence is found to be untruthful. *AIR 1978 SC 191.*

(2) Partisan eye-witnesses—it is not safe to base conviction of accused on their evidence unless some corroboration is found in the other evidence or material on record. *AIR 1972 SC 1309.*

(3) Complainant although could not be termed as 'change witness and was probably present at the spot yet in view of the enmity and blood feud existing between the parties his testimony cannot be

relied upon without any independent corroboration as to the identity of the assailants. *1983 PakLD 77 (SC).*

(4) Witnesses giving evidence against accused being his relatives, held not likely to falsely implicate him and their evidence was held to be creditworthy and accused was convicted. *AIR 1979 SC 1822.*

(5) Where the murder of a person and his two sons was committed by 8 accused and the wife of the deceased, mother of his sons was the only eye-witness and who although being a close relative of the deceased persons and an interested witness had no previous ill-will or hostility against the accused or a motive to falsely implicate the accused persons, and the medical evidence supported her testimony in regard to the nature of weapons with which the fatal injuries were inflicted on the deceased, under such circumstances the conviction of the accused persons would not be set aside. *AIR 1980 SC 1876.*

(6) Murder case—Interested witnesses—Held, in instant case that witness was class fellow of victim was not sufficient ground to throw out his testimony more particularly when he was common friend of both victim and one of the accused. *AIR 1983 SC 1081.*

(X) Knowledge anterior to event.— (1) It will not be safe to hold the accused was conscious that the pistol was loaded when he was demonstrating as to how a pistol is fired. His knowledge anterior to the event when the bullet was fired and victim killed is of no use. The accused was not guilty of murder but only under S. 304-A. *(1976) 78 PunLR (D) 99.*

(Y) Medical Report.–(1) Medical evidence—Appreciation of—Attack by several accused—Medical report stating 'injuries caused could have been fatal independently but not necessarily'—Conviction of one accused under S. 302—Not valid—Supreme Court charged conviction to one under S. 304, Part. I. *AIR 1977 SC 699.*

(2) Medical evidence showing that the injury caused on the chest of victim with a sharp weapon was sufficient in the ordinary course of nature to cause death—Injury caused intentionally and not accidentally—Accused guilty under S. 302. *1977 BBCJ 598 (Pat).*

(Z) Motive.—(1) Conviction cannot be based on motive alone when on other important issues evidence is insufficient and unreliable. *1976 CriLJ 1325.*

(2) Where the dowry demand was alleged as motive for murder, but the letters of deceased showing praise for mother-in-law, the accused and also other documentary evidence showing no serious differences between the two families this rebutes the prosecution story of insufficiency of dowry as motive for murder. *1984 CriLJ (NOC) 76.*

(ZA) Murder and Robbery—Possession of property.—Murder and robbery forming parts of same transaction—Accused found in possession of property soon after occurrence may be presumed to have committed both crimes unless he has sufficient explanation for his possession of the stolen property. *1977 MPLJ 620.*

(ZB) Presumption of guilt.—Unexplained possession of blood-stained spade with which he was alleged to have hit and killed the deceased raises strong presumption against him. *1977 RajLW 241.*

(ZC) Private defence.—(1) Accused held exceeded his right of private defence and was guilty not under S. 302 but only under S. 304 Part I. *AIR 1979 SC 1179.*

(2) Deceased entering land of accused and assaulting co-accued—Accused in purported exercise of private defence assaulting deceased—Accused can be convicted only under S. 304 Part II and not under S. 302. *AIR 1978 SC 1096.*

(3) Held, on evidence that accused had acted in private defence of property—But had far exceeded his right—S. 300 Exception 2 applied, conviction was altered to one under Ss. 304. Part 1/34. *AIR 1976 SC 2273.*

(ZD) Serious injuries—Intention to cause.—(1) Where serious injuries are found on the person of the accused it becomes obligatory on the prosecution to explain them to satisfy the Court about their origin but, before this burden is placed on the prosecution following two conditions must be satisfied: (a) Injuries on accused must be severe and serious and not superficial; (b) The same must have been at the time of the occurrence in question. *AIR 1979 SC 1010.*

(2) Serious injury inflicted with great force on chest of deceased—Left lung pierced through and through—Both the ventricles punctured—Conviction under S. 302 held was right. *AIR 1978 SC 1420.*

(3) The accused caused only one injury on the head of the victim, who died nearly after nine days of the occurrence. From the facts and circumstances held that the accused had no intention to cause the murder of the victim. *1984 CriLR 139.*

(ZE) Sudden quarrel.—Sudden quarrel—All accused beating deceased on his ribs with stones lying there—Knowledge that injuries are likely to cause death can be presumed but intention to kill not made out—Offence falls under S. 304. Para. II read with S. 34 and not under S. 302. *1977 CriLJ 59 (Raj).*

(ZF) Suspicious circumstances.—Suspicious circumstances cannot from basis for conviction of murder. *1979 CriLJ (NOC) 101 (Punj).*

68. Benefit of doubt.—(1) The greatest possible care should be taken by the Court in convicting an accused who is presumed to be innocent till the contrary is clearly established which burden is always in the accusatory system, on the prosecution. The mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt. *AIR 1972 SC 975.*

(2) If the evidence merely raises a strong doubt or suspicion but falls short of the required standard, the Court should give the benefit of the doubt to the accused. *AIR 1980 SC 551.*

(3) The reasonable doubt which the law contemplates is not that of a weak, vacillating, capricious, indolent or a confused mind. It must be the doubt of a man who is prudent, reasonable, astute and alert, and arrived at after due application of the mind to every relevant circumstance of the case appearing from the evidence. *AIR 1970 All 51.*

(4) Where there is a grave doubt as to the truth of the prosecution story the accused is entitled to the benefit of doubt. *AIR 1979 SC 1224.*

(5) Where in a trial for murder an important prosecution witness relied by both the Courts below deposed that the accused came on the scene after the deceased was fatally assaulted by the co-accused the circumstance was sufficient to give the accused benefit of reasonable doubt. *AIR 1981 SC 650.*

(6) Where it is shown that one of two persons must have murdered the deceased, but it is not clear which of them did so both must be acquitted. *AIR 1975 SC 1962.*

(7) Inconsistent versions of occurrence—Conviction set aside. *AIR 1974 SC 1871.*

(8) Murder—Several persons including accused persons injured in incident—None except three out of sixteen deposing that fatal injury was caused by Accused J—Held, J was entitled to benefit of doubt. *AIR 1974 SC 1822.*

(9) Murder—Occurrence took place on dark night—Witnesses claiming identification of accused in the light of lantern—Existence of lantern doubtful—Accused held entitled to benefit of doubt. *AIR 1974 SC 1740.*

(10) Appeal against conviction of six accused persons—As to one accused prosecution evidence insufficient for convicting him—His presence during commission of crime not believed—Prosecution story found improbable—Held, the accused was entitled to benefit of doubt. *AIR 1981 SC 925.*

69. Confession.—(1) The term "confession" must be strictly constructed as either admitting in terms, the offence or at any rate, all the facts which constitute the offence anything short of it may only be an admission of a gravely incriminating fact or even of a conclusively incriminating fact. *(1970) 2 MadLJ 371.*

(2) Under S. 24 of the Evidence Act, a confession caused by inducement, threat or promise such as is referred to in the section is irrelevant. *AIR 1927 Lah 682.*

(3) Under S. 25 of the Evidence Act a confession to a police officer is inadmissible in evidence to support a conviction. *AIR 1973 SC 922.*

(4) Where the weapons produced are not proved to be connected with the crime, the confession made in the custody of the police is not admissible against the accused. *AIR 1935 Lah 433.*

(5) The evidence of confession must always be closely scrutinised where it is alleged to have been made to witnesses, though it may not be always insufficient to justify conviction. *AIR 1929 Oudh 272.*

(6) Extra-judicial confessions are not considered with favour but that does not mean that evidence of such a confession coming from a person who has no reason to state falsely and to whom it is made in circumstances which lend support to his statement, should not be believed. *AIR 1967 SC 152.*

(7) Where a confession is retracted by the accused, it does not necessarily follow that it should be rejected. The credibility of such a confession in each case is a matter to be decided by the Court according to the circumstances of each particular case and if the Court is of opinion that such a confession is true the Court is bound to act on it. *AIR 1957 SC 381.*

(8) Where the confession was recorded without observing the precautions required by law and it was also self-contradictory and contained an unnatural version the Court dismissed it as unimpressive. *AIR 1954 J & K 42.*

(9) In a case where there is other clear and reliable evidence of murder, a description of the manner in which the murder was committed may be of no serious consequence. But where the proof of the factum of the murder is itself solely dependent upon the confession, the apparent improbability of the manner in which the murder is said to have been brought about, in the confession would be a cogent circumstance against the confession being relied upon. *AIR 1957 SC 381.*

(10) Where the confession does not amount to an admission of murder a conviction for murder cannot be based upon it. *AIR 1941 Mad 238.*

(11) Where a confessional statement contained both an inculpatory and an exculpatory statement and the latter statement was inherently improbable, Supreme Court disregarded the exculpatory statement and convicted the accused on the inculpatory statement. *AIR 1969 SC 422.*

70. Evidence and proof of poisoning.—(1) In cases of alleged poisoning the two questions that require determination are firstly, whether the deceased died of the poison and, secondly, whether the accused administered it. *AIR 1960 SC 659.*

(2) In considering whether the accused administered the poison the questions whether the accused had the poison in his possession and whether the accused had the opportunity to administer the poison will also arise. If these two points are proved a presumption may, under certain circumstances, be drawn that the accused did administer the poison. *AIR 1960 SC 659.*

(3) If the Court finds report of the Chemical Examiner incomplete, it can summon and examine him under S. 293 of Criminal P.C. to satisfy itself that the results stated in the report are correct. *AIR 1959 HimPra 3.*

(4) Where it is not clear at all what poison was actually administered, the evidence being conflicting, it is not sufficient for convicting the accused of poisoning the deceased. *AIR 1975 SC 1327.*

(5) Strict proof is necessary before it can be found as a fact that the deceased died of a particular poison though where it is clear on all the evidence that the deceased did die of a particular poison administered by the accused, a conviction for murder would be proper. *AIR 1979 SC 1513.*

(6) Where the case is tried before a jury the Judge should minutely analyse the evidence before the jury. *AIR 1937 Cal 756.*

(7) Where one deliberately administers a common poison, the effects of which are well known, it is no defence to say that one failed to grade the exact dose correctly so as to cause some injury short of death. *AIR 1938 Nag 318.*

(8) There are several poisons particularly of the synthetic hypnotic and vegetable alkaloids groups which do not leave any characteristic signs as can be noticed on post-mortem examination. *AIR 1972 SC 1331.*

71. Evidence of partisan witnesses who are relatives of deceased or prejudiced or inimical.—(1) The mere fact that the prosecution witnesses are related to the deceased does not by itself render their evidence open to suspicion and doubt. *AIR 1979 SC 702.*

(2) In fact the interest of the relatives of the deceased is undoubtedly to see that the true criminal is prosecuted ; they can have no interest in accusing anyone falsely unless they have enmity with the accused. *AIR 1974 SC 839.*

(3) When a murder takes place in the night within a house, the relatives of the deceased are but natural witnesses and their evidence cannot be said as that of interested persons. *AIR 1980 SC 181.*

(4) Where there is such enmity, it is a rule of prudence that the evidence of the relatives should be taken with caution. *AIR 1974 SC 775.*

(5) The evidence even of partisan witness should be accepted though the judicial approach in dealing with such evidence should be cautious. *AIR 1973 SC 2695.*

(6) When all the material witnesses in a murder case are either related or otherwise interested in the prosecution, in absence of corroboration to a material extent in all particulars it is hazardous to convict the accused on the testimony of such witnesses. *AIR 1981 SC 942 : 1981 CriLJ 484.*

(7) "Related" is not the same as "interested" ; a person is interested only when he is likely to derive some benefit from the litigation or in seeing that the accused is punished. When the only person who witnessed the murder of her husband was the wife, she may be related but cannot be called interested. *AIR 1981 SC 1390.*

(8) Where a witness against whom the High Court had nothing to say and if it required corroboration of his evidence it was because he was a relation of the deceased, it was not considered safe

to base a conviction on his sole testimony. The corroboration that is required in such cases is not what would be necessary to support the evidence of an approver but what would be sufficient to lend assurance to the evidence before them and satisfy them that the particular persons were really concerned in the murder of the deceased. *AIR 1954 SC 204.*

(9) The fact that the witness and the deceased jointly owned a car used as a taxi, has been held not to detract from the evidence of the witness. *AIR 1973 SC 2443.*

(10) Prosecution witnesses interested in deceased and making improvements in material particulars—Reliance could not be placed on testimony of such witnesses. *AIR 1981 SC 1223.*

72. Medical evidence.—(1) Absence of medical testimony as to the nature of the injury, in a case of murder, need not lead the Court to presume only a lesser kind of injury. The Court can itself come to the conclusion that an injury was or was not one which was sufficient in the ordinary course of nature to cause death. *AIR 1978 SC 1525.*

(2) The evidence of medical men is of an advisory character given on the data placed before them. Their evidence is primarily an evidence of opinion and not of fact. *AIR 1975 SC 1925.*

(3) Where the medical evidence is based on a misconception of facts or is contradictory it is not entitled to any weight. *AIR 1979 SC 1382.*

(4) Murder—Appreciation of evidence—Inconsistency between ocular and medical evidence—Conviction cannot be based on such evidence. *AIR 1981 SC 1578.*

(5) The evidence of the eye-witnesses is not to be taken as untrustworthy merely because it is inconsistent with the medical evidence specially when the latter has been scrutinized by the Court with great care and anxiety. *AIR 1973 SC 1204.*

(6) A post-mortem is not absolutely necessary to prove murder. *AIR 1975 SC 1083.*

(7) Where it is proved from the direct evidence of the eye-witnesses that the accused committed murder by firing gun shots the inconsistency between the opinion of expert and the prosecution story relating to distance from which gun shots were fired carries no weight. *AIR 1971 SC 2119.*

(8) In case of contradiction between the testimony of Medical Officer and that of eyewitnesses, as regards to the fatal injury of the deceased, testimony of the Medical Officer is to be preferred. *AIR 1980 SC 1873.*

(9) It is not necessary when a bichuva is used on a fleshy part of the body that there would be a punctured wound. A bichuva has sharp edges on both the sides and when it is drawn out the outer appearance it leaves is of an incised wound. *AIR 1983 SC 832.*

73. Identification of dead body to the doctor who held the post-mortem examination.—(1) Where, in a murder case, the injuries received by the deceased were all antemortem and they were likely to be caused by the alleged murder-weapon during a particular period, the facts could be established only by the doctor who held the post-mortem examination. The dead body, therefore, must be identified to the doctor properly. *(1971) 37 CutLT 477.*

74. Expert evidence.—(1) Before relying on the evidence of an expert as to foot-prints the Judge should form his own opinion as to the identity of the footprints with those of the accused. *AIR 1950 Madh B 76.*

(2) The reports of the chemical examiner and the Imperial serologist were taken on record by the Magistrate without any of the two witnesses being called to give evidence. In ordinary circumstances

there would have been nothing wrong in taking reports of these persons on record as permitted by the Criminal Procedure Code. When, however, there is difference of opinion in the reports, the duty to explain the difference is on the prosecution and the mere production of the report does not under the circumstances, prove anything which can weigh against the appellant. *AIR 1954 SC 1.*

(3) The omission to send blood, for chemical examination, recovered from the place of occurrence, in serious cases such as murder cases, is depreciable inasmuch as there is often a dispute as to the place of occurrence, but such an omission need not jeopardise the success of the prosecution if other reliable evidence as to the scene of occurrence has been produced. *AIR 1976 SC 2263.*

(4) After holding certain test firearms expert opining that cartridge found near the cot of deceased was fired from pistol produced by accused—Held there was no reason for distrusting his opinion. *AIR 1979 SC 391.*

(5) A majority of fingerprints found at crime scenes or on crime articles are partially smudged, and it is for the experienced and skilled fingerprint expert to say whether a mark is usable as fingerprint evidence. Similarly it is for a competent technician to examine and give his opinion whether the identity can be established and if so whether that can be done on eight or even less identical characteristics in an appropriate case. *AIR 1978 SC 1183.*

75. Evidence of approver.—(1) The evidence of the approver is not sufficient for a conviction for murder. It is necessary that there should be corroboration of such evidence. *AIR 1980 SC 1871.*

(2) The corroboration may be by circumstantial evidence. *AIR 1963 SC 599.*

76. Evidence of accomplice.—(1) Under S. 133 of the Evidence Act an accomplice in a crime is a competent witness, and though his evidence may be presumed to be untrustworthy unless corroborated in material particulars. *1974 CriLJ 43 (Raj).*

(2) Though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will as a matter of practice not accept the evidence of such a witness without corroboration in material particulars. *AIR 1963 SC 599.*

77. Examination of the accused under S. 313, Criminal P. C.—(1) Where the evidence was that the accused pointed out the dead body and the place where the marks of fighting and dragging took place but in the examination under Section 313 of the Criminal P. C. the accused was not asked any question about it, it was held that the evidence cannot be used against the accused. *AIR 1971 Goa 15.*

78. Presumption from possession of property of deceased.—(1) The presumption of guilt from recent possession of property which had been removed from the person of the deceased at the time of the murder is thus one of fact and the Court has a discretion to draw it or not. *AIR 1978 SC 1183.*

(2) Inference that the accused must have murdered the deceased cannot be drawn from the mere fact of recovery of ornaments last worn by the deceased at the instance of the accused in absence of any evidence connecting the accused with the murder. *AIR 1980 SC 1753.*

(3) Accused car driver of deceased, driving car with deceased sometime before incident on way to deceased's house—Motive of murder said to be strained relation between the two because of illicit connection of accused with deceased's wife—Discovery of articles belonging to deceased and weapon of assault at the instance of the accused—Accused guilty of offence of murder. *AIR 1980 SC 1708.*

(4) Mere possession of the property of the murdered person would not be enough to conclude that the person in possession is the murderer and that to convict him of murder, there must be evidence to

connect him with that offence and eliminating the possibility of his being an innocent receiver of the property from the murderer. *AIR 1966 SC 821.*

(5) These ornaments were therefore established to be the ornaments worn by the deceased and the accused was not in a position to give any satisfactory explanation as to how he came to be in possession of the same on the very same day on which the alleged murder was committed. The circumstantial evidence was therefore sufficient to hold the accused responsible for the murder of the deceased. *AIR 1978 SC 522.*

(6) The presumption permitted to be drawn under S. 114, Ill. (a), Evidence Act has to be read along with the important time factor. If ornaments or things of the deceased are found in the possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months expire in the interval, the presumption may not be permitted to be drawn having regard to the circumstances of the case. *AIR 1954 SC 1.*

(7) Murder taking place at night—Early next morning accused disappearing from his house—After his arrest accused producing articles which were removed from body of deceased from his house—Inquests made shortly after dawn and not late in day—Accused held was not merely receiver of stolen property but murderer. *AIR 1954 SC 704.*

79. Sufficiency of evidence.—(1) To justify a conviction in a criminal case the evidence of guilt must not be a mere balance of probabilities but must satisfy the Court beyond reasonable doubt that the accused is guilty. *AIR 1979 SC 1382.*

(2) The prosecution had to stand on its own legs ; it could not take advantage of the weakness of the defence. *AIR 1974 SC 1550.*

(3) Where the evidence is unsatisfactory it would be unsafe to convict the accused of murder. *AIR 1980 SC 102.*

(4) Cases of homicide cannot be decided by adherence to mechanical rules ; the decision must depend upon the particular circumstances of each case. Where a case depends entirely upon circumstantial evidence, in order to justify the inference of guilt the facts found must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt. *AIR 1977 SC 1063.*

(5) Where the murder committed is cruel and revolting it is necessary to examine the evidence with more than ordinary care, for, the shocking nature of the crime might induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law. *AIR 1952 SC 159.*

(6) The fact that blood-stained clothes were recovered from the accused or a blood stained knife or the head or cloth of the deceased or the corpse is recovered at the instance of the accused or the fact that some blood-stains were found on his clothes is not sufficient for convicting the accused of murder. *AIR 1977 SC 135.*

(7) When the evidence of a sole eyewitness is full of discrepancies it is unsafe to act upon his evidence. In such a case, it is always wise to seek corroboration from other prosecution witnesses. *AIR 1983 SC 810.*

(8) Unless the prosecution has positively proved its case to the Court's satisfaction, the accused cannot be convicted by reason of the weakness and unsatisfactory nature of the defence. *AIR 1957 SC 614.*

(9) It is unsafe to convict a person of murder upon the interested testimony of witnesses. *AIR 1973 SC 944.*

(10) The maxim "falsus in uno falsus in omnibus" is merely a rule of caution and not a rule of law and the Court is entitled notwithstanding the maxim, to convict the accused when the commission of the offence is clearly established. *AIR 1974 SC 1096.*

(11) Inconsistency in F.I.R. and evidence by eye-witnesses due to officer's remissness at the time of F.I.R.—No prevarication or improvement by witnesses—Evidence held reliable. *AIR 1974 SC 220.*

80. Value of evidence.—(1) When a person sees a murder committed and gives no information thereof his evidence is little better than that of an accomplice. *AIR 1923 Lah 391.*

(2) The fact that the eye-witness does not divulge the name of the murderer to any of the several persons to whom he is likely to mention it, casts a doubt on his evidence. *AIR 1974 SC 284.*

(3) The mere fact that the accused belong to a high caste and that the witnesses value the lives of the accused more than the life of the deceased person is not a sufficient reason for rejecting their evidence when they are prima facie reliable. *AIR 1923 Lah 436.*

(4) The finding of blood-stains on nails though it may be of value as circumstantial or corroborative evidence. *AIR 1950 Lah 149.*

(5) Absence of blood-stains on clothes of witnesses who claimed to have held accused does not disprove their evidence. *AIR 1979 SC 1831.*

(6) Prosecution under Ss. 302/34 and 342, P.C.—Witness resiling from statement in committing Court—Such statement admitted under S. 288, Criminal P.C.—Conviction for murder based on such sole uncorroborated evidence—Not proper. *AIR 1964 SC 1357.*

(7) Murder case—Injured prosecution witnesses illiterate rustics cannot be discarded simply because of their inability to describe vividly location of enclosure relating to which altercation ensued. *1983 AllLJ 652.*

81. Statement on oath.—(1) The ordinary presumption is that a witness speaking under oath is truthful unless and until he is shown to be untruthful or unreliable in any particular respect. Witnesses solemnly deposing on oath in the witness box during a trial upon a graver charge of murder must be presumed to act with a full sense of responsibility of the consequences of what they state. It may be that what they say is so unlikely or unnatural or unreasonable that it is safer not to act upon it or even to disbelieve them. *AIR 1974 SC 1168.*

82. Circumstantial evidence.—(1) Circumstantial evidence consists in various links in a chain, which, if complete, leads to the undoubted conclusion that the accused and the accused alone could have committed the offence with which he is charged. *AIR 1979 SC 1711.*

(2) It is a fundamental principle of criminal jurisprudence that circumstantial evidence should point indubitably to the conclusion that it is the accused only who is the perpetrator of the crime, and that such evidence should be incompatible with the innocence of the accused. *AIR 1978 SC 1544.*

(3) Where the circumstantial evidence was absolutely incompatible with the innocence of the accused, the mere failure of the prosecution to prove the exact spot where deceased was killed or fact of recovery of only some ornaments from the body of the deceased after it was taken out of the well when large part of ornaments were proved to have been removed by the accused before throwing the body of the deceased in the well, could not fault the prosecution case. *AIR 1981 SC 363.*

(4) The fact that the accused was alone in the house with his wife when she was murdered and the fact that the relations between the two were strained would in the absence of any cogent explanation by the accused point to his guilt. *AIR 1972 SC 2077.*

(5) If the evidence though circumstantial brings home the guilt of the accused, the conviction for murder would be proper. *AIR 1979 SC 716.*

(6) If the evidence is consistent with any other natural explanation there is an element of doubt of which the accused must be given the benefit. *AIR 1955 SC 792.*

(7) It is trite law that when the evidence against an accused person, particularly when he is charged with a grave offence like murder, consists only of circumstances and not direct oral evidence, it must be qualitatively such that on every reasonable hypothesis, the conclusion must be that the accused is guilty, not fantastic possibilities nor freak inferences but rational deductions which reasonable minds make from the probative force of facts and circumstances. *AIR 1974 SC 1144.*

(8) Mere suspicion arising from circumstantial evidence is not sufficient. *AIR 1974 SC 1193.*

(9) Where the circumstantial evidence is unsatisfactory the accused must be given the benefit of the doubt. *AIR 1979 SC 1382.*

(10) Whether circumstantial evidence establishes the guilt of the accused is a question of fact and not a question of law. *AIR 1937 PC 179.*

(11) The absence of motive does not establish innocence of the accused when there is strong evidence to the contrary. *AIR 1974 SC 1193.*

(12) Where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant with reasonable definiteness and in proximity to the deceased as regards time and situation and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. *AIR 1955 SC 801.*

(13) In a case where writing made by the accused on the night of the murder was found on deceased's table and watch belonging to the deceased was got recovered by the accused it was held that in the absence of any acceptable explanation by the accused, the circumstances coupled with recovery were sufficient to hold the accused guilty of murder. *AIR 1980 SC 531.*

(14) In evaluating the circumstantial evidence, each circumstance is not to be considered in isolation ; various circumstances have to be viewed conjointly and an overall picture of the affair has to be drawn from them. *AIR 1974 SC 631.*

(15) Ordinarily, when a person is accused of committing murder of another, the fact that the accused and the deceased were last seen alive in company of each other and failure of the accused to satisfactorily account for disappearance of the deceased is considered a circumstance of an incriminating nature. *AIR 1979 SC 1949.*

(16) The circumstance of the case are so telling that the only conclusion reasonably possible is the one that the wife did not commit suicide by hanging herself but was done to death by being brutally assaulted and thereafter hung by neck with a rope by her husband and mother-in-law. Medical evidence also shows that hanging herself was not possible because of severe injuries on her person. Conviction of husband and mother-in-law is confirmed. *AIR 1983 SC 1002.*

(17) The fact that the accused did not surrender and was not traceable for one year does not by itself justify a conviction. *AIR 1974 SC 1193.*

(18) Dead bodies in a decomposed state—Doctor did not send them to anatomy expert—Accused would be entitled to get benefit of any gap or lacuna in prosecution evidence. *AIR 1975 SC 258.*

(19) Evidence showing motive for the crime, conduct of accused immediately before and after incident to be unreasonable and unnatural refusal of accused to participate in identification parade and to give specimen of his footprints—These circumstances, held to have bearing on guilt of accused. *AIR 1973 SC 264.*

83. Injuries on the accused.—(1) The presence of injuries on the person of the accused may be a circumstance against him. *AIR 1976 SC 2263.*

(2) In a case of throttling causing death, the absence of injuries on the person of the accused would not go to show that he was not the person who had throttled the deceased to death because resistance by the deceased resulting in injuries to the assailant is not a necessary feature to every act of throttling. *AIR 1972 SC 677.*

84. Time of death.—(1) The question as to the time of death cannot be decided only by taking into consideration the fact that faecal matter was found in the intestines of the deceased though it may be one of the factors to be considered. *1970 SC Cri R 209.*

85. Absconding of accused.—(1) The act of absconding is a relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstance of each case. Generally the Courts consider it as a very small item in the evidence for sustaining conviction. It cannot be held as a determining link in completing the chain of circumstantial evidence consistent only with the hypothesis of the guilt of the accused. *AIR 1971 SC 1050.*

(2) Absconding of accused is a relevant piece of evidence. *(1971) 37 CutLT 698 (DB).*

86. Dying declaration.—(1) It is generally unsafe to convict a person of murder on the mere dying declaration of the deceased without satisfactory and sufficient corroboration. *1980 CriLJ (NOC) 30 (DB) (Gauhati).*

(2) A conviction based on a dying declaration which is found from the circumstance and evidence to be credible is not wrong. *AIR 1980 SC 358.*

(3) Once the Court comes to the conclusion that the dying declaration was the truthful version of the circumstance of the death and the assailants of the victim there is no question of further corroboration. *AIR 1958 SC 22.*

(4) It is not prudent to base conviction on a dying declaration made to Investigating Officer, particularly when it is not signed by the declarant or the witnesses. *AIR 1979 SC 190.*

(5) Dying declaration giving detailed account of occurrence though made in serious condition—Declaration not attested by deceased's wife or doctor present there—It smacks concoction and cannot be relied on. *AIR 1981 SC 1578.*

(6) Where the person is not proved to have died as a result of the injuries received by him in an incident his dying declaration containing a complete account of the occurrence and the assailants as seen by him cannot be said to be a statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death so as to become relevant under S. 32, Evidence Act. *AIR 1964 SC 900 (903) : 1964 (1) CriLJ 727.*

87. Murder by poisoning.—(1) Where A administers poison to B with the intention of causing death or of causing bodily injury such as is likely to cause death or with the knowledge that he is likely by such act to cause death and B dies as a consequence the offence would amount to culpable homicide and may amount to murder. *AIR 1957 Pat 462*

(2) Where the evidence is circumstantial, the prosecution has to establish in addition to motive three facts in a case of poisoning: (i) that death took place by poisoning ; (ii) that the accused had the poison in his possession; and (iii) that the accused had the opportunity to administer the poison. It is only where there is motive that these facts will enable the Court to draw the inference that the poison was administered by the accused to the deceased resulting in his death. *AIR 1972 SC 656.*

(3) The mere fact that the accused had no intention to cause death is not sufficient to take the case out of S. 300. If it was done with the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, the case satisfies the requirements of S. 300. *AIR 1954 HimPra 11.*

(4) In the case of Dhatura poisoning, it is always necessary to ascertain the object with which the Dhatura was administered and the best indication of the intention of the offender can be gathered from the amount of Dhatura administered. *AIR 1957 AndhPra 456.*

(5) Where the accused, who was registered as a homoeopath, administered to the patient suffering from guinea-worm 24 drops of stramonium and a leaf of Dhatura without studying their probable effect, but the poisonous contents of the leaf were not satisfactorily established, it was held that the accused was guilty under S. 304A and not under S. 302 as it could not be held that the accused administered the stramonium drops and Dhatura with the knowledge that he was likely by such an act to cause the death of the deceased. *AIR 1965 SC 831,*

(6) Accused administering poison—Death—He is guilty of murder as he must be held to have intended death or to have known that death would be the imminent result. *AIR 1959 HimPra 3.*

88. Drunkenness.—(1) Voluntary intoxication of the offender at the time of the offence does not excuse the offender. Under S. 86 ante he is liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. The section does not, however, say that he is liable to be dealt with also as if he had the same intent as he would have had if he had not been intoxicated. *AIR 1956 SC 488.*

(2) Where A in a state of drunkenness fired his gun in the air to scare away the opposite party and in that act a stray pellet wounded the deceased, it was held that A can, under the circumstances, be attributed the knowledge referred to in S. 299 but not the knowledge referred to in clause 4 of Section 300 and so was punishable under the second part of S. 304. *AIR 1955 Punj 13.*

(3) Where the drunkenness has led to insanity of course, the offender will not be guilty. *AIR 1957 All 667.*

(4) Presumption that the accused intended natural consequences of his act in stabbing the deceased is not rebutted where there is nothing to show that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous. *AIR 1916 Low Bur 114.*

(5) Accused and deceased attending a marriage dinner—Accused who was intoxicated asking deceased to step aside so that he might occupy a convenient seat—On his refusal accused shooting deceased in abdomen and causing his death—Accused found to be not so much under influence of drink as to be incapable of forming required intention—Accused was guilty of murder. *AIR 1956 SC 488.*

89. Act done to person believed to be dead.—(1) A causes bodily injury to B without any of the intentions referred to in clauses 1, 2 and 3 of S. 300 or the knowledge referred to in cl. 4 of S. 300. B falls down unconscious. A believing that B is dead but with the intention of causing the disappearance of the evidence of his act hangs B's body or sets fire to it or throws it into a well or

places it on the Railway track. It is established that the first bodily injury did not in fact cause death, but only the subsequent act of hanging, etc. It seems to be clear that the offence does not constitute the offence of culpable homicide nor can it consequently amount to murder. *AIR 1920 Mad 862.*

(2) A causes bodily injury to B as a result of which B falls unconscious. A does not know whether B is dead or alive but does the further act in order to be sure of killing B if he is still alive and death is caused only by the further act. Held : that this would be murder. *AIR 1949 Mad 648 (649)*.

90. Practice and procedure.—(1) When a person is attacked and killed it must be decided whether the assailant is guilty of culpable homicide and if so whether it amounts to murder or not. If it is held that it does not amount to murder, it must further be made clear whether the offence falls under Part I or Part II of S. 304. *AIR 1928 Lah 868.*

(2) As a matter of practice, Courts prefer not to act on plea of guilty in order to ascertain the accused's state of mind and see whether or not he acted under provocation sufficient to reduce the offences to culpable homicide or only sufficient to affect the sentence. *AIR 1935 Rang 49.*

(3) Plea of guilt only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section. *AIR 1932 Lah 363.*

(4) Where there is ambiguity in the law of procedure it should be resolved in his favour. *AIR 1941 Nag 94.*

(5) In capital cases it is important that the more important of the witness should be examined in such a way as would enable the Court to properly appreciate the evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events, the facts which the witness saw or the acts which they did and also the reasons which actuated them therein to the acts, being narrated in an intelligent fashion. It is only by this means that a clear and consistent account of the whole affair may be presented to the Court. *AIR 1935 Cal 184.*

(6) First conviction for attempt to murder—Subsequent trial on death of victim for murder not barred. *AIR 1935 Pesh 18.*

(7) Where a case is put up under S. 302 in the Magistrate's Court for inquiry it is advisable to commit under S. 302 instead of under S. 304; whether the offence falls under S. 302 or S. 304 should be left to the Sessions Court. *AIR 1953 Bhopal 1.*

(8) Six named accused charged under Section 302/149—Fact as to who gave the fatal blow not known—Acquittal of four of them—conviction of remaining two—Legality—Conviction under Ss. 302/34, Penal Code, not illegal. *AIR 1968 SC 43.*

91. Bail.—(1) Persons accused under S. 302/115 of the Code are not entitled to bail as a mater of right. *AIR 1940 Oudh 8.*

(2) Person wanted for a murder is also entitled to get an anticipatory bail under S. 438 Cr. P. Code. *1982 CriLJ 508.*

92. Duty and powers of Court in undefended capital cases.—(1) Indeed the right gives to a judge under S. 165 of Evidence Act is so wide that he may "ask any question he pleased in any form, at any time of any witness, or of the parties about any fact, relevant or irrelevant". S. 172(2) of the Criminal P.C. enables the Court to send for the police diaries in a case and use them to aid in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial. *(1972) 1 AnWR 340.*

93. Appointment of amicus curiae.—(1) The Court may appoint counsel to act as amicus curiae even if the accused refuses to be defended by a counsel engaged by Court. But such counsel does not represent the accused and cannot cross-examine witnesses since cross-examination must be by the adverse party. The only way in which the Court may protect the accused in such situation is to put necessary question itself to the prosecution on witnesses in all matters requiring clarification. *(1972) 1 Andh WR 340.*

94. Court's duty generally in capital cases.—(1) In capital cases, it is the duty of the Court to sift the evidence carefully and try to find the truth. It should appreciate the evidence carefully without resorting to unwarranted surmises and conjectures and should not avoid responsibility by merely observing that prosecution has not come with clean hands. *1972 CriLJ 182 (Assam).*

(2) Court while holding an accused guilty of murder should also enter a finding that he did the act with the requisite intention or knowledge. *1981 CrilJ 451.*

(3) Where two views one indicating conviction and the other supporting acquittal are equally possible High Court should not disturb the finding of the trial court. *AIR 1982 SC 1224.*

(4) In cases of murder High Court must give reasoned judgment indicating application of mind to question of fact and law. *AIR 1981 SC 645.*

95. Corpus delicti.—(1) The minimum evidence necessary to prove that a person is dead is either the dead body being found or somebody's evidence that he saw the body lying dead or that he had seen the deceased being done to death. *AIR 1953 Pepsu 17.*

(2) If the body is not forthcoming, the strongest possible evidence as to the fact of murder should be insisted on before the accused can be convicted. *AIR 1925 All 627.*

(3) Fact of death can be proved like any other fact from circumstantial evidence. *AIR 1957 SC 381.*

(4) The fact of death can be proved like any other fact from circumstantial evidence but it must be proved by the prosecution. *AIR 1935 Lah 805.*

(5) Prosecution is required to give satisfactory proof corpus delicti—Then it has to prove that accused is the person who murdered the deceased and no one else. *AIR 1967 Goa 21.*

(6) Murder—Corpus delicti—not found —Conviction can still be based on circumstantial evidence. *AIR 1981 SC 738.*

96. Framing of charge.—(1) An alternative charge of murder or culpable homicide not amounting to murder is not permissible. *1887 Pun Re No. 11 P. 19.*

(2) Where A and B were jointly tried for the offence of murder and/or aiding and abetting one another in the commission of that offence, it was held that they are tried for two separate and distinct offences and that the charge framed in the case mentioning only S. 302 read with S. 109 and not also S. 302 separately was defective in view of S. 221, Criminal P.C. (5 of 1898). *AIR 1947 Bom 146.*

(3) A conviction under S. 325 and S. 304, Part II in the alternative cannot be made. *AIR 1933 Lah 865(865) : 34 CriLJ 1210.*

(4) A person may be tried at one trial both under S. 302 and S. 201. *AIR 1940 Pat 289.*

(5) Where a person is acquitted of the charge of murder and other cognate offences with which he is charged, his conviction under S. 201 of the Code not illegal. *AIR 1952 SC 159.*

(6) Where the accused is charged under S. 302 read with S. 34 his conviction for the substantive offence under S. 302 is not bad in the absence of prejudice. *AIR 1956 SC 116.*

(7) Where the accused persons have been charged under S. 302 but they have notice that they are being charged with the offence of committing murder in pursuance of their common intention, their conviction under S. 302 read with Section 34 is not bad. *AIR 1958 SC 672.*

(8) Although there is a difference between common object and common intention, they both deal with combination of persons who become punishable as sharers in an offence and a charge under S. 149 is no impediment to a conviction by the application of S. 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all. *AIR 1958 SC 672.*

(9) A charge under S. 149 is no impediment to a conviction by the application of S. 34 if the evidence discloses the commission of the offence in furtherance of common intention of all and no prejudice to the accused is caused. *AIR 1974 SC 1256.*

(10) It is not permissible to charge a man with murder on the ground that he himself has caused the death and at the same time to charge him with constructive liability for murder on the assumption that someone else has caused the death. *AIR 1955 Assam 226.*

(11) when the case of the prosecution is that the person abducted has been murdered by the abductor there is no scope for further charge under S. 364, Penal Code for kidnapping or abducting in order to murder. *AIR 1964 Assam 53.*

97. Charge should be explained to the accused.—(1) When arraigning an accused and before receiving his plea, the Court should be careful to explain the charge to the accused in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead. *(1880) ILR 5 Cal 826.*

98. Charge for murder—Conviction for hurt or grievous hurt or for other offences.—(1) Where death is caused by an injury inflicted by the accused and the case does not fall within S. 299, he may be convicted of hurt. *AIR 1971 Mad 259.*

(2) A person who voluntarily inflicts injury such as to endanger life must always, except in the most extraordinary and exceptional circumstances, be taken to know that he is likely to cause death. If the victim is actually killed, the conviction in such cases ought ordinarily to be of the offence or culpable homicide. *AIR 1930 Bom 483.*

(3) A person can be guilty of voluntarily causing grievous hurt who does not intend to cause grievous hurt but only knows himself likely to cause grievous hurt; and it would appear that if he did not intend to cause grievous hurt, it would probably not fall under any of the clauses of S. 300 and so would not be murder. *AIR 1937 Mad 792.*

(4) The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death; in the other, the injuries must be such as endanger life. *AIR 1946 Bom 38.*

(5) Where death was the result of the injury caused, it was held that the elements necessary to constitute an offence of culpable homicide under S. 299 were absent but the culprit was liable to be convicted of the offence of causing grievous hurt. *AIR 1979 SC 2755.*

99. Several charges—Judge's duty.—(1) A Judge is bound under S. 235 of the Criminal P.C. to pass a sentence on each of the charges of which the accused is found guilty. Where, therefore, a Court has convicted the accused under Ss. 302, 304 and 324 of the Code his refusal to prescribe the punishment under Ss. 304 and 324 is illegal. *AIR 1939 Pesh 23.*

100. Charge for murder—Conviction under S. 194 or 201.—(1) Where a person is charged with murder, his conviction under s. 194 of the Code is not illegal but the accused should have been called upon to plead to the charge under Ss. 194 of fabricating false evidence. *AIR 1933 All 30.*

(2) Where the accused was charged with offences under Ss. 302 and 201 and he was convicted of the offence under S 302 it does not necessarily follow that he should be acquitted of the offence under S. 201. *AIR 1957 Orissa 216.*

101. Charge for murder and kidnapping.—(1) Where the offence of kidnapping is part of the transaction which led to murder, a separate conviction and sentence could not be maintained. *(1920) 2 LahLJ 653.*

102. Charge under S. 302/34—Conviction under S. 302.—(1) The omission to frame separate charge under S. 302 is curable irregularity and it can be condoned if it is shown that no prejudice is caused to the accused by way of failure of justice. *ILR (1969) Cut 887.*

(2) Where P and other persons were charged under Section 302 read with Section 34, but the other persons were acquitted, it was held that the liability of P had to be established individually and not conjointly before he is convicted under S. 302 simpliciter Such liability should be fixed on him conclusively and not by conjectures or presumptions only. *AIR 1974 SC 778.*

103. Charge under S. 302/34—Conviction under S. 302/149.—(1) In some cases the common object of an unlawful assembly may coincide with the common intention of the members of the assembly committing a crime and that in such a case both Ss. 34 and 149 may apply. In such cases a charge under Ss. 302/34 may be altered to one under S. 302/149 and the accused convicted under the altered charge when no prejudice is caused thereby to the accused. *1970 UJ (SC) 866.*

Section 301

301. Culpable homicide by causing death of person other than person whose death was intended.—If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been, if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Cases

1. Scope.—(1) Section 301 PC applies only to a case where an act falls to have intended or known to be likely effect on the victim aimed at, but has that very effect upon another unintentionally. The accused's intention or knowledge of the effect of his act in relation to the unintended or accidental victim is presumed not to exist at all in a case to which section 301 can apply. When a person intending to kill one person kills another person by mistake, he is guilty of murder as if he had killed the person whom he intended to kill *(1967 AllLJ 631)*. Homicidal intention cannot be restricted to the life of the person intended to be killed. Once the criminal intention to destroy human life is established there appears to be no reason to restrict by limiting the scope of its operation only to the person who is intended to be killed *(29 CriLJ 280)*. Illustrations to sections 34 and 149 of the Penal Code cannot be invoked in the provision of this section. *(AIR 1965 (SC) 1260.)*

(2) Section 301 embodies the principle that where a blow aimed at one person alights upon another and kills him, the offence committed by the assailant is the same as it would have been if the blow had struck the intended victim. This is based on the well-established principle of criminal jurisprudence known as the doctrine of "transferred malice." *AIR 1928 Lah 344.*

(3) Section 301 embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. To invoke S. 301, the accused shall not have any intention to cause the death or the knowledge that he is likely to cause the death of the victim. *AIR 1965 SC 1260.*

(4) If an accused person could be convicted of murder of another by reason of this section in the event of death, he could be convicted of attempt to murder if death has not resulted. S. 308, Penal Code provides for the punishment of a person who intends and attempts to commits murder but fails in achieving his object. The effect of the two sections read together is that an accused who shoots at A and wounds B by mistake could be guilty under S. 307, although he has not been able to get the person whom he intended to injure. *AIR 1935 Pesh 74.*

(5) If the case is not one of culpable homicide this section has no application thus where the accused had only the intention of causing hurt to A in aiming a blow with a strike at him and the blow fell on the child in arms of the intervening woman and resulted in its death, he is guilty only under Section 323, Penal Code. *(1969) 2 MadLJ 109; AIR 1920 Bom 224.*

(6) The essential pre-requisite for an offence under this section is the commission of an offence of culpable homicide as defined in S. 299 with reference to some person. Once that is established and a person dies as a consequence of the act intended for a different person there is an offence of culpable homicide with reference to the person whose death was caused. *AIR 1979 (NOC) 157.*

(7) In order that the section may apply the accused's guilty intention or knowledge must have no reference to the actual victim but to some other person. *AIR 1965 SC 1260.*

(8) Where the culpable homicide is not committed in respect of the intended victim but of some one else, the quality of the homicide, this is whether it amounts to murder or not, will be determined by a consideration of the intention or knowledge of the offender in respect of the intended victim. In other words, if the offence would be murder in respect of the intended victim the same would be the nature of the offence in respect of the actual victim. Thus if the offender intended to kill A but killed B in mistake for A the offence is murder. *AIR 1979 (NOC) 157.*

(9) Where A aims a blow with a stick at B knowing that the blow was likely to cause B's death, but the stick, instead of hitting B, hits C who dies in consequence of the blow, A will be guilty of culpable homicide not amounting to murder. The reason is that even if B had been hit and was killed. A would have been only guilty of the offence of culpable homicide not amounting to murder. *AIR 1957 MadhPra 217.*

(10) The requisite intention or knowledge to cause death of the actual victim though in fact absent, is ascribed to the person causing the death and not to other. Thus if a member of rioting assembly in attempting to kill A actually killed his mother (who intervened) whose death he neither intended not knew himself to be likely to cause, he would be guilty of murder under S. 302 read with S. 301, but the other members cannot be made liable under S. 302 read with S. 149, Penal Code as, for such conviction, it has to be proved that the offence was such that the members of the assembly knew it likely to be committed in prosecution of the common object. The offender could not have known that he was likely to kill the person whom he actually killed. A fortiori the other members could not have such knowledge. *AIR 1963 AndhPra 146.*

Section 302

302. Punishment for murder.—Whoever commits murder shall be punished with death or [1][imprisonment] for life, and shall also be liable to fine.

1. Substituted by Ordinance No. XLI of 1985, for "transportation".

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Section 303 declared void—Effect.*
3. *Extenuating circumstances—General.*
4. *Murder by several persons—Sentence.*
5. *Age or sex of accused, if an extenuating circumstance.*
6. *Age of victim.*
7. *Presence or absence of motive.*
8. *Provocation.*
9. *Starvation.*
10. *Family considerations.*
11. *Feelings of relatives.*
12. *Status of accused.*
13. *Murder committed at the instigation of others or for hire.*
14. *Absence of premeditation.*
15. *Suddenness of quarrel.*
16. *Subsequent remorse.*
17. *Offence being brought to bay.*
18. *Corpus delicti not found.*
19. *Lapse of time after commission of offence.*
20. *Infidelity of woman.*
21. *Absence of intention to kill.*
22. *Acquittal of co-accused.*
23. *Acquittal of A for murder of X—Subsequent trial of B for the same offence .*
24. *Intoxication.*
25. *Communal excitement.*
26. *Confession.*
27. *Plea of guilty.*
28. *Enmity.*
29. *Guilty found on circumstantial evidence.*
30. *Mental condition of the accused.*
31. *Exceeding right of private defence.*
32. *Possibility of commutation by Government.*
33. *Delay in execution of sentence of death—Effect.*
34. *Difference of opinion between Judges of the Bench.*
35. *Accused persons exceeding the number of victims.*
36. *Accused, a person who has done service to public.*
37. *Rashness of deceased.*
38. *Weakness of evidence.*
39. *Murder under threat of co-accused.*
40. *Injuries on accused.*
41. *Killing on obedience of illegal order.*
42. *Nature of attack by accused.*
43. *Accused, a pregnant woman.*
44. *Superstition.*
45. *Deafness and dumbness.*
46. *Other miscellaneous cases in which the lesser sentence was given.*
47. *Onus of proving mitigating circumstances.*
48. *Custom of killing for unchastity.*
49. *Recommendation for clemency.*
50. *Abetment of murder—Punishment.*
51. *Benefit of doubt.*
52. *Sentence—Accused taking only secondary part in the crime.*
53. *Interference by High Court Division.*
54. *Interference by Supreme Court.*
55. *Charge for murder—conviction for offence under S. 201.*
56. *Alteration of charge from S. 302/34 to S. 302/149.*
57. *This section and S. 396.*
58. *Charge for murder and for other offence forming part of same transaction.*
59. *Fine.*
60. *Charge under S. 302—Conviction under Section 302 read with S. 34.*
61. *Form of sentence.*
62. *Double murder—Sentence.*
63. *Procedure.*
64. *Form of charge.*
65. *Hearing before passing sentence.*
66. *Appreciation of evidence.*
67. *Practice.*
68. *Confessions, motive and dying declaration.*
69. *Poisoning.*
70. *Onus of proof.*
71. *Medical evidence.*
72. *Sentence.*
73. *Circumstantial evidence—murder charge—no eye-witness.*

(1) There is no homicide unless both A and B are human beings. The proper definition of human being depends upon the answers to three questions: when a living organism becomes a human being; what living creatures are properly classifiable as human beings; and when a person ceases to be a human being. The first of these questions deals with birth, the second with monsters and the third with death, The general rule in criminal law is that C cannot be convicted of the offence with which he is charged unless D has proved the commission of that offence by C as charged beyond reasonable doubt. This means that in criminal cases D normally carries the burden of proof and that the quantum of proof is beyond reasonable doubt. In a case involving capital punishment it is essential that all material evidence should be placed before the court particularly if that evidence would go in favour of the accused. Where the murder committed is a particularly cruel and revolting one, it is necessary to examine the evidence with more than ordinary care least the shocking nature of the crime might induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law. The prosecution must prove the circumstances which ordinarily constitute the offence of murder. The burden is not cast upon an accused person of proving that no crime has been committed though it has been established that the accused has special knowledge of the point whether a crime was committed or not *(41 CriLJ 369)*. The onus of proving grave and sudden provocation, such as would reduce the offence of murder to one of culpable homicide not amounting to murder, is on the accused. The accused on his trial is merely on the defensive and owes no duty to any one but himself. He cannot be convicted because he has not tried to explain to the court how a death has occurred or by what means. It is the duty of the advocate in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with accused's innocence. In a case of murder it is unsafe to relay upon the evidence of witnesses who have resiled from their previous statements. The silence of the accused and failure to produce evidence are not consequence and cannot relieve the prosecution of the duty to bring home the guilty to accused *(AIR 1975 SC 573)*. Where the accused was seen running away from the scene of murder with hood-stained clothes and a knife in his hand it was held that this evidence along with his subsequent conduct was sufficient to prove his guilty *(1974 CriLJ 36 SC)*. Whether a particular injury is fatal or non-fatal is a question of fact to be determined with reference to the circumstances of each case. Discovery of dead body at the instance of accused is not conclusive proof of an offence of murder *(AIR 1966 SC 821)*. But that evidence though conclusive proof of an offence under section 201, PC is not sufficient to sustain a charge of murder. The conduct of an accused charged with murder, in running away from the scene of occurrence and in absconding for a period of four months, though it may raise some suspicion against him, does not necessarily suggest guilty mind when he happens to be an uneducated person living in a village. The fact that the murder was committed at accused's house raises a strong suspicion of guilt against him but any amount of suspicion cannot take the place of proof. In cases of murder it is not only desirable but necessary that the identity of the spot murder should be fixed by collecting the blood-stained earth, if and when available, and forwarding it to the Chemical Examiner and the Serologist for analysis of the blood. Mere presence of serious injuries on accused is no ground for acceptance of defence version. Where it was a sudden fight which took place in the heat of passion upon a sudden quarrel, and a person died, lesser penalty of imprisonment for life can be rightly awarded *(1978 P CriLJ 772)*. Where the provocation caused to the accused is very grave though not sudden the court is justified in not inflicting sentence of death *(35 CriLJ 476)*. Provocation, which is not sufficient to reduce an offence of murder to that of culpable homicide, may be taken into consideration, together with other circumstances, in passing the alternative sentence of imprisonment for life. The accused is ordinarily responsible for his own acts and is not responsible for the acts of others unless law specifically makes him responsible for the acts of others. Whether any particular conduct amounts to provocation is a question of fact for the court to decide. The ordinary rule has several aspects. First, it refers to the question whether an ordinary man would have lost his self

control under the provocation offered. Secondly, "the mode of resentment must bear a reasonable relationship to the provocation." The third aspect of the ordinary rule requires the length of time elapsing between provocation and relation to be taken into account. The ordinary rule depends implicitly on the existence of a homogeneous society adhering to well-recognised custom and standards of behaviour.

(2) Offence under the section—Evidence—Assessment of—High court Division disbelieved the evidence of prosecution witnesses in respect of the charge against two co-accused, but on the basis of the self-same witness upheld the conviction of the petitioner—Appellant Division declined to interfere on the question of assessment of evidence. The trial Court convicted and sentenced the petitioner along with three others u/s 302/34, P.C. On appeal High Court found the evidence against the two co-accused to be discrepant and not trustworthy as such acquitted them but relied upon the remaining part of the evidence which was consistent with the dying declaration of the deceased and upheld the conviction of the petitioners U/s. 302 P.C., which was under challenge before the Appellate Division

Held : The High Court having reasons for discarding a part of the evidence and for accepting the remaining part of the evidence, the point raised was essentially a question of assessment of evidence. *Nuru Jamman alias Jama Vs. The State, 1 BSCD 242.*

(3) Death sentence—recognition—T.I. 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 killed 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. *The Solicitor, Govt. of Bangladesh Vs. Makbul Hossain & others, 1 BSCD 242.*

(4) Material allegations constituting an offence under this section, examined. The allegation in the F.I.R. was that while "A" was taking his bath in the river, the accused persons surrounded him and then caught hold of him and thereafter, forcibly dragged him towards their house. At this point A's sons along with others come to the rescue of his father and the accused persons to release A which was not denied requested the accused dealt on falla blow on the person of "A" who died on the spot. Held :--This allegation by itself is an offence under this section of the Penal Code. *Forhad Hossain Vs. The State & ors., 2 BSCD 139.*

(5) Prosecution case was that the accused respondent murdered his wife by throttling—Defence contended that it was suicide by insecticides—Medical evidence clearly supported the prosecution case that death was due to throttling—the doctor in details explained the nature of the injuries found by him in post mortem who did not find any trace of any poisonous substance in the stomach nor its effect in the liver and lung—trial Court held the accused to be guilty—High Court set aside the conviction on the ground that chemical examination of the liquid contained in the bottle produced before Police Station and viscera of the deceased was not done—absence of chemical examination of the liquid contained in the bottle produced before the police Station and viscera of the deceased, did not in any way render the trial defective in the face of sufficient evidence to lend support to the prosecution case chemical examination as stated by the High Court was not at all necessary—High Court's Judgment reversing that of the trial Court is against the weight of the evidence and as such not sustainable. *The State Vs. Altazur Rahman, 2 BCR 1982 AD 264.*

(6) Conviction u/s. 302 by invoking aid of Sec.34—S. 34 does not say "common intentions of all" nor does it say "an intention common to all"—It emphases the doing of criminal act in furtherance of such intention—out of three accused persons—two acquitted by different forum—conviction of the accused petitioner notwithstanding the acquittal of his co-accused—held, sustainable. *Lutfor Rahman Vs. The State 4 BSCD 25.*

(7) Assembly of evidence—eye-witness's—testimony of solitary eye-witness whether can be relied upon informing the order of conviction in a case involving Sec. 302/34 and 201/34, PC—nothing was on record showing that eye-witness had any special grudge or enmity to falsely implicate the accused persons in murder case—evidence of eye-witness corroborated by other prosecution witness and established beyond all reasonable doubt that the accused committed the murder in furtherance of their common intention—their conviction u/s. 302/34 upheld—conviction u/s. 201/34 set aside as there is no evidence to sustain the charge—death sentence committed to life term. *Liakat Ali Chaklader & others Vs. The State BCR 1984 AD 114.*

(8) Conviction based on confessional statement of accused-appellant and dying declaration of one of two deceased persons—No eye witness in the case—confession voluntary and true—Witnesses who deposed about dying declaration of the deceased found to be competent and reliable—Prosecution case was established beyond reasonable doubt—No interference by the Appellate Division. *Suklal Sdrdar Vs. The State BCR 1985 AD 283.*

(9) Conviction for murder—Assessment of evidence—Recognition of the accused—Use of black face cover—Benefit of doubt—Whether the conviction of the appellant for murder has been grounded on correct assessment of evidence on record—Recognitions of the accused cannot be excluded—Due omission of P.W. 6 before lodging the Ejahar or by face cover of the accused—There is hardly anything to show that the possibility of recognition of the known persons like the accused was excluded by such cover—Both the trial Court and the appellate Court accepted the prosecution's explanation as to non-mentioning of the accused by P.W. 6 before the FR was lodged—Deceased's minor son's recognition of the accused though disclosed later cannot be assailed—Excepting a little delay is in making the disclosure there was nothing against their evidence—Considering all the facts and circumstances to the case Appellate Division held that the finding as to recognition was on proper assessment of the evidence leaving no scope for giving benefit of doubt to the accused. *Eklasuddin Ahmed Vs. The State, BCR 1986 AD 59.*

(10) The Accused—Appellant faced trial u/s. 302/34, PC and were found guilty of the offence of committing murder in furtherance of their common intention and sentenced to transportation for life—Their appeal before the High Court Division also failed—question as to the character of the Entry—Whether Second Information Report which was lodged 6 hours later should be treated as FIR in the case. G.D. Entry giving the board facts of the case was the basic prosecution story and further the names of the accused were also mentioned in the G.D. Entry. The subsequent FIR lodged within 6 hours gives the trials of the prosecution case and introduced the story of the eye witnesses but basically there is no difference between the G.D. Entry and the FIR as the prosecution case is still based on the broad facts given in both the information. *Habibur Rahman & ors. Vs. The State, BCR 1986 AD 218.*

(13) Murder—No eye-witness—Investigation Officer who made the G.D. Entry and he filed a suo motu FIR, not examined in the case to prove statement of the prosecution witnesses as to the points on which their attention was drawn u/s. 162, Cr. P.C.—No evidence that inquest was held on the deadbody of the victim—No inquest report produced by the prosecution—Neither the post mortem report was produced not the Doctor who held the autopsy of the deadbody was examined—All accused persons convicted and sentenced to transportation for life—In the absence of any direct evidence, conviction based only on circumstantial evidence, whether sustainable in law—Criminal Appeal—No lawyer appeared to represent the convicts before the High Court Division in Criminal Appeal—There were witness who stated that they saw marks of injuries on the victim's deadbody—Where all the

evidence is circumstantial it is necessary that cumulatively its effect should be to exclude any reasonable hypothesis of innocence of the accused—To give a favourable verdict it will be necessary for the accused to set up facts on which he may rely as exculpatory circumstance sufficient to cast a reasonable doubt on the prosecution case—Circumstance of the case incompatible with the innocence of the accused appellant and sufficient to exclude all possibility of their being innocent of the murder—Conviction and Sentence based on circumstantial evidence not interfered with by the appellate Division. *Kashab Chabdra Mistry Vs. The State, 1985 BLD (AD) 301=BCR 1985 (AD) 298.*

(12) The trial court acquitted the accused persons who were charged u/s. 302/34/148, & 323/48—PC—High Court Division in criminal revision in a Cryptic Order discharged the Rule by observing the trial Court's judgment was quite elaborate on consideration of evidence on record—The High Court Division did neither consider the evidence nor applied its mind as to whether the facts and circumstances warranted the order of acquittal passed by the trial Court—State counsel before the Appellate Division submitted that the High Court Division's judgment did not meet the requirement of law—Cases sent back to the High Court Division for disposal on merit. *Md. Majibur Rahman Vs. Mathabuddin & ors., BCR 1987 (AD) 150.*

(13) Acquittal—when interfered with by the Appellate Division—Victim beaten to death—No eye-witness—Accused's close relations decelerated hostile witness—The trial Court on the evidence of the complaint, Medical Officer holding the deadbody's autopsy, Police Officer and the circumstantial evidence held that the murder could not have been committed by any one except the accused persons in their own parlour and accordingly held the accused guilty u/s. 302/34, PC—High Court Division passed an order of acquittal and set aside trial court's order of conviction and sentence—Appellate Division examined merit of the case—Contrary findings of the High Court Division found perverse being not consistent with the facts and circumstances of the case—High Court's order of acquittal set aside—In view of the nature of injuries causing the Victim's death, conviction altered—Sentence modified. *The State Vs. Afsar Ali Khan & ors., BCR 1987 (AD) 87.*

(14) Death sentence—Question of commutation—Inordinate delay in execution of sentence may be a ground for commutation in some cases but the delay which is not due to any laches of the prosecution should not be considered to be a ground for commutation—This section does not specify in which case death sentence should be given and in which case transportation for life to be awarded but leaves the matter to the direction of the court—Bitter matrimonial relationship played a part in the nefarious situation and the same cannot be overlooked—Ends of justice will be met if the appellants are sentenced to transportation for life instead of death. *Nowsher Ali Sardar Vs. The State, 1987 BLD (AD) 324=39 DLR (AD) 194=BCR 1987 376.*

(15) Culpable homicide—When it does not amount to murder—M was not struck on any vital part of his body nor any lethal weapon used to chastise him—Doctor found only abrasion and swelling of M's six legs and arms and haematoma on the left side of the scrotum—There is evidence that a doctor was called in by the accused to treat the victim—The immediate purpose was to give a bit smart beating and in the process some excess was committed—It was a case of culpable homicide not amounting to murder—Conviction is accordingly modified. *Mohiruddin & ors. Vs. The State, 1986 BLD (AD) 318.*

(16) Murder charge—Accused person's mercy petition before the trial Court on conclusion of Trial admitting their guilt and praying for lenient punishment—Accused persons held guilty of the Offence of culpable homicide not amounting to murder—Conviction based on good evidence but no extenuating

circumstance calling for lenient punishment—On conclusion of the trial the only course left for the court is to pronounee judgment—No scope for filing any Mercy petition by the accused before the trial Court—No scope for the trial court for entertaining any Mercy Petition from the accused—Light punishment awarded on the mercy petition from the accused not proper—High Court Division rightly enhanced the sentence in Criminal Revision. *Murtoza Hussain & ors. Vs. The State & ors. 6 BSCD 32.*

(17) The Trial court on evidence found 25 accused including the present appellant guilty U/ss. 148, 164/149 & 302/109, PC and acquitted the other accused including "MS" of the respective charges—The Trial court found that the offence U/S 364 was in respect of S M & MK and the offence U/S 302 was in respect of committing murder of J—The sentence of life term was awarded U/s 302/109 but no separate sentence was passed U/Ss 148/364/149—On appeal the conviction and sentence of the present appellants were upheld by the High Court Division and the rest were acquitted—The Court, however, set aside the conviction even of those 10 persons U/ss 364/149—Out of the 10 accused persons eight were in appeal before the Appellant Division—Acceptance of evidence without scrutiny on correct principle of assessment of evidence resulted in wrong finding—Evidence and circumstances cast doubt on the prosecution case—None of the witnesses informed any authority until a certain date about the place of occurrence although the occurrence took place some days earlier—The finding of the trial court upon appreciation of evidence of some of the prosecution witnesses casts a long shadow on the subsequent prosecution case of alleged killing of J—Evidence on record does not justify the order of conviction U/S 302/109 and 148 upheld by the High Court Division—Conviction and sentence set aside. *Jamal & ors. Vs. The State, 40 DLR (AD) 38=BCR 1988 (AD) 17.*

(18) Acquittal—Order of Acquittal—Supreme Court's (High court Division's) power to review such order—No limitation could be placed upon that power unless it is found expressly stated in the Criminal Procedure Code—Consideration must always be whether in relation to the proved facts and circumstances, justice has been done in accordance with law. *42 DLR (AD) 31=1990 BLD (AD) 25.*

(19) Conviction of all the appellants u/s. 302/34 set aside Appellant No. 5 convicted u/s. 302, PC—Appellants 1 and 6 convicted under section 323—Appellants 2-4 convicted under Section 324—Sentences passed accordingly. *Md. Chand Mia & ors. Vs. The State, BLD (AD) 155=42 BLD (AD) 2.*

(20) Bail—*Prima facie* case made out under this Section—Petitioner not entitled to bail. *Shah Alam Chowdhury Vs. The State, 42 DLR (AD) 10= 1989 BLD (AD) 127.*

(21) Incitement when it amounts to abetment to murder. 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 320/109 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 11 DLR 258 : 1959 PLD (Dac) 832.*

(22) Several persons charged under sections 302 and 302/34, P.C. were acquitted—Two charged under sections 302/109 cannot be convicted for abetment of murder by unknown persons. *Sekandar Ali Vs. Crown 2 DLR 158.*

(23) Charge under section 304/49 but convicted u/s. 304(1)/34—Valid. Charge was framed under section 302, read with section 149 P. Code. But conviction was founded on section 304(1), read with section 34 P. Code. Conviction valid in law. *Ahmad Ali Vs. State (1960) 12 DLR 365.*

(24) Charging severally under section 396 and alternatively under sections 302/120B would vitiate the trial on account of misjoinder of charges. *Crown Vs. A Quddar 5 DLR 52.*

(25) Charge framed was under sections 302/149—Conviction and sentence under sec. 302. Where it has been found that each of accused was individually guilty of murder, the Court is competent to convict each one of them for murder under section 302, notwithstanding that the charge preferred against them in respect of the murder was under section 302 read with section 149, P.C. *Sardar Ali Vs. Crown 9 DLR (FC) 7.*

(26) Person charged under sections 302/149. Where a person is charged under sections 302/149, there is no necessary implication that he himself committed the murder unless in the charge it is so alleged. The primary basis of a constructive charge under section 149 is the existence and membership of an unlawful assembly and the commission of an offence by a member thereof in prosecution of a common object or such as the members knew it to be likely to be committed in prosecution of such object. *Rahman Sardar Vs. Crown 7 DLR 572.*

(27) Confessional statement shows that one accused held the victim down while the other accused cut his throat. Held :Conviction of both the accused under section 302, P.C.—Ocular evidence wanting not possible. The two accuseds were charged and convicted under sections 302 and 364 of the Penal Code and sentenced respectively to transportation for life and R.I. for 5 years each. The conviction of the appellants under both sections 302 and 364 the Penal Code is untenable inasmuch as the two offences are mually exclusive. It was contended that the prosecution has succeeded in bringing home the charge under section 302 of the Code to the appellants. It may be observed here that on the evidence on record there cannot be any conviction of both the appellants under section 302 of the Penal Code. There is no eye-witness to the occurrence and as such evidence is lacking as to who caused fatal injury to the deceased. According to the confessional statement, Tapa cut the throat of the deceased while Haria held him. If the entire prosecution would be based on this confession then Tapa could be held guilty under section 302 and Haria under sections 302/109 of the Penal Code. the conviction of both the appellants under section 302 of the Penal Code is not maintainable. *Hari Pada Debnath Vs. The State, 19 DLR 573*

(28) Death sentence commented to transportation for life—Circumstances—The accused was charged under sections 302/34 and convicted and sentenced to death. The High Court in commuting the death sentence to transportation for life. It appears from the written statement put in the suit that deceased complainant had made imputation against the chaste of the mother of the accused prisoner and the legitimacy of the accused prisoner itself. It is not unlikely that such denunciation of the character at a time when the feelings between the parties were running high over the dispute of the property might have disturbed the equanimity of the accused prisoners particularly Suren who is the eldest child. It further appears that the deceased complainant was trying to posses the disputed property which apparently was in the possession of the accused prisoner. These are the circumstances which, in our opinion, should be regarded as extenuating ones which should weigh in favour of reduction of the extreme penalty of law. We, therefore, think that the sentence of death passed upon the condemned prisoner Suren should be commuted to transportation for life. *The State Vs. Suren Das Koni, 21 DLR 604.*

(29) When a person inflicts hatchet injuries on a dead man, he cannot be charged for the offence of murder. *Feroz Khan Vs. State 13 DLR (SC) 266.*

(30) Knife aimed at mother caused stab wounds to a child resulting in its death—Offence under section 302. *PLD 1955 (Lah) 63.*

(31) Where gun-shots were directed towards the lower part of a victim's body who died subsequently and the injury was not shown to be one which was sufficient in the ordinary course of nature to cause death . Held : It could not be said that the offence committed was one of murder. *Tera Mia Vs. Crown 7 DLR 539.*

(32) Charge for murder and abduction for murder should be kept distinct, and the evidence bearing on each should be separately summed up. *Sher Ali Biswas Vs. State 10 DLR 374.*

(33) Murder by poisoning—Points that have to be established. In a case of murder by poison, the following points have to be proved : Firstly, did the deceased die of the poison in question, secondly, had the accused got the poison in question in his or her possession and thirdly, had the accused an opportunity to administer the poison in question to the deceased. If these three points are proved a presumption may under certain circumstances be drawn by the court that the accused did administer poison to the deceased and did cause the death of the deceased. It is not usual that reliable direct evidence is available to prove that the accused did actually administer poison to the deceased. *Ayesha Khatun Vs. The State, 19 DLR 818.*

(34) Murder—Mere absence of accused's intention in a murder case does not take the case out of the purview of the offence of murder where the accused had knowledge that his attack on the deceased was likely to cause death. *Khanwada Vs. State 28 DLR (WP) 15.*

(35) Conviction on circumstantial evidence alone—Facts proved must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. *Mst. Sairan Vs. The State, 22 DLR (SC) 35.*

(36) Murder—Husband can not be held responsible for the murder of his wife merely because they used to quarrel occasionally. As regards conviction based on circumstantial evidence alone, the rule is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Murder—Husband cannot be held responsible for the murder of his wife merely because they used to quarrel occasionally. It is not unusual for husband and wife to quarrel over various matters occasionally when they have to live together. From that fact alone a husband or a wife cannot be held responsible when his or her spouse happens to be murdered. *Kasiruddin Sarkar Vs. The State, 24 DLR 164.*

(37) Punishment for murder is death or transportation for life which is at the discretion of the court in consideration of the facts and circumstances of the case. *Nausher Ali Vs. State, 39 DLR (AD) 194.*

(38) Culpable conduct of the accused that he made no attempt to look for his wife since she was missing is explicit, which is confirmatory of his involvement in the murder of his wife. Normally an accused is under no obligation to account for the death for which he is on trial, but this is bound to be different. *Dipok Kumar Sarker Vs. The State 40 DLR (AD) 139.*

(39) In the present case the offence followed a brief tenure of a rancorous married life between the appellant and the deceased. It was admitted by the prosecution that it was not a blissful union from the beginning. Circumstances would have been taken notice of while inflicting proper punishment prescribed under the law. *Dipok Kumar Sarkar Vs. The State 40 DLR (AD) 139.*

(40) Motive is though a piece of evidence and may not be a sine qua non for bringing offence home to accused, yet it is relevant and important on the question of intention. The existence of motive has a great significance in a criminal trial. *The State Vs. Mizanul Islam. 1988 40 DLR 58.*

(41) The credit to be given to the statement of witness is a matter not regulated by rule of procedure. The credibility of a witness depends upon his knowledge of fact to which he testifies his disinterestedness, his integrity and his veracity. *State Vs. Mizanul Islam, 40 DLR 58.*

(42) Evidence of a witness is to be looked at from a point of law of its credibility. Appreciation of oral evidence depending as it does on such variable inconsistent factor as human nature cannot be reduced to a set formula. *State Vs. Mizanul Islam, 40 DLR 58.*

(43) Common intention—Offence committed—Moral and legal responsibility to be shared by all the accused equally. When all the accuseds have fully contributed to the death of the victim in a joint venture and it is diffcult to weigh and distinguish their respective contribution on a charge under section 302 read along with section 34 of the P. Code, they are equally guilty in the eye of law and their moral responsibility is also the same. *State Vs. Nawab Biwas 13 DLR 646.*

(44) For producing a cumulative effect—all persons taking share, responsible—While in circumstance of a case the fact that a particular accused has not given the fatal blow or that his liability is only vicarious, may be a good ground for imposing the lesser penalty, in a case like the present where a number of persons inflict a large number of injuries with the intention of causing death so that each is contributing towards the death of the deceased, it is not necessary for the purpose of imposing maximum penalty to determine who gave the fatal blow. In such a case all those accused to whom the Court attributes the intention of causing death in a brutal manner should (in the absence of some other circumstances justifying the imposition of the lesser penalty) be awarded the maximum penalty. *Fateh Khan Vs. State, 15 DLR (SC) 51.*

(45) Where charge has been established against all the appellants, they are equally guilty in the eye of law irrespective of their contribution in the death of the victim. *Majibur Rahman Vs. State, 39 DLR 437.*

(46) Evidence adduced by P.W .I. was corroborated by P.Ws. 3, 17 and 18 who were eye witnesses—Whether benefit of doubt can be given. *Nurul IslamVs. The State, 40 DLR 122.*

(47) Common intention to murder the deceased Kanchan having been established by the appellants' participation in the offence, they were rightly convicted. *Nurul Islam Vs. State, 40 DLR 122.*

(48) Common intention—Whether the evidence of P.W.I. ad P.W.II, two eye-witnesses, shows that the appellant Nos. 2-4 had shared common intention to cause the death of Nandalal along with the appellant No. 1—There was no proper evidence to make such an inference . *Amar Kumar Thakur Vs. The State, 40 DLR (AD) 147.*

(49) Deceased was seen in the company of the accused at 10 p.m. followed by discovery of his body at noon next day—No presumption, without further materials, that the accused was concerned in the murder of the deceased—Circumstantial evidence being not incompatible with accused's innocence. *Ismail Sarkar Vs. State, 33 DLR 320.*

(50) 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—The learned Judges did not at all consider the evidence relating to the alleged abduction of Sohrab, Mahtab and Mobarak for which the appellant were convicted also under sections 362/149, Penal Code. *Jamal Vs. State, 40 DLR (AD) 38.*

(51) Common object was to abduct a girl—Accused were armed with deadly weapons—In course of carrying out their common object one of the accused fired a shot and killed a person—Held : all the accused guilty of capital charge under sections 302/149. Original common object of the accused was to abduct a girl and in furtherance of this object, they, armed with deadly weapons, broke open the door of dwelling house and one of them fired a shot killing a woman (and not the girl). The Trial Judge

acquitted them of the capital charge under sections 302/149 holding that the object of the unlawful assembly was to abduct and not to kill anybody and that there was no evidence as to which particular person fired the shot. The conviction and sentences were upheld by the High Court on appeal. In a petition for special leave to appeal the Supreme Court, Held : The courts below fell into an error in acquitting the accused of the capital charge, even if no reliable evidence was available as to which of the particular persons killed the woman yet all the accused charged were burdened with vicarious liability under section 149 P.C. notwithstanding that the original common object was to forcibly abduct the girl. The accused being armed with deadly weapons, the intention to use these arms in case of resistance was, therefore, manifest. The petitioners were, therefore, guilty of the offence under sections 302/149. *Samman Vs. The State, 22 DLR (SC) 127.*

(52) Where a number of accused participated in beating a man to death under circumstances which amount to murder under section 302/109 of the Penal Code, the conviction should be under some lesser section than section 302. Section 149 does not create a new offence but provides for vicarious liability for offences committed by others in furtherance of the common object. Under this section the liability of the other members except those who assaulted the deceased for the offence committed during the continuance of the occurrence rests upon the fact whether they knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may be reasonably inferred from the nature of the assembly, arms or behaviour at or before the scene of action. *Abdus Subhan alias Motirbap Vs. The State, 19 DLR 927.*

(53) The common object in the charge was stated to take forcible possession of plot A. Evidence established that though there was an occurrence over plot A in the morning it came to an end soon after K of the complainant party was surrounded and attacked when he subsequently went to plot B. Held : When once the occurrence with regard to plot A had come to an end, the common object which motivated the accused persons to surround K on plot B was not to take forcible possession of plot A.. The common object of the assembly having been erroneously given in the charge the conviction both under sections 147 and 302/149, P.C. could not be sustained. *Hakim Ali Vs. Crown, 1DLR 139.*

(54) Joinder of charges under sections 302/149 and 201 is permissible in cases coming under section 236 of the Code of Criminal Procedure. *Rahman Sardar Vs. Crown 7 DLR 572.*

(55) Death due to broncho-pneumonia developing independently of burns caused by accused's act—Accused not guilty of murder. *1956 PLD (Lah) 453.*

(56) Loss of self control under provocation—However unexpected the occasion for striking in self defence and whatever the loss of self control under provocation might be, a person who causes the death of another by smashing his skull with repeated blows on the head must be taken to intend causing death or such injury as is likely to cause death. *Qadir Baksh Vs. Crown 5 DLR (WPC) 82.*

(57) Charge and conviction u/ss. 302 and 201, if legal. A man can be charged both under section 302 for murder as well as under section 201 for causing disappearance of the evidence of murder but in a case of this description it is proper that the charge under section 201 should be made in the alternative. Where charge under section 302 fails it is nothing illegal to convict a person under section 201, if the offence under this section is established against him. This is permissible even though the charge under section 201 was not in terms framed against him as such a course is permissible under the provision of section 237 of the Cr. P. Code. *Afsaruddin Choukidar Vs. State, 21 DLR 783.*

(58) Where the finding is that the accused has the guilty intention of causing such injury as is likely to cause death the offence cannot be converted into one under part 1 of section 304 of the Code,

unless it is brought to any of the 5 Exceptions of section 300. *Govt. of Bangladesh Vs. Siddique Ahmed, 31 DLR (AD) 29.*

(59) Substitution of sub-section (5) of section 367 CrPC by the Law Reforms Ordinance—Effect of change on sentencing—Previously death sentence was the normal sentence for murder and the court was required to give reasons if the lesser sentence of life imprisonment was given—After the substitution now reasons have to be given in either case—A death sentence is to be justified in as much in the same way as in the case of lesser sentence of life term imprisonment. *Abed Ali Vs.State, 42 DLR (AD) 171.*

(60) Sentence—Commutation of death sentence—Delay of about two years or so in the disposal of the Death Reference case and the Jail appeal in the High Court Division cannot by itself be a ground for awarding lesser sentence. *Abed Ali Vs State, 42 DLR (AD) 171.*

(61) Culpable conduct of the accused that he made no attempt to look for his wife since she was missing is explicit, which is confirmatory of his involvement in the murder of his wife. Normally an accused is under no obligation to account for death for which he is on trial, but this is bound to be different. *Dipok Kumar Sarker Vs. State, 40 DLR (AD) 139.*

(62) In the present case the offence followed a brief of a rancorous married life between the appellant and the deceased. It was admitted by the prosecution that it was not a blissful union from the beginning. Circumstances would have been taken notice of while inflicting proper punishment prescribed under law. *Dipok Kumar Sarker Vs. State, 40 DLR (AD) 139.*

(63) The question is whether the materials on record warrant conviction of the appellant Momin Malitha under section 302 of the Penal Code. We have carefully examined the evidence on record from all aspects and we are of the opinion that the offence committed by this appellant does not come within the scope of section 302 of the Penal Code. *Momin Malitha Vs. State, 41 DLR 37.*

(64) Commutation of sentence—extenuating circumstances for commutation—condemned prisoners are under peril of death sentence for almost 3 years suffering agony and torments thereby partially purged their guilt. Their life may be spared. Sentence of death commuted to one of imprisonment for life. *Abdul Kashem Vs. State 42 DLR 378.*

(65) Submission of sentence for confirmation—the order of conviction under section 302, Penal Code by the Sessions Judge on the basis of part of the evidence recorded by an Assistant Sessions Judge, who is not competent to hold trial under that section, is illegal. The death reference is rejected and the case sent back for re-trial of the condemned prisoner in accordance with law and in light of observation made. *State Vs. Imdad Ali Bepari, 42 DLR 428.*

(66) Motive is though a piece of evidence and may not be a *sine qua non* for bringing offence home to accused, yet it is relevant and on the question of intention. The existence of motive has a great significance in a criminal trial. *State Vs. Mizanul Islam 40 DLR 58.*

(67) The credit to be given to the statement of witness is a matter not regulated by rule of procedure. The credibility of a witness depends upon his knowledge of fact to which he testifies his disinterestedness, his integrity and his veracity. *State Vs. Mizanul Islam, 40 DLR 58.*

(68) Evidence of a witness is to be looked at from point of law of its credibility. Appreciation of oral evidence depending as it does on such variable inconsistent factor as human nature cannot be reduced to a set formula. *State Vs. Mizanul Islam, 40 DLR 58.*

(69) Common intention—Whether the evidence of PW I and PW II, two eye-witnesses, shows that the appellant Nos. 2-4 had shared common intention to cause the death of Nandalal along with the appellant No. 1—There was no proper evidence to make such an inference. *Amar Kumar Thakur Vs. State, 40 DLR (AD) 147.*

(71) Evidence adduced by PW 1 was corroborated by PWs 3, 17 and 18 who were eye-witnesses. *Nurul Islam Vs. State 40 DLR 122.*

(72) Common intention to murder the deceased Kanchan having been established by the appellant's participation in the offence, they were rightly convicted. *Nurul Islam Vs. State 40 DLR 122.*

(73) Sessions Judge did not take any step for proper arrangement of defending the condemned prisoners who were denied the substantive right of being defended through a lawyer at the cost of the State—Conviction not sustainable in law. *State Vs. Jahaur Ali 42 DLR 94.*

(74) Conviction of co-accused who had not confessed—Circumstances show the accused Shahajahan Manik had intimacy with accused Rina and this put them to visiting terms and the visits had strengthened his intimacy with Rina. Their guilty conscience is also evident from the false plea in their statements made under section 342, CrPC that they did not know each other. *Shahjahan Manik Vs. State 42 DLR 465.*

(75) The confession is sufficient to find accused Rina guilty of the charge under sections 302/34 Penal Code inasmuch as she participated in the murder starting from hatching of conspiracy for killing her husband in order to marry accused Manik to allowing the latter to bring in poison and mix it with the drinking water of her husband's jug and then to see the husband drinking that water; then after his death to hang the body and raising a feigned cry. Besides, the circumstances showed there was no scope for anyone to enter the room to kill her husband without her co-operation. *Shahjahan Manik Vs. State 42 DLR 465.*

(76) Inconsistent evidence of PWs 2 and 4—Omissions and contradictions in their depositions were not given consideration by the Courts below—Defence case appears to be more probable than that of the prosecution "as it fits in human nature and conduct". Appellants entitled to acquittal as a matter of right. *Abul Kashem Vs. State 41 DLR (AD) 152.*

(77) No hint having been given to her during her examination under section 342 of the Code of Criminal Procedure as to the disappearance of evidence of crime she was prejudiced in her defence, and her conviction under section 201, Penal Code is not sustainable. *Abdul Khaleque Vs. State 41 DLR 349.*

(78) Confession—Conviction on confession alone—Relying on his incriminating statements that he made conspiracy with co-appellant Abdul Khaleq to murder his step-mother and when from his statement it appears that he was very much present standing outside the hut at the time of the murder, appellant Hazrat Ali can be safely convicted for abetment of murder. *Hazrat Ali & others Vs. State 44 DLR (AD) 51.*

(79) 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—The learned Judges did not at all consider the evidence relating to the alleged abduction of Sohrab, Mahtab and Mobarak for which the appellants were convicted also under sections 362/149, Penal Code. *Jamal Vs. State 40 DLR (AD) 38.*

(80) 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. *Soleman Vs. State 42 DLR 118.*

(81) Abetment—To sustain a charge of abetment of an offence it is necessary that there must be some evidence of overt act or omission so as to suggest a pre-concert or common design to commit a particular offence. So long as the design rests in intention short of overt act directed to the commission of the offence it is not indictable in law. *Ali Ahmed Malaker Vs. State 43 DLR 401.*

(82) Culpable homicide not amounting to murder—From the circumstances of the case and the nature of injury that resulted in the death of victim after 11 days after the infliction of the injury, the appellant cannot be held guilty of murder. Conviction altered to section 304, Part I. *Lal Miah alias Lalu Vs. State 41 DLR (AD)1.*

(83) Motive is not a necessary ingredient of an offence under section 302 of the Code. The Court will see if sufficient direct evidence is there or not. If not, motive may be a matter for consideration, specially when the case is based on circumstantial evidence. *State, represented by the Solicitor, Government of the People's Republic of Bangladesh Vs. Giasuddin and others 51 DLR (AD) 103.*

(84) The High Court Division affirmed the order of conviction and sentence as passed by the trial Court forgetting altogether that the conviction of the appellant was recorded by the trial Court under section 302/149 of the Penal Code which is a completely different kind of conviction from one under section 302 directly where the liability is personal and in the former case the liability is vicarious. *Altaf Hossain Vs. State 50 DLR (AD) 120.*

(85) Though the appellate Court including this court may enlarge a convict on bail for reasons to be recorded by it such a convict is not entitled to be released on bail if he is sentenced to suffer imprisonment for life. Appellate Division in some cases opined that a convict may be enlarged on bail if there is no chance of disposal of the appeal within the period of his sentence. A convict who is sentenced to imprisonment for life does not fall within the pronouncement of the Appellate Division. Bail granted to appellant-opposite party Abdul Momin Sarder on 11-1-96 is cancelled and he is directed to surrender to his bail bond forthwith. *State Vs. Abdul Momin Sardar 50 DLR 588.*

(86) Without a proper finding that the accused had a common object, conviction with the aid of section 149 of the Penal Code is illegal. *State Vs. Raisuddin and others 48 DLR 517.*

(87) Though the appellate Court including this court may enlarge a convict on bail for reasons to be recorded by it such a convict is not entitled to be released on bail if he is sentenced to suffer imprisonment for life. *State Vs. Abdul Momin Sardar 50 DLR 588.*

(88) The accused was free to inflict as many blows as he liked—That he dealt merely one blow shows that he did not intend to kill the victim. The killing cannot be termed murder. *State Vs. Khalilur Rahman 48 DLR 184.*

(89) There was none to stop Rashid to deal repeated blows if he had the intention to kill—he merely had struck one blow which eliminates the intention to kill. Therefore, the intention to kill is lacking—It is not a case of culpable homicide amounting to murder but a culpable homicide not amounting to murder. *Abdul Khaleque and others Vs. State 48 DLR 446.*

(90) By inclussion of the offence of the above Ordinance in the schedule to the Special Powers Act the jurisdiction of the Sessions Court has been ousted. Now, as the death is proved but not for demand of dowry, the present case is sent back to the Sessions Court for trial. *Firoz Miah Vs. State 51 DLR 37.*

(91) The accused persons might have given the deceased a serious beating to effect divorce of his second wife and this resulted in his death. The offence committed by them does not attract sections 302/109, it attracts provision of section 304 Part II of the Penal Code. *Shahajahan Talukder @ Manik and others Vs. State 47 DLR 198.*

(92) Though the appellate Court including this court may enlarge a convict on bail for reasons to be recorded by it such a convict is not entitled to be released on bail if he is sentenced to suffer imprisonment for life. *State Vs. Abdul Momin Sardar 50 DLR 588.*

(93) The injury inflicted did not cause instant death. The victim was alive for about 11/12 months at the hospital. This shows the injury inflicted was not likely to cause death, but it endangered the life and ultimately resulted in death. The appellant therefore is guilty under section 326 of the Penal Code. *Humayun Matubbar Vs. State 51 DLR 433.*

(94) বোমার আঘাতে ঐরূপ ভাবে আঘাত প্রাপ্ত হয়ে ফয়জুননেছা ২২ দিন হাসপাতালে চিকিৎসাধীন থাকাবস্থায় মৃত্যুবরণ করেন। এমতাবস্থায় ময়না তদন্তকারী ৮নং সাক্ষীর মতে উক্ত আঘাত পচন ও শৈল্য চিকিৎসা জনিত জটিলতায় তার মৃত্যু হওয়ায় আসামীদের বিরুদ্ধে দঃ বিঃ ৩২৬ ধারার পরিবর্তে ৩০২ ধারায় অভিযোগ গঠন করা ঠিক হয়নি। ঘটনা ও সাক্ষ্য প্রমাণ থেকে আসামীগণকে ৩২৬ ধারার অভিযোগে অভিযুক্ত করা সংগত ছিল। তা না করে বিজ্ঞ অতিরিক্ত বিচারক ভুল করেছেন। *Sabur Alam and others Vs. State 51 DLR 16.*

(95) Although charge was framed against the accused under Sections 302/34 of the Penal Code, conviction of the appellant under Section 201 of the Penal Code is not illegal—Code of Criminal Procedure (V of 1898) Ss. 236 and 237. *Kalu and another Vs. The State 1 BLD (AD) 299.*

(96) Culpable homicide when not murder—There is no evidence on record to show that the accused had any intention to cause the death of his wife or to cause such bodily injury as was ordinarily sufficient to cause death—The accused struck his wife without any premeditation with hands and feet on the spur of the moment and being deprived of the power of self-control—The assault upon the wife must have come about suddenly following certain instant incident—The injuries are prima facie not fatal—It is not unusual in our society for the spouses to be involved in occasional fits of violence, sometimes transgressing the limits of common rudeness—For all these reasons the offence committed by the accused appellant is a culpable homicide not amounting to murder—Since an exasperated husband caused some injuries to his wife without any weapon on the heat of the moment the question of criminal liability and sentence has to be considered with a sense of compassion—The conviction of the appellant is altered to the 2nd Part of Section 304 of the Penal Code and he is sentenced to suffer R. I. for 4 years only. *Shafiullah alias Kala Mia Vs. The State 5 BLD (HCD) 129.*

(97) Culpable homicide when does not amount to murder—Victim Mahiruddin was not struck on any vital part of his body nor any lethal weapons was used to chastise him—The doctor found only abrasions and swellings on Mahiruddin's legs and arms and haematoma on the left side of the scrotum—There was no fracture or dislocation in the body of the victim—There is evidence that doctor was called in by the accused to treat the victim—The immediate purpose was to give a smart beating and in the process some excess was committed—It was a case of culpable homicide not amounting to murder—The conviction of the appellants is altered to one under Section 304 part II & 109 of the Penal Code and they are sentenced to R 1 for 5 years. *Mahiruddin and others Vs. The State 6 BLD (AD) 318.*

(98) The lathi blows were inflicted on the vital parts of the body of the victim such as the temporal regions of the head, the chest and the abdomen—There was, of course, no fracture of bones caused by the assaults and the doctors found swelling injuries—The victim survived for more than two days—In the circumstances it is reasonable to hold that the injuries caused by the appellants were not inflicted with the intention of causing the death of the victim—Nevertheless, from the use of the lathies on the vital parts of the body of the deceased it can be reasonably inferred that the accused had at least the intention to cause such bodily injuries as were likely to cause death—The offence committed by the appellants therefore, falls under the First Part of Section 304 of the Penal Code—The conviction of the appellants is altered from Section 302/34 of the Penal Code to one u/s. 304 Part 1 and each of them is sentenced to suffer R.I. for ten years. *Abul Kashem and others Vs. The State 10 BLD (AD) 210.*

-110

(99) 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—In such a case the charge must be under Section 302/109 of the Penal Code or for murder pure and simple.

(100) Murder and its abetment—Ingredients of—Mere taking away of the victim from his house without any overt act or animus in the form of any hostile attitude or initial intention to kill will not justify a conviction for such offences. *Soleman and others Vs. The State 10 BLD (HCD) 179.*

(101) Circumstantial evidence—Ordinarily an accused has no obligation to account for the death for which he is placed on trial—But in the instant case murder having taken place when condemned prisoner was living with the victim, who was his wife, in the same house he was under an obligation to explain how his wife had met with death—In the absence of any explanation coming from his side, coupled with his confessional statement it seems that none other than the condemned prisoner was responsible for causing the death of Mamtaj Begum. *The State Vs. Kalu Bepari 10 BLD (HCD) 373.*

(102) Lone eye-witness to the occurrence disclosed for the first time the names of the assailants in a salish held 28 days after the occurrence— Confessional statements of the appellants were found to be not voluntary—The belated disclosure of the names of the accused in the village salish does not inspire any credence—The conviction is set aside. *Abu Taher and others Vs. The State 11 BLD (AD) 80.*

(103) Accused charged under Sections 302/149 may be convicted under Sections 302/34 of the Penal Code when evidence on record justifies it. *Sawai alias Md. Hussain and others Vs. The State 11 BLD (HCD) 495.*

(104) Principle for appreciation of circumstantial evidence—Each circumstance relied upon by the prosecution must be established by cogent, succint and reliable evidence and the proved circumstances must unequivocably point to the guilt of the accused and must exclude any hypothesis inconsistent with the innocence of the accused—In examining the evidentiary effect of the circumstances, the Court has to guard itself against any tendency to substitute suspicion and supply links which are missing to constitute the necessary guilt of the accused—In a case involving capital sentence the Court should be more scrutinising in reaching its conclusion—The appeals are allowed and the reference is rejected. *Mostain Mollah and others Vs. The State 11 BLD (HCD) 552.*

(105) It is not safe to convict an accused on a charge of murder on dubious, tainted and interested evidence. *Abdul Gafur Vs. The State 12 BLD (AD) 90.*

(106) Motive—In a criminal trial the prosecution is not bound to prove the motive—If, however, any motive is ascribed, the prosecution is to prove it but failure of the prosecution to prove the motive does not necessarily destroy the prosecution case. *I bid*

(107) Section 364 is not a minor offence to the offence under Section 302—The offence under Section 364 is a distinct and specific offence recognised by authoritative judicial pronouncements—An offence to be a minor offence to a major one must be a cognate offence to a major one, having the main ingredients in common—The ingredients of the offence of murder and those of the offence of abduction for murder or putting the abducted person in danger of being murdered are not common. Hence the offence under Section 364 of the Penal Code is not a cognate offence to the offence under Section 302 of the Penal Code. *I bid.*

(108) "Last seen together"—It is a weak type of circumstantial evidence on which a conviction can be based. *The State Vs. Sree Ranjit Kumar Pramanik 12 BLD (HCD) 284.*

(109) In a case where two persons have been murdered at dead of night, it is but natural to inform the police first about the occurrence. Non-mentioning of any name in the F.I.R. rings a truth in the F.I.R. *Shahjahan Sardar and others Vs. The State 13 BLD (AD) 58.*

(110) In case where allegation had been made that a husband had murdered his wife, whether the husband had a duty to explain how and by whom she was murdered—the Public Prosecutor, whether is supposed to know the law and has a responsibility to work with devotion. In case where the allegations had been that a husband had murdered his wife and then absconded, the husband in such a situation had a duty to explain how his wife was murdered and by whom she was murdered and in case of non-explanation by the husband or his silence in the matter or he having absconded immediately after the murder, would be considered to be a good ground for a finding that the husband is guilty of murder of his wife if, however, there is no suggestion or circumstances to show to the contrary that other inmates of the house also used to beat her and killing her in the process. The Public Prosecutor is supposed to know the law and has a responsibility to work with devotion keeping in mind that he is representing not a party but the people in the administration of criminal justice. *The State Vs. Nurul Huq 13 BLD (HCD) 99.*

(111) Circumstantial evidence—Chain of circumstances wanting—presumption that deceased was last found in the company of accused—whether the accused is the killer of the deceased. The circumstantial evidence found against the accused is incapable of explanation on any reasonable theory except that of the guilt of the accused his persons. Accused presumed to be innocent of the charge till guilt is established by legal evidence. Principle to be followed in criminal case based on circumstantial evidence. It is the fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that the accused and accused only was the perpetrator of the offence and such evidence should be incompatible with the innocence of the accused. Last seen theory—in the absence of any eye-witness to the murder and in the absence of any positive evidence that appellant Malai was found following deceased Siddique Ali with sharp cutting weapons in hand and in the absence of any overt act on the part of the deceased it cannot be said with reasonable certainty that appellant Malai was responsible for the murder of deceased Siddique Ali. Litigation—litigation existing between the accused and some of the witnesses is not enough to bear grudge by the accused so as to commit the offence of murder, rather such litigation sometime can be taken as a cause for false implication. *Malai Miah Vs. The State (1993) 13 BLD (HCD) 277.*

(112) When admittedly a wife sleeps at night with the husband in a room or hut not approachable by others, whether the husband is rightly convicted under section 302 of the Penal Code on the basis of indubitable evidence on record? When admittedly a wife sleeps at night with the husband in a room or hut which is not approachable by others and there is no probable circumstance explaining the cause of death of the wife and she is found to have been killed in a brutal manner by strangulation, the husband is rightly convicted under section 302 of the Penal Code on the basis of indubitable evidence on record against him. *Abdul Hamid @ Sofaruddin Vs. The State, 13 BLD (HCD) 563.*

(113) Motive—When there is sufficient direct evidence to prove an offence, motive is immaterial and has no importance. While trying a case under S. 302 of the Penal Code or hearing an appeal involving S. 302, the Court must not consider first the motive of the murder, because motive is a matter of speculation and it rests in the mind and special knowledge of the accused persons. Motive is not a necessary ingredient of an offence under section 302 of the Penal Code. The Court will see if sufficient direct evidence is there or not. If not, motive may be a matter for consideration,

specially when the case is based on circumstantial evidence. *The State Vs. Giasuddin and others, 18 BLD (AD) 254.*

(114) Plea of alibi—In a wife killing case it is always presumed that the husband was with the deceased-wife at the time of occurrence, unless any alibi is set up by the defence. In that case the burden of proving such plea rests on the husband in order to absolve him of any criminal liability. *Abdus Salam Vs. The State, 19 BLD (HCD) 98.*

(115) Since the sentence prescribed under section 302 of the Penal Code is death or imprisonment for life, the Court before recording a conviction must be satisfied beyond reasonable doubts about the guilt of the accused persons on careful scrutiny of the evidence on record. A conviction even on grave suspicion and high probability is not tenable in law. *Md. Jiaur Rahman Vs. The State, 15 BLD (HCD) 459.*

(116) Sentence—Sentence is a complex matter which needs special considerations in the context of proved facts. In the instant case the broad facts that stare at the face are that there were hot altercations and exchange of hot words between the parties immediately preceding the occurrence and there was grappling by Salam and 2 others on one side and victim Jalal on the other and in the course of such quarrel and on the heat of passion condemned prisoner Abdul Aziz Mina inflected dagger blows on the victim. Under such circumstances, it is to be found that the condemned prisoner had no premeditation for killing victim Jalal and he acted on the heat of passion. The sentence of death is therefore commuted to a sentence of imprisonment for life. *The State Vs. Abdul Aziz Mina, 16 BLD (HCD) 183.*

(117) In view of the fact that the condemned prisoner did not inflict any injury on victim Hazera, although he was a silent spectator to the cruel and gruesome murder of his wife by his companions, who were acquitted for want of legal evidence, it is reasonable to hold that he could not be convicted under section 302 of the Penal Code but should be found guilty for abetment under sections 302/109 of the Penal Code. *Abdul Awal Vs. The State, 14 BLD (AD) 224.*

(118) There is complete chain of circumstances that the appellants assaulted deceased victim Biswajit severely and dealt fatal blow causing his death when appellant Gulzar participated in the occurrence most actively and he was found by PW4 for the last time with the deceased victim when Gulzar was chasing by the eastern side of the khal and the circumstances of the case taken cumulatively are forming a claim so complete that there is no escape from the conclusion that the murder of victim Biswajit was committed by the appellant Gulzar and his associates and none else. *Gulzar Biswas and others Vs. The State, 20 BLD (HCD) 550.*

(119) The wife of the deceased deposed in Court that she had recognised the assailants of her husband and accused Akkel Ali gave channy blow, Delwar gave dao blow, accused Omar Ali gave Lathi blow and accused Quasem gave rifle blow on her husband who succumbed to the injuries on 15.6.1989 in the hospital which is corroborated by PWs. 1,2,3,4,6 and 8 and the dying declaration and there is nothing to disbelieve the credibility of their evidences and hence the prosecution proved the case beyond all reasonable doubt and therefore the conviction and sentences under section 302/34 of the Penal Code against the condemned convict is sustainable. *The State Vs. Akkel Ali and ors, 20 BLD (HCD) 484.*

(120) Non-recovery of the deadbody—Even in a case of non-recovery of the deadbody of a victim a conviction can be secured for an offence of murder under section 302 of the Penal Code if there be legal and sufficient evidence on record to prove the commission of murder by the accused. In the face of clear evidence of eye-witnesses proving murder of the victim by the accused by inflicting assaults on his

person and the subsequent removal of the deadbody by the accused persons for the purpose of causing disappearance thereof, conviction of the appellant under sections 302/34 of the Penal Code is justified. There is no warrant of law altering the charge from section 302 to section 364 of the Penal Code merely because the dead body was not recovered. *Shaha and others Vs. The State 17 BLD (AD) 241.*

(121) A conviction under section 302 of the Penal Code and a conviction under sections 302/149 of the Penal Code are different kinds of conviction as section 302 of the Penal Code involves direct and personal liability of the accused whereas sections 302/149 of the Penal Code involve a vicarious liability. The trial Court convicted the accused-appellant under sections 302/149 of the Penal Code and as such the High Court Division was wrong in affirming the order of conviction and sentence under section 302 of the Penal Code. *Altaf Hossain Vs. The State, 18 BLD (AD) 231.*

(122) The line of demarcation between culpable homicide and grievous hurt is rather thin. In the former case injury must be such as is likely to cause death whereas in the latter case that is likely to endanger life. Offence of culpable homicide pre-supposes an intention or knowledge of likelihood of causing death. In the absence of such intention or knowledge the offence committed may be a grievous hurt notwithstanding death being caused. *Humayun Matubbar Vs. The State, 18 BLD (HCD) 492.*

(123) Right of self-defence against murder charge—Section 100—Reduction of charge into section 304-I—Permissible when there is land dispute between parties—Right of private defence extending to voluntarily causing the death can be taken in appropriate case when reasonable apprehension of death or grievous hurt exists. Where the deceased was not armed with deadly weapon there cannot be reasonable apprehension of death or grievous hurt providing the right of self defence. In an occurrence taking place on land dispute the conviction and sentence under section 304 Part I is justified. *Khondaker Saiful Islam Vs. The State—3 MLR (1998) (AD) 117.*

(124) Conviction on circumstantial evidence—In a case of murder in order to base conviction on circumstantial evidence it must be free from doubt. In criminal case guilt of each and every accused must be proved beyond all reasonable doubt. Where there were fourteen inmates in the house in the fateful night in which the murder was committed, the prosecution must prove beyond all reasonable doubt that such and such inmate or inmates of the house or one or two or more inmates jointly or separately committed the murder. If any doubt arises in the mind of a judge, it is difficult to convict an accused who must always be given the benefit of doubt. *Zahirul Alam Kamal and two others Vs. The State 1 MLR (1996) (HC) 122.*

(125) Motive in murder case—Not always to be established—The discovery of motive is not imperative in every case of murder. If motive is not established even then that does not throw the prosecution case over board. The abscondence of the accused soon after the crime by itself is not an evidence. At best it may lend weight to other evidence. *Ashraf Ali Munshi Vs. the State—1 MLR (1996) (HC) 10.*

(126) Absence of intention-mitigating factor—The absence of intention to commit murder brings the culpable homicide outside the ambit of section 302 which is an offence punishable under section 304 of the Penal Code. *Baharuddin Vs. The State—1 MLR (1996) (HC) 159.*

(127) Suspicion is not proof—It is well-settled that suspicion however strong is not substitute for proof of a murder charge which must be proved beyond doubt by independent positive evidence. *Swapan Vs. The State—1 MLR (1996) (HC) 205.*

(128) Proof of charge beyond doubt—Charge of murder must be proved to the hilt beyond doubt by consistent and reliable evidence. When there is departure from the manner of the occurrence as alleged by the prosecution found in the evidence during trial the prosecution case becomes doubtful and

in such a case conviction and sentence cannot be sustained in the eye of law. *K.M. Hamaytuddin @ Awaranga Vs. The State—1, MLR (1996) (HC) 280.*

(129) Charge cannot be reduced merely because deadbody was not recovered—Conviction under section 302/34 can well be maintained when based on legal and sufficient evidence even if the deadbody cannot be recovered. There is no warrant to reduce the charge from Section 302 to 364 merely because the deadbody was not recovered. *Shaha and others Vs. The State—2, MLR (1997) (AD) 162.*

(130)Evidence of a child witness corroborated by circumstantial evidence including the absconsion of the accused immediately after the occurrence can well form the basis of conviction in a case involving murder charge under section 302 of the Penal Code. *Md. Siraj Mia Vs. The State—2, MLR (1997) (HC) 66.*

(131) Nature of proof of charge—When land dispute exists—The charge under section 302 of the Penal Code must be proved to the hilt by consistent evidence of independent witnesses by way of corroboration to inspire confidence in the mind of the court in a case where enmity arising out of land dispute admittedly exists between the parties. *Amir Hossain Dhali Vs. The State—2, MLR (1997) (HC) 100.*

(132) Delay in lodging FIR—When not fatal—When satisfactorily explained, delay in lodging the F.I.R is not fatal for the prosecution. Minor contradictions in the evidence of the P.W.s in relation to their statements recorded under section 161 Cr.P.C are immaterial when the charge against the accused appears to have been established by the consistent evidence of reliable witnesses and the chain of incidents pointing the finger at the accused. *Jahangir Howlader and Habib Mallik alias Kalu Vs. The State—3, MLR (1998) (HC) 62.*

(133) Charge of murder—Motive of murder—where there is direct evidence—The settled position of law is that the prosecution is not bound to prove the motive of murder where there are ocular evidence, because motive is not a necessary ingredient of the offence under section 302 of Penal Code. The failure of the prosecution to prove motive even though taken, does not render any ground to disbelieve the prosecution case where there are material evidence of direct nature. Motive may be a matter for consideration specially when the case is based on circumstantial evidence. In a case of gruesome murder scrutiny of evidences on record must be made with great care. Reducing the sentence of death into R.I. for 10 years under section 304 in a case involving four murders in lighthearted manner attended with non-application of judicial mind, surmise and conjecture, contradictory and incoherent findings unrelated with the evidence on record are held to be perverse occasioning failure of justice. *State represented by the Solicitor of the Government of Bangladesh Vs. Giasuddin and others—4, MLR (1999) (AD) 29.*

(134) Conviction and sentence passed on proper appreciation of ocular evidence cannot be interfered with. Sentence reduced by the High Court Division cannot be further reduced. *Babul Farajee Vs. The State 4, MLR (1999) (AD) 149.*

(135) Delay in furnishing post mortem report—Effect of—Delay of 7 days in furnishing post mortem report is no ground for interference with the conviction and sentence. There is no scope to reduce the sentence of life imprisonment under section 302. *Sabiruddin Mondal Vs. The State—4, MLR (1999) (AD) 151.*

(136) Commutation of sentence—The prosecution is not required to prove motive in all cases. Where there is direct evidence motive is immaterial. Motive may be for consideration where the case is

based only on circumstantial evidence. Imprisonment for life need not be ordered to be served for 30 years which has no legal basis. Commutation of sentence is provided for under section 57 of Penal Code. *Farid Ali Vs. The State—4, MLR (1999) (HC) 23.*

(137) Recording of confessional Statement of accused—In plain paper—Not inadmissible—Section 304—Husband is to explain circumstances under which his wife died—When the confessional statement of an accused is recorded by a competent Magistrate after due caution to the accused about the consequence and compliance with the requirements of section 164(3) Cr.P.C. such confessional statement cannot be inadmissible in evidence merely by reason of its being recorded in plain paper and one of its sheet not signed by the accused. The husband is under the legal obligation to explain the circumstances under which his wife died while they were living together in the same house. *Abul Kalam Mollah Vs. The State—4, MLR (1999) (HC) 225.*

(138) Murder of wife—Husband's liability—Husband while living with wife at the time of occurrence in the same house owes an explanation as to under what circumstances his wife died. Absence of any such plausible explanation coupled with long absconsion of the husband from immediately after the occurrence constitute strong circumstance as to the guilt of the accused husband. *Fazer PK. alias Fazer Ali (Md.) Vs. the State—5 MLR (2000) (HC) 351.*

(139) Murder charge—Use of F.I.R. and power of comparison by the court when informant gives different version during trial—F.I.R. is not a substantive evidence. It is important that it gives the information about the occurrence first in point of time. Court has power to compare the recitals of the F.I.R. when the informant gives different version during trial. *Khorshed (Md.) Vs. The State—4, MLR (1999) (HC) 217.*

(140) Murder charge—Delay is not always a ground for altering sentence of death—Delay by itself is not extenuating circumstance for commutation of the sentence of death into imprisonment for life. The condemned prisoner suffering from a bitter sense of being wronged by his wayward wife together with delay merit such commutation. *Zahiruddin Vs. The State—1, MLR (1996) (AD) 248.*

(141) Murder—Culpable homicide not amounting to murder—mitigating circumstances—Absence of intention to commit murder, lack of premeditation and causing injuries on sudden provocation are the elements which reduce the offence one from section 302 to 304. *Abul Hashem Mollah Vs. The State—1, MLR (1996) (HC) 99.*

(142) Murder of wife—Huband's liability—Burden of proof—Alibi as defence—Nature of proof—Burden of proof of prosecution case entirely lies upon the prosecution. In a wife killing case while residing in the same house with the husband, the husband is under the liability of explaining the circumstance under which his wife was murdered. The burden of proof of alibi as to the husband's remaining somewhere else when his wife died lies upon the husband. This burden is somewhat lighter than that of the prosecution which means that the burden of the husband is discharged when he has given a reasonable explanation in favour of his innocence but the prosecution in discharging its burden has to prove the charge with cogent and consistent evidence. *State Vs. Mofazzal Hossain Pramanik—43 DLR (AD) 64.*

(143) Charge when can be altered—When there is no derict evidence that the convict-appellant inflicted the fatal injury to the deceased, the charge under section 302 of the Penal Code is altered into one under section 302/109 for abetment. *Billal Vs. The State—5, MLR (2000) (AD) 244.*

(144) Calling and taking away of the victim by the appellant Billal and co-convict Saiful from his residence half an hour before his murder, recovery of the body of the victim, Billal's offer of love and

threat to the PW 2 Mokseda, and abscondence of Billal immediately after the occurrence are circumstances to lead to the conclusion that he abetted the murder. *Billal Vs. State (Criminal) 52 DLR (AD) 143.*

(145) The Trial Court committed mistake in sentencing the appellant to suffer rigorous imprisonment for 30 years but section 302 of the Penal Code provides punishment for imprisonment for life. *Bhola Vs State (Criminal) 55 DLR 36.*

(146) Mere absence at the spot during the occurrence cannot provide the accused with grounds to escape liability under sections 302/109 Penal Code. *Alam Kabiraj and others Vs. State (Criminal) 55 DLR 273.*

(147) Convictions under section 302 read with section 149 of the Penal Code are distinct and different kinds of conviction under section 302 of Penal Code involves direct and personal liability of accused or a group of accused whereas section 149 of Penal Code involves constructive or vicarious liability. In order to find the accused guilty of the offence under section 302 read with section 149 of the Penal Code the prosecution must establish that the offence was committed by any member of unlawful assembly in prosecution of the common object of the assembly. *The State v. A.S.I. Md. Ayub Ali Sardar & anr. 23 BLD (HCD) 181.*

(148) In a murder case, when the dead body of a person is handed over to the concerned doctor for post mortem examination along with the inquest report, the doctor is required to check out whether the injury or injuries mentioned in the inquest report are all there in the dead body. If any major injury, as mentioned in the inquest report, is not found in the deadbody the doctor must not undertake the post mortem examination without first seeking clarification in this regard from the I.O. Similarly when the post mortem report is silent about an injury which is mentioned in the inquest report, the I.O. must seek clarification from the concerned doctor and give an explanation in the charge sheet. *The State V. Mainul Haque @ Mainal. 23 BLD (HCD) 220.*

(149) Confessional statement of one co-accused cannot be used for corroborating the confession of another co-accused, as both are tainted evidence, much more so when they are retracted. The learned Additional Sessions Judge solely relied upon the alleged confessional statements of the co-accused in convicting the accused-appellant under section 302/34 of the Penal Code and thereby committed illegality. *Md. Rezaul Karim alias Rezaul Alam Rikshawala v. The State. 23 BLD (HCD) 255.*

(150) The law is well settled that mere relationship of the witnesses and/or relationship with the victim do not make them unreliable. The court can rely on the evidence of a witness who is related to the victim if it considers the same reliable and that evidence is corroborated by other reliable witnesses who are not related to the victim. *Zahed Ali Foreman (Driver) & ors. v. The State. 23 BLD (AD) 182.*

(151) Conviction and sentence when based on consistent evidence—Calls for no interference—Where the conviction and sentence are based on concurrent findings of the trial court and the High Court Division upon proper appreciation of evidence and when no legal infirmity could be pointed out, the leave petition is rejected. *Abu Jamal & another Vs. The State. 6 MLR (AD) 29.*

(152) Altering the charge into one under section 304 part I and reducing the sentence to 10 years R.I. In a case of murder where the convict-petitioner was sentenced to imprisonment for life by the trial court which has been reduced to 10 years R.I. upon altering the charge into one under section 304 part I by the High Court Division in appeal in view of the mitigating circumstance, the occurrence taking place in a bid to resist the taking away of pulse grown by the convict-petitioner, there being no illegality committed in the impugned judgment and order warranting any interference leave to appeal is refused. *Emdadul Haque Vs. The State 6 MLR (AD) 98.*

(153) Nature of proof—The well established principle of law that in order to sustain conviction the prosecution must prove the charge against the accused by consistent and reliable evidence. When there is no legal and reliable evidence on record as to the proof of charge beyond doubt accused cannot be convicted on any other hypothesis. *The State Vs. Azim Sarder and another 6 MLR (AD) 103.*

(154) Charge of murder–Nature of proof—Contradictions on material points by eye witnesses make the prosecution case doubtful—Contradictions in the evidence of the eye witnesses on material points as to the manner of occurrence make the prosecution case doubtful. When the decision and findings of the High Court Division do not suffer from any misreading of the evidence, the impugned judgment and order of reversal of conviction and sentence does not call for any interference. *The State Vs. Nasir Ahmed @ Nasiruddin and another 6 MLR (AD) 194.*

(155) Charge of murder–Legal requirement as to proof of—Evidentiary value of confessional statement—The well settled principle of law is that the confessional statement of one accused cannot be used against the other co-accused. Moreover the confessional statement recorded under section 30 is not an evidence within the meaning of section 3 of the Evidence Act, 1872. When none of the eye witnesses of the occurrence said a single word against the convict-appellant, this is factually a case of no evidence. Therefore the impugned order of conviction and sentence which is not based on any legal evidence is set aside with a serious stricture against the learned trial Court Judge. *Abu Syed Vs. The State 6 MLR (HC) 237.*

(156) Charge of murder—Onus of proof lies upon the prosecution—No hard and fast rule as to number of witness to be examined–Partisan witness need not always be discarded—The cardinal principle of criminal jurisprudence is that the onus entirely lies upon the prosecution to prove the charge against the accused to the hilt beyond all reasonable doubt. There is no hard and fast rule as to the number of witness the prosecution has to examine. In a case where there are huge number of witnesses, the prosecution is not required to examine each and every of them. It is enough to secure conviction if the material witnesses are examined. Partisan witnesses where in the circumstances are probable and reliable cannot be discarded merely on the ground of their being partisan. Suffering the pangs of death for long time pending disposal of reference and appeal are considered to be good ground for altering the sentence of death into one of imprisonment for life. *The State Vs. Md. Monir Ahmed @ Monir Hossain 6 MLR (HC) 243.*

(157) Motive as to murder is not always necessary to be proved—When there are sufficient reliable evidence establishing the charge beyond doubt, motive for the murder need not be proved. Inquest report being the part of investigation alongside the post mordem report can well be used by the court as to the condition of the dead body. *Anisur Rahman Chowdhury Vs. The State 7 MLR (AD) 119.*

(158) Murder of wife by husband—Circumstantial evidence.—When life is murdered in the house of the husband while living together, the husband has the liability to explain under what circumstances his wife died. When ocular evidence is hardly possible from the neighbours or inmates of the house circumstantial evidence can well form the basis of conviction against the husband-accused—Reasonable doubt has to be adjudged commensurate to the nature of the offence. *Alfazuddin Khan (Md.) Vs. The State 7 MLR (HC) 73.*

(159) Motive when to be proved.—In murder trial motive is not always essential and need not be proved by the prosecution. But when motive is alleged then the prosecution has to prove it. *Salim (Md.) Vs. The State 7 MLR (HC) 20.*

(160) Charge of murder—Acquittal on ground of insanity.—Defence of insanity if taken shall have to be proved by the defence. Legal insanity when proved can be the ground of acquittal of the accused.

-111

Criminal lunatic may be detained in asylum till cure. *Nikhil Chandra Haldar Vs. The state 7 MLR (HC) 115.*

(161) Commission of theft is pre-requisite of an offence—Non appealing convict may be allowed the benefit of acquittal.—Unless there is a case of theft with preparation to cause death or hurt to escape, section 382 of the Penal Code is not attracted. When the prosecution case is found wholly not proved, the non-appealing convict may also be given benefit of acquittal. *Mofizul Islam Vs. The State 7 MLR (HC) 108.*

(162) Charge of murder—Dying declaration—Evidentiary value for conviction.—Dying declaration has a special sanctity in view of the fact that a dying man as expected cannot tell lie and as such a dying declaration when considered true can alone form the basis of conviction. Order of acquittal which is perverse and is based on findings on improper appreciation of evidence need be set aside. The High Court Division in such a case is required to interfere with the order of acquittal which is shockingly unconscionable. *The State Vs. Rashid Ahmed and others 7 MLR (HC) 147.*

(163) Charge of murder—proof by circumstantial evidence—Sentence for 30 years is not authorised—Imprisonment for life is the proper term of sentence.—When chain of events are proved by consistent witness and the calling of the deceased by the accused and the trial of marks blood found from the P.O. house to the place where the dead body was detected constitute most strong circumstantial evidence irresistibly leading to the conclusion as to the guilt of the accused beyond all reasonable doubt. *Bhola Vs. The State 7 MLR (HC) 224.*

(164) Motive—circumstantial evidence—When the wife of convict appellant died with marks of injuries where her husband and minor children were present but the husband neither informed the police nor did he give any explanation as to the cause of her death and the facts and circumstances are such that the death could not be caused by any other person except the husband and in such circumstances motive is not necessary. *Farid Ali Vs. State (Criminal) 4 BLC 27.*

(165) The blow of accused Jahangir and chora blow of accused Habib Mallick had resulted in the death of victim Belayet on the date, time, place and manner as alleged by the prosecution and learned Sessions Judge had correctly found that these two accused-appellants were guilty of the charge brought against them under sections 302/34 of the Penal Code and had rightly convicted and sentenced them requiring no interference. *Jahangir Howlader and another Vs. State (Criminal) 3 BLC 164.*

(166) The evidences as to the order to kill victim Kastura Bibi by convicted Abdul Jabbar are inconsistent and also suffers from contradictions and the prosecution failed to prove the case beyond all reasonable doubt and as such the conviction and sentence passed upon him under sections 302/34 of the Penal Code cannot be sustained in law. *Abdul Jabbar and another Vs. State (Criminal) 3 BLC 231.*

(167) Death would not have occurred if accused Abdul Hoque would not have played the part of pressing victim on her neck. Accused Shamsul Huq had no premeditated intention to kill the victim and the intention to kill is lacking in the instant case. Although, he had no intention to kill the victim, it must be held that he had the knowledge that such throwing of brick was likely to cause her death and the act done by him was both rash and indiscreet and as such accused Shamsul Huq is liable to commission of offence punishable under section 304 Part II of the Penal Code. *Abdul Jabbar and another Vs. State (criminal) 3 BLC 231.*

(168) Death caused by lathi on the head—The accused petitioner assaulted with a lathi on the head of the deceased Md. Nurul Howlader as a result of which he died when PWs 3,4,5, and 9 all testified

about the inflicting of the injury on the head by the accused-petitioner corroborated by the P.W. 13, the doctor who was not cross-examined by the defence. The High Court Division rightly upheld the conviction and sentence of the petitioner. *Kabir Howlader Vs. State (Criminal) 5 BLC (AD) 12.*

(169) The learned Signal Judge has failed to consider the material aspect that the first information report was lodged within one and a half hour of the occurrence and all the four eye-witnesses proved the participation of the accused in inflicting one dagger injury in the body of deceased, Abu Taher @ Abu. When the learned Signal Judge considered some very minor and insignificant circumstances which are not at all relevant in this case as the case was well proved by as many as four eye-witnesses of the occurrence and hence the accused-respondent is found guilty under section 302 of the Penal Code and he is sentenced to suffer imprisonment for life. *State Vs. Ful Mia (Criminal) 5 BLC (AD) 41.*

(170) The trial court as well as the High Court Division thoroughly considered the evidence adduced by the prosecution and came to the concurrent finding that the petitioners along with others were instrumental in causing murder of Mokles when there is no denial of the factum of murder of Mokles at the time place and in the manner as alleged by the prosecution, the Courts below committed no illegality and wrong in finding guilt of the petitioners. *Abu Jamal and another Vs. State (civil) 5 BLC (AD) 157.*

(171) The way the condemned convict took the rifle and the live cartridges from his superior officer, went out, returned and then shot at his superior officer leaves no room for doubt that the gun shot taken by him was the result of premeditation and cool calculation with the intention to cause death and thereby committed murder rendering him to be convicted under section 302 of the Penal Code and that there is no extenuating circumstances to alter the sentence. *State Vs. Siddiqur Rahman (Criminal) 2 BLC 145.*

(172) As the solitary eye-witness PW 3, who is found to be fully trust-worthily and reliable and has been corroborated by PWs. 1-2 and 4-7 and the strong circumstances arising out of the conduct of the condemned-accused for his attempt of running away from his house and the place of occurrence and his long continuous absconsion during trial and even thereafter which has proved the charge of murder beyond all reasonable doubt. *State Vs. Ranjit Kamur Mallik (Criminal) 2 BLC 211.*

(173) Although there was altercation between the appellant and the deceased at the time of occurrence which was corroborated by the PWs. 1 and 2 but this case does not fall under section 304 of the Penal Code as the appellant caused fatal injury on the vital part of the deceased and it was an offence of culpable homicide amounting to murder. *Siraj Miah Vs. State (Criminal) 2 BLC 402.*

(174) Common intention not proved—although the six accused persons surrounded the victim and five of them dealt blows by different weapons but the Doctor opined that the death was caused not by the cumulative effect of the injuries but by the injury on the back of the deceased for which it cannot be accepted that all the accused persons had intention of causing death as the five accused persons dealt one blow each by their respective weapon which would suggest the lacking of intention to kill the deceased Ashabuddin by all. *Madris Miah and others Vs. State (Criminal) 2 BLC 249.*

(175) It is well settled that the statement recorded under section 164 CrPC is not substantive evidence, but is only corroborative evidence or it can negative the evidence of the witness as given before the Court. As the prosecution has failed to adduce any positive evidence against the appellants implicating them or any or more of them in the commission of the murder in question, they are entitled to be acquitted. *Ashu and 3 others Vs. State (Criminal) 2 BLC 465.*

(176) Death by the violent act of the accused Shawkat Iqbal whose conduct as revealed form the materials on record and the injuries as noticed by PW 13 if considered in juxtaposition then it would

be understood that death had occurred to Renu owing to the injuries as noticed by PW 13 who held postmortem examination and because of that accused Shawkat Iqbal made all attempts including procuring of certificate from accused Dr. AKM Akhter Azam and that completed burial without informating Renu's husband and that upon making entries in the death register of Azimpur graveyard giving incorrect information and hence there is no reason to interfere with the impugned judgment of conviction and sentence of the appellants. *Dr. AKM Akhter Azam and others Vs. State (Criminal) 6 BLC 231.*

(177-178) Trial Judge carefully considered and assessed the evidence of PWs 1,2,4, and 5 and recorded positive decision that Reza and Akkas were directly involved in the killing of Maqbul and accused Reza killed the victim Maqbul taking dagger from accused Akkas and as such they were rightly convicted under section 302/34 of the Penal Code as the testimony of PW 1 having got credibility and ring of truth and such conviction could very well be based on her solitary testimony but there is no evidence either ocular or circumstantial connection the convict-appellant Helaluddin in the commission of the alleged offence and the learned Trial judge awarded conviction and sentence upon him without any legal evidence. *Rezaul Hoque @ Reza and others Vs. State (Criminal) 6 BLC 501.*

(179) In the instant case PW 2, daughter of the deceased, is the sole ocular witness and there is admitted enmity between the parties where the prosecution has failed to examine any distrusted and independent witnesses, rather their testimonies being hearsay evidence has no evidentiary value and as such they are incapable of corroborating the evidence of PW 2 whose evidence was also not corroborated by inquest report as well as post mortem report, even the prosecution has failed to prove by the testimony of any witness to the fact that PW 2 was in fact in the company of the deceased at or about the time of occurrence and hence in the absence of such evidence the testimony of PW 2 as lone witness to the occurrence is not at all acceptable. *Mukta Miah & others Vs. State (Criminal) 6 BLC 211.*

(180) In the instant case the victim died in hospital after 9/10 days of her assault by the appellant party. The injury inflicted on her was grave and homicidal and ante-mortem in nature. The impact of it was so grave that the same severed and tore out the spinal cord of the victim when the evidence of PW II in cross is that it is possible for a person to live for 15/20 days with such injuries and hence a premium should not be given to the appellant on the ground that the victim having died after 9/10 days in hospital his offence should be regarded as an offence under section 304 Part II of the Penal Code. The appellant is guilty under section 302 of the Penal Code and it is maintained as if the same has been passed by the competent court in Sessions case. *State Vs. Mannan Gazi (Criminal) 6 BLC 187.*

(181) High Court Division on consideration of the evidence found that the petitioner had killed two victims without any provocation whatsoever and the killing was a result of premeditation and that the petitioner who has taken two lives should give his own life and the sentence of death was not commuted to imprisonment for life. *Mofazzal Hossain Pramanik Vs. State (Criminal) 6 BLC (AD) 96.*

(182) The victim was kidnapped by the accused Hemayet and done to death in a beel by the said accused with the help of the petitioners and others and his body was recovered from the said beel on the showing of one of the accused and only eye-witness of the occurrence is PW 25 who has no enmity with the accused persons including the petitioners. Only because the hurricane lamp was not seized by the Investigation Officer his evidence cannot be doubted and High Court Division committed no illegality in relying upon his evidence and also on the confessional statement of the co-accused persons

to uphold the conviction of the petitioners. *Chowdhury Nuruzzaman & another Vs. State (criminal) 6 BLC (AD) 58.*

(183) As no one identified the respondents as assailants or persons responsible for the commission of dacoity and murder and no confessional statement was made by the respondents and there is no evidence implicating them in the commission of dacoity and murder, no interference with impugned judgment and order of the High Court Division is called for. *State Vs. Azim Sarder and another (Criminal) 6 BLC (AD) 124.*

(184) Considering the fact that the accused person in order to save their crops resisted the deceased which ultimately caused his death at the blow of the petitioner and the medical evidence shows that there was a penetrating wound in the back of the gluteal region damaging the internal organs of the deceased as a result of which he died within a few hours of the occurrence and before inflicting the said injury the deceased was pressed on the ground and he was unarmed, the High Court Division has rightly altered the conviction form 302 to 304 (part-1 of the Penal Code, reducing the sentence from imprisonment for the life to 10 years rigorous imprisonment. *Emdadul Hoque Vs. State (Criminal) 6 BLC (AD) 125.*

(185) The condemned husband was convicted under section 10(1) of the Nari-o- Shishu Nirjatan (Bishes Bidhan) Ain, 1955 and sentenced to death by the Nati-o-Shishu Nirjaton (Bishes Bidhan) Adalat but it appears from the evidence on record that charge under section 10(1) of the Ain of 1995 was not proved when the High Court Division relying upon an unreported decision of the Appellant Division without sending the case for trial afresh considered the case on merit in the interest of justice and it was found the circumstances are not capable of any other explanation or hypothesis other than the guilt of the husband who is responsible for killing his wife as he failed to explain the reasons for the death of his wife and accordingly the accused husband is found guilty under section 302 of the Penal Code and convicted thereunder and sentenced to suffer imprisonment for life. *State Vs. Eunus Khan (Criminal) 5 BLC 353.*

(186) In view of the confessional statement coupled with circumstantial evidence and the evidence of the PWs the prosecution has proved the case of committing double murder by the condemned prisoner which she did intentionally and such intention is apparent from the nature of the injuries proved by PWs 9 and 10 and hence the accused has rightly been convicted under section 302 of the Penal Code by the trial Court. *State Vs. Romana Begum @ Nomi (Criminal) 5 BLC 332.*

(187) The murder of the wife of the accused having taken place in the house of the accused who was living with his wife in the same house and he having an obligation to her death made a ;plea of snake biting but the same has found to be travesty of truth in view of the evidence of witness including PW 2 the explanation given by the accused being found to be false and in the absence of any other satisfactory explanation from the defence the accused is responsible for the death of his wife and the facts and circumstances revealed through the evidence of witnesses are incompatible of explanation upon any other reasonable hypothesis than that of guilt of the accused. *State Vs. Abul Kalam (Criminal) 5 BLC 230.*

(188) Since there is evidence of killing of the wife of the accused, lodging ejahar under section 302 of the Penal Code, submission of charge sheet under section 302 of the Penal Code and there is no cogent evidence as to the demand of dowry by the accused, no evidence to prove immediate cause of committing the offence, no cogent evidence as to committing the murder for dowry and no evidence as to the real cause of killing of the wife by the husband, the case does not come under section 10(1) of the

Nari-o-Shishu Nijatan Daman (Bishesh Bidhan) Ain, 1995, but it comes under section 302 of the Penal Code when the accused is responsible for causing death of his wife. *State Vs. Abul Kalam (Criminal) 5 BLC 230.*

(189) The wife was in custody of the husband and the death was caused while she was in the custody of her husband who has failed to explain the cause of death of his wife, the husband is liable for the cause of death of his wife and hence the appellant was rightly convicted under section 302 of the Penal Code and sentenced to suffer imprisonment for life. *Shah Alam (Md.) Vs. State (Criminal) 5 BLC 492.*

(190) No reliance can be placed on the evidence of PWs 3 and 4 for holding that the witness saw the condemned prisoner and his wife in the right of 16-5-95 going inside the hut and that they slept inside the hut in the night following the morning of which condemned prisoner's wife was found dead and hence it cannot be said that it was the condemned prisoner who caused death of his wife. Since the prosecution has not been able to establish the case by reliable witness the condemned prisoner is entitled to be acquitted. *State Vs. Azizur Rahman alias Habib (Criminal) 5 BLC 405.*

(191) The prosecution having proved the presence of the convict husband at the place of occurrence house on the night of occurrence, husband of the deceased owes an explanation as to how his wife met her death at his house. Neither the husband called in a physician for treatment of his wife nor did he inform his father-in-law nor any other near relations regarding the occurrence nor was he present at the time of burial of the deceased, he remained absconded even after the delivery of judgment without any cogent explanation is a relevant fact under section 8 of the Evidence Act to show his conduct and it is also a circumstance indicating his complicity in the crime. *Fazer Pk. (Md.) alias Fazer Ali Vs. State (Criminal) 5 BLC 542.*

(192) It appears that the prosecution has failed to establish the existence of preconcert intention even by proof of acts performed by each individual accused at the time of commission of the main crime. Several persons can simultaneously attack a man and each can have the same intention, namely, the intention to kill, and each can individually inflict separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any others and if the prosecution cannot prove that his separate injury was a fatal one, he cannot be convicted of the murder, however clearly an intention to kill could be proved in his case. *Babul Mia and 2 others Vs. State (Criminal) 5 BLC 197.*

(193) There is complete chain of circumstances that the appellant assaulted deceased victim Biswejit severely and dealt fatal blows causing his death when appellant Gulzar participated in the occurrence most actively and he was found by PW 4 for the last time with the deceased victim when Gulzar was chasing by the estern side of the khal and the circumstances of the case take cumulatively are forming a chain so complete that there is no escape from the conclusion that the murder of victim Biswajit was committed by the accused appellant Gulzar and his associates and none else. *State Biswas and others Vs. State (Criminal) 5 BLC 278.*

(194) The wife of deceased deposed in Court that she had recognised the assailants of her husband and accused Akkel Ali gave channy blow, Delwar gave dao blow, accused Omar Ali gave lathi blow and accused. Quassem gave rifle blow on her husband who succumbed to the injuries on 15-6-89 in the hospital which is corroborated by PWs 1, 2, 3, 4, 6 and 8 and the dying declaration and there is nothing to disbelieve the credibility of these evidences and hence the prosecution proved the case

beyond all reasonable doubt and therefore the conviction and sentence under sections 302/34 of the Penal Code against the condemned convict is sustainable. *State Vs. Akkel Ali and others (Criminal) 5 BLC 439.*

(195) It is not correct to say that the case as made out in the FIR has been given a go-bye and a new case developed during the trial and the learned trial Court most illegally discharged the evidences of 8 eye-witness and hence the findings and decisions of the learned trial Court are not supported by the evidence on record and as such by the impugned judgment and order of acquittal are considered to be perverse and it is set aside. Accordingly, accused Mahir Mollah, Shamsuddin Molla and Rafiquddin Molla are found guilty under sections 302/34 of the Penal Code but considering the lapse of 23 years in disposing of the 2 appeals each of them is convicted and sentenced to suffer imprisonment for life and accused Nurul Molla, Joynal Molla, and Mokbul Hossain Molla are found guilty under section 304/34 of the Penal Code and they are sentenced to suffer R1 for 10 years. *Mahir Molla and others Vs. State (Criminal) 5 BLC 386.*

(196) Charge can be altered at any time before delievery of judgment as per provisions of section 227 of the Code of Criminal Procedure. After framing a charge under sections 304/34 of the Penal Code, there is no legal bar to find the accused guilty under lower sections 304/34 of the Penal Code. *Mahir Molla and others Vs. State (Criminal) 5 BLC 386.*

(197) Wife klling Case—Death by throttling—High Court Division was correct in acquitting the husband due to lack of legal evidence—Question arose from consideration was whether the prosecution was able to prove conclusively that the husband alone killed his wife—Reappraisal and scrutiny of evidence by the Appellate Division—It will be improper to substitute moral conviction for legal evidence—No interference with the acquittal order passed by the High Court Division *The State Vs. Khadem Mondal 10 BLD (AD) 229.*

(198) Evidence as to causing the death of the victim as unimpeachable High Court Division upheld the conviction—The injuries ascribed to appellants 8 to 10 were not supported by medical evidence—No inference by the Appellant Division. *Md. Abdul Wahab & ors. Vs. The State BCR 1990 AD 329.*

(199) Trial court convicted and sentenced the accused appellant to death for committing a double Murder—High Court Division confirmed the sentence in a Death Reference case and dismissed the Jail Appeal preferred by the condemned prisoner—Appellate Division examined whether there was any extenuating circumstances the lesser sentence of imprisonment for life instead of death under sec. 300 of the Penal Code and sustained the conviction and sentence as there was nothing in the facts and circumstances of case and in the conduct of the accused to take a lenient view. *Abed Ali Vs. The State 10 BLD (AD) 89=42 DLR (AD) 171.*

(200) Murder in December 1971—Delay of Fifteen days in lodging the FIR—Sentence of life term—Victim's burial without Post Mortem—I/O not examined as he died before trial began—High Court Division affirmed the Trial Court's order of conviction and sentence of the same evidence of the eye-witness whom the Trial Court disbelieved with regard to the acquitted co-accused—Validity—Claim for acquittal on benefit of doubt when cannot be given—I/O's evidence before the committing Court was brought on record u/s. 33 of the Evience Act on posecution's prayer. Delay is lodging the F.I.R. and absence of any post mortem examination on the dead body of the victim are great defects but reason for having no post-mortem examination was due to abnormal situation prevailing in the locality at the relevant time. High Court Division rightly upheld the trial Court's acceptance of the informant's

explanation as to delay and commission as satisfactory. No scope for taking a different view in the matter—The part played by the appellants in committing the offence has been amply corroborated—The defects pointed out by the defence in the prosecution case not materially prejudiced the accused nor do they raise any benefit of doubt for which the appellants could claim acquittal on the ground of benefit of doubt. *Kismat Moral & anr. Vs. The State BCR 1990 AD 331.*

(201) Bail in a murder case—No allegation in the FIR and also in the statements of the witness recorded u/s. 161, Cr. P.C. that the appellants committed murder—Statements recorded u/s. 161 Cr.P.C. were placed before the High Court Division but nothing was stated with regard to them—Considering the statements recorded by the police u/s. 161 Cr. P.C. wherein no special event, act or direct allegation involving the appellants with the killing of the victim is found. Appellate Division granted bail to the appellant—Appellants will continue on the same bail granted by the Appellate Division earlier—If the trial starts in the meantime, trial Court will be free to take them into custody during trial. *Abdul Matin & ors. Vs. The State 44 DLR (AD) 8.*

(202) *Lathi* blows were inflicted on the victim's vital parts, the tempotal region of the head, chest and abdomen—Autopsy revealed only swollen injuries. The Victim did not immediately succumb to the injuries but was alive for more than two days. The injuries were not inflicted with the intention of causing victim's death. From the successive *lathi* blows on the victim's vital parts, it is inferable that the accused had at least the intention to cause such bodily injuries as were likely to cause death. The offence committed falls under the first part of section 304—conviction and sentence altered from Sec. 302 to Part I of Sec. 304. *Abul Kashem & ors. Vs. The State. 10 BLD (AD) 210=43 DLR (AD) 77.*

(203) Victim of murder—a minor boy was called away and lastly seen in the company of two accused persons before disappearance—Principle relating to circumstantial evidence—Circumstantial evidence, when cannot be conclusive as to the guilty of the accused persons—Question as to motive—No material to show that the accused harboured evil motive in calling away the Victim boy whose father suggested the motive was to give him sorrow for the rest of his life but did not say why the young accused persons would like to cause him pain and sorrow—This is no motive. *The State Vs. Khasru & ors. 43 DLR (AD) 182.*

(204) This section provides the punishment in cases where the accused is found guilty of murder. Where there is a doubt as to the guilt of the accused he must be acquitted, and not be given the lesser punishment of imprisonment of life. *AIR 1975 SC 654.*

(205) Under S. 367(5) of Criminal P. C. 1898 the primary or normal sentence in cases of murder must be a sentence of death and the lesser sentence can be given only if extenuating or mitigating circumstances are established. *AIR 1957 SC 614.*

(206) The question of awarding the lesser sentence is a matter of judicial discretion even apart from the existence of any extenuating or mitigating circumstances. *AIR 1955 SC 216.*

(207) The choice of the alternative punishment in cases of murder is a matter of judicial discretion. *AIR 1974 SC 1039.*

(208) Life imprisonment for murder is the rule and capital sentence the exception. *AIR 1974 SC 799.*

(209) Special reasons must be given while imposing death sentence. Fact of murder being terrific is not an adequate reason. *AIR 1981 SC 1220.*

(210) While murder in its aggravated form and in absence of any extenuating factors connected with crime, criminal or legal process, still is condignly visited with death penalty, a compassionate alterative of life imprisonment in all other circumstances is gaining judicial ground. *AIR 1974 SC 677.*

(211) Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime. *AIR 1983 SC 957.*

(212) The proper exercise of the discretion in respect of the punishment, as in all cases of exercise of discretion be exercised judicially on a proper consideration of all the relevant facts and circumstances of the case, keeping in view the broad objective of the sentence namely that it is neither too severe nor too lenient. *AIR 1974 SC 1901.*

(213) The relevant considerations, in the exercise of the discretion will include the motive for the crime, the magnitude of the offence and the manner of its commission. *AIR 1977 SC 703.*

(214) A sentence of death will be proper where the case is one of cold-blooded, callous, and vindictive character. *AIR 1975 SC 573.*

(215) Murder of Amin; a Government Servant, for effecting sale of lands of accused in discharge of his ministerial duty—Sentence of death confirmed by observing that crimes committed against public servants for reasons arising out of performance by them of their public duties must be discouraged and put down with firm hand. *AIR 1981 SC 1160.*

(216) The conferment of the power on courts to exercise the discretion without laying down any standard to guide them cannot be said to be an excessive delegation by the legislature of its power. *AIR 1980 SC 898.*

(217) A provision conferring power on Court to exercise discretion cannot be said to be violative of the Constitution. *AIR 1973 SC 947.*

(218) Section 302 of the Penal Code and the connected section of the Criminal P. C. are constitutionally valid. *AIR 1980 SC 898.*

(219) A sentence of imprisonment for life can only be substituted if the facts justify the non-imposition of the extreme penalty of the law. *AIR 1965 SC 1467.*

(220) The rule that normal sentence for the offence of murder is life imprisonment should be observed both in letter and spirit. Death sentence should be imposed in very extreme cases. *AIR 1981 SC 764.*

(221) Death sentence should not be passed except in rarest of rare cases. *AIR 1983 SC 446.*

(222) Judges are not bound to award the capital sentence simply because the murder is deliberate or cold-blooded if circumstances exist where the principle of discrimination should be applied as among the several culprits. *AIR 1975 SC 455.*

(223) Capital punishment should not be regarded as per se unreasonable or as not being in public interest. *AIR 1973 SC 947.*

2. Section 303 declared void—Effect.—(1) Since S. 303 of the Penal Code is declared unconstitutional and void, all cases of murder by life convict will now fall under S. 302 and there shall be no mandatory sentence of death for the offence of murder . *AIR 1983 SC 473.*

(2) Murder by life convict during parole—accused sentenced to death on conviction under S. 303—co-accused awarded life imprisonment—s. 303 having been declared unconstitutional accused held in the facts of case should be awarded sentence of life imprisonment. *AIR 1984 SC 45.*

3. Extenuating circumstances—General.—(1) In order to award the lesser sentence of imprisonment for life there must be some extenuating circumstances—Some excuse which, though the law does not consider sufficient to render the killing culpable homicide not amounting to murder, is still a consideration for dealing leniently with the accused. *1955 Madh BLJ (HCR) 2151 (2172, 2173).*

(2) The mere absence of aggravating circumstances is not the same thing as the presence of extenuating circumstances. *AIR 1965 SC 1467.*

(3) It is impossible to lay down any general rule defining the classes of cases in which the lesser sentence may be imposed though, form time to time, certain circumstances have been recognised by Judges as valid grounds imposing such sentence. *AIR 1979 SC 1384.*

(4) Where the murderer is too young or too old the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice with an extenuating impact may in special cases, induce the lesser penalty. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim and the like steel the heart of the law for a sterner sentence. *AIR 1974 SC 799.*

(5) Several extenuating circumstances may be present in a case and none of them taken singly may be adequate to warrant the lesser sentence but where, in their totality, they tilt the judicial scales in favour of life rather than putting it out the lesser sentence should be awarded. *AIR 1974 SC 1039.*

(6) Where not only there are no extenuating circumstances, but the crime has been committed under circumstances of revolting cruelty and ruthlessness and is of a nature and magnitude that cannot fail to excite the pity and horror of any ordinary person, it is clear that the case calls for the imposition of the extreme penalty of the law. *1978 CriLR (SC) 297.*

4. Murder by several persons—Sentence.—*(A) Sections 34 and 302.*—(1) U/s. 34 of the Code the blow given by one will be considered to be a blow given by all the persons actually giving the blow being merely considered as the hand or instrument by which the others strike. *AIR 1980 SC 1496.*

(2) There can be no distinction made in the matter of punishment, on the ground that some of them did not actually inflict any injury on the victim or that it is doubtful who gave the fatal blow. *AIR 1971 SC 132.*

(3) Where, in pursuance of the common intention, several persons caused several injuries and either any one or all the injuries cumulatively, are sufficient in the ordinary course of nature to cause death it cannot be urged that the common intention was only to cause injuries 'likely' to cause death. Conviction should be therefore under S. 302/34 and not under S. 34 of the Code. *AIR 1977 SC 1800.*

(4) In a prosecution u/s. 302/34 where it is doubtful who gave the fatal blow or where the accused is found not to have struck the fatal blow the lesser penalty should be given. *AIR 1972 SC 1229.*

(5) Aliunde and apart from the fact that it is not proved who gave fatal blow there may be extenuating circumstances such as for example, acting under the baneful influence of another youth making the lesser sentence more appropriate. *AIR 1956 Mad 536.*

(6) Where the part played by the accused was only a secondary one the supreme Court gave him a life sentence. *AIR 1972 SC 811.*

(7) There can be no objection to the accused being convicted and sentenced under this section simpliciter (i.e.) without reference to S. 34 where there is substantial evidence against him. *AIR 1977 SC 705.*

(8) If there is evidence to show that other persons named or not in the charge-sheet or mentioned by the prosecution witnesses took part in the crime there can be a conviction under Ss. 302/34. *AIR 1979 SC 1344.*

(9) The common intention may develop on the spot. *1969 SCD 859 ; AIR 1978 SC 1492.*

(10) A common intention on the part of the accused is essential to attract the applicability of S 34. *AIR 1977 SC 1821.*

(B) Sections 149 and 302.—(1) Where the killing cannot be held to be in pursuance of the common object, all the members of the unlawful assembly cannot be convicted under S. 302 by resort to S. 149. *AIR 1978 SC 1759.*

(2) By virtue of S. 149, every member of the assembly would be liable for the crime committed by one of them. *AIR 1980 SC 957.*

(3) The liability is a vicarious one, and it has been held that in cases of vicarious liability for murder, it is generally proper to pass only the lesser sentence on the accused who did not actually strike the fatal blow. *AIR 1976 SC 2197.*

(4) Where A one of the members of an unlawful assembly, was responsible for the killing and was given the capital sentence while the other members were given the lesser sentence and it was argued that A should have also been given the lesser sentence, it was held that mere fact that leniency had been shown the other appellants was ground for reducing the sentence on A. *AIR 1957 SC 474.*

(5) It cannot be said that in cases of all convictions under S. 302 read with S. 149, the appropriate sentence must be imprisonment for life. *AIR 1944 FC 35.*

(6) As a mere prosecution of law it cannot be said that the sentence of death can be legitimately imposed only where an accused is found to have committed the murder himself. Whether or not sentence of death should be imposed on persons who are found to be guilty. *AIR 1965 SC 202.*

5. Age or sex of accused, if an extenuating circumstance.—(1) The mere fact that the accused is a youth or an old man or a woman is not as such an extenuating circumstance justifying the imposition of the lesser sentence of imprisonment for life. *1970 SCD 52.*

(2) The lesser sentence of imprisonment for life cannot be imposed in case of a cruel and cold blooded murder. *AIR 1983 SC 926.*

(3) Taken along with other circumstances age, sex of the accused has been considered by Courts to amount to an extenuating circumstance which will enable the Court to mitigate the sentence. *AIR 1980 SC 83.*

(4) A young accused who has done the criminal act under the influence of elder persons, should be awarded the lesser sentence. *AIR 1971 SC 1388.*

(5) Persons committing cruel, cold-blooded and premeditated murder should must be given the capital sentence though they may be young. *AIR 1973 SC 697.*

(6) As to whether and when a youthful offender guilty of murder should or could be sent to a Reformatory School. *AIR 1978 SC 1091.*

(7) A person who is under 16 years of age and accused of an offence murder is entitled to the benefit of the Children Act. Therefore, his trial and conviction under Cr. P. C. is illegal. *AIR 1981 SC 2037.*

6. Age of victim.—(1) The age of the victim cannot have any effect on the punishment to be awarded. Where a new-born child is deliberately murdered it is as serious an offence as the murder of a grown-up person deserves to be punished as severely. *1980 CriLJ 235.*

7. Presence or absence of motive.—(1) The existence of a motive is not an extenuating circumstance for awarding the lesser punishment for murder. *AIR 1957 Andh Pra 899.*

(2) The absence of a motive may, in a case based on circumstantial evidence, prove significant in arriving at a conclusion as to the guilty of the accused. *AIR 1983 PakLD 198.*

(3) Where the accused has been found guilty of murder the mere fact of absence of a motive for the crime or the inadequacy of the motive proved is not an extenuating circumstance for inflicting the lesser sentence. *AIR 1973 SC 337.*

8. Provocation.—(1) Culpable homicide committed under "grave and sudden provocation" as envisaged by Exception 1 to S. 300 of the Code is not murder and is punishable under S. 304. *1975 Raj Cri C 51 (DB).*

(2) Culpable homicide committed under provocation not falling within the Exception 1 to S. 300 will not take the case out of the category of murder but the provocation may be an extenuating circumstance justifying the award of the lesser punishment under this section. *AIR 1976 SC 915.*

(3) Where the provocation is grave but not sudden, Exception 1 to S. 300 will not apply so as to reduce the offence of murder to one of culpable homicide not amounting to murder. In such a case the accused will be liable to punishment under this section and not under S. 304. But the provocation may be an extenuating circumstance so as to justify the imposition of the lesser punishment of imprisonment for life. *AIR 1972 SC 2077.*

9. Starvation.—(1) Where the accused owing to starvation intending to kill her child and herself to commit suicide, killed her child, it was held that she was guilty of murder, but that a sentence of life imprisonment would meet that ends of justice. *AIR 1932 Cal 658.*

10. Family considerations.—*(A) Accused having young children.*—(1) The fact that the accused had young children who would become orphans and be left helpless if death penalty is imposed is not a consideration for awarding the lesser sentence. *AIR 1966 Bom 179.*

(B) Fact that family would be ruined.—(1) The fact that the family would be ruined by the death of murderer is not a circumstance for awarding the lesser punishment. *AIR 1951 Pepsu 111.*

(C) Accused being only son of his widowed mother.—(1) The fact that the accused was the only son of his widowed mother cannot be put forward as a reason for imposing the lesser sentence. *AIR 1935 Cal 594.*

(D) Saving of family honour.—(1) Fact that the accused committed murder for saving the honour of his family is not a mitigating circumstance for awarding the lesser sentence. *AIR 1960 Mad 218.*

11. Feelings of relatives.—(1) The feelings of relatives of the deceased cannot be allowed to influence the question of sentence. *AIR 1949 Ajmer 54.*

12. Status of accused.—(1) The following facts are not extenuating circumstances for awarding the lesser punishment :

(a) That the accused is a man of culture and education. *AIR 1952 Tripura 16.*

(b) That he is a European British subject. *AIR 1933 Nag 136.*

(c) That he is a successful budding lawyer. *1973 SC Notes 2.*

(d) That the murder was committed in order to maintain the family honour. *AIR 1960 Mad 218.*

(e) That he belongs to a community which is singularly free from criminal proclivities. *AIR 1932 Lah 500.*

(2) Where one of the two accused convicted of murder is sentenced to life imprisonment, the other playing a similar part, must not be awarded the capital punishment on the ground that he was the leader of the party of the accused and a village pardhan. *AIR 1974 SC 336.*

13. Murder committed at the instigation of others or for hire.—(1) A youth committing murder under the influence of elders may be given the lesser sentence of imprisonment for life. *AIR 1971 SC 1388.*

(2) Lesser sentence of imprisonment for life cannot be given to persons who are hired to commit murder or who commit the murder in order to please the master or the landlord in order to oblige a friend. *AIR 1979 SC 871.*

14. Absence of Premeditation.—(1) The mere absence of premeditation is not such an extenuating circumstance as will constitute a ground for awarding the lesser sentence on a conviction for a cold-blooded murder. *AIR 1967 Goa 40.*

(2) The absence of premeditation take along with other circumstances such as provocation, sudden quarrel, sudden impulse or loss of mental balance caused by rage, anger etc. will be a ground for awarding the lesser sentence. *AIR 1975 SC 1703.*

(3) In the case of a premeditated, cold-blooded and calculated murder, the accused must be given the capital sentence. *AIR 1975 SC 95.*

(4) Premeditated murders of wife and daughter—Facts of case showing no sufficient grounds for departing from rule of normal punishment and for imposing sentence of death—Sentence commuted to life imprisonment. *AIR 1983 SC 629.*

(5) As a general rule there can be no extenuating circumstance in a deliberate act of murder. *AIR 1968 Goa 21.*

15. Suddenness of quarrel.—(1) The mere absence of premeditation is not an extenuating circumstance. Therefore the mere fact that the quarrel is sudden will not necessarily be an extenuating circumstance. *AIR 1936 Sind 31.*

(2) Murder by accused of his brother's wife and nephew—Murder committed under sudden impulse in grave fit of rage—In ends of justice death sentence commuted into imprisonment for life. *AIR 1981 SC 1710.*

(3) Where in a party fight which was not started by the accused and in which several persons took part he thrust a knife in the abdomen of another, it was held that lesser punishment would meet the ends of justice. *AIR 1933 Lah 434.*

16. Subsequent remorse.—(1) The fact that the accused displays, afterward, remise cannot be considered at all in deciding upon the punishment for the murder. *AIR 1949 Mad 8.*

(2) What ought to guide the Court is the ascertainment of the state of mind of the accused when the crime was committed. *AIR 1935 Cal 591.*

(3) The fact that the accused stabbed himself after he had committed the murder was held not to be an extenuating circumstance. *AIR 1960 Mad 443.*

17. Offender being brought to bay.—(1) The fact that the murder was committed when the offender was brought to bay and in his desire to escape is not an extenuating circumstance, which will be a ground for inflicting the lesser punishment. *AIR 1932 Cal 818*

18. Corpus delicti not found.—(1) That the body of the murdered person is not found is no reason for not giving the sentence of death, when the guilt of the accused is established. *AIR 1958 All 514.*

(2) If, by reason of the fact the corpus delicti is not found a doubt is created as to whether the murder has at all been committed, the proper course is to acquit the accused and not to change the nature of the sentence from death to transportation for life. *AIR 1925 All 637.*

(3) Accused labouring under a hallucination—The body of the murdered person not found—Impossibility of knowing the nature of the injuries—Difficult to classify the crime as burtal or dastardly—S.C. preferred to lean on the side of leniency and commuted death sentence into one of life imprisonment. *AIR 1977 SC 1319.*

19. Lapse of time after commission of offence.—*(A) Lapse of time between date of crime and date of apprehension of accused*—(1) Where the accused was apprehended 6 years after the date of the murder, it was held that the delay could not be considered as an extenuating circumstance for passing the lesser sentence. *AIR 1941 Mad 258.*

(2) Where accused was under spectre of sentence for over 3 years and 7 months and evidence also indicated that he committed the killing at the instance of some one else the sentence of death was reduced to one for imprisonment for life. *AIR 1978 SC 1506.*

(B) Lesser sentence passed by lower court—Application for enhancement—Lapse of time in hearing.—(1) Where the Sessions Judge passed the lesser sentence when the case called for the passing of the capital sentence and an application was made to the High Court for enhancement of the sentence, it was held that the delay in hearing the application (one year) was not a sufficient reason for not passing the death sentence. *AIR 1953 Raj 17*

(C) Death sentence passed by lower Court—Appeal decided after lapse of time.—(1) Where a sentence of death had been passed and the appeal against it was heard after a long delay, the Supreme Court reduced the sentence to one of transportation for life. *AIR 1953 SC 131.*

(2) Where the appeal by the accused against the death sentence passed by the Sessions Judge was heard after an inordinate delay the Federal Court declined to reduce the sentence in one of transportation for life. *AIR 1944 FC 1.*

(3) Where twenty month had elapsed since the accused was sentenced to death, the Supreme Court held that this, by itself, does not suffice to reduce the sentence but the delay together with other factors may tilt the scale in favour of a life term. *AIR 1974 SC 677.*

(4) The sentence of death can be altered to one of imprisonment for life owing to inordinate delay in trial. *AIR 1979 SC 1177.*

(D) Acquittal by lower Court—Delay in hearing appeal.—(1) Where in appeal the acquittal by the lower Court is set aside, and there is a long interval between the judgment of the lower Court and that of the appellant Court, there is valid ground for awarding the lesser sentence. *AIR 1978 SC 191.*

(E) Death sentence by Sessions Judge—Acquittal by High Court set aside by Supreme Court.—(1) Where the accused was sentenced to death by the Sessions Judge and the High Court acquitted him of murder, the Supreme Court, though convicting the accused for murder passed the lesser sentence in view of the long interval after the date of offence and also period of mental agony suffered by him till the High Court acquitted him. *AIR 1974 SC 1163.*

20. Infidelity of woman.—(1) The mere suspicion of infidelity of the wife or concubine will not ordinarily be an extenuating circumstance. *AIR 1929 Mad 495.*

(2) The actual infidelity may be an extenuating circumstance. *AIR 1973 SC 2551.*

21. Absence of intention to kill.—(1) Premeditation or intention to kill is not always necessary for passing a capital sentence. *AIR 1979 SC 1006.*

(2) The absence of intention taken with other circumstances has been regarded as an extenuating circumstance for passing the lesser sentence. *AIR 1939 Lah 245.*

(3) Where there was a slight quarrel between the accused and the deceased and the latter's buffalo entered the former's field and the accused went at night to house of the deceased and struck him on the head with an exe using it as a strike and did not use the sharp edge of the axe, the way the axe was used did not show an intention to commit murder and a life imprisonment would be the appropriate sentence to be passed on the accused. *AIR 1969 SC 951.*

(4) The question whether there was or was not an intention to kill depends upon the facts and circumstances of the particular case and inference drawn therefore. *1980 CriLR (SC) 73.*

22. Acquittal of co-accused.—(1) The fact that the accused who actually committed the murder was tendered pardon and went free, cannot be a mitigating circumstance in awarding sentence to the co-accused, who, through he did not actually commit the act, was the person who conceived and instigated the murder. *AIR 1941 Mad 358.*

(2) Where the appellant was the actual murderer the fact that his co-accused was given a life sentence is not a ground for giving the appellant lesser sentence. *AIR 1977 SC 703.*

(3) Out of several persons tried for murder ten were acquitted by Sessions Court—Two more acquitted on appeal by High Court and only one convicted and sentenced to death—Held that his conviction was not bad in law but reduced sentence from life penalty of death to imprisonment for life because a comparatively minor injury was attributed to the appellant and then too he was vicariously held liable for the fatal injury. *AIR 1975 SC 2211.*

(4) Appellant tried for murder along with 10 others—Ocular evidence unreliable—Benefit of doubt given to all except appellant—Case of appellant not distinguishable from others—Benefit cannot be refused to appellant—His conviction under S. 302 read with S. 34 set aside, however , that under S. 326 confirmed. *AIR 1982 SC 1022.*

23. Acquittal of A for murder of X—Subsequent trial of B for the same offence.—(1) The acquittal of A for the murder of X in a prior and separate trial is no bar to the trial and conviction of B in a subsequent trial for the same murder. *1963 MPLJ (Notes) 14 (DB).*

24. Intoxication.—(1) Voluntary drunkenness is not necessarily by itself, a sufficient ground for not passing the sentence of death on an accused found guilty of murder, particularly when the accused may have consumed alcohol to get into proper mood to commit the offence. *AIR 1971 SC 1232.*

(2) Prosecution of accused P for murder or his wife M—Accused addicted to heavy drinking—At time of death of M, there was no one in house except P—Trustworthy medical opinion that death of M was due to asphyxea—Held it was P who murdered M—Sentence of imprisonment for life upheld. *AIR 1982 SC 1217.*

25. Communal excitement.—(1) That the accused was an ignorant man excited by events of the days when communal feelings were extreme is not an extenuating circumstance for reducing a sentence of death for murder into one of imprisonment for life. *(1849) 54 Mys HCR 237.*

(2) The state of public feeling is not an admissible reason for not passing the sentence of death. It is no part of the duty of a Judge to be influenced by public feeling. His duty is to administer the law. *AIR 1939 Mad 109.*

26. Confession.—(1) The fact that the accused confesses his guilt is not an extenuating circumstance for passing the lesser sentence. *(1945) 46 CriLJ 357 (DB) (Nag).*

(2) Accused in his statement under S. 342, Cr. P. C. admitted that after the deceased fell down he ran away out of fear and did not see if the deceased was stabbed. To a direct question put to him, he

denied the crime and his responsibility. Held, that under these circumstances he could not be convicted. *AIR 1979 SC 1414.*

27. Plea of guilty.—(1) It is not illegal to convict the accused of murder where he pleads guilty though it is not in accordance with practice to accept the plea of guilty involving sentence of death. *AIR 1923 Nag 251.*

(2) A plea of guilty put forward to a charge of murder should not be accepted unless the meaning of this technical term as defined in S. 300 of the Penal Code is explained to the accused and understood by him. *1982 CriLJ (NOC) 215.*

28. Enmity.—(1) The absence of enmity is not by itself an extenuating circumstance in favour of the accused. *AIR 1923 Lah 326.*

(2) No acceptable evidence of eye-witnesses to occurrence—Appeared that accused person's name was inserted in F. I. R. due to bitter enmity—Conviction under S. 302 set aside. *AIR 1974 SC 2394.*

29. Guilt found on circumstantial evidence.—(1) The fact that the finding of guilt of the accused was based on circumstantial evidence cannot be a circumstance which would entitle the accused to a lesser sentence. *AIR 1968 Bom 127.*

(2) The question of sentence is to be determined not with reference to the volume or character of the evidence adduced but with reference to the fact whether there are any extenuating circumstances which can be said to miti gate the enormity of the crime. *AIR 1958 Mys 150.*

(3) The Judge is either satisfied that the accused is guilty or he is not. There can be only one of the two positions. If he is satisfied that the accused is guilty the normal sentence should be given. If he is not so satisfied, the accused must be acquitted. There is no middle course at all in judging the guilt of the accused. *AIR 1939 Pesh 47*

30. Mental condition of the accused.—(1) Where it was proved that the accused had been suffering from an unbalanced mind, and in committing the murder, though a brutal one, he was actuated by jealousy or by indignation either of which would have tended further to disturb the balance of his mind, it was held that the lesser sentence would be the more appropriate one. *AIR 1944 FC 1.*

(2) Where the mental condition of the accused is abnormal and unhinged from circumstances the case is not one for capital punishment. *AIR 1973 SC 806.*

(3) Mere mental wrong is no extenuating circumstances. *AIR 1952 Mad 289.*

(4) Where the accused was not insane but clearly knew what he was doing, the mere absence of motive and apparent senselessness of the murder can furnish no extenuating circumstances for awarding the lesser punishment. *AIR 1952 Mad 289.*

(5) The following cannot be grounds for awarding the lesser punishment :—

(a) mere eccentricity and inadequacy of motive. *AIR 1931 Oudh 77.*

(b) annoyance at the refusal of the woman on whom he had spent a large sum of money to go with him. *1953 RajLW 82.*

(c) the accused being abnormally sensitive. *1974 WLN 785 (Raj).*

31. Exceeding right of private defence.—(1) Where the accused has a right of private defence of body at the start, and he does not exceed that right he commits no offence at all. *1977 CriLJ (NOC) 244 (Gauhati).*

(2) Where the accused was held not to have exceeded the right of private defence and had been sentenced to death by the High Court, the Supreme Court reduced the sentence to one of imprisonment for life. *AIR 1963 SC 612.*

(3) Where the case falls under Exceptions 2 to section 300 the offence would not be murder at all but only culpable homicide not amounting to murder and punishable under S. 304. *AIR 1979 SC 44.*

(4) Where, the accused is the aggressor and chases and attacks and causes the death of a person with a sharp weapon, no question of self-defence arises and Exception 2 to S. 300 will not apply and the case will clearly be one of murder. *AIR 1980 SC 108.*

(5) Where the injuries were inflicted not by the deceased or his aids in a scuffles with the accused but were received by the accused at the hands of the police when he was resisting with violence their attempt to arrest him, may be no question of private defence and the applicability of Exception 2 to S. 300. *AIR 1976 SC 1130.*

32. Possibility of commutation by Government.—(1) The fact that in similar cases the State has commuted the sentence of death to the lesser sentence of transportation for life and that it is possible that the Government may commute the sentence in the case on hand is no ground for the Court itself to award the lesser sentence. *AIR 1953 All 356.*

(2) Accused persons convicted and sentenced to death by common judgment—Death penalty commuted into imprisonment for life of one of co-accused—Other co-accused is also entitled to commutation. *AIR 1982 SC 849.*

(3) Where a death sentence was passed and confirmed by High court and there was considerable delay in disposing the mercy petition filed by accused despite notice and reminder sent to Government, the Supreme Court reduced the death sentence to sentence of life imprisonment. *(1983) 1 Crimes 796.*

33. Delay in execution of sentence of death—Effect.—(1) Commutation of death sentence to one of life imprisonment—Delay in exceeding of death sentence exceeding two years that by itself does not entitle person under sentence of death to demand quashing the sentence and converting into sentence of life imprisonment. *AIR 1983 SC 465.*

34. Difference of opinion between Judges of the Bench.—A question of sentence is, and must always remain, a matter of discretion, unless the law directs otherwise. But where appellate Judges who agree on the question of guilt differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons. *AIR 1955 SC 216.*

(2) The view of not awarding death penalty when appellate Judges differ on question of sentence cannot be raised to the pedestal of rule for that would leave the sentence of the determination of one Judge to the exclusion of the other. *AIR 1955 SC 1467.*

35. Accused persons exceeding the number of victims.—(1) It is not permissible to refrain from sentencing the murderers to death merely because their number exceeds the number of the victims. Where a number of persons have together planned and executed the murder of a single person each of them must be sentenced to death unless there are some legal reasons for not doing so. *AIR 1939 Mad 109.*

(2) It would not be right to inflict the death penalty on a number of persons merely because a large number of persons have been killed. *AIR 1957 Bom 226.*

36. Accused, a person who has done service to public.—(1) Where the accused had done public service in giving evidence for the Crown in other cases against other persons leading to their

conviction. It was held that he should be given the lesser sentence in view of such service. *AIR 1921 All 220.*

37. Rashness of deceased.—(1) Where the deceased had been warned of the possibility of robbery and still took the risk, his rashness in taking the risk cannot constitute an extenuating circumstance in favour of the accused for awarding the lesser sentence. *AIR 1961 MadhPra 10.*

38. Weakness of evidence.—(1) The strength or weakness of the evidence given is a matter to be considered before and not after conviction. Once the accused is convicted of murder, the sentence of imprisonment for life instead of a sentence of death cannot be given merely on the ground that the evidence was not of a sufficiently convincing character. *AIR 1933 Pat 149.*

(2) If there is doubt on the evidence as to the guilt, the accused should be acquitted and not given the lesser sentence. *AIR 1980 SC 1621.*

39. Murder under threat of co-accused.—(1) The fact that the accused committed the murder under threat of other persons who were co-accused is not an extenuating circumstance for passing the lesser sentence on him. *AIR 1938 Pat 258.*

40. Injuries on the accused.—(1) Where the accused commits a deliberate murder the fact that he himself receives severe injuries is not a reason for mitigating the punishment. *AIR 1979 SC 1828.*

(2) Where the accused pleads that he acted in the exercise of his right of private defence such injuries would be prima facie evidence in support of his plea and if the prosecution fails to displace the presumption raised by the existence of such injuries, the accused would be entitled to a verdict of acquittal. *AIR 1977 SC 2252.*

41. Killing in obedience of illegal order.—(1) That the death was caused in obedience to an illegal order is not an excuse for the commission of murder but will be a mitigating circumstance in the matter of awarding punishment. *AIR 1940 Lah 210.*

42. Nature of attack by accused.—(1) The fact that death was caused by a single blow is not a ground for passing the lesser sentence, when such a blow was such as could be effective and fatal. It is the intention behind the blow and other concomitant circumstances by which the sentence should be determined. *AIR 1931 Lah 749.*

(2) When the solitary blow given by the accused to the deceased was on the left clavicle—a non-vital part—and the accused did not know that the superior venacava would be cut as a result of that wound, the injury though sufficient in the ordinary course of nature to cause death was not one intended by the accused. In such a case accused could be convicted not under S. 302 but under S. 304 Part II. A sentence of 5 year's R. I. held would meet ends of justice. *AIR 1981 SC 1441.*

(3) One of the injuries caused by the accused being on the chest cutting thoracicatorta and sufficient in ordinary course of nature to cause death—Offence falls under S. 302. *AIR 1980 SC 573.*

43. Accused a pregnant woman.—(1) Where it is doubtful if the woman is pregnant or not the capital sentence cannot be excused. *(1912) 23 CriLJ 195.*

44. Superstition.—(1) Where a person was killed by the accused who were of primitive belief and low intelligence in the belief that the victim was a sorcerer, it was held that the extreme penalty of death is not necessary. *AIR 1932 Cal 815.*

(2) Where an illiterate young woman living in the midst of environments reminiscent of the dark ages caused the death of another woman's child under the belief that, that woman's evil shadow caused

the death of the accused's children, it was held that the lesser sentence was sufficient. *AIR 1933 Lah 718.*

45. Deafness and dumbness.—(1) There is no provision in the Code for exempting an accused from punishment on the ground that he is deaf or dump. *AIR 1959 Ker 165.*

(2) Under the provisions of S. 318, Criminal P. C. the Court should not in a case of deaf and dumb pass the sentence but forward the proceedings to the High Court for passing such sentence as it thinks fit. In exercise of such powers under S. 318 the High Court can pass the minimum sentence. *AIR 1959 Ker 165.*

46. Other miscellaneous cases in which the lesser sentence was given.—(1) Offence committed during a family quarrel—Father and brother of accused murdered—Still in the circumstances of the case, it was held that the extreme penalty was not called for. *AIR 1979 SC 1177.*

47. Onus of proving mitigating circumstances.—(1) The onus of proving the circumstances showing that the accused deserves a mitigation of the sentence to one of imprisonment for life instead of the extreme penalty of the law is on the accused. *ILR (1979) 2 Punj 29.*

48. Custom of killing for unchastity.—(1) A Baluch custom of killing a woman for unchastity cannot be taken into consideration as an extenuating circumstance for mitigating the sentence for murder. *AIR 1914 Sind 136.*

49. Recommendation for clemency.—(1) The Court convicting an accused of murder may recommend to the Local Government that the sentence may under S. 432, Criminal P. C. be commuted to a lesser punishment. *AIR 1977 SC 349.*

(2) The power of commutation of sentences under that section and S. 433, Criminal P. C. vested in the Government is kept intact by the Constitution and the High Court cannot issue a writ of mandamus against the State directing sentence given by the High Court to be carried out. *AIR 1962 All 151.*

(3) No mitigating circumstances—Sentence of death could not be reduced to imprisonment for life—If there were any mitigating circumstances not brought on record proper course was to bring them to notice of Government. *AIR 1977 SC 349.*

(4) There were any commiserative factors which could be taken into consideration by the executive Government in exercise of its prerogative of clemency it was for the Government to do so. *AIR 1975 SC 118.*

50. Abetment of murder—Punishment.—(1) The abetment of an offence which is committed in consequence of the abetment is itself an offence punishable under S. 109 with the punishment provided for the offence. If the offence abetted is murder, the punishment for the abetment is same as that for the offence of murder, namely, death or imprisonment for life. No other sentence can be passed. *ILR (1959) Ker 319.*

(2) It is not necessary that both the principal and the abettor should be awarded the same punishment. The principal may be given the death sentence and the abettor, imprisonment for life. *AIR 1926 All 737.*

(3) In proper cases the abettor may be given the capital sentence. *AIR 1933 Oudh 148.*

51. Benefit of doubt.—See cases under Ss. 299-300.

52. Sentence—Accused taking only secondary part in the crime.—(1) Where the accused was found to have taken only a secondary part in the crime in which several persons took part it was held by the Supreme Court that a life sentence would be sufficient. *AIR 1970 SC 1305.*

53. Interference by High Court Division.—(1) In dealing with appeals or reference proceedings where the question of confirming a death sentence is involved, the High Court has also to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death. All arguments urged by the appellants and all material infirmities pressed before the High Court on their behalf must be scrupulously examined and considered before a final decision is reached. *AIR 1965 SC 202.*

(2) It is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials, apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law it is for the High Court to come to an independent conclusion of its own. *AIR 1957 SC 469.*

(3) Where the trial Court has awarded the lesser sentence, the High Court will be reluctant to interfere with it as the error, if any, is on the side of leniency. *AIR 1967 Goa 21.*

(4) An interference would be justified only when the inadequacy of the punishment is manifest on the facts and circumstances of the case. *AIR 1971 SC 757.*

(5) While confirming the capital punishment the High Court has an obligation to itself consider what sentence should be imposed and not be content with the trial Court's decision on the point. *AIR 1973 SC 2551.*

(6) The mere fact that let to itself, the High Court would have awarded the capital sentence is not a proper ground for enhancing the sentence given by the trial Court. *AIR 1953 SC 364.*

(7) Where the accused was acquitted by the Sessions Judge and no appeal was failed against the acquittal, the High Court will not suo motu interfere, even if it would have confirmed the sentence of death had the Sessions Judge convicted the accused and inflicted such sentence. *AIR 1980 SC 1871.*

(8) Appeal against acquittal—Murder case—Accused given benefit of doubt—Judgment of trial court found reasonable and based on consideration of all evidence—Two views possible—High Court not entitled to set aside acquittal giving importance to one aspect of evidence and failing to consider integrity of evidence. *AIR 1981 SC 733.*

(9) Accused sentenced to imprisonment for life—Direction by court that he shall in no case be released unless he has undergone minimum 25 years' imprisonment is bad in law. *1982 CriLJ 1762.*

(10) High Court after careful security of the evidence finding the prosecution evidence dependable and reliable and also finding the injuries on the deceased were caused by the weapons used by the accused—High Court reversed finding of acquittal—High Court's order held to be correct by Supreme Court. *AIR 1979 SC 1116.*

54. Interference by Supreme Court.—(1) Where the High Court, after full re-appraisal of all the facts and circumstances of the case confirms the sentence passed by the Sessions Court or awards sentence, the Supreme Court will not interfere with the sentence. *AIR 1980 SC 1871.*

(2) Where the High Court gave a finding that the evidence of eye-witnesses was consistent and there was no reason for them to falsely implicate the accused but disbelieved the eye-witnesses on the basis of some minor discrepancies and set aside the conviction of the accused it was held that the approval the High Court was clearly wrong and perverse judgment of the trial Court recording conviction of the accused was therefore restored. *AIR 1984 SC 452.*

(3) Motive for murders was gain—Murders perpetrated in a cruel, callous and fendish fashion—Supreme Court declined to interfere with sentence of death thought the accused was 22 years of age and case rested upon circumstantial evidence. *AIR 1983 SC 504.*

(4) Where no right of appeal exists under the such law the Supreme Court cannot be treated as a general court of review for correcting all errors in all criminal cases. But where great injustice is shown to have occurred then the extraordinary power under the Constitution is meant to be exercised. *AIR 1979 SC 1145.*

(5) Where the death sentence of two co-accused was altered to life imprisonment, the death sentence of the appellant was also convicted to life imprisonment as the testimony of eye-witness being partially doubtful was not acceptable against the appellant in its entirety. *1983 SCC (Cri) 65.*

(6) Under this section on conviction for murder a sentence of death or imprisonment for life is mandatory. In addition, the accused was also liable to fine. In such cases, a sentence of fine is a matter of discretion of the Court. But the discretion is subject to interference by a higher Court in appropriate cases. *1989 CriLR (SC) 83.*

(7) Prosecution under S. 302/34—Evidence of P Ws. duly corroborated by medical witness who was an independent witness and by dying declaration of the deceased—The fact that the dying declaration was produced only during the trial is immaterial—Conviction under S. 302/34 upheld. *AIR 1980 SC 443.*

55. Charge for murder—conviction for offence under S. 201.—(1) A person charged with an offence of murder can be convicted under S. 201, without a further charge being made against him under that section. Such a conviction is warranted by S. 221, Criminal P. C. *AIR 1926 Lah 88.*

(2) It is unusual and undesirable to convict the accused under both the sections. *AIR 1943 Mad 275.*

(3) If the charge of murder is subsequently withdrawn no conviction can be sustained under S. 201 when it is proved that the accused committed murder. *AIR 1916 Cal 919.*

(4) Where the accused knew that what was being disposed of by them was a dead body involved in a murder although their involvement in the murder cannot be established, yet they can be found guilty under S. 201/34. *AIR 1979 SC 1534.*

(5) As to whether separate sentences can be given in respect of both the offences. *AIR 1916 Mad 1163.*

56. Alteration of charge from S. 302/34 to S. 302/149.—(1) The alteration of a charge under Section 302/34 to one under S. 302/149 at the appellate stage, and conviction in the latter charge will not cause prejudice to the accused. *(1972) 76 CalWN 901.*

57. This section and Section 396.—(1) The provision of S. 396 cannot override those of S. 302 so as to render a man liable to a less severe punishment under S. 396 than could legally be inflicted under S. 302 (i.e. death or imprisonment for life) *(1897) 10 CPLR (Cri) 20.*

(2) In a case falling under S. 396 and not falling under S. 302 the rule that an accused convicted under S. 302 be granted only one of the two alternative sentences of death or imprisonment for life, does not apply and the Court may grant any sentence of imprisonment extending up to 10 years. *AIR 1964 Tripura 54 (57) : 1964 (2) CriLJ 585.*

(3) When the conviction of the accused under S. 396, Penal Code is not based on constructive liability as members of the gang of dacoits the offence under S. 396 is no less heinous than an offence

under S. 302 and in such a case as in the case of conviction under S. 302 reasons for not awarding death sentence must be given. *AIR 1968 SC 1464.*

58. Charge for murder and for other offence forming part of same transaction.—(1) Where a person is charged for murder and also for an offence forming part of the same transaction as the murder, e. g. kidnapping no separate sentence need be awarded for the latter offence as the sentence of imprisonment for life will be sufficient to cover every act of the accused done with the object of committing the murder. *AIR 1920 Lah 512.*

59. Fine.—(1) The words "and shall also be liable to fine" has been used only in connection with those offences where the Legislature has provided that a sentence of imprisonment is compulsory. In regard to such offences the Legislature has left a discretion to the Court to impose also a sentence of fine in appropriate cases in addition to the compulsory sentence. *AIR 1968 Pat 287.*

(2) A sentence of fine in addition to a sentence of death or imprisonment for life, is not considered appropriate or desirable the murder has been motivated by monetary gain. *AIR 1971 SC 2064.*

(3) The sentence of fine is appropriate when the murder has been motivated by monetary gain. *AIR 1957 All 317.*

(4) The Court should state its reasons for awarding the excess penalty of fine. *AIR 1957 All 317.*

60. Charge under S. 302—Conviction under S. 302 read with S. 34.—(1) A, B and C were charged and convicted under S. 302 read with S. 34. On appeal B and C were acquitted of that charge but were convicted under other section and A was convicted under S. 302 simpliciter. On further appeal by A, B and C, it was held that inasmuch as the State had not appealed against the acquittal of B and C of charge under S. 302 read with S. 34, the Supreme Court could not while setting aside conviction under S. 302 simplicter consider whether A was guilty under S. 302 read with S. 34. *AIR 1971 SC 2064.*

(2) Offences committed by A, C and U in concert, in pursuance of their pre-agganged plan and in furtherance of common intention of all of them. For causing death of D while A was found guilty of offence under S. 302, C and U were held guilty under S. 302/34—All the three accused were also held guilty under S. 302/34 for committing murder of N and G—Held there was no justification for distinguishing the case of A with that of his co-accused C and U in the matter of sentence for the offence of murder of D—Sentence of death awarded to A for that offence altered to imprisonment for life. *AIR 1977 SC 1078.*

61. Form of sentence.—(1) A sentence that the accused should be "hanged" is not the proper form of sentence. The section does not prescribe the manner in which the sentence of death is to be carried out. *AIR 1955 Madh B 119.*

(2) Life imprisonment, sentence of—High Court refused special leave application but as part of the sentencing process directed that the Government and the Superintendent of the prison concerned would ensure that the two prisoners are put to meaningful employment and if permissible, in open prison as an experimental measure—The accused were of tender age. *AIR 1979 SC 1595.*

(3) Hanging convict by rope as proved under S. 354 (5) of Cr. P. C.—Provision, if violative of the Constitution—As that question is not concluded by Supreme Court in *AIR 1980 SC 896*—Petitioner questioning validity in maintainable. *AIR 1983 SC 1155.*

62. Double murder—Sentence.—(1) Where the accused is convicted at one trial for murder of two persons, two consecutive sentences of imprisonment for life cannot be awarded. *AIR 1971 MadhPra 116.*

(2) Special leave in criminal cases—Interference with sentence of death—Accused having caused brutal murder of two persons, sentence of death maintained. *AIR 1978 SC 1397.*

63. Procedure.—(1) Because a counter case involving a murder was committed to Sessions Courts for a trial, it will not be correct to commit the counter part of the case when none of the offences involved makes out a case exclusively triable by Sessions Court. *1979 BLJR 209.*

(2) Where the deceased was fired at by a revolver from a close distance and the accused were enlarged on bail, it was held that having regard to the nature of allegations and clinching evidence of eye-witnesses the Magistrate transgressed the limits of his jurisdiction in granting bail. *1983 Mah LR 407 (Bom).*

(3) In a case of rape on a minor girl aged 8 and her subsequent murder, the case was transferred to Sessions Court as it had created sensation in the town and the trying magistrate was giving short dates so as to decide the case prior to his retirement which was impending. *1984 CriLR 221 (Raj).*

(4) Two incriminating circumstances showing accused involved in the murder—Circumstances not explained away by the accused—There is prima facie case against the accused—discharge of accused under S. 227 Cr. P. C. held not proper. *1982 Cri App R 386.*

(5) Cognizable—Warrant—Not—Bailable—Not compoundable—Triable by the Court of Session.

64. Form of charge.—(1) Where no basic infirmity in approach adopted by the court was discernible in the order framing a charge u/s. 302 P. C. against accused the High Court refused to interfere with the said order. *1981 CriLJ (NOC) 137.*

(2) Charges under Ss. 147, 148 and 302, read with S. 149, P. C.—No specific charge under S. 302 but conviction under S. 302. Held, conviction under S. 302 in absence of specific charge not maintainable—However retria after framing of charge under S. 302 was ordered. *1982 CriLJ 1477.*

(3) The charge should run as follows :

I, (name and office of the Judge) hereby charge you (name of the accused) as follows :

That you, on or about the—day of—,at—did commit murder by intentionally (or knowingly) causing the death of (specify the name of the deceased), and thereby committed an offence punishable under section 302 of the Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried on the said charge.

65. Hearing before passing sentence.—(1) The right of the accused to address arguments on the question of sentence will enable his counsel to point out the mitigating circumstances warranting the imposition of a sentence of imprisonment for life instead of a sentence of death. *AIR 1977 SC 949.*

(2) In exercising its discretion, the Court should take into consideration the humanist principle of indiviualising punishment to suit the particular person to be punished. *AIR 1977 SC 949.*

(3) Where an accused is convicted under S. 302 of the Penal Code and sentenced to imprisonment for life, it is not necessary to remit the case to the trial court for giving an opportunity to the accused of being heard on the question of sentence, as the sentence awarded was the minimum that could be awarded under the law and there was no possibility of its reduction even if he was heard. *AIR 1977 SC 1066.*

66. Appreciation of evidence.—See cases under Ss. 299-300

67. Practice—Evidence—Prove: (1) That the death of a human being has actually taken place.

(2) That such death has been caused by, or in consequence of the act of, the accused;

(3) That such act was done with the intention of causing death Or

That it was done with the intention of causing such bodily injury as (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death. Or

That the accused caused death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing death or injury.

In case of Murder by Poisoning

Prove: (1) That the death took place by poisoning.

(2) That the accused had poisoned the deceased. And

(3) That the accused had the opportunity to administer the poison to the accused.

68. Confession, motive and dying declaration.—Confession may be either judicial or extra-judicial. Judicial confession are those recorded by Magistrates in court and they being solemnly made are sufficient to support a conviction. Extra-judicial confessions are those made before others and the weight given to be attached to such confessions would depend upon circumstances. As regards extra-judicial confessions, the courts have held that it would be unsafe to convict a person on such confessions unless there is corroboration *(AIR 1959 (SC) 18).* Extra-judicial confessions are not usually considered with favour but that does mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in circumstances which tend to support his statement, should not be believed *(AIR 1967 (SC) 152; 1967 CrLJ 1321).* A retracted confession requires corroboration *(AIR 1954 (SC) 4).* a confession of a co-accused is not substantive evidence at all. It cannot be relied upon to supplement other evidence which is insufficient for conviction and cannot be used to fill up gaps in the prosecution evidence. Where the motive as set up by the prosecution has been disbelieved, there must have been some other motive which either the prosecution has concealed or it has not been on the record. In order words, the real motive for crime remained shrouded in mystery. In such a case the sentence of death should be altered to imprisonment for life. Where the prosecution fails to prove the alleged motive and there is a possibility of a reasonable cause for a quarrel between the accused and the deceased, the extreme penalty of law is not called for *(48 CrLJ 786).* Motive is the reason for prompting the intention which induces a person to do an act which he intends to do. It is relevant and important when dealing with the question of intention. It is an essential ingredient of an offence. The absence of motive may be a circumstance in favour of the accused. If the commission of the offence is otherwise proved, no importance can be attached to the circumstance that there is motive for the commission of the crime. Motive will have an important part to play in weighing the evidence of the prosecution witnesses *(AIR 1960 Mad 532).* Section 32(1) of the Evidence Act deals with the admissibility and relevancy of a declaration where such a declaration is made dealing with the cause of his death or the circumstances related to his death. Such a statement is relevant whether or not the person making it was at the time under expectation of death. The manner of recording the statement whether as a narrative or in the form of question and answer or the actual words used are all relevant. It is not safe to convict a man on the strength of mere dying declaration without any other corroboration evidence *(AIR 1962 (SC) 168).*

69. Poisoning.—In the case of a murder by administering position, the prosecution has, along with the motive, also to establish that the deceased died of a particular poison said to have been administered, that the accused was in possession of that poison and that he had the opportunity to

administer the same to the deceased. the evidence of the motive which is frequently given in these cases is of subsidiary importance, and the mere fact that the accused had a motive to cause death of the deceased is not a fact which will dispense with the proof of the second and third points, namely that the accused had the poison in his or her possession and that the accused had an opportunity to administer the poison to the deceased *(34 CrLJ 754)*. In a trial for murder by arsenic poisoning the prosecution must prove that the deceased died of such poisoning; that the accused administered arsenic to the deceased with intent to murder. If the prosecution wishes to establish the first proposition by means of the Chemical Examiner, weight is to be attached to his evidence. In this connection, section 510 CrPC as amended may be read. *(30 DLR 288; 19 DLR 818)*.

70. Onus of proof.—The burden of establishing the guilt of the accused is throughout on the prosecution and the prosecution must prove every link in the chain of evidence against the accused from the beginning to the end. The above proposition regarding onus of proof is subject to the exception contained in section 105, Evidence Act. In a case involving capital punishment courts require even a higher degree of proof and all material evidence particularly those in favour of the accused is placed before the court. The failure of the accused to produce evidence does not relieve the public prosecutor of his duty to bring home the guilty to the accused. A plea of guilty means that the accused had admitted all the facts on which a charge has been founded. Where the accused had pleaded guilty to charge under section 302, a conviction of culpable homicide is illegal *(10 CrLJ 5)*. It is a settled practice not to accept a plea of guilty in a murder case unless the court is fully satisfied that the accused was fully made aware of the implications thereunder *(46 CrLJ 357)*.

Presumption of innocence in a criminal case is the basis of our Criminal Jurisprudence. The doctrine of the burden of proof in the context of the plea of insanity may be stated in the following propositions: (a) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea and the burden of proving that always rests upon the prosecution from the beginning to the end of the trial; (b) There is a reputable presumption that the accused was not insane, when he committed the crime, in the sense laid down in section 84 the accused may rebut it by placing before the court all the relevant evidence; (c) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case, the court would be entitled to acquit the accused on the ground that the general burden resting on the prosecution has not been discharged *(AIR 1964 (SC) 1563)*. A conviction on circumstantial evidence cannot be based unless and until all the inferences to be drawn from the whole history of the case point so strongly to the commission of the crime by the accused that the defence theory appears on the face impossible or highly improbable. The charge of murder, like any other charge of an offence, can be established by inferences but when there is extremely little in the way of direct evidence it is due to the accused that there should be no exaggeration of minor incidents in the case and that each inference against him should be verified with scrupulous accuracy *(28 CriLJ 758)*. Circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability that is, sufficiently having that a prudent man, considering all the facts and realising that the life or liberty of the accused depends upon the decisions, feels justified in holding that the accused committed the crime *(23 CrLJ 40)*. Circumstantial evidence must be consistent, and consistent only with the guilt of the accused; if the evidence is consistent with any other rational explanation, that there is an element of doubt of which

the accused must be given the benefit. One of the circumstances which has to be taken into account is the fact that the accused has offered no explanation, or has offered a particular explanation; but it must be born in mind that the accused cannot go into the witness box, and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him. In a word, the circumstantial evidence should be such as to connect the accused with the crime. In a murder case when the prosecution evidence is held to be untrustworthy or unsafe and the dying declaration has been recorded in circumstances which do not inspire confidence, the court would be more reluctant to base the conviction of the accused only on the recovery of the knife and the cloths particularly when the investigation agency also does not appear to have conducted themselves in a straight forward manner. Such recovery of articles should not be held to be a strong corroborative piece of evidence *(AIR 1963 Punj 170).* The mere fact that the dead body was pointed out by the prisoner or was discovered as a result of a statement made by him would not necessarily lead to the conclusion of the offence of murder . Mere knowledge of facts such as the place where the blood-stained articles are found or the place where the dead body is found does not conclusively establish that the person to whom such knowledge is attributed is guilty of murder *(Ref 1982 PCrLJ 1252).*

71. Medical evidence.—The post-mortem report of a doctor or his opinion is normally inadmissible in evidence. But in view of the incorporation of section *509A CrPC.* Post-mortem report may be used as evidence where the medical officer who made the report is dead or incapable of giving evidence or is beyond the limits of Bangladesh and his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such report may be used as evidence. The doctor's deposition on oath when he is examined as a witness will be substantive evidence. The post-mortem report may be used to contradict the officer who prepared it. It may be used by the officer when examined in court to refresh his memory. In a case dependent wholly on circumstantial evidence, the court before recording a conviction, on the basis therefore must be firmly satisfied: (1) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt; (2) that the circumstances are of a determinative tendency unerringly, pointing towards the guilt of the accused; and (3) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt of the accused. In a case where death is due to injuries or wounds caused by lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which, and in the manner in which, they are alleged to have been caused. In all cases of murder, where a person dies of injuries, it is the duty of the prosecution to put a question to the doctor, when he is examined in court as to the nature of the injuries, i.e. whether they were sufficient in the ordinary course of nature to cause death, or likely to cause death, because the intention or the knowledge of the person is to be inferred only from the nature of the injuries. Where the direct evidence is not supported by the expert evidence, the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. If the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case *(AIR 1975 (SC) 1727).* If testimony of a single witness is found by the court to be reliable, there is no legal impediment to the conviction of the accused persons *(29 DLR 211 AD : 38 CrLJ 299).* Where persons offer themselves as eyes witnesses, there are a number of ways to find out and check if they have actually seen the occurrence as alleged by them. One of the tests is whether the evidence of such witnesses is corroborated by legal evidence. When the evidence of eye-witnesses is inconsistent with the medical evidence it is unsafe to convict the

accused *(1953 PLR 463).* While it is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone, it is equally well settled that when once a prosecution witness is declared hostile the prosecution clearly exhibits its intention not to rely on the evidence of such a witness and, hence his version cannot be treated as the version of prosecution itself. The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict the accused person of murder. To recoginse any such condition precedent, as being absolutely necessary for conviction in all cases, would be to afford complete immunity and certain escape to those murderers who are cunning or clever enough to make away with or destroy the bodies of their victims. Such a principle once admitted would in some instances render the administration of justice impossible *(Ref 1982 Pak CrLJ 1237).*

72. Sentence.—For the offence of section 302, PC death is the rule and imprisonment for life is an exception. Death should ordinarily be imposed unless the trying Judge, for reasons which sentence should normally be recorded, considers to award the lesser penalty. Where the crime is deliberate and there are no extenuating circumstances, death penalty should be imposed and the duty cannot be shirked merely because discretion is vested in the court. The extenuating circumstances are as follows: (1) Where there is a free fight and no unfair advantage is taken up by accused; (b) Where there is an unjustified interference by the deceased with the possession of the accused *(PLD 1964 SC 177).* Death was caused in an attempt by the owner to take possession by force; (c) When the murder was the result of intimacy between the deceased and the accused's wife; (d) Where the accused committed the offence when he was desperate and sick of life. But the fact that a rejected lover murdered his beloved in desperation is not a mitigating circumstance; (e) When the accused acts on provocation, even if it is not sudden provocation and even when the provocation has been offered by a person other than the deceased's case has been pending for a very long time; (g) When there is no motive; (f) Where a motive was very definitely alleged but was not proved; (h) Where the accused was subjected to such severe beatings at the hands of the crowd that he had to be admitted into jail hospital for treatment which necessitated his detention in the hospital to six months; (i) Absence of premeditation and murder on the spur of the moment and in heat of passion unless death was caused in a cruel manner; (j) Where the deceased's father-in-law refused to return the wife of the accused in spite of his best efforts at reconciliation; (k) Where death was caused out of religious zeals and a person of the other sect was killed. Old age and sex by itself is not an extenuating circumstance. If an accused is a pregrant woman, the execution of sentence may be postponed till after delivery. Section 401 of the CrPC empowers the Government to suspend or remit sentence. In the case of remission the guilt of the offender is not affected but the sentence alone is sought be reduced. Usually the court disposing of a matter may record extenuating circumstance and recommend to the Government for the mitigation of the sentence. Choice as to which of the two punishments prescribed by section 302, PC for murder is the proper one to be awarded, will depend upon the particular circumstance of each case, but broadly speaking, murder committed with unusual brutality and such murders that appear to be particularly heinous as to arouse judicial indignation may be considered as some of the cases deserving the extreme penalty. Of course, these are not exhaustive, but merely illustrative. In the absence of any extenuating circumstances, whatsoever, the sentence of death would be the appropriate sentence. The court whose duty it is to award punishment must exercise its own discretion; but the desecration must be exercised judicially and not arbitrarily *(1963 CrLJ 536).* If the murder be not result of any premeditation, life imprisonment is sufficient to meet ends of justice *(1963 CrLJ 540).*

This section for imposing sentence has been amended by Ordinance No XLI of 1985 dated 3-8-85 and the word 'transportation ' has been substituted by the word 'imprisonment' so now the punishment prescribed for murder is either death or imprisonment for life. Imprisonment for life must prima-facie be treated as imprisonment for remaining period of the convict's natural life. The question

of remission of sentence lies entirely with the Government under section 401 of the CrPC. The Rules framed under the Prisons Act or under the Jail Manual will not affect the total period which the prisoner has to suffer but merely amount to administrative instruction regarding the various remission to be given to the prisoner from time to time in accordance with the Rules *(42 DLR 378).*

73. Circumstantial evidence—murder charge-no eye.—witness against husband for killing his wife in his house.—Only circumstantial evidence found against husband was that death occurred in the night of occurrence in the house of accused husband and the defence did not give satisfactory explanation, that fact alone does not conclusively fix the liability of the husband to the charge of murdering his wife. In a charge of murder moral condition is no substitute for legal evidence. The only fact that the girl was found lying dead in the room of her husband, although very grave and definitely incriminating susceptible to give rise to genuine moral conviction as to the guilt of the accused, in the absence of other incriminating conduct of the accused, is not sufficient to convict and sentence him under section 302 of the Penal Code. It is improper to substitute moral conviction for legal evidence. *(Ref 10 BLD 373).*

Section 303

303. Punishment for murder by life convict.—Whoever, being under sentence of [1][imprisonment] for life, commits murder shall be punished with death.

Cases and Materials

1. Scope.—(1) 'Death punishment awarded under the Penal code under nine sections namely sections 121, 132, 194, 302, 303, 305, 307, 364A and 396, PC. Section 303 has, no application to the case of persons other than the actual murderer who are liable to enhanced punishment for the act of one of their associates under section 396. Section 303 is expressly limited to the case of a person or persons who being under sentence of imprisonment for life, commit murder *AIR 1933 Lah 977.* If a person, who has been sentenced to imprisonment for life and whose sentence (after he had served a part of it) has been remitted under section 401, CrPC by the Government upon conditions, commits murder after his release, he must be considered as 'being under sentence of imprisonment for life' within the meaning of this section. Contrary view has been taken in *AIR 1943 Sind 114 and 1977 CrLJ 1121 SC.* According to those decisions, section 303 is not attracted to the case when the accused was sentenced to imprisonment for life but the same was remitted under section 401, CrPC and the court must pass a sentence of death upon him. This section makes capital sentence compulsory in the case of a convict who commits murder while undergoing a sentence of imprisonment for life *AIR 1963 SC 118, AIR 1973 SC 786.*

(2) Section is violative of the Constitution: *AIR 1983 SC 473.*

(3) Murder trial—Accused convicted and sentence to death under S. 303—S 303 having been struck down by Supreme Court as violative of the Constitution conviction of accused under S 303 altered to one under S. 302. *AIR 1983 SC 838.*

(4) Where charge framed is under Section 302 with the aid of section 34 or 149. Conviction under section 302 alone legal. *The State Vs. Idris Pandit, (1973) 25 DLR 232.*

2. Practice.—Evidence :—Prove: (1) That the accused was undergoing sentence of imprisonment for life.

(b) That while so undergoing the sentence he committed a murder.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

4. Charge.—The charge should run as follows :

I, (name and office of the Judge) hereby charge you (name of the accused) as follows :

That while under a sentence of imprisonment for life on or at—about you committed murder by intentionally (or knowingly) causing the death of (name of the deceased) and thereby committed an offence punishable under section 303 PC and within my cognizance.

And I hereby direct that you be tried on the said charge.

Section 304

304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder, shall be punished with [1][imprisonment] for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death ;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Distinction between parts I and II of this section.*
3. *"Act by which the death is caused."*
4. *" Is done with the intention of causing death.'*
5. *Intention to cause such bodily injury as is likely to cause death.*
6. *"With the knowledge that it is likely to cause death—Part II of the section.*
7. *This section and S. 326.*
8. *This section and S. 304A—Death caused by rash or negligent act.*
9. *This section and S. 460.*
10. *Attack by several persons—Liability.*
11. *Blow aimed at one causing death of another.*
12. *Abetment of offence under this section.*
13. *Cases falling within Exception 1 to Section 300.*
14. *Cases falling under exception 2 to section 300.*
15. *Cases falling under Exception 3 to Section 300.*
16. *Cases falling under Exception 4 to Section 300—Sudden fight.*
17. *Onus of proof.*
18. *Effect of acquittal under this section.*
19. *Benefit of doubt.*
20. *Appreciation.*
21. *Jurisdiction.*
22. *Judgment—Judge's duty.*
23. *Charge.*
24. *Confession—Conviction on.*
25. *Sentence.*
26. *Culpable homicide under superstitious belief.*
27. *Interference by High Court.*
28. *Interference by Supreme Court.*
29. *Procedure.*
30. *Section 304 read with section 149.*
31. *Section 304 read with section 34.*
32. *Right of private defence and death causd under provocation.*
33. *Practice.*

1. Scope of the section.—(1) This section of two parts depending upon the gravity of the offence. The more serious offence being those depending upon the two types of intention mentioned in the first two clauses of section 299 and the less serious not being dependent upon intention but dependent only upon guilty knowledge. Part I applies where the act by which death is caused is done either with the intention to cause death or with the intention to cause such bodily injury as is likely to cause death. This section will apply to the following classes of causes : (a) when the case falls under one or the other of the clauses of section 300 but it is covered by the Exception to that section; (b) when the injury caused is not of the higher decree of likelihood which is covered by the exceptions "sufficient in the ordinary course of nature to cause death" but is of a lower degree of likelihood which is generally spoken of as an injury "likely to cause does not fall under clause (2) of section 300; (c) when the act is done with the knowledge that death is likely to ensure but there is no intention to cause death or any injury likely to cause death. In such case there may be either no intention to cause any injury at all, or there may be an intention to cause simple or grievous hurt but not an injury likely to cause death *(AIR 1953 All 203).* The first part of section 304 applies when there is guilty intention and the second part applies where there is no such intention but there is guilty knowledge *(AIR 1931 Cal 345, 32 CrLJ 594).* Intention always connotes a conscious state of mind of a wrongdoer, when the mental faculties of a culprit, are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end then, he is said to have acted intentionally. Intention can be inferred from act as every man is presumed to intend the natural consequences of his act *AIR 1983 SC 529.*

(2) This section prescribes the punishment for the offence of culpable homicide not amounting to murder, which in English law is known as manslaughter. *(1881) ILR 3 All 776.*

(3) If the offence is not culpable homicide at all this section does not apply. Thus, for example, if A intentionally causes hurt to B but has no intention of causing his death or of causing such bodily injury as is likely to cause death or has no knowledge that his act is likely to cause B's death. A is not guilty of culpable homicide punishable under this section though B dies as a result of the injuries caused. But A would be liable for the act intended by him which was to cause hurt to B and he would accordingly be liable to punishment under SS. 323, 324, 325 or 326 as the case may be. *AIR 1979 SC 1434.*

(4) Before an accused can be said to have committed culpable homicide, it must be found that he did the act with the intention or knowledge referred to in Section 299, namely intention to cause death or such bodily injury as was likely to cause death or knowledge that his act was likely to cause death and it must further be found that death was caused by the injuries inflicted. *AIR 1979 SC 1525.*

(5) Where the culpable homicide falls within any of the four clauses of S. 300 but is covered by any of the Exception to S. 300 the offence is brought back or reduced to the offence of culpable homicide not amounting to murder. *AIR 1953 All 203.*

(6) There are thus two and only two clauses of culpable homicide not amounting to murder :

(a) Culpable homicide not falling within any of the four clauses of S. 300 will not amount to offence of murder. *(1965) 67 PunLR 1204.*

(b) Culpable homicide falling within any of the four said clauses of S. 300 but falling also under any of the Exceptions to S. 300 will amount to the offence of culpable homicide not amounting to murder. *AIR 1954 SC 36.*

(7) Section 304 must be interpreted as providing punishment for the offence of culpable homicide in all cases where the accused cannot be convicted of murder. *AIR 1932 Nag 121.*

(8) Where the culpable homicide falls under any of the four clauses of S. 300 and none of the Exceptions applies, the culpable homicide is murder and is punishable under S. 302 and not under this section. *1976 CriLR (SC) 582.*

(9) Features of two parts of the section—Applicability. Held :—Sec. 304 of the Code which consists of 2 parts, does not create offence but provides for the punishment of manslaughter or culpable homicide not amounting to murder. The section makes a distinction in the word of punishment. Under the Ist part of the section if the intention to kill is present, and the act would have amounted to murder or the act is done with the intention of causing such bodily injury as is likely to cause death but the act having fallen within one of the five exceptions in S. 300 of the Code the offence will fall within its ambit. The 2nd part of the Section is attracted to a case where the act is done with the knowledge likely to cause death but without any intention of causing death or to a case where such bodily injury is caused as is likely to cause death. The first part applies to a case where there is guilty intention and the second part where there is no such intention, but there is guilty knowledge. *The Supt & Remembrance of Legal Affairs, Govt. of Bangladesh Vs. Siddique Ahmed 3 BSCR 91 = 31 DLR (AD) 29.*

(10) Right of private defence and property—complainant party unarmed—Appellant exceeded right of private defence of property by inflicting more harm than it was necessary—accused-appellant intended to cause such bodily injury as was likely to cause death—(leja blow causing death)—sentence of 7 years R.I. not excessive as provided u/s. 304 part I of the Penal Code. *Amulya Kumar Biswas & others Vs. The State 1 BSCD 243.*

(11) Sentence of 3 years' R.I.—Self-same witness—benefit of doubt—No material discrepancy between the Medical Evidence and the Eye-witness Benefit of doubt given to one Co-accused. Held:—(i) That by itself can hardly be any reason for the petitioner also to claim benefit of such a doubt, (ii) Charge against the petitioner was established by evidence there is reason to interfere with the petitioner's conviction and sentence. *Abdul Majid Vs. The State 1 BSCD 243.*

(12) Where the conviction of an accused u/s. 304 is sustainable in law when there was neither any charge framed against him nor was his attention drawn, while examined u/s. 342 Cr. P. C. to the fact that he was put on trial on that charge—Where it appears that failure of justice has been occasioned due to omission to frame charge under a particular section of the Penal Code, conviction thereunder cannot be maintained. *Joiynal Abedin & ors. Vs. The State BCR 1985 AD 272 = 37 DLR (AD) 115 = 14 BLR (AD) 176.*

(13) Culpable homicide not amounting to murder, offence of—Punishment to be awarded when the injury is made with the intention of causing death—From the material, on record and nature of injuries caused it is not difficult to hold that the accused persons assaulted with intention of causing death and as such the cause falls clearly under Part I of Sec. 304, Penal Code—The conviction of the respondents is altered from Part II to Part I of Sec. 304 and their sentence is enhanced from 5 years' R. I. to 7 years' R. I. each. *The State Vs. Abdul Aziz & ors. 1985 BLD (AD) 176.*

(14) Criminal Cases u/s 304/34 BPC—Order allowing withdrawal of a criminal case under this section of Code—To give consent to withdrawal for prosecution is a judicial act and not a matter procedure—Neither the trial Court's order nor the application of the Public Prosecutor disclosed any ground for withdrawal—Order of Withdrawal from the prosecution, not proper. *Anwara Bewa Vs. Razzak & ors. 5 BSCD 42.*

(15) The cases of present appellants who had not moved the Appellate Division earlier never considered—Since the Court maintained the conviction of the co-accused persons who applied in

Criminal Appeal No. 44 of 1984 and reduced the sentence to ten years' R. I. each the conviction of the present appellant was maintained and reduced to ten years' in line with the decision in Criminal appeal No. 44 of 1984. *Afsar Ali and another Vs. The State. BCR 1947 AD 359.*

(16) Culpable homicide—When it does not amount to murder—There was a confrontation between the accused and the deceased on the land of that occurrence—From the circumstances of the case and the nature of injury that resulted in the death of eleven days after it was inflicted the appellant cannot be held guilty for murder but he must bear in the death of the victim—Accordingly the conviction for culpable homicide amounting to murder. *Lah Mian @ Labu Vs. The State 1988 BLD (AD) 107 = 41 DLR (AD) 1.*

(17) Case involving this section on accused's mercy petition—the Trial Judge gave light punishment—Punishment commensurate with the gravity of offence—Sentence of 15 days' R.I. along with fine of Tk. 500/- grossly inadequate—High Court Division rightly enhanced the sentence in Criminal Revision. *Murtoza Hussain & ors. Vs. The State & ors. 6 BSCD 33.*

(18) Under the first part of the section, if the intention to kill is present, and the act would have amounted to murder or the act is done with the intention of causing such bodily injury as is likely to cause death, but the act having fallen within any one of the five Exceptions in section 300 of the Code, the offence will fall within its ambit. The second part of the section is attracted to a case where the act is done with the knowledge likely to cause death but without any intention of causing death or to a case where such bodily injury is caused or is likely to cause death, The first part applies to a case where there is guilty intention, and the second part where there is no such intention, but there is guilty knowledge. *Govt. of Bangladesh Vs. Siddique Ahmed 31 DLR (AD) 29.*

(19) Conviction under both the charges of sections 304/149 and 304/34—Illegal. The accused having been charged under sections 304/149 cannot again be charged under sections 304/34 because the same person cannot be convicted twice for the same act. *Akbar Vs. State 8 DLR 378.*

(20) It is not illegal for a Court, after framing a charge under section 304/34 against certain accused persons, to record a conviction under sec. 304 itself, apart from sec. 34. *Muzaffar Sarker Vs. Crown 2 DLR 90.*

(21) Charge under section 302/49 but convicted under sec. 304 (1)/34—Valid. Held : Both sections 34 and 149, P. C. deal with constructive liability and it is to be considered whether the accused who have been convicted under sections 304 (1)/34 P. C., have been prejudiced in the absence of a charge under that section. A slight variation in the facts established from the facts alleged in the charge and conviction for an offence on the facts established would not render it by itself bad in law in view of the provisions of section 236, read along with illustrations as well as section 237 of the Code of Criminal Procedure. *Ahmed Ali Vs. State 12 DLR 365.*

(22) In furtherance of common intention of all. The words "in furtherance of common intention of all" in section 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 intended that the joint act be performed. Section 34 can, therefore, be applied under the second part of S. 304, P. Code. Where three accuseds were tried under section 304 Part II read with section 34, P. C., for causing the death of one M—Two of the accused being armed with sharp weapons, the third accused can be found guilty under section 304 (II) read with section 34 P. Code. *Fazar Vs. Crown 4 DLR 99.*

(23) Culpable homicide under grave and sudden provocation—intention to kill negatived by emotional state of accused—Nevertheless knowledge of likelihood of death resulting from his act may be imputed—Accused may be convicted under Part II of section 304. *1954 PLD (Lah) 11.*

(24) Accused finding his mother unequally matched in a fight among womenfolk of the accused and complainants' parties, stabbed and killed a woman of the other party—Right of the private defence—Conviction altered from section 302, P. C. to section 304 Part II P. Code. *1954 PLD (Lah) 155.*

(25) Grave and sudden provocation caused by adultery—Appropriate sentence. A sentence of three to five years' rigorous imprisonment is the appropriate sentence in cases of grave and sudden provocation caused by adultery. The measure of sentence is largely a matter of judicial desecration but as a working rule, a sentence nearer three years than five where only one person is killed and nearer five than three where two are killed is the appropriate one *Fatehan Vs. Crown (1953) 5 DLR (WPC) 103.*

(26) Rash and negligent driving.—Responsibility cast on the driver of a vehicle is greater than that cast on pedestrian. *Abdur Rashid Vs. State 9 DLR 207.*

(27) Death of man due to gunshot injuries fired at the victim out of nervous apprehension does not make out a case of rash or negligent act under section 304A, P. C. A man who was indeed insane was found at the dead of night standing almost necked on the roof of the accused's kitchen. The accused took up his shotgun and fired at the man at the lower part of his thigh; the victim fell down and rolled to the ground and shortly died thereafter. The trial Court convicted the accused under section 304 (II) P. C. and sentenced him to 4 years' R. I. On appeal the High Court converted the offence under section 304 (II) to one under S. 326 P. C. holding that the evidence disclosed neither an offence under section 304 (II) nor under section 304A but it was an offence under section 326 P. C.; convicted him thereunder and sentenced him to the period of imprisonment already undergone and further imposed a fine of Rs. 2,500/- to be paid to the widow of the deceased. *Rashidullah Vs. The State 21 DLR 709.*

(28) One of the accused was charged with many others under sections 147 and 448 of the Penal Code, with an additional charge u/s. 304 of the Code but when he was examined u/s. 342 Cr. P. C. he was not told that he was facing trial u/s. 304 in addition to common charge under sections 147 and 448–As such his conviction u/s. 304 is illegal. *Joynal Abedin Vs. The State 37 DLR (AD) 113.*

(29) Culpable homicide not amounting to murder—In the absence of any conspiracy, pre-plan or premeditation on the part of the accuseds while inflicting injuries resulting in the death of the victim 4 days after the occurrence, the accuseds did not intend to cause his death but they caused culpable homicide not amounting to murder. *Dalilur Rahman Vs. State 44 DLR 379.*

(30) Joint action—Omission may also render an offender liable for punishment—If a man joins with another to assault a person, even though the original intention was mere to inflict relatively harmless injuries, but if he sees his companions in course of the action giving serious beating which is likely to cause his death, but he does not take any step to interfere and the victim dies, such omission may render him liable under section 304. *Shaikh Baharul Islam Vs. State 43 DLR 336.*

(31) Since accused Abdul Bari merely in an innocent manner brought the victim in obedience to OC's order he is not involved in any criminal act. *Shaikh Baharul Islam Vs State 43 DLR 336.*

(32) Culpable homicide not amounting to murder—From the facts proved it is clear that the victim did not die immediately after assault by her husband. There is no evidence of ill-feeling between the two. rather it is in evidence that he enticed her away and then married her. In the circumstances the

accused-husband is not guilty of murder but of culpable homicide not amounting to murder. *Abdul Khaleque Vs. State 45 DLR 75.*

(33) The immediate cause that triggered off serious violence and resulted in the loss of four lives though calls for the maximum punishment being shrouded in mystery a lesser punishment may meet the ends of justice. *State Vs. Giasuddin 45 DLR 267.*

(34) Culpable homicide—Intention to cause death—From the evidence there can be no manner of doubt that the assault was done with the intention of causing such bodily injury as was likely to cause death. The accused-husband was not content by striking his wife with a branch of a tree but was reckless enough to kick her in the tender part of her body which immediately caused bleeding. It was not a case of mere knowledge only (to constitute offence under section 304 Part II) that such act was likely to cause death but that the intention to cause death such injury as is likely to cause death was very clear. It is true there is no finding as to "intention" either in the impugned judgment or in the judgment of the trial Court. This is certainly not desirable because the law requires a clear finding as to "intention" before recording a conviction under Part I of section 304. Notwithstanding the absence of the requisite finding as to intention the appellant-husband was rightly convicted. *Jatin Chandra Sil Vs. State 43 DLR (AD) 223.*

(35) Attack on the deceased by the appellant in an infuriated state—Imposition of 5 years imprisonment is a proper sentence. The criminal and not the crime must figure prominently in shape in the sentence. Reform of the individual in the society and other necessities to prevent recurrence are right factors. Heinousness of the crime is a relevant factor in the choice of sentence. *Santosh Mia Vs. State 42 DLR 171.*

(36) Culpable homicide—Committed under provocation—Even if the appellants were provoked, the nature of the injuries shows that they assaulted the deceased with the intention to kill and in that view of the matter the offence committed falls under Part I of Section 304 of the Penal Code. *Md. Shah Alam and others Vs. The State 5 BLD (AD) 198.*

(37) Culpable homicide not amounting to murder—From the materials on record and the nature of the injuries caused it is not difficult to hold that the accused persons assaulted the victim with the intention of causing death and as such the case falls clearly under Part I of Section 304 of the Penal Code—The conviction of the respondents is altered from Part II to Part I of Section 304 of the Penal Code and the sentence is enhanced from 5 years' R. I. to 7 years' R. I. each. *The State Vs. Abdul Aziz and other 5 BLD (AD) 176.*

(38) Culpable homicide—when it does not amount to murder—There was a confrontation between the accused and the deceased on the land of the occurrence—From the circumstances of the case and the nature of injury that resulted in the death of Yasin 11 days after it was inflicted, the appellant cannot be held guilty for murder but he must bear the consequences for causing the bodily injury that resulted in the death victim—Accordingly the conviction is altered from the offence of murder to one of culpable homicide not amounting to murder under Part I of Section 304 of the Penal Code. *Lal Miah alias Labu Vs. The State 8 BLD (AD) 107.*

(39) Homicide not amounting to murder—The assailant had given manual pressure on the throat of the victim but he withdrew his hand realising that he was going to die—The intention to kill is therefore lacking in this case and as such the charge of murder must fail—Although the assailant had no premeditated intention to kill the victim he appears to have the knowledge that such pressure as he had exerted was likely to cause her death and in fact the victim succumbed to her injuries—latter—The

order of conviction is altered from Section 302 to that Section 304, Part II of the Penal Code. *Afazuddin Pramanik Vs. The State 8 BLD (HCD) 282.*

(40) In the absence of any conspiracy, pre-plan or premeditation on the part of the accused inflicting injuries on the hands and legs of the victim by lathies, iron roads, shovels etc., resulting in the death of the victim four days after the occurrence the offence committed is one for culpable homicide not amounting to murder as the accused did not intend to cause death—The conviction of the accused is altered from Section 302/34 to Section 304, Part I of the Penal Code and each of the accused is sentenced to suffer R. I. for 7 years. *Dalilur, Rahman and others Vs. The State 12 BLD (HCD) 327.*

(41) On scrutiny and careful analysis of the evidence of the P.Ws it appears that accused Shamsul Huq did not foresee that throwing of brick towards victim Kastura Bibi would cause death to her. He had no intention to cause death or to cause such bodily injury as was likely to cause death. Victim sustained violent blow on the abdominal wall by the brick thrown towards her chest and got senseless but death occurred when accused Abdul Hoque (since deceased) pressed her on the neck resulting in her spontaneous death. Death would not have occurred if accused Abdul Hoque would not have played the part of pressing the victim on her neck. Accused Shamsul Huq had no premeditated intention to kill the victim and the intention to kill is lacking in the instant case. Although, he had no intention to kill the victim, it must be held that he had the knowledge that such throwing of brick was likely to cause her death and the act done by him was both rash and indiscreet and as such accused Shamsul Huq is liable for the commission of an offence punishable under section 304, Part II of the Penal Code. *Abdul Jabbar and another Vs. The State 18 BLD (HCD) 109.*

(42) Section 304 of the Penal Code, which consists of two parts, does not create any offence, but provides for punishment of culpable homicide not amounting to murder. The first part applies to a case where there is guilty intention and the second part applies where there is no such intention, but there is guilty knowledge. *Nibir Chandra Chowdhury and others Vs. State (Criminal) 53 DLR (AD) 113.*

(43) Respondent by inflicting the injury on the chest resulting the death of the victim committed an offence under section 304, Part-I of the Code for causing the bodily injury as was likely to cause death. *State Vs. Abdul Barek and others (Criminal) 54 DLR (AD) 28.*

(44) The injury caused was not on the vital part and there was no evidence that the accused knew about the pregnancy of the victim. Under the circumstances the accused committed an offence punishable under section 304, Part-II of the Code. *State Vs. Abdul Barek and others (Criminal) 54 DLR (AD) 28.*

(45) By the infliction of injury resulting in the death of the victim, he committed an offence under section 304, Part-I of the Penal Code. As the injury inflicted by the other respondent was not on a vital part of the other victim he committed an offence punishable under section 304 Part-II of the Penal Code. *State Vs. Abdul Barek and others 22 BLD (AD) 38.*

(46) Alteration of charge under section 302—where mitigating circumstances are present.—When the victim died as a result of injury inflicted upon his person by the accused in occurrence arising out of quarrel offering sudden provocation, the appropriate charge will be under section 304 Part II of Penal Code for the offence of culpable homicide not amounting to murder. Accordingly the charge u/s. 302 is altered and the sentence is reduced. *Nabir Chandra Chowdhury and others Vs. The State 6 MLR (AD) 256.*

(47) Culpable homicide not amounting to murder—Procedure of sentencing in case of long custody—In the absence of common intention to cause death it is culpable homicide not amounting to

murder punishable under section 304 of the Penal Code. The custody of the accused for long time pending trial or hearing of appeal may be taken into account and deducted from the total sentence to be awarded. *State Vs. Abdul Barek and others 7 MLR (AD) 17.*

(48) Charge of culpable homicide has to be established by cogent and acceptable legal evidence—No moral conviction is sustainable—Conviction must be based on cogent and acceptable legal evidence. There is no room in criminal jurisprudence for moral conviction. *Habez Md. Peru Kazi Vs. The State 7 MLR (AD) 333.*

(49) As the medical evidence shows that there was a penetrating wound in the back of the right gluteal region at the level of the sucaro cocoigial joint which damaged the internal organs of the deceased as a result of which he died within a few hours of the occurrence and there is also evidence that before inflicting the said injury he was pressed on the ground and he was unarmed when the petitioner or any other accused did not sustain any injury and hence the conviction under section 304 (Part-I) of the Penal Code is in accordance with law. *Emdadul Hoque Vs. State (Criminal) 6 BLC (AD) 56.*

(50) Culpable Homicide—Intention to cause death—From the evidence there can be no manner of doubt that the assault was done with the intention of causing such bodily injury as was likely to cause death—The accused husband was not content by striking his wife a branch of a tree but was reckless enough to kick her in the tender part of the body which immediately caused bleeding. It was not a case of mere knowledge only (to constitute offence under section 304 Part II) that such act was likely to cause death but that the intention to cause such injury as is likely to cause death was very clear. It is true there is no finding as to 'intention' either in the impugned judgment or in the judgment of the trial Court—This is certainly not desirable because the law requires a clear finding as to 'intention' before recording a conviction under Part of Sec. 304—Notwithstanding the absence of the requisite finding as to intention, the appellant-Husband was rightly convicted. *Jatin Ch. Sil & ors. Vs. The State 43 DLR (AD) 223.*

(51) Justifiability of awarding the maximum punishment of 10 years under second part of this section—Appellant was convicted under second part of this section for giving order to the principal accused to fire from his rifle in the 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.*

2. Distinction between Parts I and II of this section.—(1) The fist paragraph of the section applies to the offences of culpable homicide not amounting to murder if the act by which the death is caused is done—(a) with the intention of causing death, or (b) with the intention of causing such bodily injury as is likely to cause death. Case (a) will be culpable homicide not amounting to murder only if it falls within any of the exceptions to S. 300 : for, otherwise, it would fall under the first clause of S. 300 and would amount to murder. *(1911) 12 CriLJ 274.*

(2) If the offender intends to cause such bodily injury as he knows to be likely to cause death the case would fall under the second clause of S. 300 and would be murder, otherwise, not. *AIR 1916 LowBur 32.*

(3) Par I of this section will apply to case of causing such bodily injury as is likely to cause death, if, either it is not covered by clauses two and three of S. 300 or though so covered, falls within any of the Exceptions. *AIR 1957 SC 324.*

(4) Part I of this section applies only to acts done with the intention to cause death or such bodily injury as was likely to cause death. *AIR 1975 SC 179.*

(5) The second paragraph of the section which may be referred to as Part II applies to act which are done without any intention to cause death or such bodily injury as is likely to cause death but which are done with the knowledge that they are likely to cause death. *AIR 1972 SC 955.*

(6) An act done with the knowledge referred to as 'special knowledge' that it is so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause death may fall within the 4th clause of S. 300 and constitute the offence of murder, If, however, the Exceptions apply to the case, it would only be culpable homicide not amounting to murder, Part II would apply to such a case also. *AIR 1956 SC 116.*

(7) Partl of this section deals with the first two clauses of S. 299 and Part II deals with the third clause of S. 299. *AIR 1969 Orissa 138.*

3. "Act by which death is caused."—(1) An act cannot be said to be one which causes death where its connection with the death is too remote and is not punishable under this section. *1978 Raj CriC 376.*

(2) Death which is due to supervening causes and is not merely a natural consequence of the act of the accused cannot be said to be caused by the act of the accused. *AIR 1951 Raj 123.*

(3) Where A joins with B in assaulting C and even though the original intention may be merely to inflict relatively harmless injuries, sees B in the course of action which may reasonably be excepted to bring about the death of C and takes no steps to interfere with that action or to assist the deceased, such an act is an act of omission which renders him liable under this section. *AIR 1929 Pat 65.*

(4) It is the ultimate consequence of the act committed by the accused which should be considered in convicting him. *AIR 1927 Cal 73.*

(5) Causing death means causing death of a human being. If a person assaults a person believing him to be a ghost, he cannot be said to have intended to cause the death of a human being. Neither this section nor Section 302 will apply to such a case *AIR 1926 Lah 554.*

4. "Is done with the intention of causing death."—(1) An act causing death, and done with the intention of causing death will be culpable homicide not amounting to murder punishable under Part I of this section, only if it is covered by any one of the Exceptions to S. 300. *AIR 1935 Rang 391.*

(2) The proposition that every person intends the natural consequences of his act is offen a coventient helpful rule to ascertain the intention of persons when doing a particular act. It is wrong, however to accept this proposition as a binding rule which must prevail on all occasions and in all circumstances. The ultimate question for decision being whether an act was done with a particular intention all the circumstances including the natural consequence of the action have to be taken into consideration. *AIR 1964 SC 986.*

(3) The fact that the injuries inflicted did, in fact result, in death will not justify the Court in reasoning backward from the result, to an intention to cause death. What has to be seen is, firstly, what degree of injury did the accused intend and secondly, what did he know of the consequences of such injury. *AIR 1931 Cal 261.*

5. Intention to cause such bodily injury as is likely to cause death.—(1) The causing of death by an act done with the intention of causing such bodily injury as is likely to cause death falls under the First Part of this section. *AIR 1980 SC 267.*

(2) Where the intention is to cause such bodily injury as is sufficient in the ordinary course of nature to cause death, the case will fall under S. 300, Cl. (3) and hence the offence will be one of murder punishable under S. 302 and not of culpable homicide not amounting to murder punishable under this section. *AIR 1980 SC 573.*

6. "With the knowledge that it is likely to cause death"—Part II of the section—(1) The knowledge referred to in Part II of this section is of lesser degree than the special knowledge referred to in the fourth clause of S. 300. *AIR 1920 All 110.*

(2) Where an injury caused is not intended to cause death and is not in normal conditions, likely to cause death the offence cannot be culpable homicide not amounting to murder but may be an offence of causing hurt. *AIR 1917 Bom 259.*

(3) The question whether the accused had the knowledge that his act was likely to cause death is, as in the case of intention, a question of fact depending upon the circumstances of the particular case, the weapon used, the part of the body on which the injury was inflicted, the number of injuries caused, the deliberateness of the act etc. *AIR 1979 SC 1532.*

(4) Where injuries are inflicted and the victim dies but the case cannot be brought under either part of this section. (for want of the requisite mens rea as described in this section or S. 299) the accused can be convicted only for the injury caused under Ss. 323 to 326 of the Code and not for culpable homicide. *AIR 1923 Oudh 97.*

(5) A person will be presumed to have knowledge of the natural consequences of his act. *AIR 1979 SC 1708.*

(6) As a general rule a person who voluntarily inflicts injury on another so as to endanger his life, must always, except under extraordinary circumstances, be taken to know that his act is likely to cause death. *AIR 1979 SC 1532.*

(7) If a man really believed that a certain result will not follow his act he cannot be held to know that it is likely to follow. *AIR 1921 LowBur 26.*

7. This section and S. 326.—(1) The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the former case the injuries must be such as are likely to cause death while in the latter they must be such as endanger life. *AIR 1946 Bom 38.*

(2) A person who voluntarily inflicts injury and the injury is such as to endanger the victim's life must always, except in extraordinary cases, be taken to know that he is likely to cause death and if the victim actually dies as a result of the injury, the conviction must be for the offence of culpable homicide not amounting to murder. *AIR 1938 Mad 723.*

8. This section and S. 304A—Death caused by rash or negligent act.—(1) A voluntary commission of an offence cannot be a rash or negligent act. If a man intentionally commits an act and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness. If it cannot be imputed, still the wilful offence does not take the character of rashness because the consequences have been unfortunate. In such a case the offence will fall under this section and not under S. 304A. *1976 WLN (UC) 425 (Raj).*

(2) The words "not amounting to culpable homicide" seem only to repeat the meaning of "a rash or negligent act" causing death. Such a construction may seem to make the words "not amounting to culpable homicide" a mere surplusage—a mode of construction which is to be adopted only as a last

resort. But when the alternative is to reduce the section to nonsense and absurdity such a construction is unavoidable. *AIR 1976 SC 1012.*

9. This section and S. 460.—(1) Where a person is convicted of an offence under S. 460 a separate conviction on a charge under S. 304 read with S. 34 is not justified as this is only a repetition of one of the ingredients of the charge under S. 460. *AIR 1951 Assam 60.*

(2) If a person causes the death of another at the time of committing lurking house trespass by night or house breaking by night it does mean that he escapes being tried under S. 302 or S. 304, Penal Code, as the case may be, and that he can only be tried under S. 460 Penal Code. *AIR 1940 Lah 281.*

10. Attack by several persons—Liability.—(1) A number of provisions have been enacted in the Code designed to prevent loopholes of escape to guilty persons. One of these provisions is S. 34 of the Code. Another provision is S. 149 of the Code. *AIR 1979 SC 1259.*

(2) Where one member of an unlawful assembly commits culpable homicide not amounting to murder, in furtherance of the common objective of the assembly to commit such offence every member will be liable under S. 304 read with S. 149 irrespective of the question as to who gave the fatal blow. *AIR 1978 SC 1525.*

(3) Where the common object to commit culpable homicide is not established and it is not established further that any particular member or members of the assembly individually committed culpable homicide, none of them could be convicted either under Sections 304/149 or 304 only. *AIR 1958 Assam 44.*

(4) Where several persons attacks A with the common intention to cause his death and the case is one of culpable homicide not amounting to murder they will all be liable to punishment under S. 304. Part I read with S. 34. *AIR 1972 SC 254.*

(5) Where there is no such common intention and there is no evidence as to which of them gave the fatal blow none of them can be convicted under this section. *AIR 1951 Assam 65.*

(6) If there is evidence that any of the accused persons caused injuries, they will be liable individually for causing such injuries under Ss. 323 to 326, as the case may be. *AIR 1971 SC 1847.*

(7) If any of the accused person's caused injuries they will be liable collectively for such injuries caused by one of them in pursuance of their common intention. *AIR 1961 Guj 16.*

(8) Where two groups of persons indulged in a free fight resulting in the death of two persons, only those persons who are proved to have caused the death can be held guilty of the offence individually committed by them. *AIR 1970 SC 219.*

(9) Where several persons make an unpremeditated joint attack against a person and each individual beats with a stick anything more than knowledge that their joint attack, in its cumulative effect, is likely to cause death, cannot be imputed to them collectively. They will be liable under Part II of this section. *AIR 1976 SC 2499.*

11. Blow aimed at one causing death of another.—(1) Where A intended to cause death to X and the death of Y is caused, A will be liable under S. 302 read with S. 301 and not under S. 304. *AIR 1972 SC 502.*

(2) If the degree of injury intended to be inflicted on the person aimed at was to cause hurt only, the accused will be guilty only for causing hurt, although the blow falls on another resulting in his death. *AIR 1957 All 132.*

12. Abetment of ocffence under this section.—(1) Where X instigated B to beat C and caused the death of C thereby committing the offence of culpable homicide, and this act done by B was not a probable consequence of the abetment. x is not liable for the culpable homicide committed by B. *AIR 1962 MdhPra 91.*

13. Cases falling within Exception I to S. 300.—(1) Where a case of murder falls within Exception I to S. 300 the offence of murder will be reduced to the offence of culpable homicide not amounting to murder and then it will be punishable under this section, the act intended to cause death or bodily injury being governed by Part I of the Section and acts done without such intention but with the knowledge of likelihood of death, being governed by Part II. *AIR 1977 SC 1801.*

(2) Verbal abuse may amount to grave and sudden provocation. *1982 CriLJ 1691.*

(3) Verbal altercation—Accused assaulting deceased with great force—Nothing to show that altercation was of such serious nature which could cause sudden provocation—Injury on chest and heart was most cruel according to medical evidence—Held that the case fell squarely under S. 302 and was not covered by S. 304 Part II. *AIR 1983 SC 361.*

14. Cases falling under Exception 2 to S. 300.—(1) Death caused in the exercise of the right of private defence within the limits prescribed by Ss. 96 to 103 is no offence at all and no question of the applicability of this section arises in such cases. *AIR 1972 SC 244.*

(2) Where a person exceeds the right of private defence and causes death the case may fall within Exception 2 to S 300 and he will be guilty of culpable homicide not amounting to murder and will be punishable under this section. *AIR 1980 SC 660.*

(3) Where the identity of the particular person who caused death by exceeding the right of private defence is not established by evidence none of the members of the assembly can be made liable under S. 304. *AIR 1954 All 771.*

(4) Where there is no question of the exercise of any right of private defence at all, all the members of the assembly would be liable for the acts of one of them in pursuance of the common object. *AIR 1955 NUC (All) 2713.*

(5) There can be no common intention to commit culpable homicide by exceeding the right of private defence. *AIR 1976 SC 2273.*

(6) A person exceeded the right of private defence and causing death may be liable under Part I of this section if he did the act with the intention of causing the death. But if there is no such intention but knowledge that his act is likely to cause death, he would be liable under Part II of this section. *AIR 1979 SC 577.*

(7) As to when a person can be said to exceed the right of private defence. *1983 PakLD 251.*

(8) Where the lower Court accepted a part of the statement of the accused namely that he inflicted the injuries on the deceased but it had declined to place reliance on that part of the statement of the accused which explained the circumstance under which the fatal blow was given it was held that where there is a solitary evidence of the accused and no other evidence then the whole of the statement must be taken into consideration. On consideration of the whole statement of the accused it was held that the accused was entitled to right of private defence. His conviction under S. 304, Part II was set aside. *1983 CriLJ NOC 211.*

15. Cases falling under Exception 3 to S. 300.—(1) Police officer shooting at unlawful assembly without arresting leaders or giving pervious warning—Act not in good faith—Death caused—Case did not fall under Exception 3 to S. 300. *1 Weir 310.*

16. Cases falling under Exception 4 to S. 300—Sudden fight.—(1) The following are cases in which Exception 4 to S. 300 was held to apply and the offence held to be one falling under this section. *AIR 1978 SC 315.*

(2) In a case the Exception was held not to apply and the offence was held to be one of murder. *AIR 1980 SC 448.*

(3) Sudden fight without premeditation—Accused alleged to have inflicted injuries on the deceased—Accused causing one injury each to two victims and receiving six injuries on various parts of his body—Prosecution neither in FIR not in their statement ever claimed to have caused injuries on the person of the accused—For such a lapse, it is the prosecution who has to suffer—Accused, held to have acted in self-defence and acquitted. *1983 Chand CriC 441 (P&H).*

(4) When the accused while dispossessing others from their land behaved in a cruel or unusual manner by causing multiple injuries on vital part of those persons and claimed protection of Exception 4 of S. 300, it was not granted and they were convicted under S. 304. *1981 CriLJ 516.*

17. Onus of proof.—(1) The burden is on the prosecution to prove that all the ingredients of the offence are satisfied in the particular case. *1979 RajLW 214.*

(2) It is not the duty of the accused to show how the death was caused. *Rat 686 UN CrC.*

(3) Where the accused pleads that the death was due to accident and there is nothing to show that the suggestion is unfounded he cannot be held liable under his section. *(1953-1954) 12 J & KLR 58.*

18. Effect of acquittal under this section.—(1) Earlier acquittal u/s. 303/34, Penal Code—Conviction u/s. 304/34, Penal Code by Appellate Court not hit by former acquittal. *AIR 1969 Cal 28.*

(2) Where A was charged under S. 323 of the Code of 1898 and the case was compounded, but subsequently the victim died as a result of the injury, it was held that there was nothing to prevent the accused being charged for an offence under this section. *(1914) 15 CriLJ 64 (DB) (All).*

19. Benefit of doubt.–(1) Where the evidence is conflicting the benefit of doubt must be given to the accused. *1982 SCC (Cri) 134.*

(2) Where it is difficult to determine whether the offence is one of murder or of culpable homicide not amounting to murder the proper course is to convict the accused only for the lesser offence. *1982 CriLJ (NOC) 107.*

20. Appreciation of evidence.—(1) Attack by several accused—Medical report stating 'injuries caused could have been fatal independently but not necessarily'—Conviction of one accused under S. 302—Not valid. *AIR 1977 SC 699.*

(2) Accused throwing brickbats on the person of the deceased—Deceased aged about 65 years—No injury, wound or abrasion on body of deceased—Medical report showing diseased heart of deceased—Opinion of Doctor performing post mortem that death could have been due to heart failure—No offence was committed by the accused and their acquittal was justified. *(1982) 2 Chand LR (Cri) 107.*

(3) As to cases relating to appreciation of evidence. *AIR 1982 SC 1021; AIR 1976 SC 912; AIR 1970 SC 826.*

21. Jurisdiction.—(1) The offence under this section is triable only by a Court of Session . *(1903) 8 Mys CCR No. 419 Page 358.*

(2) The offence under this section cannot be tried by an Assistant Sessions Judge. *(1980) 1 CalHN 504.*

(3) The offence under this section cannot be tried by a Magistrate in charge of the Children Court. *AIR 1932 Cal 487.*

(4) The accused believing that a woman had bewitched another gave the former a severe beating and branded her in several places. Four or five days after this her back swelled and fever came on. She finally took to her bed and died on the sixteen day after the beating. The accused were, on these facts, tried by a Second Class Magistrate, who convicted them of offences under S. 323 and sentenced them each to rigorous imprisonment for six months. It was held, reversing the conviction and sentence, that the accused should be committed for trial on a charge of culpable homicide. *(1902) 4 Bom LR 879.*

(5) Prosecution under S. 302—Magistrate should commit under that section and not under S. 304. *AIR 1953 Bhopal 1.*

22. Judgment—Judge's duty.—(1) Where a Judge convicts the accused on a charge of culpable homicide not amounting to murder by reason of the Exception 2 to S. 300 he should record under which of the Exceptions the case falls. *1870 Pun Re (Cri) No. 18 Page 32.*

23. Charge.—(1) A person charged under S. 304 can be convicted under S. 325 without a specific charge being framed thereunder. *AIR 1934 Oudh 251.*

(2) A person charged under S. 304 can be convicted under S. 304-A without a specific charge being framed under those sections. *AIR 1924 Bom 450.*

(3) It is not illegal to convict the accused under S. 304/34 on a charge under Ss. 304/149 in the absence of prejudice to the accused. *AIR 1934 Mad 565.*

(4) Where the accused was charged under Ss. 148, 304/149 and 326/149 and was acquitted of the charge under S. 148 he cannot be convicted for an offence under S. 326 without the aid of S. 149 there being no charge under S. 326. *AIR 1915 Cal 292.*

(5) Where the facts of a case are such that the accused could have been charged alternatively, either under S. 302 read with Section 149 or under S. 302 read with Sec. 34, the conviction of the accused under S. 302 read with S. 149 can be altered by the High Court in appeal to one under Section 302 read with S. 34 upon the acquittal of other accused persons. *AIR 1952 SC 167.*

(6) Observation by High Court that charge should have been framed under section 304 while confirming conviction under S. 304A—High Court however, had not stated that trial was illegal—Held, conviction under S. 304A is not illegal. *(1971) 2 SC CriR 511.*

(7) The charge should run as follows :

I, (name and office of the Judge hereby charge you (name of the accused) as follows :

That you, on or about the—day of—, at—committed culpable homicide not amounting to murder, causing the death of—, and thereby committed an offence punishable under section 304 of the Penal Code and within the cognizance of the Court of Session. And I hereby direct that the you be tried by this court on the said charge.

24 Confession—Conviction on.—(1) The retracted confession of a co-accused carries practically no weight. There could be no conviction of the accused on the basis of such confession without the fullest and strongest corroboration of material particulars. *1968 CurLJ 244.*

(2) Where corroboration to the confession of confession of co-accused present, the accused can be convicted on the basis of such confession. *(1974) 1 CriLT 107 (Him Pra).*

25. Sentence.—(1) For an offence of murder only one of two alternative punishments can be awarded—death or imprisonment for life. In the case of culpable homicide not amounting to murder the

Court has a discretion to modulate the sentence according to the circumstances of each case. *1961 RajLW 601.*

(2) In exercising such discretion the principles governing the award of the lesser punishment for murder by reason of extenuating circumstance, may usefully be followed in the matter of modulating the sentence to be awarded under this section. *AIR 1979 SC 577.*

(3) Ordinarily the punishment should be sufficiently severe to be a deterrent on a repetition of such offences. *(1921) 22 CriLJ 341 (Ali) (DB).*

(4) In cases governed by Exception I to S. 300 the sentence should be as low as is commensurate with the nature of the offence but should not be so low as to encourage the commission of homicide. The nature and number of the injuries inflicted lose their significance in acts done under grave and sudden provocation and cannot be a ground for awarding excessive sentence. *1980 Mad LJ (Cri) 314.*

(5) In a case falling under Part I of the section by reason of the accused having exceeded the right of private defence it was held that a sentence of transportation for life was too severe. *1977 Raj CriC 352.*

(6) As to other illustrations on point of sentence. *AIR 1983 SC 652; AIR 1983 SC 162.*

26. Culpable homicide under superstitious belief.—(1) Where A struck his uncle B under the grievance that he had brought from her parent's house his wife who was alleged to be a witch and who was responsible for the death of A's children it was held that the case fell under Part I of this section and called for a severe punishment. *AIR 1955 NUC (Bom) 3660 (DB).*

(2) Where the accused subjected a girl to a beating for the purpose of exercising the spirit with which she was supposed to be possessed and it resulted in her death it was held that the accused was guilty of culpable homicide not amounting to murder. *Rat Un CrC 603 (DB).*

27. Interference by High Court.—(1) As regards sentence passed by the trial Court the High Court rarely interferes with the discretion of the trial Court as to the sentence, but it will not allow a very inappropriate sentence to stand. *AIR 1955 SC 778.*

(2) As to other illustrations on point of interference by High Court. *AIR 1979 SC 1114.*

28. Interference by Supreme Court.—(1) Where there is evidence to support the findings of the lower Court, the Supreme Court will not in an appeal by special leave, interfere with a conviction under this section. *AIR 1971 SC 2268.*

(2) The Supreme Court declined to further reduce the sentence which was already reduced by the High Court in exercise of its discretion on the ground that the accused was the sole bread earner in the family. *AIR 1980 SC 1315.*

(3) When the accused have committed an act of butchery in murdering the victim, but in trial escaped conviction under S. 302 and were convicted under S. 304 Part I and the Government had not filed an appeal against the acquittal, the Supreme Court declined to interfere. *AIR 1980 SC 1315.*

(4) Accused in the dead of night going to the camp of mine labourers and asking his companions to set fire to the huts of the labourers when P. W. I. came out of his hut with a child in his hand the accused gave a lathi blow which resulted in the death of the child. Accused was convicted under Section 304 Part II. Supreme Court did not interfere as there was no law point and the decision was on facts. *1983 SCC (Cri) 129.*

29. Procedure.—(1) There is nothing in the Code which restricts the powers of Sessions Judge to transfer a case where charge is under Section 304 Part I to the Assistant Sessions Judge. Imprisonment

for life is the maximum sentence under S. 304 Part I. As soon as such a case is transferred to the Assistant Session Judge, he cannot pass a sentence for more than 10 years. But only for that, it cannot be said that an Assistant Sessions Judge in such a case is without jurisdiction to try the case. *(1980) 1 CalHN 504.*

(2) Murder—Sentence—Accused and deceased raw youngmen—A day before the occurrence the accused while passing by the shop of the deceased had coughed in an insolent manner—Deceased giving irresponsible reply to an otherwise innocuous question prompted by earlier enmity between them—Accused and deceased grappled together when blows were given to deceased—Held, in the facts and circumstances of the case that conviction of the accused could be converted from one under S. 302 to S. 304 Part II. *1983 All CriLR 618.*

(3) As regards bail. *AIR 1969 Munipur 6(8).*

(4) *Procedure:* Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

30. Section 304 read with section 149.—In the case of an unlawful assembly, conviction under section 304 must depend upon one of the two alternatives, i.e. either that the persons convicted have been proved individually to have committed the offence or that the person convicted has been a member of an unlawful assembly, that is to say, of an association of persons having a common unlawful object *(43 CriLJ 654).* Section 304 coupled with section 149 applies to such persons who, though not taking an active part in an unlawful assembly, are liable to be punished by reason of their being members of the unlawful assembly, if a person is killed in prosecution of the common object of the assembly, unless any one of them can show that he had not the common object of the assembly in prosecution of which death was caused. When five or more accused are found guilty under section 304, second part of causing death by doing an act with the knowledge that they were likely by such act to cause death, they can be convicted under section. 304/149, because they knew that death was likely to result from their attack *(44 CriLJ 624).*

31. Section 304 read with section 34.—Section 34 being based on common intention cannot go with the second part of section 304 as common intention is excluded therefrom. Where an accused was charged under Section 304 and 34 or 149 alternatively, the duty of the trial court was to decide whether the assault resulting in the death was committed by the accused or any one of them in prosecution of a common object or in furtherance of a common intention and whether the accused formed an unlawful assembly with the common object of assaulting the deceased.

This section creates no offence , but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted, where an intention to kill being present, the act would have amounted to murder, but for its having fallen within one of the Exceptions of section 300, and those cases in which the crime is culpable homicide not amounting to murder *(33 CriLJ 849).* Both the parts of section 304 refer to distinct offences. Part I would be attracted to an offence which was otherwise murder but was reduced to culpable homicide not amounting to murder by reason of being covered by any of the Exceptions to section 300, Part II of section 304, would be applicable if the fatal injury inflicted on the deceased was caused to him without any intention on the part of the accused to cause death or such bodily injury as was likely to cause death but about which the accused could be burdened with the knowledge that it was likely to cause his death *(PLD 1971 Pesh 13).* Where the case is on the border line between murder and culpable homicide not amounting to murder, the accused is entitled to the benefit of any reasonable doubt and be convicted only under this section *(35 CriLJ 1112).*

32. Right of private defence and death caused under provocation.—The right of self-defence arises only in cases where there is an apprehension of hurt or grievous hurt, but the right of private defence in no case extends to inflicting of more harm than is necessary to inflict for the purpose of defence. Where the right to private defence is being exercised and in the exercise of that right more harm is caused than is necessary, the person exceeds the right of self-defence. In such a case Exceptions 2 to section 300 PC is available if there is no intention to cause more harm than is necessary for the purposes of defence. Where the right of self-defence does not exist or has ceased to exist for it exists as long as the apprehension lasts, as provided in section 102 PC there can be no right of self-defence nor a situation leading to the exceeding of the right arises. Where a person causes fatal injury to another in the defence of his property, the offence would fall under section 304. Part II PC *(PLD 1954 Lah 602).* Where death is caused under grave and sudden provocation, conviction would be under section 304(1), and not under section 302. Where the accused lost self-control because the deceased used highly provocative language against him, a sentence of five years RI was held sufficient. Where death is caused on a sudden quarrel in the heat of passion without any premeditation, the accused would be guilty of an offence under section 304 and not under section 302 *(AIR 1957 SC 324).*

33. Practice.—*Evidence:*—Prove: (1) That there is the death of person in question.

(2) That such death was caused by the act of the accused.

(3) That the accused intended by such act to cause death; or that he intended by such act to cause bodily injury as was likely to cause death; or

(4) That he knew that such act of his would be likely to cause death.

Section 304A

[2][**304A. Causing death by negligence.**—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to [3][five] years, or with fine, or with both.]

Cases and Materials : Synopsis

1. *Scope.*
2. *"Any person".*
3. *Rash or negligence act.*
4. *Rash or negligent act in driving or riding along a public way.*
5. *Rash or negligent act in medical treatment.*
6. *"Not amounting to culpable homicide"—Intentional violence not within this section.*
7. *Death must be the direct result.*
8. *Death due to accident.*
9. *Negligence—Difference between civil and criminal liability—Contributory negligence.*
10. *Vicarious liability.*
11. *Procedure.*
12. *Burden of proof.*
13. *Proof and conviction.*
14. *Charge under S. 302—Conviction under this section.*
15. *Plea of guilty.*
16. *Sentence.*
17. *Revision and reference.*
18. *Appeal.*
19. *Charge.*
20. *Practice.*

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2. 304A was inserted by the Indian Penal Code Amendment Act, 1870 (XXVII of 1870), section 12.
3. Subs by Ord. No. X of 1982, s. 4, for "two".

1. Scope.—(1) The provisions of this section seem to apply to cases where there is no intention to cause death and no knowledge that the act done in all probability would cause death. In order to establish a charge of negligence under section 304A of the Penal Code, it must be established that the accident was the direct result of the negligence or rashness of the accident. This section does not apply to cases where there is an intention to cause death or knowledge that the act done will in all probability cause death. The term 'rash act' within the meaning of this section connotes want of proper care and caution. In "negligence' there is failure to observe such care as the occasion demands to protect interest of other persons and in "rashness" there is failure to consider the consequences of an act with the result that the act is devoid of proper care and caution. Negligence under this section does not mean absolute carelessness or indifference but want of such a degree of care as is required in particular circumstances *(AIR 1944 Nag 285; PLD 1962 Lah 267).* Mere carelessness is not sufficient for conviction under this section like other sections of the Penal Code, requires mens rea or guilty mind. To attract the provisions of section 304A death must have occurred. A conviction can be sustained under section 304A of the Penal Code if death is the direct result of rash or negligent act of the accused. Contributory negligence has no plea in criminal law. Plea of contributory negligence on a victim's part is no defence of itself to a charge of murder *(AIR 1938 Sind 100, 39 CriLJ 566).* Great care should be taken before importing criminal negligence to a professional man acting in the course of his profession. A doctor is not criminally responsible for a patient's death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State.

(2) Non-consideration of important circumstances by the trial Court vitiates the judgment. *Ahmad Ali Vs State 26 DLR 182.*

(3) "Rash or negligent act'—Explained—Implication thereof with reference to the facts of present case. This section does not say the act must be rash and negligent; it says that the act must either be rash or negligent. A rash act means hazarding a dangerous and wanton act with the knowledge that it is dangerous or wanton act, and that it may cause injury but without any intention to cause injury or knowledge that it will probably be caused. The criminality in such a case lies in running the risk of doing the act with recklessness or indifference as to the consequences. In the present case, we do not think that the accused had acted either rashly or negligently. He certainly can be imputed with the knowledge that his act, i.e., firing a gun at deceased Prashanna will cause injury to him. The injury caused to Prashanna by the accused was certainly not an accidental one resulting from a rash or negligent act, nor can it be said that in the facts and circumstances of the case in doing the act, the accused intended to cause death of Prashanna or knew that his act was likely to cause the death. *Rashidullah Vs. The State 21 DLR 709.*

(4) Death of a man due to gun shot injuries fired at the victim out of nervous apprehension does not make out a case of rash or negligent act under section 304A PC. Section 304A does not say that the act must be rash and negligent; it says that the act must either be rash or negligent, A rash act means hazarding a dangerous and wanton act with the knowledge that it is dangerous or wanton or that it may cause injury but without any intention to cause injury or knowledge that it will probably be caused. The criminality in such a case lies in running the risk of doing the act with recklessness or indifference as to the consequence. *Rashidullah Vs. State 21 DLR 709.*

(5) Driving a car recklessly until it comes so close to a pedestrian that it is impossible to save a collision cannot but be characterised as rash and negligent driving. Mere negligence on the part of a pedestrian cannot excuse negligence, on the part of a driver of such a fast and dangerous vehicle as a

motor bus. As between the pedestrian and a driver of a motor vehicle the responsibility of the latter is greater. He has a duty to keep better lookout than a pedestrian. A driver of a motor vehicle who is himself negligent cannot plead in his defence the negligence of a pedestrian whom he knocked unconscious and killed. *Abdur Rashid Mia Vs State 9 DLR 207.*

(6) Even if an act by the accused resulting in death is admitted, there can be no presumption that the fact was voluntary and intentional, and these elements must be established by the prosecution, like any other element of the offence charged. It is not correct to say that the accused must be found guilty if he fails to show the circumstances necessary to establish the accident pleaded by him. *Sultan Md. Vs. Crown 6 DLR 28 FC.*

(7) This section was added by an amendment of the Code in 1870. It does not create a new offence. *(1909) 9 CalLJ 393 (Cal).*

(8) This section is restricted to cases where a rash or negligent act results in the death of a person. *AIR 1965 All 196.*

(9) This section is directed at offences outside the range of Ss. 299 and 300 and obviously contemplates those cases into which neither intention nor knowledge of the kind dealt with by Ss. 299 and 300 enters. *AIR 1976 SC 1012.*

(10) This section does not say that every unjustifiable or inexcusable act of killing not hereinbefore provided shall be punishable under the provisions of this section; but is specially and in terms limits itself to those rash or negligent acts which cause death but fall short of culpable homicide of either description. *AIR 1966 All 196.*

(11) From the evidence as it is if it can be safely said that the accident was due to misjudgment of the accused not due to rashness then conviction under S. 304-A cannot be said to be legally correct *(1980) 82 PunLR 293.*

(12) Although the death of a person injured is a condition precedent to liability under this section the question whether an act is rash or negligent has to be judged independently of the fact that the death was caused. *1977 Raj CriC 9.*

2. "Any person."—(1) A child in the mother's womb, sufficiently developed to make it possible to call it a 'child' is a person within the meaning of this section. *AIR 1966 All 590.*

(2) Where the accused kicked a woman in an advanced state of pregnancy with the result that the child in the womb died, it was held that the accused was guilty under this section. *AIR 1966 All 590.*

3. Rash or negligent act.—(1) Under S. 32 'act' includes an illegal omission. An illegal omission may, therefore, come under this section if it is negligent. *1968 CriLJ 405 (Cal).*

(2) Mere carelessness is not sufficient for a conviction under this section. This section like other sections of this Code, requires a mens rea or guilty mind. The rashness or negligence must be such as can fairly be described criminal. *(1980) 49 CutLT 337.*

(3) Criminal negligence or rashness should not be presumed merely on application of the maxim resipsa loquitur which imports that the plaintiff had made out a prima facie case without any direct proof of actionable negligence. *1980 CriLJ (NOC) 132.*

(4) Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as

to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury, either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. *AIR 1972 SC 685.*

(5) The distinction between a negligent and a rash act is somewhat different namely that a negligent act is an act done without doing something which a reasonable man would have done or an act which a prudent or reasonable man would not do in the circumstances attending it, and that a rash act is negligent act done precipitately. *1971 All CriR 416.*

(6) Rashness and negligence are not the same. *AIR 1966 Bom 122.*

(7) In a rash act there is the consciousness or awareness of the mind with the reference to the act done and the actor indulges in the act with the foolhardy hope or exception against anything untoward happening. On the other hand, negligence presupposes a negative state of mind, an absence of awareness or consciousness of what should be done or omitted to be done, such a state of mind being consequent upon failure to apply or exercise the requisite caution or precaution. *1979 CriLJ 1258 (Gauhati).*

(8) Merely because a person contravenes some rules and regulations he does not make himself liable for rashness or negligence. *1980 SimLC 246.*

(9) The accused in order to make entry into his latrine dangerous to intruders fixed up a live naked electric wire in the passage to the latrine. There was no warning that the wire was a live one. A trespasser managed to pass into the latrine without contacting the wire, but her hand happened to touch the same while coming out and she got a shock as result of which she died soon after. It was held that the act of the accused was a rash act within the meaning of this section, as it was done in reckless disregard of the serious consequences to people coming in contact with it. *AIR 1964 SC 205.*

(10) An assistant station master gave a 'line clear' signal to a passenger train with the knowledge that a good train was standing at a particular point where the train might collide with it, but hoping to remove the goods train before the arrival of the passenger train. The goods train was not removed in time and a collision occurred which was attended with loss of life. The assistant station master was guilty of a rash act punishable under this section. *AIR 1918 All 429.*

(11) The accused administered a drug to her husband in the belief that it was a love potion which would stimulate his affection for her. It was really a poison and the husband died from the effect of the poison. The accused was held liable for an offence under this section. *AIR 1915 Bom 297.*

(12) Accused who had a loaded pistol was demonstrating to the deceased by bringing the pistol into different positions, as highway robbers held up way fares. There were facts showing possibility of pistol exploding and it exploded killing the deceased. It was held that the accused was guilty of causing death by a negligence act. *AIR 1949 Lah 85.*

(13) In an ordinary quarrel and fight between the complainant and the father of the accused the accused went to the help of his father. The complainant went into the fight with a child of two years of age on his hip. The accused had a stick with which he struck a blow at the complainant. The blow missed the complainant and fell on the head of the child. The child died within about an hour thereafter. The accused was liable for an offence under this section. *AIR 1921 Lah 297.*

(14) Victim, a lady sitting on puliya (culvert of 12 ft. width—Bus of 8 ft. width dishing against victim while crossing the culvert—Bus driver held rash and negligent—Speed of bus was irrelevant factor in such case. *AIR 1982 MP 83.*

(15) As to illustration of cases where the act was held to be rash and negligent. *1978 CriLR (SC) 642.*

4. Rash or negligent act in driving or riding along a public way.—(1) In judging whether a driver of a motor vehicle is guilty of a rash of negligent act within the meaning of this section, no abstract standard can be laid down, and the Court has to judge what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient having regard to all the circumstances of the case. *1979 CriLJ 1258 (Gauhati).*

(2) A person who is driving a motor vehicle should always keep it in a state of control sufficient to enable him to avoid dashing against any other vehicle or running over any pedestrian who may be on the road. *AIR 1979 SC 1327.*

(3) In order to determine the culpability of driving of vehicle one has also to see his conduct immediately before the occurrence. he cannot create a situation in which the vehicle may go out of order and then plead that because the vehicle became out of control, the accident could not be avoided. *1979 CriLR (Mah) 132.*

(4) The speed with which a motor vehicle is driven has relevance only when taken in conjunction with other relevant facts, such as the condition of the road, the nature of the load carried by it, persons likely to be affected in case of accident, etc. *AIR 1975 SC 1324.*

(5) While in one case the fact that the vehicle was driven at a high speed may not constitute rashness or negligence, there could be such rashness or negligence, in another where the speed is much less. *AIR 1971 Bom 164.*

(6) It is a sound rule that he who drives a mechanically propelled transport vehicle, or for the matter any other transport vehicle, is under a duty to exercise that vigilance and care which is expected of him so as to eliminate, to the extent possible, danger and peril to others who have a similar right to use a highway. *AIR 1975 SC 1960.*

(7) In cases of running over by motor vehicles, it is difficult to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests on the accused. The task of keeping out such prejudice might be difficult but it has got to be performed by Courts. *AIR 1967 Mad 365.*

(8) In a prosecution under this section for causing death by rash or negligent driving the Court should not take into account the speed which the accused developed after the accident in order to judge the speed at which he was driving prior to the accident. *AIR 1954 All 186.*

(9) Unless a passenger is conversant with the driving, it is difficult to rely upon the evidence of such a passenger to determine whether the bus was driven at fast speed or otherwise. *(1983) 1 BomCR 307.*

(10) It is a common human failing, however reprehensible it may be, for a man to attempt to run away after such an accident. *1979 CriLJ 517 (All).*

(11) A lorry was hired to fetch fire-wood. The driver started in the evening and reached the place where fire-wood was stored at about midnight. The lorry was immediately loaded. The driver the accused without waiting to take food or some rest again started on his way back. On the way, he was overpowered by sleep and lost control of the vehicle. The lorry swerved to the left as a result of which he woke up and turned the lorry to the right. It crossed the road, went over the pavement and dashed against a tree. A person in the lorry died as a result of the dashing. It was found that the lorry was

driven at a high speed and the brakes were also defective, the accused was held guilty of a rash act. *AIR 1965 All 196.*

(12) A lorry laden with several bags of paddy was being driven along the center of a straight road at a high speed in order to keep pace with a railway train running parallel to the road. The bullock carts were coming in the opposite direction on the correct side of the road. First two carts passed without any trouble. The third cart loaded with iron bars which protruded in front of the cart, suddenly turned to the right. The accused the driver of the lorry, suddenly swerved to the right to allow the cart to pass with the result that the lorry overturned causing the death of a person. The accused was held liable under this section. *AIR 1954 Trav-Co 25.*

(13) Where the driver of a motor car, who is a novice and has no licence, ventures to drive in a crowded thoroughfare a defective car having no horn and the brakes of which are entirely defective, his act amounts to rashness. Where he in such circumstances tries to overtake pedestrians and other vehicles on the road his act amounts to negligence. *AIR 1953 Sau 10.*

(14) A military Captain had to inspect at night certain oil installations. For that purpose, he was driving a car at about 2 A. M. on his way to the place of duty at a speed of about 25 to 33 miles an hour. Due to A.R.P. Restrictions only one dim light was on his car and the streets were unlit. On his way he knocked down a pedestrian who died. But the Captain went on not aware of this and when subsequently he was told of this, he was surprised and expressed regret. The road was uneven and bumpy. In the circumstances it was held that the Captain was not guilty of a rash or negligent act. *AIR 1944 Sind 124.*

(15) A road was partly under repair. A person drove his car along the road at night. Some persons who were sleeping on the road were run over and killed. A driver could look out for a vehicle or persons standing or walking on a road, but could not expect persons to sleep on the road. Hence, it was held that the driver of the car was not liable under this section. *AIR 1926 Cal 300.*

(16) Negligence—Accused Asstt. Station Master—Collision between two trains resulting in death of several passengers and damage to railway property—Held, mere direction to subordinate staff for making due arrangement for arrival of trains was not sufficient—It was duty of accused to see that arrangement were made in accordance with his directions and according to requirements of situation. *1984 CriLJ NOC 46 (Gauhati).*

(17) As to illustrations where the act complained of was neither rash nor negligent. *AIR 1972 SC 221; AIR 1971 Bom 164; AIR 1953 Hyd 123; AIR 1950 All 300.*

(18) As to further illustration whether or not the acts of the accused amount to negligence. *AIR 1971 Bom 164; AIR 1971 MadhPra 145.*

5. Rash or negligent act in medical treatment.—(1) Great care should be taken before imputing criminal rashness or negligence to a professional man acting in the course of his professional duties. A doctor is not criminally liable for a patient's death unless his negligence or imcompetence passes beyond a mere matter of compassion and shows such a disregard for life and safety as to amount to a crime against the State. *AIR 1943 PC 72.*

(2) Where a doctor administers a proper medicine to his patient, but the quantity administered is very considerably in excess of the prescribed quantity and the patient dies as result of such administration, it would be a case of murder under S. 302 ante or a rash or negligent act under this section depending upon the circumstances of the case. *AIR 1963 MadhPra 102.*

(3) If an unqualified person ignorant of the science of medicine or the surgery undertakes an operation or medical treatment and it results in the death of the patient, it would be a rash or negligent act within the meaning of this section. *AIR 1965 SC 831.*

6. "Not amounting to culpable homicide"—Intentional violence not within this section.—(1) Voluntary and intentional acts done with knowledge of the likelihood of the actual result caused are not rash or negligent acts. *1955 MadhBLR (Cri) 181.*

(2) The section does not apply to a case in which there has been a voluntary commission of an offence against a person. *1988 BurLR 780.*

(3) If a man intentionally commits an offence and consequences beyond his immediate purpose result , it is for the Court to determine how far he can be held to have the knowledge that he was likely, by such act, to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness : if it cannot be imputed still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. *AIR 1955 All 626.*

(4) Where A, in the course of a dispute with B, struck at him with a lathi and B avoided that blow which fell on the head of B's sister who had come up unperceived by A and B and which fractured her skull and resulted in her death, it was held that this section was inapplicable. *1975 KerLT 748.*

(5) Where the accused professed to be able, by tattooing, to render the persons tattooed by him immune from the effect of snakebite and tattooed a number of villagers and then allowed a poisonous snake, which he himself was handling, to bite one of them and the man bitten died at once, it was held that if the accused honestly believed himself to be able to produce immunity, he would be guilty of merely a rash and negligent act not amounting to culpable homicide; but otherwise he would be guilty of culpable homicide not amounting to murder because he caused the death with the knowledge that it was likely to cause death but had neither the intention nor the knowledge necessary to make his offence murder. *AIR 1921 LowBur 26.*

(6) Accused forming unlawful assembly and attacking other party—Lifting a child of 4 years and throwing him on ground—Child dying—Held, it was culpable homicide and neither murder nor rashness within the meaning of S. 304A. *AIR 1983 SC 529.*

7. Death must be the direct result.—(1) In order to impose criminal liability under this section, it is necessary that the death should have been the direct result of a rash or negligent act of the accused and that the act must be the proximate and efficient cause of the death. It must be the causa causans (the immediate cause); it is not enough that it may have been the cause sine qua non (cause of which the proximate cause is the effect). *AIR 1968 SC 829.*

(2) There must be a direct nexus between the death of a person and the rash or negligent act of the accused. *AIR 1972 SC 1150.*

(3) The accused a tractor driver was driving a tractor attached to a trailer loaded with materials. While negotiating an up-gradient of a ghat section, the engine stopped abruptly, a part of the trailer broke at a point which was previously welded the trailer was detached and ultimately capsized in a ditch killing two of the occupants in the trailer. It was held that there was no negligence on the part of the accused which was direct or proximate cause of the death. *1968 CriLJ 851.*

(4) Where a truck, heavily loaded with logs of wood and twelve persons sitting over them contrary to Motor Vehicles Rules was driven in heavy rains and cyclonic weather on a muddy, irregular and zigzag forest cart tract at night and dashed against a tree stump and the resulting jerk broke the rope

tying the logs which fell over and crushed under them one of the persons to death, it was held that the death was the direct and proximate result of the negligent driving. *(1973) 39 CutLT 1343.*

(5) As sustained serious injuries when a jeep driven by B who had only a learner's licence struck him. B took him to a doctor who refused to treat him saying it was a medico-legal case and asked him to take A to a Government dispensary. B instead of going there drove back to his village and A died on the way. B was charged with an offence under this section. There was evidence that he had been driving for about six months and that he had been driving the jeep the previous day in several places. It was held that assuming that B was guilty of a rash act, the prosecution had not proved that it was the rash act that caused the death of A. *AIR 1968 SC 829.*

(6) Where the driver of a bus was prosecuted under S. 304-A and S. 279 P. C. for carrying on bus roof certain corrugated iron sheets which fell down due to jolting while bus was driven on a kucha road and the Investigating Officer made no attempts to find the said sheets nor the prosecution found who the owner of the bus and who had loaded them, the driver would not be liable to be convicted *AIR 1972 SC 1485.*

(7) Where the three lower Courts gave a concurrent finding that the negligent driving of the accused was the proximate cause of death, the Supreme Court though doubtful about the same refused to apprise the evidence for itself and upheld the finding of the lower Courts. *AIR 1973 SC 2127.*

8. Death due to accident.—(1) Where death is due to a mere accident, this section can have no application. *1976 ChandLR (Cri) 290.*

(2) Where the accused and the deceased went into a jungle for hunting and they agreed to take up positions in the jungle and wait for game and in the night the accused hearing a resulting sound and believing that there was a wild animal, fired in that direction as a result of which his companion was shot at and killed, it was held that the accused could not be convicted under this section. *AIR 1927 Lah 880.*

(3) The accused was striking a hammer on a shelf in order to frighten a boy who was pestering him in his sleep. The hammer accidentally dislodged from his hand and hit the boy who died as a result of the blow. It was held that the accused was not liable for negligent act. *(1962) 1 MadLJ 161.*

9. Negligence—Difference between civil and criminal liability—Contributory negligence.—(1) The principles of liability governing civil actions based on negligence differ from those governing criminal liability in two particulars. The negligence of the accused in a criminal case must be such that it goes beyond a mere matter of compensation and shows such disregard for life and safety of others as to amount to a crime. *1972 AllCriR 401.*

(2) The negligence of the accused must be of a high degree and not of the type which gives rise to a claim for compensation. *AIR 1980 SC 1354.*

(3) The rule of contributory negligence which may be a good defence in a civil action has no place in an indictment for criminal negligence. Once it is established that the accused has caused the death of any person by a negligent act not amounting to culpable homicide, contributory negligence on the part of the deceased is irrelevant. *1970 KerLT 828.*

(4) Simple lack of care may give rise to a civil liability but without mens rea and such a degree of culpability as amounts to gross negligence there is no criminal liability. *1970 KerLT 828.*

(5) Notwithstanding any rash or negligent cut, if the other side with its eyes open was also negligent and invited the calamity then the person who acted rashly or negligently cannot be held to be criminally liable. *(1984) 1 Crimes 505.*

10. Vicarious liability.—(1) As the offence under this section one requiring mens rea the principle of vicarious liability does not apply to it. Hence, an employer cannot be held guilty under this section where death has been caused by the negligence of his servant or employer. *AIR 1970 Mad 198.*

11. Procedure.—(1) An accused was prosecuted under this section before a Judicial Magistrate and a complaint was also filed against him in the Sub-Division Magistrate's Court for an offence under the Motor Vehicles Act. In the latter case some formal evidence was let in and the accused was acquitted. It was held that the former trial was no bar to the trial of the offence under the section. *AIR 1965 Raj 221.*

(2) Magistrate alleged to have agreed to impose lighter punishment, if accused pleaded guilty—Accused pleading guilty—Imposition of lighter punishment—Trial held not fair. *1980 CriLR (Guj) 415.*

(3) The accused should not be released on bail when his identification proceedings are not yet complete. *1970 AllLJ 631.*

(4) A panchanama of scene of offence is of significance in a trial for offence under Section 304A and therefore, it is desirable that the prosecution should examine at least one of the panchas to prove the contents of the panchanama. *1981 BomCR 7.*

(5) Conviction of two accused by Sessions Court under S. 302/34—Appeal—One of accused gifting land to deceased's window as compensation—High Court acquitting such accused and converting conviction of another accused from S. 302 to S. 304-A—Acquittal and conversion is illegal. *AIR 1984 SC 1029.*

(6) *Procedure*—Cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Session.

12. Burden of proof.—(1) The section is no exception to the general rule that the burden of proof is on the prosecution to establish the guilt of the accused beyond reasonable doubt. *1978 CriLJ NOC 197 (Delhi).*

(2) The onus on the accused is discharged on the theory of balance of probabilities as in a civil suit. If the version of the accused may reasonably be true no conviction can lie. *(1974) 40 CutLT 199.*

(3) The driver of a jeep drove it at a reasonable speed and blew the horn when it passed a stationary bus. The jeep, however, struck two boys, thereafter, killing one on the spot. The only plea of the driver was that he did not know how the accident occurred. He was convicted under this section as the accident was due to his negligence. *(1974) 40 CutLT 199.*

(4) In a charge under this section, the prosecution must prove : (i) that the accused caused the death of the person in question; and (ii) that such act of the accused was rash or negligent, although it did not amount to culpable homicide. *(1975) 41 Cut LT 245.*

(5) Rashness and negligence in driving cannot be inferred from the mere fact that the crossing pedestrian was knocked down by the bus. *(1983) 2 Bom CR 729.*

(6) The prosecution must establish beyond all reasonable doubt that the accused at the time and place of occurrence , was driving his vehicle in such a manner as gives rise to an inference that he acted with the consciousness of the risk of causing death or injury to any person. *(1971) 2 CutWR 121.*

13. Proof and conviction.—(1) The question whether the conduct of an accused in a particular case amounted to culpable rashness or negligence will have to be judged from the circumstances of each case and from the point of view of the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient in all the circumstances of the case. *AIR 1979 SC 1848.*

(2) The offences under S. 279 ante are minor offences in relation to the offence under this section. Hence in a charge under Section 279 and this section a conviction under S. 279 also along with this section would be redundant and unnecessary. *AIR 1965 All 196.*

(3) Almost all prosecution witnesses turning hostile—No contradictions brought on record—Acquittal of accused—Held, in circumstances proper. *1981 CriLJ (NOC) 201.*

14. Charge under S. 302—Conviction under this section.—(1) A person charged under S. 302 for murder can be convicted for an offence under this section without specifically being charged for an offence under this section. *(1965) 1 MysLJ 647.*

15. Plea of guilty.—(1) An accused should know the substance of the charge before he can be in a position to plead guilty. The statement of the accused, on a charge for rash driving of a motor car that the accident was due to failure of brakes cannot be regarded as a plea of guilty. *AIR 1969 Goa 39.*

16. Sentence.—(1) Sentence, in cases arising under this section is a matter of discretion of the trial Court and the limits cannot be fixed by judicial precedents for all times in the future. *1979 CriLR (Bom) 132.*

(2) The Court must, in passing the sentence, keep out the prejudice that inevitably creeps in the case of loss of life. *AIR 1959 Mad 497 (501) : 1959 CriLJ 1344.*

(3) Benefit of probation should not be given to a person convicted under S. 304-A. *(1984) 1 Crimes 768 (P&H).*

(4) Though contributory negligence would not be a defence to charge under this section, it might be a factor for consideration in determining the sentence. *AIR 1927 Lah 165.*

(5) The imposition of one punishment on a driving of a motor vehicle under this section and a further punishment for the same offence under the Motor Vehicles Act for using a vehicle in an unsafe condition is opposed to law. *AIR 1955 Mad 548.*

(6) Where a truck and an auto-rickshaw collided against each other due to the negligence of both drivers, the rickshaw dashed against a child killing it, the trial Magistrate sentenced the rickshaw driver to rigorous imprisonment for 6 months and a fine of Rupees 500, the driver served out three weeks' imprisonment and the case was finally before the Supreme Court eight years after the accident, the term of imprisonment was reduced to the term already served out in view of the harassment of a long criminal trial and expenses incurred by the accused therefor. The fine was however increased to Rs. 700 out of which Rs. 500 were ordered to be paid to the mother of the deceased child. *AIR 1977 SC 892.*

(7) Accidental death—Sentence—On facts that deceased leaving family behind him and the accused had already been in jail for four and half months sentence of imprisonment reduced to the one already undergone—However, sentence of fine was raised from Rs. 2000/- to Rs. 10,000/- so that family members of deceased be compensated from that amount. *(1982) 2 SCC 439.*

(8) Where human misery is pitted against operational negligence on the part of stage carriage driver the Supreme Court declined to interfere with the decision of the lower court. *AIR 1980 SC 1354.*

(9) Where the rash and negligent driving of a truck driver result in a fatal accident, the Supreme Court declined to reduce the sentence of two years' R.I. and no compassion was showed. The Court however generally expressed a need to adopt a policy of correction. *AIR 1980 SC 84.*

(10) Occurrence in 1969—Accused who had already suffered imprisonment for a period of over 2.5 months need not be sent back to jail after a period of 9 years—Sentence of accused was reduced to imprisonment already undergone but fine was maintained. *1979 UJ (SC) 131.*

(11) As to other illustrations on point of sentence *1980 Chand Cri C 56; AIR 1971 Guj 72.*

(12) Conviction under S. 304-A—Accused first offender and occurrence taking place in 1979—Sentence of imprisonment reduced from one year to six months. *1984 Chand Cri Cas 117.*

17. Revision and reference.—(1) The Court will not ordinarily interfere in revision with the exercise of the discretion of the trial Court in the matter of sentence ; but it may, if necessary, enhance a sentence of fine into one of imprisonment. *AIR 1966 Bom 122.*

(2) Where in the course of a trial on a charge under this section the Magistrate decided to commit the accused to the Sessions under S. 304 the High Court held in revision that the trial should have been only under this section. *AIR 1949 Cal 302.*

(3) The High Court can interfere with an order framing a charge under this section and discharge the accused where it is found that no act of rashness or negligence could be imputed to the accused and it was purely an accident. *AIR 1927 Lah 731.*

(4) Where the defence version that there were defects in vehicle was not acceptable and no different view could be taken from the one taken by lower courts the conviction of the accused was maintained. *1984 Raj Cri Cas 82.*

18. Appeal.—(1) Where the lower Court's finding that the accused is not guilty of a rash and negligent act is supported by evidence in record, the High Court, in appeal, will not lightly interfere with it. *AIR 1969 Goa 87.*

(2) Where the delay in filing appeal was not condoned by the High Court. *1980 CriLR (Mah) 200.*

19. Charge.—(1) Observation by High Court while confirming conviction under S. 304-A that charge should have been framed under S. 304—As the High Court would have quashed proceedings if it was of opinion that conviction under S. 304-A was illegal, conviction under S. 304-A upheld by Supreme Court. *(1971) 2 SC CriR 511.*

(2) Lorry driver charged with offence under Road Traffic Ordinance,—Charge demanded to one under Section 304-A for causing death by negligence act—Essence of charge being negligent driving particulars of negligence not necessary in the charge. *(1967) 2 MalayanLJ 252.*

(3) The charge should run as follows :

I, (name and office of the Judge) hereby charge you (name of the accused) as follows :

That you, on or about the—day of—, at—, caused the death of—, by doing a rash or negligent act not amounting to homicide to wit—and thereby committed an offence punishable under section 304A of the Penal Code and within the cognizance of the Court of Sessions.

And I hereby direct that you be tried on the said charge.

20. Practice—*Evidence*—Prove: (1) That there is the death of the person in question.

(2) That the accused caused such death.

(3) That such act of the accused was rash or negligent, although it did not amount to culpable homicide.

Section 304B

[4]**[304B. Causing death by rash driving or riding on a public way.**—Whoever causes the death of any person, by rash or negligent driving of any vehicle or riding on

4. Section 304B was inserted, *ibid.*, s. 5.

any public way, not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to [5][three years], or with fine, or with both.]

Cases and Materials

1. Scope.—(1) This section deals with the causing of death by a rash and negligent driving. Driving motor cars and vehicles have become an essential part of human activities, and it is impossible to avoid a certain number of accidents. There is no criminality attached to the section but is made punishable by reason of death having resulted. Here there is no intention to cause death or knowledge that the act done will in all probability cause death. It only applies to cases where there is neither intention nor knowledge but death is caused by reason of a rash and negligent driving on public way. A person driving a motor car is under a duty to control it. Therefore it is for the person driving a car to explain the circumstances how the accident took place. The prosecution has the obligation of proving relevant facts from which the inference of negligence can be drawn *(1968 P CrLJ 1438).* Conviction under section 204B requires that some rash or negligent act on the part of accused must be conclusively established by direct evidence. It must be established by evidence that at time of the accident the driver was driving the car at uncontrollable speed and was therefore guilty of a rash or negligent act *(PLD 1959 Kar 30).* Driving a car at high speed cannot be considered as a rash and negligent act as modern technology provides for reasonable safeguard or stopping the vehicle within known distance and time. In order to prove rashness and negligence by the driver the prosecution had to establish that he failed to take proper care by omitting to take some action through which he could have avoided the accident *(1980 PCrLJ 103).* Driving a car recklessly until it came so close to a pedestrian that it became impossible to save the collision, cannot but be characterised as rash and negligent driving. The driver of a vehicle must drive at a speed that will permit of his stopping or deflecting his course within the limits of his vision. It is the duty of the driver to drive his vehicle at a speed which will not impart the safety of others using the road. The driver is under a duty of using whatever means are at hand to avoid a threatened collision. In considering the question of enhancement of sentence under this section, one has to consider whether the rash and negligent act of the accused which has occasioned the death, shows callousness on his part as regards the risk to which he was exposing other persons. The severity of the sentence must depend, to a great extent, on the degree of callousness which is persent in the conduct of the accused *(AIR 1937 Bom 96, 30 CrLJ 660).* In regard to the sentence the court must keep out false prejudice in cases of accidents.

(2) Effect of amendment on the sentence to be imposed in a criminal case—Where a right has accrued or a liability incurred under the original statute its repeal cannot affect a vested right or an incurred liability—Although ex-post facto law is not generally retrospective in its operation yet the matter may be approached from another angle viewed from the changing social condition and legislative intent—The rule of construction of a penal statute is that where the law makers intend to mollify the rigour of the law and make amendment of the existing law accordingly, the law applicable would be the law which stands modified in favour of the accused—In the instant case Section 304B was amended reducing the sentence to a term of three years' rigorous imprisonment during the pendency of the appeal—There being no saving clause on the amended Ordinance, the appellant is entitled to invoke the provisions of Section 304B of the Penal Code as amended providing for three years' irgorous

5. Subs. by Ordinance No. XLVIII of 1985, for "seven years".

imprisonment—Penal Code (Second Amendment) Ordinance, (XLVIII of 1985) S. 2. *Sekander Ali Howlader Vs. The State 8 BLD (HCD) 296.*

(3) There is absolutely nothing on record to disbelieve the consistent and corroborative evidence of competent witnesses proving the guilt of the driver Eakub Ali and his guilt under sections 338A and 304B of the Penal Code has been proved to the hilt by most cogent and consistent evidence. *Eakub Ali Khan (Md.) and anr Vs State (Criminal) 6 BLC 558.*

(4) Death by rash and negligent driving. Deceased coming from a said road to main road riding on motor-cycle. His motor-cycle colliding with car of accused which was going on main road. Car not colliding with motor-cycle. Mere fact that accused was driving car at a fast speed would not make him liable for rashness and negligence if road was clear. Duty of a person coming driving from a side road towards main road, to see that main road was clear before entering same. It was held doubtful if death of deceased was due to any rash and negligent act of accused. Accused given benefit of doubt and acquitted. *1985 PCrLJ 2794.*

(5) Causing death by negligence. Deceased while sitting in front of truck hit by iron bar projecting out of truck driven by accused as a result of collusion. No sketch prepared or position given to enable Court to ascertain as to which truck was on right side and which was on wrong side. Close examination of evidence showing that connection of accused with incident as well as his alleged rash driving and negligence were both doubtful. Driving at high speed on national highway by itself not rendering action of accused driver rash or negligent. No allegations made that accused was driving on wrong side; that headlights of his truck were not on; that he was driving with knowledge of such mechanical defect in his vehicle which could have resulted in any accident and that he was intoxicated at the time of accident. None of the vehicles examined by Investigating Officer or got examined by Motor Vehicles Inspector to prove mechanical defect. Courts below in circumstances, held, did not appreciate evidence properly nor applied correct law to facts of case. Conviction and sentence set aside. *1984 PCrLJ 1470.*

(6) Rash and negligent driving. Magistrate instead recording admission of accused in words used by him merely recording his own words that "accused pleaded guilty". Plea of guilty and conviction, held, properly recorded by Magistrate and conviction rightly based on such plea. Dismissal of appeal of accused by Sessions Judge upheld and conviction maintained. *1984 PCrLJ 1525.*

(7) Rash and negligent driving—Abetment—No prima facie evidence that accused was sitting in truck and urging or egging driver to drive rashly or negligently, Accused, held, not abetted offence or committed offence in same transaction, Coupling accused with driver vitiates trial on grounds of misjoinder of charges. *1983 PCrLJ 1298.*

(8) Rash and negligent act—Death caused by—Post-mortem examination report not forthcoming and doctor who conducted examination not produced. No positive proof available to hold with certainty that injuries suffered by victim were direct cause of his death. Conviction under section 304B held, cannot be sustained in circumstances. *1983 PCrLJ 1095.*

(9) Rash and negligent driving. Evidence, appreciation of possibility that in order to give way to an on-coming vehicle with dazzling headlights, accused driving his bus toward his left but going too close to a trolley already parked on that side and by time recovering from blinding effect of flash-light, colliding with such stationary trolley, exists. Collision, held, conviction and sentence set aside. *1983 PCrLJ 2024.*

2. Practice.—Evidence:—Prove: (1) That there is the death of a human being.

(2) That the accused caused the death.

(3) That the death was caused by the doing of a rash and negligent act of driving though it did not amount to culpable homicide.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—, at—caused the death of—by doing rash or negligent driving of (kind of vehicle) on—a public way, not amounting to culpable homicide and thereby committed an offence punishable under section 304B of the Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Section 305

305. Abetment of suicide of child or insane person.—If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication commits suicide, whoever abets the commission of such suicide shall be punished with death or [1][imprisonment] for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) Suicide is self murder. This section will apply to abettors of suicide committed by persons under eighteen years, and person under disability such as a delirious person, an idiotic person and intoxicated person. This is another section where death sentence has been provided.

(2) Deceased intoxicated with bhang. Throwing out challenge to deceased to take a certain pill (found to be arsenic) if he did not feel sufficiently intoxicated—Offence under section 305. *(1954) PLD Lah) 103.*

2. Practice.—Evidence—Prove: (1) That there is the commission of suicide by a person.

(2) That the person who committed suicide was under eighteen years of age, or was insane or delirious, or an idiot, or intoxicated.

(3) That the accused abetted the commission of suicide.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session.

4. Charge.—The charge should run as follows :

I (name and office of Judge) hereby charge you (name of the accused) as follows :

That you, on or about—, at—, abetted the commission of suicide by—, a person under 18 years of age (or an insame person or an idiot) and thereby committed an offence punishable under section 305 of the Penal Code and within the cognizance of this court.

And I hereby direct that you be tried on the said charge.

Section 306

306. Abetment of suicide.—If any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *"Whoever abets".*
3. *Evidence.*
4. *Sentence.*
5. *Practice.*
6. *Procedure.*
7. *Charge.*

1. Scope.—(1) Committing suicide though incapable of being punished is yet an act forbidden by the Penal Code as attempt to commit suicide is punishable under section 307 and abetment of suicide is punishable under section 306 PC. The section may be read with section 108 PC.

(2) Section 306 of the Penal Code provides for punishment to the person only in the case where a suicide is abetted and intended but unfortunately, there in no provision in our laws to punish such a person whose cruel behaviour drags a married woman to commit suicide but section 113A of the Evidence Act and section 498A of the Indian Penal Code provide punishment in such cases and it is expected our Parliament will enact similar laws. *State Vs. Yahiya alias Thandu & ors (Criminal) 1 BLC 185.*

(3) As there was no alleged intention on the part of the petitioners that Shimu Akter alias Kulsum committed suicide and no charge can be framed against the petitioners under section 306 of the Penal Code even on the basis of allegations made against them and as such the proceeding against the petitioners is quashed. *Abdul Khaleque Howlader and ors Vs. State (Criminal) 3 BLC 591.*

2. "Whoever abets".—(1) Suicide has not been declared as a crime by the Code. An attempt to commit suicide is punishable under S. 309 and abetment of suicide is made punishable under this section. *ILR (1972) 1 Ker 589.*

(2) Where the accused were members of the crowd who had joined the funeral procession from the house of the deceased to the cremation ground, while the widow of the deceased was walking in front of the procession with the intention of committing suicide (sati). It was held that all those persons who joined the procession were aiding the widow in committing sati and that deterrent punishment was necessary for such a brutal act. *AIR 1958 Raj 169.*

(3) Where the accused with the common object of abetting "sati" by a woman induced her to get herself burnt along with the body of her deceased husband, made her sit on the pyre with the husband's body on her lap and foiled her attempt to save herself and also the attempt of the police to save her, it was held that the accused were guilty under this section. *AIR 1928 Pat 497.*

(4) Where some people gave ghee to the widow which she poured over the fire and burnt herself, they were held guilty under this section. *AIR 1914 All 249.*

(5) Where a widow burnt herself on the funeral pyre of her husband on his death and it was indicated that the accused desired that the woman should become "sati" and arranged for cremation of the dead body in the village itself and not at the usual cremation ground and that several villagers had assembled to see "sati" and the first accused was head of the deceased's family and the others, his relatives, it was held that the offence of abetment of suicide was committed by the accused. *AIR 1933 All 160.*

(7) Where a leper wanted to commit suicide by throwing himself in a sacrificial pit and burn himself and the accused assisted him in bathing prior to suicide, and accompanied him to the sacrificial pit and garlanded him it was held that the accused were guilty of abetment of suicide. *(1867) 2 Agr HCR (Criminal) 21.*

(8) Where the accused charged with abetting suicide of the wife of one of them, failed to dissuade the lady from committing suicide when she threatened to commit suicide and actually committed suicide by setting fire to her clothes after sprinkling kerosene on them the accused could not be guilty of illegal omission contemplated by Sl. 3 of Section 107. *1983 CriLJ 706.*

(9) Where the wife of the accused died by consuming arsenic even if the accused had said to her in anger that she could die by taking poison if she liked, it would not tantamount to any such instigation for commission of suicide which could be culpable. *(1983) 1 ChandLR (Cri) 123.*

(10) Suicide by newly married girl, pregnant between 3 to 5 months—Girl not taking meals for three or four days before committing suicide—Atmosphere in the house prior to suicide tense due to certain disturbances—No act or illegal omissions attributed to husband or parents-in-law—On basis of mere not taking food and her husband and parents-in-law not persuading deceased to take food, the latter cannot be held guilty of abetting the crime of suicide. *1981 CriLJ (NOC) 178 (Punj).*

(11) Where the wife of the accused died of the burn injuries, the fact that the accused had maltreated the wife and thereby created circumstances which made the deceased wife to end her life would not amount to abetment within the meaning of the word 'abetment' as defined in S. 107, consequently there was no material justifying the framing of charge under S. 306 against the accused. *1983 Chand Cri C 350 (Delhi).*

(12) Where the deceased, a girl, who was forced by the accused to get herself photographed with one of the accused in poses which showed intimacy between them and who was threatened to marry the accused or else would be kidnapped, committed suicide to save her father from shame the accused could not be convicted for abetment of suicide. *1983 CriLJ (NOC) 35 (Punj).*

3. Evidence.—(1) Where the ingredients of abetment by instigation are proved from the evidence adduced, the accused can be convicted even if the charge under S. 34, P.C. fails provided no prejudice is caused to accused. *(1977) 81 CalWN 713.*

(2) Where the offence is not proved beyond reasonable doubt the accused is entitled to be acquitted. *1978 ChandLR (Cri) 224.*

(3) Where there was no evidence that the accused at the time of commission of suicide by the deceased in any way instigated or abetted her to commit the suicide and there was also no evidence to the effect that they were present at the time the deceased committed suicide, the accused could not be convicted under S. 306. *(1983) 2 ChandLR (Cri) 391 (P&H).*

(4) Death by burns—Dying declaration categorically stating that accused mother-in-law maltreated deceased and taunted her for bringing less dowry and that accused was responsible for extreme step taken by deceased—Conviction upheld. *1983 CriLJ (NOC) 230.*

4. Sentence.—(1) Conviction and sentence under S. 306—Accused alleged to be below 18 years of age on the date of commission of offence—Probation Officer reporting that accused was person of good character and religious bent of mind—No evidence led by prosecution to prove his age to be above 18 years—Accused given benefit the of Probation of Offenders Act and acquitted. *1981 ChandLR (Cri) 147 (P&H).*

5. Practice.—Evidence—Prove: (1) That there is the commission of suicide by a person.

(2) That the accused abetted the commission thereof.

6. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session, Chief Metropolitan Magistrate, Additional District Magistrate, Magistrate of the first class specially empowered.

7. Charge.—The charge should run as follows :

I (nameand office of the Judge/Magistrate etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, one XY committed suicide, and that you abetted its commission by—(specify the act), and thereby committed an offence punishable under section 306 of Penal Code within the cognizance of this court. And I hereby direct that you be tried on the said charge.

Section 307

307. Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ; and, if hurt is caused to any person by such act, the offender shall be liable either to [1][imprisonment] for life, or to such punishment as is hereinbefore mentioned.

Attempts by life convicts.—[6][When any person offending under this section is under sentence of [1][imprisonment] for life, he may, if hurt is caused, be punished with death.]

Illustrations

(a) A shoots at Z with intention to kill him, under such circumstances that if death ensued, A would be guilty of murder, A is liable to punishment under this section.

(b) A with the intention of causing the death of child of tender years exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of [7][the first paragraph of] this section.

(d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

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6. Inserted by the Indian Penal Code Amdt. Act, 1870 (XXVII of 1870), s. 11.

7. Inserted by the Amending Act, 1891 (XII of 1891), Sch. II.

Cases and Materials : Synopsis

1. Scope of the section.—(1) In an attempt to murder all the elements of murder exist except the fact of death. The cause of the want of success is immaterial. It may be due to timely escape, the missing fire of the gun or recovery from a wound. To determine whether an act falls within the ambit of section 307, on the wording of this section, three considerations appear to be essential: (a) the nature of the act done, (b) the intention or knowledge of the agent, and (c) the circumstances under which the act is done *(AIR 1943 Nag 145)*. In cases of attempt to commit by firearms, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence. But once he fires and something happens to prevent the shot taking effect, the offence under section 307 is made out. To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds *(31 CrLJ 782)*. Under this section the intention precedes the act and is to be proved independently of the act, not merely gathered from the consequences that ensue. An attempt to commit a crime is an act done with an intention to commit that crime and forming part of a series of acts constituting its actual commission. The distinction between preparation and attempt to commit a crime is whether the last act if interrupted and successful would constitute a crime *(AIR 1961 SC 1698)*. Mens rea is the second essential element in an attempt to murder. The intention may be of any of the kinds referred to in section 300. Knowledge being the alternative to intention in section 300 Cl(4), if established, will be sufficient *(33 CrLJ 613)*. To constitute an attempt to murder contemplated by section 307 there must be an overt act combined with evidence of mens rea, the burden is on the prosecution to prove both *(AIR 1954 Pat 350)*. Under section 34, the act committed by a number of persons in furtherance of common intention shall be deemed to be the act of every one and each of them shall be held to have committed the offence even if the act is only an attempt to murder *(AIR 1965 SC 132)*. The object of the assembly cannot said to be frustrated in the commission of an offence by some unforeseen event prior to the commission of the offence *(53 CrLJ 78)*. Death sentence can be awarded when the accused, who has been sentenced to imprisonment for life, causes hurt.

(2) Ingredients which must be proved.—Two contending parties opposing each other came to certain plot of land. The accused party had two guns in the hands of two accused persons. The dispute

was with regard to certain piece of land growing paddy. When the accused party started reaping paddy therefrom the complainant party protested. Whereupon two shots were fired from two guns which hit one of them in the arm, thigh and leg and other person was also similarly injured. Shots extracted from the affected part of the bodies were found to be small pellets. The accused were found guilty and convicted and sentenced under section 307 for attempt to murder by the Sessions Judge. Held: In the circumstances of the case the accused cannot be held guilty under section 307. *Asiruddin Paramanik (1961) 13 DLR 466=1962 PLD (Dac) 7.*

(3) In a charge under section 307, it is not necessary that the injury inflicted should in itself be sufficient in the ordinary course of nature to cause death. The section will apply even if no hurt is caused, if the circumstances disclose that the intention of the assailant was to cause the death of his victim. Intention or knowledge and the nature of the circumstances are the chief factors to be looked into in determining whether a particular case comes within the mischief of section 307. *Muhammad Vs. Crown (1955) 7 DLR 430.*

(4) Difference between sections 307 and 511 explained. There is a clear difference between the definition of attempt in section 511 and that given in section 307 of the P. Code. To convict a person of an attempt to murder under section 307, it must be shown that accused has done some act which was capable of causing death and that act must also be the last proximate act necessary to constitute the completed offence, while under section 511 the act may be any act done in the course of the attempt towards the commission of the offence. There must, however, be some act done towards the commission of the offence. *Ashaq Hussain Vs. Crown 1 PCR 121.*

(5) The intention or knowledge referred to in section 307, P.C can hardly be inferred from a mere recourse to a gun. *Md. Yakub Ali. Vs. State, (1968) 20 DLR 881.*

(6) Suspicion is not substitute of evidence. A faint doubt means a doubt without any reasonable basis. No benefit of doubt is contemplated in law. Reversal of the appellate Court's finding will not bring the case within the ambit of murder u/s. 302 P.C. Trial Court arrived at the finding that these injuries constitute murder. It is the degree of probability of death from certain injuries which determines whether the injuries constitute murder or culpable homicide not amounting to murder. *State Vs. Tayeb Ali and others (1988) 40 DLR (AD) 6.*

(7) Conviction and sentence, alteration of, on technical ground by the appellate Court—Conviction by the Trial Court u/s. 326/34, PC and sentence of 5 years' R. I.—On appeal the High Court Division altered the conviction to that u/s. 324/34, PC and reduced the sentence to 3 years' R.I.—The conviction was altered just on a technical ground, discrepancy in the evidence of Medical Officer—Altered conviction challenged before the Appellate Division on the ground that no charge was framed u/s 324 but the charge was framed u/s. 307, PC—No illegality in conviction u/s 324, PC—Though the charge was framed u/s. 307, PC—No interference by the Appellate Division. *Abdul Gafur & anr. Vs. The State. 5 BSCD 43.*

(8) In order to constitute an "attempt" two elements are necessary to be satisfied namely, mens rea (guilty intention) and actus reus (act of the person complained against). *1979 RajLW 254.*

(9) In order that an attempt may fall under this section a third element besides two elements of mens rea and actus reus (act of the person complained against) is necessary, namely, that the act was done with such mens rea as would have constituted the act a murder if death had occurred. *1980 AllLJ 337.*

(10) In an attempt to commit murder, all the elements of murder exist except the fact of death. *(1974) 76 PunLR 345.*

(11) Where the prosecution had failed to prove that injuries inflicted where sufficient in the ordinary course of nature to cause death and also the intention of accused was not established, the accused could not be convicted under S. 307. *1983 MahLR 529 (Bron).*

(12) The distinction between an offence under Ss. 324 and 307 is well established. In order to bring the offence under S. 307 home to the accused the prosecution must establish that his intention or knowledge was of the description mentioned under S. 300. Where evidence is not sufficient to establish with certainty the existence of the requisite intention or knowledge he could only be convicted under S. 324. *1984 UP Cri Rul 70 (All).*

(13) In civil law the attempted doing of an act which, when completed, is actionable is not actionable at all. On the other hand, the attempted commission of an offence is taken serious note of by the criminal law, and attempts are punished with great severity. *AIR 1961 Mad 498.*

(14) It is not necessary for the offence of attempt under this section that any hurt or injury should have been caused by the act. *AIR 1970 Ker 998.*

(15) For the attempts under this section the intervening cause of the want of success of the intention is not a relevant factor. Whatever the intervening obstacle to the success may be, the accused cannot plead it in his aid if it was not known to him. *1976 Raj Cri C 343.*

(16) When the shots could not be effective from the either side then question of commission of offence under S. 307 does not arise. *1984 CriLR 40 (Raj).*

2. Act must be one capable of causing death.—(1) The act which would amount to an attempt under this section must be one which is capable of causing death. *AIR 1970 Ker 98.*

(2) In order to amount to an attempt under this section the act must be such that if not prevented or interrupted, it would be sufficient to cause the death of the victim. *AIR 1972 SC 1764.*

(3) The words 'under such circumstances' posit the view that if the act done is intrinsically or inherently incapable of causing death, as where a man intending to murder X gives him a cup of milk which he erroneously believes to be poison, this section will not apply. *(1956) 9 SauLR 307.*

(4) An injury caused by the accused was rupture of the lung described by the doctor as "dangerous to life if not treated". Such an injury is certainly not of a type as would attract S. 307. It would be covered by S. 326. *1978 ChandLR (Cri) 76 (Punj).*

(5) Quarrel between D and G—J coming to rescue on hearing D's cries—J aged about 70—Beating of J by handle side of kassis consequently J fell down—Fractures of ribs of J—Evidence of doctor that fractures of ribs could be possible due to the fall—Held, ingredients of S. 307 were not made out. *(1983) 1 Crimes 305 (Raj).*

(6) Evidence showing that deceased not entirely died due to assault by accused though they were found to have exceeded their right of private defence—Charge under S. 307 was altered to one under S. 308. *(1983) 1 Crimes 721 (MP).*

3. "If he by that act caused death".—(1) Where the accused inflicted several injuries on a person but none of the injuries was singly or cumulatively dangerous to life, it was held that the requirement that the act must be done with such intention or knowledge or under such circumstances that if death be caused by that act the offence of murder would emerge, was not fulfilled, and the conviction of the accused under S. 324 of the Code was correct. *1968 SCD 208 (209).*

(2) Accused using sharp-edged weapons with which causing of death could not be ruled out—Held, accused cannot escape punishment under S. 307. *1981 CriLJ (NOC) 60.*

4. Section if exhaustive of all cases of attempt to murder.—(1) This section is exhaustive of all cases of attempt to murder. *(1892) ILR 14 All 38.*

(2) An act which is not capable of causing death but done with the intention to commit murder does not fall under this section, but may be punishable under S. 512 read with Ss. 299 and 300. *(1867-68) 4 Bom HCR (Cr) 17.*

5. This section and S. 301.—(1) If this section applies to a person who intends to commit murder but fails in achieving his object. The effect of the two sections read together is, that a person who shoots at A and wounds B by mistake would be guilty under S. 307 although he has not been able to get the person whom he intended to kill. *AIR 1979 (NOC) 157.*

6. Causing injury, if necessary.—(1) It is not necessary for the applicability of the section that any injury should have been caused to the person whose murder is attempted. *1979 CriLJ 400 (Bom).*

(2) The fact that only minor injuries resulted from the act or that no injuries resulted at all is not relevant for the purpose of deciding whether the act of the accused is or is not an attempt to commit murder. *1968 CriLJ 134 (Raj).*

(3) If, injuries are caused due to the act, the accused would be liable to enhanced punishment under the latter part of the section. The effect of the act is thus only relevant as a measure of the sentence to be awarded. *1969 KerLT 488.*

(4) When an injury has been caused by the accused, but there is no evidence as to the nature of the injury caused, the accused cannot be convicted under this section. *AIR 1971 SC 335.*

7. "Such intention".—(1) The words 'such intention' refer to the intention referred to in S. 300 namely : (a) intention to cause death, or (b) intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused, or (c) intention of causing bodily injury to any person, where the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. *1978 Raj CriC 432.*

(2) The intention precedes the act and is to be proved independently of the act. All that is necessary to be established is the intention and if that is established the nature of the act will be immaterial. *(1976) 78 PunLR 867.*

(3) Where intention is not proved the accused cannot be convicted under this section. *(1979) 81 PunjLR 444.*

(4) A result cannot be said to be intended where the act is a rash, negligent or reckless one. A state of mind which amounts to mens rea is that of a man who conceives the future event and believes that there is a chance of its following his volition or act. *AIR 1955 Pat 330.*

(5) The wife of the accused was strangulated by the accused when she was sleeping on the roof and threw her down from the roof—Evidence that accused used to beat and illtreat his wife—Accused was held guilty under S. 307. CrP.C. *1981 UP (Cr.) C 66 (All).*

(6) Under the English law there must, in order to constitute the offence of attempt to murder, be a specific intention to cause death. The intention or knowledge referred to in clauses secondly, thirdly, and fourthly of S. 300 is not enough. *AIR 1970 Ker 98.*

(7) The question whether, the accused had the intention referred to in the section must depend upon the facts and circumstances of the particular case. *1977 Raj Cri C 244(244).*

(8) Where the accused caused only one injury on the deceased and the occurrence took place all of a sudden and on the date of occurrence. The doctor did not opine that it was grievous and there was no

previous enmity between the parties it was held that the accused held no intention to commit murder of the deceased, he could not be convicted under S. 307 but he was convicted under S. 324. P.C. *(1980) 7 CriLT 154 (P & H).*

(9) Quarrel case—Accused No. 1 convicted under Section 307 for causing injury to A which was proved by medical evidence to be of grievous nature which might have resulted in death of A—Other evidence produced proved that there was no direct enmity between Accused No. 1 and A—Assault was made on A only because he tried to intervene in the matter—No attempt by accused No. 1 to murder A can be inferred—Conviction under S. 307 is altered to that under Section 326 of Penal Code. *(1984) 1 Crimes 297 (MP).*

(10) The nature of the weapon used, the expressed intention of the accused at the time of the act, the motive of the accused, and where injuries are caused, the nature of the injuries and severity and persistence of the blows given may all be taken into consideration in coming to a conclusion on the question of intention. *AIR 1965 SC 843.*

(11) Attempt to murder—Accused causing injury by penknife—Medical evidence showing that the injury was sufficient in the ordinary course of nature to cause death—Merely because weapon was penknife and there was only one injury it cannot be concluded that accused had no intention to cause death. *1981 CriLJ 1724 (Bom).*

(12) The intention referred to in the section cannot be inferred merely from the nature of the injuries in the absence of other circumstances. *1979 WLN (UC) 456.*

(13) In the absence of proof of other circumstances, the accused must ordinarily be deemed to have intended to cause only that kind of injury which has been actually caused. *AIR 1970 Raj 220.*

(14) The benefit of doubt as the nature of the injury intended to be caused must be given to the accused *1979 SimLC 238.*

(15) Firing with gun—Prosecution must prove that it was intended to be fired at some one—As it is possible that the shot may have been fired in the air merely with a view to create panic. *(1971) 3 SCR 674.*

(16) Where in pursuance of a conspiracy to murder the Governor of Bengal, one of the conspirators armed with a loaded revolver attempted to fire with such revolver at the Governor with intent to murder him—Held, that the offence came under S. 307. *AIR 1935 Cal 361.*

(17) Intention must be inferred from the circumstances in the case. *AIR 1970 Ker 98.*

(18) P, when pursued as a thief by B, firing at B, and hitting him not in vital part of body—Offence, held fell within S. 307. *AIR 1944 Sind 83.*

8. "Or knowledge".—(1) Even if the accused had no intention to kill but had the knowledge referred to in Section 300 'fourthly', which would make his act an offence of murder if death had been caused by his act, and had done the act with such knowledge, then he would be guilty of an offence under this section. *1975 CriLJ 1337 (Goa).*

(2) So far as a conviction is to be based on knowledge as distinguished from intention, the act (not necessarily the injury caused) must be likely to cause death and this section or S. 308 will apply according to the degree of likelihood and the knowledge of the assailant established. *AIR 1943 Nag 145.*

(3) Where the accused threw an acid on the victim but had no knowledge that his throwing of the acid was likely to cause the death of the victim and the medical evidence was contradictory on the

death being directly due to burns it was held that the offence was under S. 324 only and not under S. 302 or under this section. *(1976) 3 CriLT 47.*

(4) Mens rea—Accused chased by police party—Accused firing shot from 2-3 feets at police party—Knowledge that such shot may hit or kill police official can be attributed to accused having regard to the close range from which shot was fired. *1982 CriLJ (NOC) 140.*

(5) Where the accused caused two head injuries to the victim by wielding his axe it was held that the accused could be saddled with the knowledge that by this act in all probability death would be caused and consequently the accused was guilty under S. 307. P.C. *1981 Raj CriC 177.*

9. "Under such circumstances".—(1) The words "under such circumstances posit the requirement that the act to which the section applies must be one capable of causing death. *(1956) 9 SauLR 407.*

(2) The words "under such circumstances" have nothing to do with the question whether the act committed by the accused could or could not cause death, but relate to the nature of the offence which the accused would have committed if his act did cause death, that both in this section and in S. 308 the phrase 'under such circumstances' does not stand by itself and that it has to be read in conjunction with 'such intention or knowledge'. *AIR 1952 Pepsu 138.*

(3) The words 'under such circumstances' have been used to distinguish attempted murder from attempted culpable homicide not amounting to murder. *AIR 1943 Nag 145.*

(4) The expression 'under such circumstances' refers to facts which would introduce a defence to a charge of murder such as for instances, that the accused was acting in self-defence or in the course of military duty. *AIR 1932 Bom 279.*

(5) Where private persons tried to arrest the accused on information that they (accused) had committed dacoity and were running away and in their attempt to resist their arrest some persons from the arresting party were killed, it was held that the arresting party had no right to arrest the accused in the absence of any evidence that the offence was committed or that the accused were wanted by a person in whose presence the offence was committed and the accused could forcibly resist the attempt to arrest them and in doing so they could use fire arms etc.—Accused acquitted. *1980 LuckLJ 215 (All).*

(6) The expression 'whoever attempts to commit an offence' under S. 511 can only mean whoever intends to do a certain act with the intent or knowledge necessary for the commission of that offence. The same is meant by the expression 'whoever does any act with such intention or knowledge and under such circumstances that if he, by that act, caused death he would be guilty of murder' in S. 307. This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. *AIR 1961 SC 1782.*

(7) Where the act of the accused under this section is in defence of property or person conviction under this section is unjustified. *1974 ChandLR (Cri) 146 (Punj).*

10. 'Act' if should be penultimate act causing death.—(1) The 'act' referred to in the section is not necessarily the last or penultimate act which would have caused death. *AIR 1961 SC 1782.*

(2) If the culprit attempt to commit murder by fire-arm it is clear that he does not do any act towards the commission of the crime till he fires, but once he fires, and something happens to prevent the shot taking serious turn, the act would be an attempt to commit murder within this section. *1970 CriLJ 653 (Raj).*

11. Attempt and preparation.—(1) An attempt to commit a crime, is more than a mere preparation and must be a move directly towards the commission of the crime. *AIR 1961 Mad 498.*

(2) Attempt to commit an offence, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. the moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. *AIR 1961 SC 1698.*

12. Act of several persons.—(1) Where the act is done by one of several persons in pursuance of the common intention of several persons, the legal position is that each person must be held to have committed the entire criminal act and can be convicted under S. 307 read with S. 34, if the act done is an attempt to murder. *AIR 1978 SC 1604.*

(2) The conviction of the accused was under S. 307/34, P.C. It was however found that there was no prior enmity that the accused came at the spot together by chance and in an altercation that ensued the victim was injured. On appeal it was held S. 34 will not apply and each accused would be liable for what he did. *1984 CriLJ 201.*

(3) When a number of persons armed with dangerous weapons lay in wait and one of the members of the assembly caused death but it could not be found who caused the death and it could not be said that the common object of the accused persons was to cause death, it was held that this section did not apply and that the case fell under S. 326 of the Code, read with S. 149 of the Code. *AIR 1979 SC 1509.*

(4) In the FIR there was absolutely no mention of the motive leading to occurrence—It was also not mentioned in the F.I.R. that one of the accused was initially armed with a gun which he passed on to the other and exhorted him to fire at the victim and also that the other two accused were armed with lathis—Held it was highly improbable and strange that all the accused were lying in wait for the complainant to arrive—Held conviction was liable to be set aside. *1982 UP Cri R 265.*

(5) Assault taken in the phases—First phase restricted only to involvement of three accused causing injuries to R and C—Death of R cannot be attributed to these three accused who made assault on R at a lesser extent only at first phase of incident—Concerted assault on R proved common intention for causing grevious hurt—Concerted assault on C with Pharsa and iron rods by accused attributes to them similar common intention—They are liable to be convicted under Section 326/34 of Penal Code and not under Section 307 of Penal Code with respect to grevious hurt caused to R and C by means of lethal weapons. *(1984) 1 Crimes 392 (MP).*

(6) Members of unlawful assembly armed with deadly weapons—Only one of them firing shots resulting in injuries covered by Section 307—No proof that other accused used weapons during assault—They were, still, liable to be convicted under Ss. 307 and 149—However, they did not use their weapons was a mitigating circumstance—Their sentence was reduced to rigorous imprisonment for two years. *AIR 1982 SC 59.*

(7) Five members forming an unlawful assembly alleged to have attempted to murder the complainant—Name of one of the co-accused not mentioned in the F.I.R.—No participation in the act shown by him—Accused held, entitled to benefit of doubt and was acquitted. *(1983) 2 Crimes 112 (MP).*

(8) Where the evidence of the prosecution was thrown away with respect to the four acquitted accused, the High Court threw away the same evidence with respect to the rest four accused who were convicted under S. 307—Prosecution held failed to prove its case and the accused were acquitted. *1981 LuckLJ 47(50) (All).*

(9) The fact that a large number of accused have been acquitted and the remaining who have been convicted are less than five cannot vitiate conviction under S. 149 read with the substantive offence if there are other persons who might not have been identified or convicted but were party to the crime and together constitute the statutory number. *AIR 1974 SC 1567.*

(10) Offence of attacking with sua, dang resulting in injuries sufficient to cause death proved against two accused—Other accused acquitted—Prosecution case cannot be doubted though some of the accused were acquitted and accused could be held guilty of offences under Ss. 307, 325, 323, 34. *1982 CriLJ (NOC) 36.*

(11) Even though in a case under S. 307 read with Ss. 147, 379, accused was acquitted of offences under Ss. 307 and 379 yet if the common object was proved, a conviction under S. 147 can be sustained. *1981 BLJ 329.*

(12) The deceased and accused persons A and B were abusing each other while drunk—The deceased proceeded towards A with a stick and gave a blow on A's head—A retaliated in the heat of passion, but without premeditation by firing one shot at the deceased and injured him—B, who was also standing by, fired one shot at the deceased and injured him—Injuries resulted in the death of the deceased, but it was not known who caused the fatal injury—Held that A's case fell under S. 308 as he was entitled to the benefit of Exception 4 to S. 300 and hence if it was proved that he caused the fatal injury the offence committed by him was only culpable homicide not amounting to murder—Held also that B was guilty of an offence under this section for he was not entitled to the benefit of Exception 4 to S. 300. *AIR 1955 NUC (Pepsu) 3280.*

(13) Offence under S. 307, P.C.—Proof—Premeditated and unprovoked attack by several persons on victims with deadly weapons and with persistent ferocity—Which individuals gave fatal blows need not be proved—Conjoint complicity is presumed. *1982 AllLJ 519(523, 4525) : 1983 All Cri C 118.*

(14) Two assailants, were held, had inflicted three knife injuries on the victim. There was no evidence as to who inflicted an injury on the abdomen of the victim. The possibility of the associate of the appellant accused causing that injury could not be ruled out. There was no evidence to show that the appellant showed a common intention with his associate to cause grievous injury. The appellant accused was therefore held guilty u/s. 324 and not u/s. 307/34, P.C. *1982 UP (Cr) C 46(49) (All).*

(15) Where two accused persons made attempt to murder K one inflicted injuries with lathi and other with pharsa and their presence at place of incident was proved beyond doubt, they both had gone to place of occurrence in furtherance of their common intention to murder K. It would be sufficient to hold them guilty of an offence under S. 307, read with S. 34, of Penal Code notwithstanding fact that injuries caused by lathi were not found on person of complainant. *(1984) 1 Crimes 214 (MP).*

13. Burden of proof—Sufficiency of evidence.—(1) The burden is always on the prosecution to prove first, the 'actus reus', that is, the act which, in point of law, marked the commission of the offence and secondly the 'mens rea' that is the intention to go on to reach a definite objective which would constitute a specific offence. *1979 UJ (SC) 281.*

(2) In a case under S. 307, evidence of instigation was a weak type of evidence. *(1983) 1 Crimes 420 (All).*

(3) Where the version of the incident given by the eye-witnesses cannot be relied then possibility that the accused acted in self defence cannot be ruled out. *(1983) 1 Crimes 671 (All).*

(4) H was charged for attempting to kill his wife W by poisoning. In her statement recorded by police officer W stated that H mixed some greenish powder in the milk and forced her to drink the milk

by slapping across her face. The blood test of W revealed no trace of poison, but there were traces of barbiturate a white substance, found in the urine of W. There was delay in recording statement of W after she had recovered consciousness and the delay was not explained. Held, in the circumstances of the case that prosecution had failed to establish its case beyond reasonable doubt. *1983 Raj CriC 388.*

(5) Where in the course of a fight, the two accused inflicted upon each other injuries so serious that in both cases their dying declaration had to be taken and there were no eyewitnesses to the occurrence and in separate trials, the evidence in each trial consisted of the evidence of the complainant and the admission of the accused that he himself had been injured in the occurrence, it was held that the conviction of each for an offence under this section was bad; because if either of the persons had died of the wounds, the other would be entitled to the benefit of Exception 4 to S. 300 and therefore the offence would not be murder. The proper section applicable was S. 326. *AIR 1925 Rang 133.*

(6) Accused challenging the convictions and sentence under S. 307 of Penal Code and under S. 27 of Arms Act—Accused inflicting injuries with knife on the chest of the complainant—Doctor opined that the injuries were grievous—Held that in the absence of relevant medical record and without knowing the reasons which led doctor to give him opinion, it was not safe to hold that the injuries inflicted by the accused were grievous. *(1980) 82 PunLR (D) 71 (73) : 17 DLT 297.*

(7) Prosecutrix, a near relative of accused raped and given 22 injuries on neck and other vital parts of the body with a sharp edged weapon—Doctor's evidence corroborating said injuries and rape—Testimony of victim could not be disbelieved only because she was prosecutrix—Accused convicted of an offence of attempting to commit murder. *(1983) 2 Crimes 641 (643) (Raj).*

(8) Where the Investigating Officer did not care to send the gun and its pellets to the ballistic expert it cannot be with certainty that the accused had fired the gun the pellets of which hit the wall of the complainant's 'padwa'. Held that the prosecution had not been able to bring home the guilt against the accused beyond doubt and the accused was acquitted of the charge under S. 307. *1982 Rajasthan Cri Cas 409.*

(9) Dark night—Accused identified merely from his voice—Conviction cannot be based on such identification for an offence under S. 307. *1981 CriLJ 1060.*

(10) In spite of two gun shots injuries, the complainant managed to escape up to 1.5 furlongs and ultimately fell in that field and there was no blood at that well or in the way up to that field. Held, prosecution failed to prove that the crime was committed by the accused and that he deserved to be acquitted. *1982 (UP) Cri R 104 (All).*

(11) Where name of the accused was not mentioned before the police shows that the complainant was not able to identify the accused. To base a conviction under S. 307 on such evidence is wrong. *1981 CriLR (SC) 304.*

(12) Evidence of eye-witness found convincing and is corroborated by FIR and one other witness—Minor discrepancy in the FIR and evidence of witness, held, would not discredit his testimony and conviction was upheld. *(1983) 1 Crimes 717 (MP).*

(13) Conviction of appellant under S. 307 based solely upon evidence of complainant and his brother—Independent witnesses turned hostile—Non-examination of independent witnesses is a material circumstance and conviction cannot be based on their police diary statements—Conviction was set aside. *(1983) 2 Crimes 865 (MP).*

(14) Where the conviction under S. 307 was based solely on two witnesses and they were found to be interested witnesses, benefit of doubt was given to the accused. *1981 Chand CriC 172 (Punj).*

(15) Accused were charged under Ss. 148 and 307, 149 P.C.—Prosecution give only two police sub-inspectors as eye-witnesses—No independent witness was produced. There was no corroboration to the evidence of police sub-inspectors. The Court was not satisfied with the uncorroborated testimony of police officers. Benefit of doubt was given and accused acquitted. *1981 UP Cri C 35 (All).*

(16) Where there was no corroboration to the sole testimony of the victim and other eye-witneses who could corroborate him were not cited as they were not prepared to support the case of the prosecution other witnesses were either inimical or interested, it was held that it was not proper to base conviction u/s. 307 on the sole uncorroborated testimony of the victim. *1982 UP (Cri) C 38 (All).*

(17) Presence of eye-witnesses found doubtful and injured not examined—Non-examination of injured held fatal and conviction set aside. *(1984) 11 CriLT 61 (Punj).*

(18) Trucks loaded with rice going from Rajasthan to Gujarat—Despite efforts by police, trucks did not stop—Police firing at the tyres of trucks and in return some one from the truck firing at police causing injury to the elbow of a constable—Accused charged under S. 307/34—Held that the prosecution evidence being vague conviction of accused was not justified. *1982 Raj Cri C 125.*

14. Charge and conviction.—(1) Once it is found that the act done by a person was in furtherance of the common intention of number of persons the legal position that results is that each person must be held to have committed the entire criminal act; and that, therefore, a charge for an offence under this section read with Section 34 is sustainable in law. *AIR 1985 SC 132.*

(2) Complainant stating in FIR that he was shot by three persons, whose identification was done by complainant after 1.5 months from date of incident—Evidence of witness, unreliable—Contradictory statements made by complainant regarding the number of accused by increasing that to 5 with passage of time—Conviction of accused under S. 307/34, not sustainable. *(1984) 1 Crimes 428 (MP).*

(3) Where the accused are charged for an offence under this section read with S. 34, one of the accused can be convicted for an offence under this section simpliciter when no prejudice has been caused to him by the absence of a separate charge for an offence under this section. *(1973) 1 SCWR 738.*

(4) The conviction of accused persons for an offence under this section read with Ss. 34 or 114 is legal though they were charged only with offences u/ss. 304, 148 and 149 of the Code. *AIR 1924 Bom 502.*

(5) Where the accused has been charged for an offence under S. 302 read with S. 34, he cannot be convicted for an offence under this section without a specific charge therefor. *AIR 1948 Mad 293.*

(6) No infirmity about the appraisal of testimony of eye and prosecution witnesses about the complicity of accused in crime under S. 302 read with S. 34 P.C.—Conviction recorded under S. 307 read with S. 34 though specific charge was drawn under Section 302 against accused —Convicted altered to S. 302 simpliciter. *1983 AllLJ 1044.*

(7) Where the material facts constituting the charge for an offence under this section have not been stated in the charge, the conviction of the accused for an offence under S. 387 is bad. *AIR 1960 MadhPra 11.*

(8) The prosecution evidence showed that only one injury was inflicted by the accused-appellant during the course of an altercation with the complainant, and if the injury caused had resulted in death of the complainant, the accused could only have been convicted under S. 304, Part I. It was therefore held that since the injury did not result in death of the complainant the accused can only be convicted of the offence of attempt to commit culpable homicide punishable under S. 308 only and not under S. 307. *1982 Raj Cri C 167.*

(9) Where evidence showed that accused A and D inflicted injuries on the victim on parietal side of the head and were convicted u/s. 323, .P.C. then when one witness for the first time stated that accused M inflicted injury on the victim on the same side M cannot be convicted under S. 307 but deserved to be treated alike with others and convicted under S. 323 P.C. *1982 WLN (UC) 272 (Raj).*

(10) Conviction of a desolate woman jumping into a well with her two children u/ss. 307 and 309—Release on admonition for offence u/s. 309 but imprisonment for offence u/s. 307—Distinction is without valid reasons—Accused released on admonition for both offences. *AIR 1981 SC 1776.*

(11) A conviction for an offence under this section read with S. 149 can be converted, in appeal, to one for an offence under this section read with S. 34, when the common object charged and the common intention are identical and the accused is not prejudiced. *AIR 1961 SC 1787.*

(12) Though the accused is convicted for an offence under this section read with Section 149, if, from the details given in the charge, an alternative charge for an offence under this section is permissible then, the accused can be convicted for an offence under this section simpliciter. *AIR 1968 All 49.*

(13) In a case under S. 307/149, P. C. where all accused were college students between the age group of 19-20, the Supreme Court altered the conviction to S. 324 and allowed the compounding of the offence. *AIR 1981 SC 1240.*

(14) Upon a charge for an offence under Ss. 302, 362 and 364, the trial Court acquitted the accused of the offence of murder but convicted him for offences under Ss. 362 and 364, it was held that the accused was not liable for conviction under Ss. 362 and 364, but held that he could be convicted for an offence under this section even though he was not separately charged under it. *AIR 1936 Oudh 44.*

(15) A conviction for an offence under this section can be altered in appeal to one under S. 328. *AIR 1931 Pat 346.*

(16) Accused were charged under S. 307 for stabbing the injured with a knife in the abdomen. Neither was the injury was opined as dangerous nor was the knife recovered. As the injury was not found to be grievous the High Court altered conviction to S. 324, P.C. and as the accused when he committed the offence was about 20 years old High Court released him on probation. *(1983) 2 ChandLR (Cri) 33 (Delhi).*

(17) Accused in a scuffle with policemen on duty caused them simple hurts while accused also sustained injuries in the scuffle. On these facts a conviction under S. 307 held was not maintainable and was altered to one under S. 332 & 34 P.C. *(1982) 2 Chand LR (Cri) 291 (Delhi).*

15. Sentence.—(1) It is only in exceptional circumstances that imprisonment for life should be awarded for an offence under S. 307. It is only when in cases of heinous type the life of victim is saved by sheer chance such sentence be awarded. *1984 Raj Cri C 58.*

(2) The question of sentence would depend upon the facts of the particular case. Where an attack was severe and unprovoked and the victim's hand has been maimed, a sentence of 5 year's rigorous imprisonment was held not to be too severe. *AIR 1923 Lah 236.*

(3) In the case of a conviction under S. 307 it is bad in law for a Court to direct that the accused when it had convicted should in no case be released till the accused has undergone a minimum period of 25 years in jail. *1982 CriLJ 1762 (Bom).*

(4) The following facts may be taken into consideration while awarding the sentence:

(a) that the accused was a man of advanced years ... weak mind and had contracted the morphia habit. *(1912) 13 CriLJ 197 (Lah).*

(b) that he was in a drunken state. *(1965) 2 CriLJ 168 (Orissa).*

(c) that the matter was compromised by the parties. *(1974) 1 CriLT 555 (Punj).*

(5) The fact that the accused were in a position to pay some compensation to the injured can be taken into consideration for determining the question of sentence. *1981 CriLJ 840 (842) (P & H)*

(6) Where the accused fired shot at police party but no member of the police party was actually hit by it, the sentence was reduced. *1982 CriLJ (NOC) 140.*

(7) Sentence of rigourous imprisonment for three years and fine of Rs. 100 for an offence under S. 307, P.C was not severe. *AIR 1979 SC 699.*

(8) Accused had already served more than 7 years in jail. Accused was convicted under S. 307 and had caused injury no. 2 on the person of the victim. Sentence was reduced to period already undergone while maintaining conviction under S. 307. *1979 UJ (SC) 281.*

(9) On peculiar facts and circumstances of the case reduction of sentence to two years' R.I. held would meet the ends of justice. *AIR 1977 SC 1338.*

(10) Where the accused was not a previous convict and there was nothing against his character and antecedents and he was only 17 years of age at the time of occurrence his sentence of 5 years for an offence under S. 307 was reduced to the period already undergone and his fine was raised from Rs. 500 and Rs. 5000.00 *(1983) 2 ChandLR (Cri) 488 (Punj and Har).*

(11) Murderous assault by accused on his own brother—Held, that in the interests of justice the sentence should be reduced to one year, since a longer sentence would lead to renewal of old feud. *AIR 1944 Pat 37.*

(12) Where a person aimed his gun at another and tried to shoot him, but the gun went off and the person was grievously wounded, it was held that the conviction for an offence under this section and S. 326 was not improper, but that only one punishment should be awarded. *AIR 1937 Sind 61.*

(13) Where the accused were punished for specific act which constitutes the object of the riot, i.e., S. 307, it was held unnecessary in the circumstances of the case to convict them for rioting and S. 148, Penal Code both, though it might not be illegal. Their conviction under S. 307/149, Penal Code, was held sufficient. *AIR 1952 Manipur 2.*

(14) Where the force or violence used in the offence under S. 307 constituted the unlawful assembly a riotous assembly and the accused are convicted and sentenced u/s. 307 by reason of the application of S. 149, there is no room for a separate sentence u/s. 147 or S. 248. *AIR 1943 Sind 212.*

16. Procedure.—(1) Complaint against accused persons including police officer for offences under Section 302, 326 and 307—Offence under Section 302 confined only against police officer—Cognizance of offence against police officer not taken for want of sanction—Prosecution for offences under Ss. 326 and 307 can proceed against remaining accused. *1981 CriLJ 541.*

(2) Where accused was convicted under S. 307 for causing injuries with a gun which was recovered during investigation its (guns) confiscation under S. 452 at the conclusion of the trial is legal Ss. 4(2) and 5 Cr.P.C. are not attracted. *1983 CriLJ 1511.*

(3) Where the case was registered under S. 307, P.C. and before acceptance of the final report submitted by the police, the informant had filed a protest petition and the Magistrate after considering the same had passed the order that the accused persons be summoned that part of the order whereby the Magistrate took cognizance was valid but as the case was exclusively triable by Sessions Court that part of order which straightway directed summoning of the accused was not valid. *1983 AllLJ 254.*

(4) During an appeal against a conviction and sentence under S. 307, the record was burnt in a fire, and could not be re-constructed and there were some loopholes in prosecution case, appellate Court held would not confirm the conviction nor could a retrial be ordered. *(1983) 1 Crimes 831 (All).*

(5) Where the accused was convicted under S. 307 but the case record was burnt out beyond reconstruction in a fire in the Court, though the incident took place 11 years before, it was a fit case for retrial which can be ordered under S. 482 to serve the ends of justice. *1981 CriLJ 67.*

(6) *Procedure*—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, District Magistrate, Additional District Magistrate, Chief Metropolitan Magistrate or Magistrate of the first class specially empowered by the Government in that behalf (first paragraph) ; District Magistrate or Additional District Magistrate specially empowered by the Government in that behalf. Chief Metropolitan Magistrate (second paragraph); Court of Session (third paragraph).

17. Bail.—(1) Where the names of several persons charged under Ss. 302, 304 and 307 were mentioned in the F.I.R and by the injured persons, and some of them were released on bail, it was held that the others too should be granted bail except those persons against whom there was reasonable ground for believing that they were guilty of an offence punishable by death. *AIR 1969 Manipur 6.*

(2) When accused a liquor vendor who was found keeping liquor containing pyridine for sale which was opined as unfit for human consumption, the accused would be entitled to bail as prosecution did not positively urge that pyridine was poison. *1981 CriLJ 461 (Punj).*

(3) Conviction under S. 307—Sentence for imprisonment for four years and a fine of Rs. 400 imposed—Appeal not likely to be listed for hearing in the near future—Appellants in jail for seven months—Appellants were granted bail by High Court. *(1983) 1 ChandLR (Cri) 143 (P & H).*

(4) As many as 17 injuries found on the victim—All injuries simple—No injury recorded as grievous—Application for bail granted by the High Court. *1981 LuckLJ 261 (All).*

(5) Informant as well as investigator were not examined in a trial under S. 307/34. Held Withholding of such witnesses had materially prejudiced accused. *1984 CriLJ (NOC) 95.*

18. Juvenile offenders.—(1) As to the applicability of the section to offenders aged 15 and 18.. *AIR 1979 SC 1509.*

19. Practice.—Evidence: Prove: (1) That the death of a human being was attempted.

(2) That such death was attempted to be caused by, or in consequence of, the act of the accused.

(3) That such act was done with the intention of causing death ; or that it was done with the intention of causing such bodily injury as (a) the accused knew to be likely to cause death : or (b) was sufficient in the ordinary course of nature to cause death ; or that the accused attempted to cause such death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

20. Charge.—The charge should run as follows:

I (name and office of the Magistrate/Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about—at—did an act namely—with such intention or knowledge and under such circumstances that by that act you had caused the death of X, you would have been guilty of murder (and that you thereby caused the hurt to the said X) and that you have thereby committed an offence punishable under section 307 Penal Code and within the cognizance of this court.

And I hereby direct that you be tried on the said charge.

Section 308

308. Attempt to commit culpable homicide.—Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

Cases and Materials

1. Scope.—(1) This section is substantially the same as section 307 the only difference being that this relates to an attempt to commit culpable homicide while section 307 relates to an attempt to commit murder.

(2) A perusal of the provisions contained in S. 307 and 308 show that they makes provision for punishment of an attempt to commit certain offence and that while S. 307 is linked with the offence of murder punishable under S. 302, S. 308 is linked with the offence of culpable homicide punishable under S. 304 Part I. *1982 Raj Cri C 167.*

(3) This section and S. 307 are expressed in similar language and should be interpreted in the same way. *AIR 1961 SC 1782.*

(4) This section applies to attempt to commit culpable homicide not amounting to murder, S. 299 defines the offence of culpable homicide and S. 300 states in what cases culpable homicide is murder and in what cases it is not murder. Culpable homicides not covered by S. 300 'secondly', 'thirdly' or 'fourthly', and culpable homicides so covered by falling within the exceptions to S. 300 are all culpable homicides not amounting to murder. The illustration of this section does not warrant the conclusion that the type of cases mentioned in the illustration is the only type of cases falling under this section. *AIR 1943 Nag 145.*

(5) X, deceased, and A and B were abusing each other all in a state of drunkenness, X struck A on the head with a stick A retaliated without premeditation by firing at X, B standing by also fired a shot at X, X died, but whether A or B caused the fatal injury was not known. It was held that A's case fell under Exception 4 to S. 300 and that he was guilty under section of an attempt to commit culpable homicide not amounting to murder. *AIR 1955 NUC (Pepsu) 3280 (DB).*

(6) A and B inflicted two injuries on the head of X. Neither of the injuries was, by itself, likely to cause death. It was not established which of the two injuries was caused by A, and which by B. The two injuries together were likely to cause death. Held that the Court could not consider the cumulative effect of the two injuries and hold both the accused responsible for the offence under S. 308, of the Code, but that they may both be convicted under S. 308 read with S. 34 or S. 149 of the Code. *AIR 1961 Raj 24.*

(7) Conviction of accused under Ss. 302/34 set aside due to doubt as to his participation in the occurrence and use of gun by him—His conviction under S. 308. P. C. and 25, Arms Act has also to be set aside. *AIR 1983 SC 748.*

2. Practice.—Evidence—Prove: (1) That the accused did an act.

(2) That he did the said act (A) with the intention of (i) causing such bodily injury as is likely to cause death, or (ii) causing death on—(a) grave and sudden provocation or (b) in the exercise of right of private defence which was exceeded, or (c) believing in the lawful discharge of the public duty, or (d) by consent of the deceased; or (B) with the knowledge that the act was likely to cause death.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first Class (first paragraph); Court of Session, Chief Metropolitan Magistrate, District Magistrate, Addl. District Magistrate or Magistrate of the first class specially empowered (second paragraph).

4. Charge.—The charge should run as follows:

I (name and office of the Magistrate/Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about—at did an act, to wit—, with such intention (or knowledge), and under such circumstances, that if by that act you had caused the death of—, you would have been guilty of culpable homicide not amounting to murder (and you caused hurt to the said—by the said act,) and thereby committed an offence punishable under section 308 of the Penal Code and within the cognizance of this court.

And I hereby direct that you be tried on the said charge by that court.

Section 309

309. Attempt to commit suicide.—Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, [8][or with fine, or with both].

Cases and Materials : Synopsis

1. *Scope.*
2. *"Attempts to commit sucicide."*
3. *Threat to commit suicide.*
4. *Evidence and proof*
5. *Punishment.*
6. *Practice.*
7. *Procedure.*
8. *Charge.*

1. Scope.—(1) This is the only instance in which an attempt to commit an offence is punishable but where actual commission cannot be punished. Attempts to commit suicide are of three classes:—(a) Persons who are driven to attempt to commit suicide by real intent suffering either mental or physical. Even instance of this kind should be treated according to its peculiar features; (b) Where suicide is attempted in a moment of passion, with little or no reflection, and not very definite motive, punishment, though not severe, should be inflicted; (c) Where the suicide partakes of the nature of poison, severe punishment may be inflicted.

(2) Attempt to commit suicide is made punishable under this section, but there is no provision in the Penal Code making suicide itself and offence, obviously because there would be no offender who could be brought within the purview of the law. *(1911) 12 CriLJ 425 (Lah).*

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8. Subs. by the Indian Penal Code Amendment Act, 1882 (VIII of 1882), section 7, for "and shall also be liable to fine".

2. "Attempts to commit suicide."—(1) An "Attempt" must be distinguished from "preparation." It is the next stage after preparation and is a direct movement to the commission of the intended act. *Rat Un Cr C 188 (189).*

(2) Mens rea, etc. involves some conscious effort to achieve a particular result. In order to constitute attempt under this section the particular result intended to be achieved should be to destroy oneself. *1963 MPLJ (Notes) 194.*

(3) Where the accused jumped into well to avoid police and afterwards came out of the well of his own accord, it was held he could not be convicted for an attempt to commit suicide. *(1912) 13 CriLJ 246.*

(4) Where a woman, being driven almost frantic by prolonged labour pain, throws herself into a well to take her own life, she will be guilty of attempting to commit suicide. *AIR 1919 All 376.*

(5) If a person openly declares that he will fast unto death and then proceeds to refuse all nourishment until the stage is reached when there is imminent danger of death ensuing, he would be guilty of attempted suicide. *AIR 1962 All 262.*

(6) Where 'A' caused the death of his wife and also inflicted injuries on his person he would be guilty of offences under S. 300 and S. 309. *1984 CriLJ 124.*

3. Threat to commit suicide.—(1) An attempt to commit suicide being an offence, it is clear that suicide is an act forbidden by law. A threat to commit suicide will therefore amount to 'coercion' within S. 15 of the Contract Act. *AIR 1969 Cal 293.*

4. Evidence and proof.—(1) To base a conviction on circumstantial evidence, the evidence must be such as to be incapable of any explanation except on the hypothesis of the guilty of the accused. *1979 WLN 445 (Pr 13) (Raj).*

(2) Where the accused categorically confessed that she had thrown children into well and she herself jumped into it, and her confession was corroborated by the circumstance that she was taken out of the well and by the recovery of dead bodies from well, the accused was guilty of offences under S. 302 and S. 309. *1982 WLN (UC) 43 (Raj).*

5. Punishment.—(1) The punishment prescribed by this section is either imprisonment extending to one year, or fine or both. The law thus confers upon the Court a very wide discretion in the matter of punishment. *AIR 1934 Lah 514.*

(2) It is not possible to lay down hard and fast rule in the matter of punishment but the Court must, in each case, consider the motive for the attempted suicide. *AIR 1934 Lah 514.*

(3) If from the circumstances in which the accused attempted suicide he is to be pitied rather than despised, the punishment for such offence should not be severe. *AIR 1967 Goa 138.*

(4) Where a woman convicted under Section 309 and S. 307 has been released on admonition for the offence under S. 309 she should also be released on admonition for the offence under S. 307. *AIR 1981 SC 1776.*

6. Practice.—Evidence—Prove: (1) That the act amounted to an attempt to commit suicide.

(2) That the attempt was complete by doing an act towards the commission of suicide.

7. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

8. Charge.—The charge should run as follows:

I, (name and office of the Magistrate)—Thereby charge you (name of the accused) as follows:

That you, on or about the day of—, at—, attempted to commit suicide and did an act, to wit—, towards the commission of it, and you thereby committed an offence punishable under section 309 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried on the said charge.

Section 310

310. Thug.—Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of, or accompanied with, murder, is a thug.

Cases

(1) This section defines "a thug" and S. 311 provides the punishment for being a thug. Constant association by the accused with a gang which commits robbery or child stealing by means of or accompanied by murder is sufficient to establish an offence under this section. It is not necessary that the he must actually commit the act. *1881 Pun Re No. 28, Page 59.*

Section 311

311. Punishment.—Whoever is a thug, shall be punished with [1][imprisonment] for life, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) Thugs are robbers and dacoits, but robbers and dacoits are not thugs. Thugs committed robbery or dacoity or kidnapping always accompanied with murder.

(2) Habitual association with various persons, after passing of the Code, for the purpose of committing robbery by means of the administration of a preparation of dhatura, with admixture of opium, amounts to being a thug within the meaning of S. 310 of the Code. *1881 Pun Re No. 28 P. 59.*

(3) In these cases, whether any act is done or not or offence committed in furtherance of the conspiracy, the conspirator is as such punishable; he will also be punishable separately for every offence committed in furtherance of the conspiracy. *(1901) ILR 24 Mad 523.*

2. Practice —Evidence—Prove: (1) That the accused was associated with other persons or persons.

(2) That such person, including the accused, were associated for the purpose of committing robbery, or child-stealing, by means of, or accompanied with murder.

(3) That such persons were habitually associated for that purpose.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Chief Metropolitan Magistrate. Additional District Magistrate of the first class specially empowered by the government in that behalf.

4. Charge.—The charge should run as follows:

That you, on or about—at—, were a thug and you thereby committed an offence punishable under section 311 of the Penal Code and within the cognizance of this Court.

And I hereby direct that you be tried on the said charge

Of the Causing of Miscarriage, of Injuries to Unborn Children, of the Exposure of Infants, and of the Concealment of Births.

Section 312

312. Causing miscarriage.—Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman, who causes herself to miscarry, is within the meaning of this section.

Cases and Materials

1. Scope.—(1) This section may be read along with sections 52 and 39. The section deals with the causing of miscarriage with the consent of the woman. The expression "with child" means pregnant. Quickening is the name applied to peculiar sensations experienced by a woman about the fourth or fifth month of pregnancy. The expression "causing miscarriage" would include anything done or given to a woman to procure abortion. Prevention of conception is not an offence.

(2) A woman is with child as soon as gestation begins. *(1886) ILR Mad 369.*

(3) "Quickening" is perception by the mother that the movement of the foetus has taken place or the embroya has taken a foetal form. *1971 MadLW (Cri) 240.*

(4) The stage of "quickening" is a more advanced stage of pregnancy. *AIR 1955 Mys 27.*

(5) The section applies also to the pregnant woman herself who causes her own miscarriage. *(1886) ILR 9 Mad 369.*

(6) The term 'miscarriage' is not difined in the Code. In its popular sense it is synonymous with abortion and consists in the expulsion of the embryo or foetus i. e. the immature product of conception. *(1886) ILR 9 Mad 369.*

(7) The expression "voluntarily causing a woman to miscarry" includes any act such as delivery of medicine which causes abortion. Where the accused merely pledged the ornaments of the pregnant woman and thereby raised money intentionally to aid and facilitate the miscarriage of the woman he would not be liable under this section but could properly be charged with abetment of the offence under S. 312 read with S. 109 of the Code. *(1909) 10 CriLJ 19.*

(8) Administering a harmless substance which cannot cause miscarriage cannot be said to be an act towards the commission of the offence which is a necessary element in an attempt. *AIR 1933 Cal 893.*

(9) Acts of doctor and nurses which facilitate or accelerate delivery cannot be treated as offences under this section merely because the delivery would have otherwise been delayed and particularly where the child is born alive and no injury is caused to the mother or the child. *AIR 1955 Mys 27.*

(10) Where a woman almost frantic by pains of prolonged labour attempted to take her own life and in so doing gave birth to a dead child, it was held that she was guilty of attempting to commit suicide but not of attempting to voluntarily cause miscarriage. *AIR 1919 All 376.*

(11) Where the allegation was regarding offence of accusing miscarriage of a child the date of alleged adultery was not of much importance as causing miscarriage is an offence. Hence non-mention of the date of adultery in the complaint under S. 312 is of no much significance. *(1984) 88 CalWN 325.*

2. Practice.—Evidence—Prove: (1) That the woman was with child; or (if under the second clause) that she was quick with child.

(2) That the accused did some act likely to cause a miscarriage.

(3) That she did so voluntarily.

(4) That such woman did miscarry in consequence.

(5) That such miscarriage was not caused in good faith in order to save the woman's life.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class (first paragraph); Court of Sessions, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered (second paragraph).

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate/Judge etc.,) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, voluntarily caused (name of the woman) then being with child to miscarry, such miscarriage not being caused by you in good faith for purpose of saving the life of the said—, and you have thereby committed an offence punishable under section 312 PC and within my cognizance.

And I hereby direct that you be tried on the said charge.

Section 313

313. Causing miscarriage without woman's consent.—Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section may be read along with sections 90 and 312 PC. This section deals with a case where the miscarriage is done without the consent of the woman.

(2) PW 2 Hosne Ara deposed in court that the accused Abul Kalam developed carnel relation with her against her will as a result of which she was carrying a baby but the accused Kalam and others took her to a doctor and caused her miscarriage and delivery of six months' old dead baby which was corroborated by the medical certificate and the evidence of PWs 1, 5 and 8 and hence the charge under section 313 of the Penal Code is proved beyond all reasonable doubt against the convict appellant Abul Kalam Gazi when the other four convict-appellants are entitled to be acquitted. *Abul Kalam & others Vs. State (Criminal) 5 BLC 270.*

(3) The Sessions Judge cannot direct the Magistrate to take cognizance of the offence and the impugned order so far it relates to such direction is set aside and quahed. *Abdul Rouf and others Vs. State and another (Criminal) 5 BLC 178.*

2. Practice.—Evidence—Prove: (1) That the woman was with child;

(2) That the accused did some act to miscarry was caused;

(3) That he did so voluntarily;

(4) That as a result miscarriage was caused;

(5) That he did not do so in good faith in order to save the woman; and

(6) That the woman did not consent to such abortion.

3. Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session.

4. Charge.—The charge should run as follows:

I, (name and office of Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—voluntarily caused X (name of the woman) then being with child to miscarry without her consent, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said woman X aforesaid and thereby committed an offence punishable under section 313 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 314

314. Death caused by act done with intent to cause miscarriage.—Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

If act done without woman's consent.—and, if the act is done without the consent of the woman, shall be punished either with [1][imprisonment] for life, or with the punishment above-mentioned.

Explanation.—It is not essential to this offence that the offender should know that the act is likely to cause death.

Cases and Materials

1. Scope.—(1) This section provides for the case where death has occurred in causing miscarriage. The first part of the section deals presumably with cases where the woman has consented to miscarriage being effected. The second part of the section, however deals with a case where the act is done without her consent. Consent may be expressed or implied. This section may be read along with section 90 of this Code.

(2) A conviction under this section cannot be based on the uncorroborated testimony of an accomplice. *(1970) 74 CalWN 378.*

(3) Where medicine was administered in the womb of a woman with child to induce abortion and there was enough medical evidence to prove that the woman died due to shock and severe clostridial infection producing jaundice as a result of the medicine, it was held that the offence was proved and that non-preservation of uterus and its fluid for chemical analysis did not at all create any suspicion about the cause of death. *1972 CriLJ 1488 (Mad).*

(4) Where there is no proof that the death was the result of the miscarriage, the offence of causing the miscarriage would fall under S. 313 and not this section. *1979 KerLT 550.*

(5) Where the appellant was charged and tried for the offence of abetting R to cause abortion of the child in the womb of the deceased but was convicted only for abetting the deceased to cause miscarriage, it was held there was prejudice to the appellant inasmuch as he was not notified that he was to meet the charge of abetting the deceased and the conviction of the appellant was set aside also on the ground that the charge of abetment failed when the substantive offence against the principal R was not established. *AIR 1970 SC 436.*

(6) Where the death was the result of miscarriage, but after considering the peculiar circumstances of the case viz, the accused being the father of victim must have suffered from a real sense of disgrace when he came to know that his unmarried daughter was running illicit pregnancy and had he taken the victim to some Govt. hospital recognised by some Act he could not be put up for trial, but was facing trial on account of getting abortion by crude method and also considering the mental torture of the loss of his own daughter suffered by the accused the sentence of five year's R. I. was reduced to 18 Months R. I. *1981 LuckLJ 7.*

2. Practice.—Evidence—Prove: (1) That the woman was with child.

(2) That the accused did an act to cause miscarriage.

(3) That he did so with that intention.

(4) That such act caused the death of woman.

(5) That such act was done by the accused without the consent of the woman.

3. Procedure.—Not cognizable—Warrant—Not baliable—Not compoundable–Triable by the Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered (first paragraph) or Court of Sessions (second paragraph).

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate/Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, with intent to cause the miscarriage (name of the woman) did certain act to wit —, which caused the death of the said—, and thereby committed an offence punishable under section 314 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by the said court on the said charge.

Section 315

315. Act done with intent to prevent child being born alive or to cause it to die after birth.—Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) In Bangladesh, abortion or any other act described in this section can be committed with impunity only to save the life of the mother. The offence which this section punishes is the injury to the child's life.

(2) Where there was no evidence to show any act or omission on the part of the child after its birth but charge under S. 315 could not be framed against the accused. *1982 CriLJ 27.*

(3) Prosecution for cheating—Plea of civil liability—The sum and substance of the complainant's case is that the accused realised a total sum of Tk. 50,000.00 from the complainant on a promise to secure him a highly paid job in Abu Dhabi. The point canvassed on behalf of the accused in support of his application under section 561A CrPC was that the liability, if any, was of a civil nature for which no prosecution would lie. Since, according to the petition of complaint, the accused totally denied receipt of any sum from the complainant, the question of civil liability does not arise. *Abdur Rahim Vs. Enamul Haq 43 DLR (AD) 173.*

2. Practice.—Evidence—Prove: (1) That the woman was with child.

(2) That the accused did an act before the child was born.

(3) The he did so to prevent the child from being born alive or to cause it to die after its birth.

(4) That such act was done by the accused with that intention.

(5) That such act was not done in good faith to save mother's life.

(6) That the child was born dead or died after its birth.

(7) That such death was caused by the aforesaid act of the accused.

3. Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—The charge should run as follows:

I, (name & office of the Magistrate/Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, did an act, to wit—, to— (name of the woman) before the birth of her child with the intention of thereby preventing that child from being born alive (or causing it to die after its birth), and by that act did prevent that child from being born alive (or cause it to die after its birth) and the said act was not done in good faith for the purpose of saving the life of the mother, and thereby committed an offence punishable under section 315 of the Penal Code and within the cognizance of this court.

And I hereby direct you be tried by this court on the said charge.

Section 316

316. Causing death of quick unborn child by act amounting to culpable homicide.—Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration

A, knowing that he is likely to cause the death of pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

Cases and Materials

Scope.—(1) This section punishes the causing of death of a quick unborn child by an act amounting to culpable homicide. If a person strikes a pregnant woman and thereby causes death of her quick unborn child, he will be guilty of the offence defined in this section, if the blow was intended by him to cause the woman's death or was one which he knew or had reason to believe to be likely to cause it. Where the accused is sentenced under section 302 for causing death of a pregnant woman, even if a separate conviction under section 316 is not objectionable, separate punishment therefore offends against section 71 PC.

(2) In order to constitute offence under this section it must be proved that such act did cause the death of quick unborn child. The unborn child should already have been quick inside the womb of the mother. *(1970) 36 Cut LT 711.*

(3) From the act of the accused, it must be possible to state that he had the necessary mens rea which renders him liable for punishment for culpable homicide. Such an act must result in the death of a quick unborn child. Then this section is attracted. *1971 Mad LW (Cri) 240.*

(4) In order to constitute offence under this section the act complained of must be done with the necessary intention or knowledge which is specified in S. 299 P. C. Merely because the death of the quick unborn child has resulted, the act would not amount to an offence under this section; the accused must be shown to have acted under circumstances from which it can be inferred that he had the necessary intention or knowledge to cause death of the victim of his assault and which would amount to the offence of culpable homicide. *AIR 1966 All 590.*

(5) If the act of the accused does in fact result in the death of the victim then the offence committed will be something else. *AIR 1953 Trav-Co 374.*

(6) Separate punishment for offences under Ss. 302 and 316 will offend the provisions of S. 71. *AIR 1953 Trav-Co 374.*

2. Practice.—Evidence—Prove: (1) That the woman was quick with child.

(2) That the accused did an act to cause the death of the child.

(3) That the circumstances under which the act was done were such as to make the accused guilty of culpable homicide if death had been caused.

(4) That such act caused the death of the quick unborn child.

3. Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session.

4. Charge.—The charge should as run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you on or about the day—of—, at—, did act, to wit—, under circumstances that if you thereby caused death, you would be guilty of culpable homicide, and did by such act cause the death of a quick unborn child, and you thereby committed an offence punishable under section 316 Penal Code and within my cognizance.

And I hereby direct you be tried by this court on the said charge.

Section 317

317. Exposure and abandonment of child under twelve years, by parent or person having care of it.—Whoever being the father or mother of a child under the

age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

Cases and Materials

1. Scope.—The offence under this section may be done by parents of bastard children or patents in distress and the gist of the offence is the exposure or leaving of such child in any place with the intention of abandoning it. In other words it is the desertion of the child by persons bound to support and protect it or by one who has taken up on himself the duty of protecting it either by adoption or otherwise *(18 CriLJ 98).* There must be an intention of wholly abandoning the child. Where a mother exposed an infant child knowing that such an abandonment by her was likely to cause its death and the child died, it was held that section 304 PC and not section 317 would apply.

(2) This section is meant to protect children below 12 years of age who are unable to take care of themselves. Abandonment and exposure of such children by their patents or by persons under whose care they are have therefore been made penal. *(1871) 16 SuthWR 12(12) (DB).*

(3) Where a woman immediately after giving birth to an illegitimate child threw it into a thorn-bush and concealed the act without showing any solicitude for the child, she was held guilty under this section. *AIR 1914 Upp Bur 22.*

(4) This section applicable only where child is exposed alive. If the child is dead or if the person exposing remains with the child till it is dead or if the person exposing murders the child and then leaves its body, a case under this section is not made out, but the case may fall under S. 302 or 304 of the Code, as the case may be. *AIR 1951 Raj 123.*

(5) A person who receives the child from the mother on condition of her not desiring to have it back must be deemed to be a person having care of the child, until he entrusts it to some other person or institution. If the person so receiving the child abandons or exposes it, he will be guilty under this section though his custody of the child may have been only temporary or for a short period. If the mother had handed over the child for abandonment she will also be liable under this section read with S. 109 of the Code. *AIR 1916 Bom 135.*

(6) In order to constitute offence under this section the intention must be to wholly abandon the child. A temporary neglect of or separation from the child is not sufficient. *AIR 1920 Nag 181.*

(7) The section does not cover a case where the child is left in the care or custody of a person. *1970 CurLJ 625.*

(7) Where a pregnant widow who was travelling by train had labour pains at the station, went to the close-by public latrine on the platform delivered an illegitimate child and returned to the adjacent bridge for rest it was held that her conduct was consistent with innocence and she was given benefit of doubt. *AIR 1920 Nag 181.*

2. Practice.—Evidence—Prove: (1) That the child is under twelve years of age.

(2) That the accused is the father or mother, or the person having the care of that child.

(3) That he exposed or left such child at the place in question.

(4) That he so exposed or left the child with the intention of wholly abandoning it.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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, being the father (or mother or having the care of a certain) child under the age of twelve years, to wit—of the age of years, did expose or leave the said child in a certain place, to wit—with the intention of wholly abandoning the said child, and thereby committed an offence punishable under section 317 of the Penal Code, and within the cognizance of this court.

And I hereby direct that you be tried by this court on the said charge.

Section 318

318. Concealment of birth by secret disposal of dead body.—Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child die before or after or during its birth, intentionally conceals or endeavors to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Dead child.*
3. *Endeavour to conceal.*
4. *Intentionally.*
5. *Concealment—Illustrative cases.*
6. *Secret disposal.*
7. *Charge and conviction.*
8. *Proof.*
9. *Practice.*
10. *Procedure.*
11. *Charge.*

1. Scope.—(1) This section is designed to punish a person for intentionally concealing the birth of the child from the public. It punishes a person for secretly burying or otherwise disposing of the dead body of the child and so intentionally concealing or endeavouring to conceal the birth of a child is not concealed from the world at large, no offence under section 318 is made out *(AIR 1935 Cal 489).*

(2) Concealment or endeavour to conceal must be by secretly burying or otherwise disposing of the dead body. *1960 MPLJ (Notes) 227.*

(3) The words "whether such child" show that it is not necessary that the child should have been born alive. *(1889) 2 CPLR 153.*

(4) The section contemplates that the child must have reached such a stage of development and maturity that it may be born alive and be capable of living. *(1906) 3 CriLJ 432.*

(5) The concealment of the birth of the foetus after reaching stage where it has assumed human shape would be an offence under this section. *(1892) 5 CPLR 21.*

2. Dead child.—(1) The child in relation to which the offence is committed should have been dead at the time of concealment. *1973 RajLW 684.*

(2) Where the body of a newborn child was found thrown in an open pit and the evidence was conflicting as to whether it was alive if dead at the time it was so thrown the Court held that the case

should be considered as falling under this section and not under Section 302 which would have been applicable if the child had been alive when it was thrown in the pit. *(1906) 3 CriLJ 317.*

3. Endeavour to conceal.—(1) The word "endeavour" has been understood as meaning the same thing as "attempt." *(1895) 8 CPLR (Cri) 5.*

4. Intentionally.—(1) The intention to conceal or endavour to conceal the birth is a necessary ingredient of the offence under this section. *(1905) 2 CriLJ 667 (Nag)*

(2) Where there is no such intention to conceal the birth of the child the fact that the body was disposed of secretly will not constitute an offence under this section. *(1895) 8 CPLR (Cr) 5.*

5. Concealment—Illustrative cases.—(1) Where the birth of the child is not concealed from the world at large no offence under this section is made out. *1960 KerLJ 1497.*

(2) Merely disclosing the fact of the birth to some confident and the latter disposing of the dead body secretly, will not absolve the accused of the penal liability under this section. *AIR 1955 Cal 489.*

(3) Where the birth of twins took place in the hospital which was known to the nurses who attended the delivery and also to others in the hospital, and was also known to two women whom the nurses tried to persuade to adopt the children and another relative of the woman (also charged) knew about the birth, it was held there was no concealment within the meaning of this section. *AIR 1935 Cal 489.*

(4) Where the evidence does not show that there was any concealment or that there was an endeavour in that direction one of the most important ingredients of this offence is not established. *1959 NagLJ (Notes) 40.*

6. Secret disposal.—(1) In order to constitute an offence under this section, there must be a secret disposal whether of a permanent or of a temporary character of the dead body. *(1900) 13 CPLR (Cr) 188.*

(2) Mere intention without the act giving effect to her intention will not amount to an offence under this section. *1960 MPLJ (Note) 227 page 78.*

(3) Leaving the dead body of child in a public place near a number of houses does not amount to secret disposition of the body within the meaning of this section. *(1913) 14 CriLJ 525 (Lah).*

7. Charge and conviction.—(1) Where the prosecution seeks to prove both the offences of murder and concealment of the birth of the child by secretly disposing of the dead body to the child, charges should be framed under two heads and not in the alternative and when the accused is found guilty of both the offences, he should be convicted under both S. 302 and this section and not in the alternative. *AIR 1941 Pesh 22.*

(2) An accused charged under S. 318 read with S. 34 may be convicted under S. 318 simpliciter where no prejudice to the accused is caused. *1972 AllLJ 958(963).*

8. Proof.—(1) In order to convict a woman of attempting to conceal the birth of her child, the dead body must be found and as that of the child of which she is alleged to have been delivered. *AIR 1935 Cal 489.*

(2) The same evidence which has not been believed for an offence of murder should not be relied on for an offence under this section where there is no eye-witness who can depose to the fact that the accused came to the place of concealment and secretly buried the body of the child there. *AIR 1953 Madh B 224 (224): 1953 CriLJ 1383.*

(3) If a conviction is to be based solely on the statement of the accused it is fair that the statement should be taken in its entirety. *(1911) 12 CriLJ 142(142) (DB) (Mad).*

(4) Where the evidence points to a disposal (though not secret) of the dead body, by the father of the girl, who gave birth to an illegitimate child, but there is no direct evidence against the girl, she should not be convicted for an offence under this section. *1958 All WR (HC) 761(764).*

(5) Where the conduct of the girl in trying to conceal the birth of the child is capable of a number of explanations which might be the offspring of an innocent intention , the mere fact that she subsequently tried to conceal the birth of the child would not be enough to bring the charge home to her. *1958 AllLJ 703.*

(6) Where the accused a teenage tribal girl was convicted for offence under S. 318 but no witness deposed to have seen the accused carrying or giving birth to child or wrapping and concealing it, nor there was any compact by accused of any pain in her private parts during medical examination indicating recent delivery and her judicial confession was also not voluntary, her conviction would not be sustained in spite of plea of guilty with prayer for clemency as the same might be result of plea bargaining by someone. *1981 CriLJ 522 (Gauhati).*

(7) Death of new born child—Accused found with dead body—Statements of chance witnesses regarding recovery of child—Not reliable—Conviction of accused u/s. 318—Invalid. *1982 CriLJ 27.*

9. Practice—Evidence—Prove: (1) That there was the birth of the child.

(2) That the child died either before, during, or after its birth.

(3) That the accused buried or otherwise disposed of the dead body.

(4) That such burial or disposal of the body was secretly done.

(5) That the accused thereby intentionally concealed, or endeavored to conceal, the birth of such child.

10. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

11. 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—day of—, at—, by secretly burning the death body of a certain child, to wit—, the child of XY, intentionally concealed (or endeavoured to conceal) the birth of the said child and thereby committed an offence punishable under section 318 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Of Hurt

Section 319

319. Hurt.—Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Cases

1. Scope.—(1) Sections 319 and 338 deal with hurt in various forms. This section defines hurt as causing bodily pain, disease, or infirmity and section 351 deals with the smallest offence connected

with infliction of bodily injury or harm so slight that no person of ordinary sense and temper would complain of it, is excluded by section 95 Severe bodily pain will fall within the definition, no matter whatever may be the duration of such pain. Hurt need not be caused by direct physical contact between accused and the victim. Serious mental derangement by causing shock amounts to hurt. Where the accused, with intent to frighten victim, presented himself in a sudden and horrified manner, intention to cause hurt can be presumed *(AIR 1944 Sind 19)*. The term infirmity is used to denote the inability of an organ to perform its normal function which may be temporary or permanent *(26 CrLJ 413)*. Where a husband caused hurt to his wife by giving a blow with a stick it was held that the husband was liable for causing hurt to his wife. A husband has no right to punish his wife by beating her for imprudence and impatience *(37 CrLJ 1153)*.

(2) Causing hurt and "using force" are not the same thing and the word force does not appear in the definition of "hurt." The use of criminal force may fall short of causing bodily pain in which case it will not amount to "causing hurt" within the meaning of this section, but will be a separate offence. *AIR 1928 Mad 18.*

(3) The offence of causing hurt cannot be said to be included in the offences involving the use of criminal force, such as rioting. *(1937) 38 CriLJ 442 (Nag).*

(4) To constitute hurt injury need not be received by physical contact. If bodily pain is caused by some voluntary act, a hurt is caused. *1970 RajLW 135.*

(5) Causing of bodily pain is sufficient to constitute offence of hurt under this section. It is not necessary that any visible injury should be caused on the person of the victim. *AIR 1967 AndhPra 206.*

(6) Where a person was dragged by hair and fisted, it was held that hurt was caused irrespective of the fact whether any visible injury was caused to the victim thereby. *AIR 1967 AndhPra 208.*

(7) The term "infirmity" has been interpreted by judicial decisions to mean inability of an organ to perform its normal function which may either be temporary or permanent. *AIR 1924 All 215.*

(8) Infirmity denotes an unsound or unhealthy state of the body and clearly a state of temporary mental impairment or hysteria or terror would constitute infirmity within the meaning of this section. *AIR 1944 Sind 19.*

(9) There is nothing in this section to suggest that hurt should be caused by direct physical contact between the accused and his victim. A person causing serious mental derangement by some voluntary act causes hurt; for instance, a person who deliberately sets out to cause a shock to a person with a weak heart and succeeds in doing so causes hurt. *AIR 1944 Sind 19.*

(10) Where poisonous drug is administered to another with the result that the person to whom the drug is administered is thrown into a delirium with the possible risk of falling into a coma and becoming unconscious for the time being it is clear that both bodily pain and infirmity are caused. *AIR 1924 All 215.*

Section 320

320. Grievous hurt.—The following kinds of hurt only are designated as "grievous":—

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.— Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Cases and Materials : Synopsis

1. ***Scope.***
2. ***Grievous hurt caused to oneself.***
3. ***"Emasculation".***
4. ***"Disfiguration"—Clause sixthly.***
5. ***"Fracture or dislocation of bone or tooth"—Clause seventhly.***
6. ***"Hurt which endangers life" etc. Clauses eighthly.***
7. ***Medical evidence as to nature of hurt.***

1. Scope.—(1) This section defines grievous hurt. Only those injuries are grievous hurt which have been specifically stated in this section. Eight kinds of hurt are designated in the section and they are defined as grievous and the classifications are not exclusive or exhaustive. Injury to the nerves is not covered by any one of these eight conditions which are necessary in order to designate a hurt as grievous *(PLD 1960 WP Lahore 62)*. Similarly, injuries inflicted with the help of a burning firewood cannot be considered as grievous hurt as they do not come within the specific items of the injuries mentioned in the definition of grievous hurt. The meaning of "fracture" is breaking and on the question whether the crack of the bone should extend to the inner surface also, there is conflict of judicial opinion *(38 CrLJ 1960)*.The term "member" as used in the Code means a limb or an organ being a part of man capable of performing a distinct offence. As such it may include eyes, ears, nose, mouth, hand and feet. It is the privation of any of these limbs or organs or the destruction or permanent imprisonment of their powers that has been made punishable as grievous hurt under the Code *(1971 P CrLJ 1075)*. Injuries inflicted by a sharp edged weapon on the head, neck, chest and abdomen are always regarded as dangerous to life. Injuries inflicted on other parts of the body such as forearm even if it becomes fatal may fall only under this section and not under murder or culpable homicide not amounting to murder *(40 CrLJ 308)*. Before a conviction can be had for an offence as defined under section 320, one of the injuries defined in this section must be strictly proved. The court should come to a finding of its own as to whether the hurt was grievous or simple. The court can examine medical officer to ascertain whether the injuries are of any of the kinds mentioned in section 320. Where the complainant had not proved that he had remained in severe bodily pain for 20 days or that he was not in a position to follow his ordinary pursuits, his merely remaining in the hospital for 33 days does not mean automatically that he is unable to follow his ordinary pursuits unless a statement to that effect is made and it is supported in that respect by the doctor. Proof of mere residence in hospital for 20 days is not conclusive evidence. The term 'emasculation' means depriving a person of masculine vigour, castration. Injury to the scrotum would render a man impotent. A person emasculating himself cannot be convicted under this section. The word 'disfigure' in this section means to do a man some external injury which detracts from his personal appearance, but does not weaken him as the cutting off a man's nose or ears.

(2) The expression "grievous hurt"—Explained if any injury endangers life, it is also a grievous hurt. The complainant while returning from field was suddenly attacked by the petitioners who assaulted him mercilessly causing as many as five injuries with sharp cutting weapons on different parts of his body. Filing of a pre-emeption case by the complainant against the petitioners was proved to be the motive of the crime. The charge was proved on the basis of the evidence of 11 witnesses for the prosecution including two Medical Officers. The petitioners were convicted by the trial Court u/s. 326/34, PC and sentenced to five years' rigorous imprisonment. On appeal their conviction was altered to that u/s. 324/34 of the Penal Code and sentence was reduced to three years' rigorous imprisonment. The conviction was altered by the High Court Division just on a technical ground that is, there was a discrepancy in the evidence of Medical Officer of the Thana Health Complex, who gave him treatment earlier. Observed—The complaint has stated that he has given treatment in the hospital for 26 days, but in the discharge certificate the period has been stated to be 16 days, but his certificate was given five months, after the treatment. Whereas in the earlier certificate given by him in the normal course of discharging his function 30 days' time was mentioned including 15 days for complete rest. This witness was declared hostile by the prosecution. The High Court Division taking the view that the complainant's evidence as to 26 days' treatment in hospital did not corroborate, altered the conviction to remain on the safe side. Held:—It may be further mentioned that "bodily pain for 20 days or a person's inability to attend to his normal work during this period, as referred to in Sec. 320 of the Penal Code, is not the only requirement of brining a hurt within the definition of "grievous hurt." If any injury endangers life it is also a "grievous hurt." The question should have been approached from this angle also. Be that as it may, the altered conviction is being challenged now on the ground that no charge was framed u/s. 324 but the charge framed was u/s. 307 of the Penal Code. We find no illegality in convicting the petitioners u/s. 324 of the Penal Code though he was charged u/s. 307 of the Penal Code. The sentence is also not severe. *Abdul Gafur & anr. Vs. The State, 5 BSCD 43.*

(3) There is no evidence that any of the injuries endangered the life of any of the victims. There was no fracture, the victims were discharged from the hospital after treatment of several days. There is no evidence to show that any of the victim suffered severe bodily pain for a period of 20 days unable to follow his ordinary pursuits. So the conviction under sections 326 and 325 of the Penal Code is not proper and legal. *Bazlur Rahman Howlader alias Jitu and 3 others Vs. State represented by the Deputy Commissioner 51 DLR 457.*

(4) Although the doctor deposed that the injuries he found were grievous in nature but those injuries are not grievous as contemplated under section 320 of the Penal Code. *Aminul Islam alias Ranga and others Vs. State (Criminal) 5 BLC (AD) 179.*

(5) PW 2, the Medical Officer, examined injuries and issued medical certificates. But while deposing in court he did not state whether any of these injured persons had any "grievous hurt" as defined in section 320 of the Penal Code. The trial Court, however, referred to the medical certificate in respect of PW Taifur and observed that the injury in his hand was a 'grievous hurt'. Fracture or dislocation of a bone is one of the eight kinds of grievous hurts described in section 302 of the Penal Code; but the doctor did not depose in this case saying that there was any fracture of bone in the hand of Taifur. His deposition on oath is a substantive piece of his evidence, whereas his medical certificate is a corroboration of his evidence on oath. The corroborative evidence cannot be considered without the substantive evidence unless the substantive evidence is dispensed with under any provision of law such as section 510A CrPC which makes a post-mortem report admissible when the maker of the report

cannot be available for examination in court. The learned trial Court assigned the fracture as grievous hurt to appellant Hadi; but the evidence is that Hadi had caused the head injury of Taifur; there is no evidence as to who caused the injury in his hand which resulted in the fracture if there was any such fracture at all. As such appellant Hadi could not be connected with the fracture and in the absence of any charge for grievous hurt caused in furtherance of a common intention under section 34 of the Penal Code, his conviction under section 325 is not sustainable in law. But as to the charge under section 323 of the Penal Code against all these four appellants it is found to have been clearly established by direct evidence supported by evidence of the expert PW 2, Mr. TH Khan contends that the appellants have been collectively convicted and sentenced under sections "148/323/325" without specifying whether all of them were held guilty of all these offences or whether separate sentences were passed on each count. It is true that for each offence as charged with there shall be distinct conviction if the charge is proved, but as to punishment, ex parte sentences need not be passed on each count; or if separate sentences are passed, they be direct to run concurrently. The impugned order of sentence is not specific on these points. This is however a mere irregularity which is curable under section 537 CrPC. In the result, the appeal is allowed in part. The conviction under section 148 is altered to that under section 147 the conviction under section 325 is set aside and all the appellants are convicted under sections 147 and 323 of the Penal Code; they are sentenced to rigorous imprisonment for six months and fine of Tk. 500/- only, in default to rigorous imprisonment for 2 months more under section 147 of Penal Code, no separate sentence is passed under section 323 of the Penal Code. The appellants who are on bail are directed to surrender to their bail bonds to serve out the remaining part of their sentence as it stands now. Mere assembly of five persons or more is not an unlawful assembly. An assembly of five persons or more is an unlawful if it has as its common object any of the unlawful acts which have been specifically described in section 141 of the Penal Code. When force or violence is used by an unlawful assembly or any of its members then the offence of "rioting" is committed. *7 BCR 6 AD.*

(6) This section designates or specifics only certain types of hurt as grievous. A person cannot therefore be said to cause grievous hurt unless the hurt caused is one of the clauses thus specified. *AIR 1953 Orissa 308.*

(7) Where a person is charged with having caused grievous hurt the Court must decide on evidence whether the hurt caused is one of the clauses specified in this section. *(1906) 4 CriLJ 202 Low Bur)*

(8) A wound is a break in the continuity of the whole skin. It is not enough that there has been a rupturing of a blood vessel or vessels internally for there to be a wound. *(1983) 3 WLR 537.*

2. Grievous hurt caused to oneself.—(1) A man cannot commit the offence of causing grievous hurt on his own person. *1875 Pun Re 22 (Cri) Page 59.*

3. "Emasculation."—(1) The term emasculation means the depriving a man of masculine vigour by castration or by cutting off his private parts. *1878 Pun Re (Cri) No. 22 Page 59.*

4. "Disfiguration"—Clause sixthly.—(1) Where in order to punish a child, the accused branded her cheeks with hot iron, it was held that if the scars left by the hot iron were of a character to cause any permanent disfiguration, then the offence would amount to grievous hurt. *(1862-63) 1 Bom HCR 101.*

(2) Where a person causes a cut on the bridge of the nose of another with a sharp weapon like a razor or a knife, this amounts to permanent disfiguration within the meaning of the 6th clause, even though the internal wall separating the two nostrils is intact. *AIR 1950 Ajmer 13.*

5. "Fracture or dislocation of bone or tooth"—Clause seventhly.—(1) It is not necessary that the bone should be cut through and through or that the crack must extend from the outer to the inner

surface or that there should be any displacement of any fragment of the bone. If there is a break by cutting or splintering of the bone or if there is a rupture or fissure in it, it would amount to a fracture within the meaning of S. 320. *AIR 1970 SC 1969.*

(2) A cut may be a grievous hurt even if the bone is not cut through. *AIR 1963 Mad 10.*

6. "Hurt which endangers life." etc.—Clause eightly.—(1) The phrase "hurt" which endangers 'life' in this section, must be applied with reference to normal conditions; any hurt which endangers human life also be one "likely to cause death" within the meaning of S. 290 of the Code. *AIR 1927 Bom 259.*

(2) Where a person dies as a result of his testicles being squeezed for a long time with considerable force and the medical evidence showed that under normal conditions it would not endanger life, held that the offence amounted only to simple hurt, since the offence did not know that the injury would endanger life or cause death under normal conditions. *AIR 1917 Bom 259.*

(3) Where the wound itself is not dangerous to life, but death was caused within 20 days due to tetanus which supervened, held that the injury did not amount to grievous hurt. *AIR 1925 Lah 297.*

(4) The thrusting of a lathi into the auns of a man causes injury which endangers life. *AIR 1934 Oudh 87.*

(5) A blow on the head with an axe which penetrated half an inch into the head is an instance of injury which endangers life. *AIR 1955 SC 216.*

(6) Proof of being in a hospital for the space of 20 days cannot be taken as equivalent to proof of grievous hurt. *AIR 1969 Guj 337.*

(7) Where, though the complainant has to be kept treated in the hospital as an inpatient for 45 days, the medical evidence showed that after 14 days the complainant could have been discharged and that after that period he was in a position to attend to his ordinary pursuits it was held that the injury suffered only simple hurt. *AIR 1958 Ker 8.*

7. Medical evidence as to nature of hurt.—(1) In order that the injured had a grievous hurt the prosecution must prove from medical record relating to the treatment given to the injured and also by producing doctor who attended on him, nature and extent of the injury. *1980 Chand LR Cri C 62.*

Section 321

321. Voluntarily causing hurt.—Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Cases and Materials

1. Scope.—(1) "Intention" is a necessary ingredient of an offence under this section. This section defines the offence of voluntarily causing hurt made punishable under section 323 while section 319 defines the nature of the act which would constitute the offence of voluntarily causing hurt. The two together constitute the offence of voluntarily causing hurt and punishment therefore is provided in section 323. The word "voluntarily" which is defined in section 39 read with this section shows that the offence is done with the intention to cause hurt or with the knowledge that it is thereby likely to cause hurt and does cause hurt.

(2) This section defines the offence of "voluntarily causing hurt." There cannot be a 'voluntarily' causing of hurt unless there is an intention of causing hurt or knowledge that hurt is likely to be caused by the act. A rash or negligent act which causes hurt is not within this section but may come under S. 337 or 338.*1955 CriLJ 173 (Madh B).*

(3) Voluntarily to cause hurt—Burns received by the victim while escaping through fire caused by the accused—Accused held guilty of voluntarily causing burns. *1955 PLD (Lah) 453.*

(4) Intention or knowledge is the main ingredient of the offence. Not only must the act have caused hurt, but the offender must have intended to cause the hurt or must have had knowledge that hurt was likely to be caused by the act.*(1962) 1 MadLJ 161.*

(5) Where the accused fired a shot towards the ground in a direction where no one was standing with the object of scaring away his pursuers, but the bullet rebounded from the ground and struck a person who died as a result of the injury caused, it was held that as the accused had no intention of causing hurt to any one, he was not guilty of voluntarily causing hurt. *AIR 1933 Oudh 269.*

(6) If the accused had intended to cause only hurt, then, notwithstanding the fact that death has occurred, his act will only be an offence under this section. Thus, where victim was suffering from enlarged or diseased spleen and the blow given by the accused in or near the region, without knowledge of the condition of the victim's spleen, ruptured the spleen and brought about the death of the victim, the case was held to be only one of causing hurt. *AIR 1952 Assam 110.*

(7) Deceased owed accused one anna. When payment was demanded he said that he had no money then and he would pay later. Accused thereupon kicked him twice on the stomach. Deceased collapsed and died soon after—Death was due to shock and there was no mark of injury external or internal—It could not be held that accused intended or knew that by kicking in the abdomen, he was likely to endanger life. He could be convicted only under S. 323 and not S. 304 (2) *AIR 1953 Madh B 262.*

Section 322

322. Voluntarily causing grievous hurt.—Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

Cases and Materials

1. Scope.—(1) Section 320 describes that the nature of the act. This section describes the mens rea to constitute the offence which is made punishable under section 325. In order to find out if the offence

has been committed, both the nature and extent of the hurt caused and the intention or knowledge of the offender in causing injury have to be taken into account. In the nature of things, it is difficult to obtain direct proof of what the offender thought was likely to happen. In all cases it is really a question of inference from the nature of the act committed by the offender, his conduct and the surrounding circumstances of the case, the requirement of explanation to this section will be satisfied if the offender of knowledge that by his act he was likely to cause grievous hurt. Such knowledge can be inferred from the part of the body chosen for inflicting violence and the severity of that violence as shown by injuries on the body of the victim.

(2) This section defines the offence of "voluntarily causing grievous hurt". Causing of grievous hurt as defined in S. 320 coupled with the intention to cause such hurt or with the knowledge that such hurt is likely to be caused, constitutes the offence of voluntarily causing grievous hurt; there must be correspondence between the result and the intention or knowledge of the accused. *AIR 1958 Pat 452.*

(3) If the offender intended or knew himself to be likely to cause simple hurt only, he cannot be convicted of causing grievous hurt even if the resultant hurt was grievous. *AIR 1914 Upp Bur 26.*

(4) Simple fracture of radius of arm by stick—No evidence whether the hurt intended or known to be likely to be caused was grievous—Accused liable u/s. 323 and not u/s. 326. *AIR 1989 Mad 507.*

(5) Fist blow on diseased spleen—Rupture of spleen which amounts to grievous hurt—Death ensuing—No evidence of intention or knowledge of causing grievous hurt—Offence under S. 323 and not under S. 304 committed. *AIR 1959 Ker 372.*

(6) When the act that caused the hurt is such that any person of ordinary prudence may be held to know that it is likely to cause grievous hurt, then it may safely be taken that the offender intended to cause grievous hurt or at least to have knowledge that grievous hurt was likely to be caused. *AIR 1958 Pat 452.*

(7) A person who forcibly thrusts a lathi into the rectum of another must be taken to know that he is likely thereby to cause grievous hurt. *AIR 1935 Oudh 468.*

(8) It cannot be said that anyone who assaults another with a lathi must be presumed to intend to cause grievous hurt. An assault with a lathi is not inconsistent with an intention of causing simple hurt only. *AIR 1949 All 89.*

(9) When a man hits another over the head with a stick hard enough to fracture his skull and endanger his life, he must be held in the circumstances to have either intended to cause grievous hurt or to have known that he was likely to cause grievous hurt. *(1912) 13 CriLJ 471.*

(10) If an accused in striking another with a rod had no intention to cause or knowledge of his being likely to cause grievous hurt, but grievous hurt was caused by the victim falling down after the blow, the accused is not liable for the offence of causing grievous hurt. *AIR 1952 Cal 481.*

(11) If a person is attacked by several persons numbering less than five and grievous hurt is caused all of them can be convicted of causing grievous hurt, if the criminal act was done in furtherance of the common intention of all, irrespective of the fact that the grievous hurt was caused by one of them only known or not known. *AIR 1951 All 21.*

(12) A, B and K assaulting J, A hitting with lathi on legs, K stabbing with spear near ear, and B stabbing with spear on left jaw and extracting spear blade from jaw by putting legs on his chest—J dying immediately—Common intention to cause grievous hurt to J was inferred—B alone liable under S. 302. *AIR 1954 SC 706.*

(13) Accused giving a blow to his wife with great force—Victim dying shortly—No intention or knowledge that death would occur—Accused was guilty of causing grievous hurt and not of death. *(1881) ILR 3 All 776.*

(14) As result of boyish quarrel accused hitting another boy behind from with granite stone on his temple—Depressed fracture and death resulting—S. 326 applied. *AIR 1960 Ker 301.*

(15) Accused inflicting two blows on wife's neck for abusing his mother—Hurt endangering life—Death resulting—S. 325 applied. *AIR 1953 Him Pra 1.*

(16) Sudden altercation between accused and deceased latter having plucked sugarcane from former's field—Accused striking two blows, one causing rupture of enlarged spleen—Accused not knowing of such condition of spleen—S. 302 did not apply. *AIR 1953 Punj 173.*

Section 323

323. Punishment for voluntarily causing hurt.—Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand [9][taka], or with both.

Cases and Materials : Synopsis

1. Scope.—(1) A criminal prosecution under section 323 will not abate by reason of the death of the complainant *(25 CrLJ 1007, AIR 1943 Pat 370, 20 CrLJ 717).* When a complainant dies after summons is served the procedure under section 247 CrPC may be followed. An offence under section 323 is compoundable without the permission of the Magistrate. It is also triable by the Village Court. Where in the case of an offence under section 323 PC, both the complainant and the accused filed a joint petition of compromise and it is accepted by the Magistrate and he acquits the accused under section 345(6) of the CrPC. The complainant cannot, thereafter, withdraw from the compromise and as such his subsequent withdrawal can neither effect the acquittal nor revive the jurisdiction of the Magistrate or Village Court or proceed with the trial of the case. The offence of hurt is included in the offence of attempt to commit murder. Therefore, where there is a charge under section 307, the court has jurisdiction to conviction the accused of voluntarily causing hurt without a specific charge in that behalf *(38 CrLJ 442).* In a case where the happening of the incident is admitted and both paries have received

9. Substituted by Act VIII of 1973, s. 3 and 2nd Sch. for 'rupees".

injuries, the only question which falls for consideration is as to which of the two parties was the aggressor. The nature and the number of injuries received by the parties is one of the factors which has to be taken into account in deciding the question of aggression. Where a person causes hurt in private defence of person or property, he cannot be convicted under this section *(1965 PLD Kar 485).* An offence under section 323 of the Penal Code which has been mentioned in Part I of the Schedule to the Village Court Ordinance (Ord. No. LXI of 1976 dated 20-10 76) is triable exclusively by Village Court and the ouster of jurisdiction of the criminal court in this respect is complete except in a case where under section 15 of the Ordinance, the Upazila Magistrate or the Village Court being of the opinion that the circumstances of the case are such that public interest and ends of justice demand its trail in a criminal court, transfers the case from the Village Court to a criminal court. A criminal court derives its jurisdiction from the original allegation made in the petitioner of complaint and not from the facts and materials subsequently brought on record during the trial. The forum of trial is to be determined upon the basis of allegations made at the initial stage and not upon ultimate findings reached at the trial. Where in cases of rioting and unlawful assemblies the accused are charged generally under sections 325 and 326 PC read with section 149, there is no necessity to charge particular accused with particular offence under sections 323, 324, 325 and 326 PC. Accused can be convicted on individual acts.

(2) Causing hurt by teeth-bite is not causing hurt by a dangerous weapon or means and consequently will be punishable under the section and not under S. 324. *(1972) 13 Guj LR 848.*

(3) Rash or negligent act causing hurt is not an act "voluntarily causing hurt." Such an act is provided for in S. 337. Personal injury if intentionally caused is neither a rash nor a negligent act and constitutes an offence under this section. *1955 CriLJ 173 (Madh B).*

(4) Where the accused who had a quarrel with his debtor over the debt, pelted brick bats at his house, knowing that there were occupants in it, and hurt one of them, it was held that the accused had committed an offence under his section. *AIR 1916 Low Bur 98.*

(5) Hurt need not be caused by direct physical contact between the accused and the victim. *AIR 1944 Sind 19.*

(6) Where the accused allowed his dog to bite the complainant, it was held that his conduct was not punishable under this section but under S. 289 of the Code (negligent conduct with respect to animal). *AIR 1923 Rang 147.*

(7) Causing hurt to a public servant while the latter is acting in the discharge of his official duties is punishable under S. 332 and not under this section. *AIR 1970 Mad 359.*

(8) An alteration of charge under sections 147 to 323—When illegal. If the common object of an unlawful assembly had been to beat the complainant and his party men and if evidence establishes that the accused did so beat them, it might have been argued that the alteration of the conviction form section 147 to 323 of the Code was not illegal because section 323 may then be held to be covered by the common object of the assembly, but when the charge recites the common object of the assembly as merely to steal away paddy seedlings the alteration of the section from 147 to 323 of the Code was illegal and has prejudiced the accused. *Jaifar Vs. Idris Ali (1951) 3 DLR 144.*

(9) Sentence of 2 years' rigorous imprisonment under section 323 was illegal, though it was to run concurrently with a like sentence under section 147, P.C. *Sultun Ahmed Vs. Crown (1950) 2 DLR 30.*

(10) Misreading of a word in a document after closure of evidence and using it against the accused without drawing his attention to it, is not only illegal but also militates against the principle of

justice—A fit case for remand but in its facts and circumstances, it was too late—Misreading vital part of evidence prejudiced the accused—Benefit of doubt given—Acquittal ordered by the Appellant Division. *Aftabuddin Vs. The State BCR 1986 AD 236.*

(11) Compromise—An offence under this compoundable u/s. 345(1) Cr.P.C. and an offence u/s. 379 of the Penal Code has now been made compoundable, with Court's permission u/s. 345(2), Cr. P. C. by a recent amendment of law—In view of the reasons given in the joint petition of the parties that they, in the interest of both, compromised the matter, permission may be given for compounding the offence—Accordingly, the joint application for compounding the offence accepted and the accused-appellants acquitted u/s. 345 of the Criminal Procedure Code. *Nasiruddin & another BCR 1987 AD 92.*

(12) In a border line case between sections 323 and 325 of the Penal Code, the accused would be entitled to the benefit of doubt and be convicted under section 323 of the Penal Code and not under section 325. *Amar Kumar Nag Vs. State 41 DLR 134.*

(13) Conviction of the appellant on the evidence of interested witness. Appellant No 2 entitled to benefit of doubt. We, therefore, hold that the prosecution has failed to established the charge under section 323 of the Penal Code against the appellant No. 2 beyond reasonable doubt and hence he is entitled to benefit of doubt and the impugned order of conviction and sentence under section 323 of the Penal Code against this appellant cannot be sustained in law and the same is liable be set aside. *Momin Malitha Vs. State 41 DLR 37.*

(14) As the offence of culpable homicide supposes an intention or knowledge of likelihood of causing death but in the absence of such intention or knowledge the offence committed may be grievous hurt or simple hurt. *Liakat Hossain (Md) Vs. State (Criminal) 1 BLC 196.*

(15) Two separate petitions of complaint were failed by the persons who received injuries and the first one was compounded but the second one was pending. As the offences under sections 323, 324 and 325 of the Penal Code can be compounded by the person or persons to whom the hurt is caused, the order of composition of the alleged offence suffers from legal infirmity and cannot operate as an acquittal of the accused persons as far as the second complainant is concerned and the doctrine of double jeopardy enunciated in section 403, CrPC is hardly applicable in this case. *Nurul Islam and others Vs. Md. Velon Mia and another (Criminal) 1 BLC 252.*

(16) Although the learned Sessions Judge has convicted the accused appellants but did not award separate sentence under sections 326 and 323 of the Penal Code, the appellate Court can award sentence under such sections if the prosecution is able to substantiate the charges. *Babul Mia and 2 others Vs. State (Criminal) 5 BLC 197.*

2. Proof.—(1) No medical evidence is required to prove an offence causing hurt. Causing any physical pain even momentarily is sufficient. *1973 ChandLR (Cri) 339 (Punj).*

(2) It is improper to arrive at a finding of guilty under this section, unless there is a clear finding on evidence although an enmity and fight have been proved and serious injuries have resulted. *AIR 1921 Lah 214.*

(3) The conviction for an offence under this section is bad where the complainant merely mentioned that accused used abusive language and did not make any mention of any assault. *AIR 1916 Lah 406.*

(4) Where the court finds that there probably was only an alteration and squabble between the parties and that only a technical offence was committed the accused should be acquitted. *AIR 1919 Lah 128.*

(5) Where the injured person does not enter the witness box nor are his injuries proved, conviction under this section is unjustified. *AIR 1974 SC 541.*

(6) Where the major portion of the prosecution evidence is found to be false it is not correct to build up a case of hurt out of the mass of the lies told by the prosecution witnesses. *AIR 1934 Oudh 124.*

(7) Where in a case of dacoity the evidence is totally unbelievable the Court cannot convict the accused of an offence under this section simply because the complainant's party had received injuries. *AIR 1945 All 87.*

(8) As to appreciation of evidence. *AIR 1979 SC 1494; AIR 1979 SC 1261; AIR 1979 SC 1010; AIR 1976 SC 199.*

3. Master and servant.—(1) The law does not give any sanction to a master to commit assault on his servant even by way of reprimanding him. Therefore, the master will be guilty of an offence under this section if he voluntarily causes hurt to the servant. *(1963) 5 OrissaJD 65.*

4. Husband and wife.—(1) A husband has no general or unqualified right of punishing his wife by beating her for impudence or impertinence. A husband causing simple hurt voluntarily to the wife is liable to be punished under this section. *AIR 1936 Mad 783.*

5. Teacher and pupil.—(1) School teachers inflicting corporal punishment on students in order to enforce school discipline would be protected by Sections 79 and 89 of the Code. The extent of a school-master's right to inflict corporal punishment depends on the circumstances of each case. *AIR 1926 Rang 107.*

(2) It is necessary that the school teacher must act in good faith while inflicting corporal punishment. *AIR 1949 Bom 226.*

6. Offence may be one of causing only simple hurt even though death occurs.—(1) Nature of crime must be judged by the intention of the offender and not by the result. *1898 AllWN 109.*

(2) What the accused person must be punished for is the hurt which he intended to cause or which he might reasonably have known to be likely to cause by the act done. He should not be punished for an unfortunate and entirely unforeseen result of the act done by him. *(1978) 5 CriLT 427 (Punj).*

7. Hurt caused in exercising right of private defence.—(1) A person exercising his right of private defence is not guilty of any offence if he caused hurt to a person while exercising such right. *AIR 1979 SC 1259.*

8. Act justified by law.—(1) Where, in execution of a civil process for deliver of possession to a party the officer pushes out the party bound by the order when he refused to vacate the property, the officer cannot be held guilty of an offence under this section. *AIR 1936 Oudh 379.*

(2) A decree-holder though entitled to recover possession in execution , cannot himself, of his own accord forcibly remove the judgment-debtor or any other person claiming the right to be in possession, and if in the process he causes hurt to the judgment-debtor he will be guilty under this section. *AIR 1930 Cal 720.*

9. Abetment of offence under this section.—(1) Abetment exhorting the assailant to attack must be proved by clear cogent and reliable evidence in order to sustain the conviction for abetment of an offence under this section. *AIR 1974 SC 45.*

10. Act of several persons.—An unlawful assembly may have a common object of committing hurt or grievous hurt and when such an assembly uses force or violence to any extent, or of any degree,

the members of the assembly are guilty of rioting punishable under S. 147. If, however, their common object is accomplished by causing hurt or grievous hurt they would be liable to be convicted for the further offence under S. 323 or 325, as the case may be. *AIR 1958 All 348.*

(2) If the victim is attacked and hurt is caused in furtherance of the common object of the assembly, every member would be guilty under S. 323 when it is proved that they were present in the assembly at the place of occurrence. *AIR 1953 All 778.*

(3) In the absence of a charge under Section 149 (or 147) it is only the person who caused the injuries that can be punished for his individual acts under S. 323. *AIR 1959 Andh Pra 102.*

(4) Where there can be no common objects as in the case of sudden mutual fights, there can be no conviction under S. 323 read with S. 149. *AIR 1976 SC 2423.*

(5) When there is absence of evidence to show as to which of the accused caused grievous hurt and there is no common intention or object to cause grievous hurt, then the accused can be held guilty only of an offence under this section. *AIR 1955 All 230.*

(6) Where out of the several accused acting with the common object of beating the complainant, beat him but they did not act with the common object of causing grievous hurt and they did not even know that one of them would cause grievous hurt, in the course of the beating, it was held that they could not be held guilty of the grievous hurt caused to the complainant but could be held guilty of causing simple hurt only. *AIR 1914 Mad 280.*

(7) Where some of the rioters threw stones causing injury and the persons who did so could not be known, the conviction should be under this section read with S 149 and not under this section. *AIR 1942 Pat 319.*

11. Joinder of charges.—*(a) Joinder of charge—General*—(1) Joinder of charges under Ss. 147, 323 and under Prohibition Act is bad. *(1954) 2 MadLJ 431.*

(2) Member of unlawful assembly committing riot by one act and causing hurt to another person by separate act—Offences of rioting and hurt can be tried jointly. *AIR 1917 All 11.*

(b) Charge for rioting—Conviction for hurt.—(1) Held, where a charge was framed under S. 147, P. C., a separate charge under Section 323, P. C. would be in the circumstances mere surplusage. *1976 RajdhaniLR 183 (Delhi).*

(2) Charge against accused under S. 302 and S. 323 read with S. 149—No direct and individual charges against the accused for offences under Ss. 302 and 323—Section 149, held did not apply under the circumstances—conviction of accused under S. 302 and Section 323 cannot be maintained. *AIR 1956 All 529.*

(c) Charge of hurt included in major offence—(1) The offence of hurt is included in the offence of the attempt to commit murder. The Court has jurisdiction to convict the accused of voluntarily causing hurt without a specific charge in that behalf. *(1937) 38 CriLJ 442.*

(2) Several blows struck—One or more of blows proving fatal—Charge under Section 304 for such fatal blows and under Section 323 for other—Held, separate charge under S. 323 was uncalled for and conviction on that charge unsustainable. *AIR 1959 Ker 372.*

(3) Offence under S. 323 is not included in offence under the Municipalities Act—Both Offences could be separately charged. *AIR 1946 Mad 102*

(d) Charge for one offence—Conviction for another.—(1) In the absence of specific charge under S. 323 conviction of accused under Section 323 is bad in law especially when all other accused were acquitted under S. 395/397 P.C. *1979 BomCR 125.*

(2) Charge only under S. 323—Conviction under S. 323/109 bad if accused had no notice of fact constituting abetment. *AIR 1970 Orissa 10.*

(e) Alteration of charge.—(1) Conviction under S. 332 by trial Court alter to one under S. 323 in revision. *1968 MadLW (Cri) 217.*

(2) Conviction of Y and Z by trial Court under S. 324/34—Appellate Court could not alter their conviction to one under S. 323 in absence of separate charge under that section. *1959 NagLJ (Notes) 38.*

(f) Miscellaneous.—(1) Common object of unlawful assembly armed with deadly weapons being to cause grievous hurt—Some causing grievous hurt and others simple hurt—Conviction under Ss. 324 and 323 read with S. 149 not sustainable. *AIR 1907 Punj 278.*

(2) Accused charged of having committed dacoity in general terms should not be convicted under Ss. 323 and 452. *AIR 1945 All 87.*

12. Composition.—(1) An offence under this section is compoundable (see S. 320, Criminal P. C.) The person who can compound an offence of hurt is the person to whom hurt is caused and not the person who causes the hurt. Hence, where there is a fight between two groups of persons in which some of them are hurt and this is followed by a criminal case in the Court hurt in which some persons involved in the fight and charged with the offence of causing hurt of the offence cannot be compounded if one of the persons hurt is not party to the compromise. *AIR 1947 Cal 31.*

(2) There can be an acquittal with reference to that complainant alone who has compounded the case. Accused cannot be acquitted of the offence in respect of the person who has not compounded the offence with the accused. *AIR 1923 Cal 168.*

(3) Once a case has been lawfully compounded complainant cannot withdraw from the composition so as to revive the jurisdiction of the Court to try the case once again. *AIR 1962 Pat 316.*

13. Sentence.—(1) The accused found guilty under this section can be punished with a sentence of imprisonment of either description which may extend to one year or with fine which may extend to one thousand rupees or with both. A sentence of two years' imprisonment would be illegal. *AIR 1955 NUC (Him Pra) 1302.*

(2) Whether the sentence should be severe one or a light one would depend upon the facts of the particular case. Where a police constable was attacked while he was in uniform (i. e., on duty), it was held that the matter should not be treated lightly. *AIR 1939 Nag 93.*

(3) When it is the police officer who causes hurt to a person taken into custody by him, the maximum sentence of one year ought to be awarded to him. *AIR 1959 Ker 372.*

(4) The act of owners of cattle recurring the same by force and causing hurt to the complainant driving the cattle to the pound was a serious offence and sentence of one year's R. I. imposed on the accused was maintained. *AIR 1953 All 358.*

(5) Where the accused was found guilty only of hurt though death resulted in a maximum sentence of one year is not excessive. *AIR 1955 NUC (Assam) 5540.*

(6) When the accused was in remand for a period of nine months pending trial, the sentence was reduced to 6 months R. I. *AIR 1955 NUC (Him Pra) 1302.*

(7) Where the injuries inflected were of a minor nature and were detected only after 4 or 5 days, a sentence of 6 months and 3 months R. I. was considered excessive. The Lahore High Court reduced it to 1.5 months. *AIR 1933 Lah 311.*

(8) The appellate Court will reduce the sentences if the accused has acted on grave provocation. *AIR 1914 Lah 551.*

(9) See also the following cases relating to sentence : *1983 Chand Cri C 390 (P&H); (1984) 1 Crimes 217 (MP); (1983) 2 ChandLR (Cri) 555 (P&H); (1982) WLN 272 (Raj); 1982 WLN (UC) 48 (Raj); 1982 Raj CriC 200.*

(10) *Separate sentences.*—An offence under this section is not included in the one punishable under S. 452. Where, therefore, the accused is convicted for offences both under this section and S. 542 committed on one and the same occasion, a separate sentence can be passed for each offence. *AIR 1938 Rang 114.*

(11) The offence of causing hurt is a separate offence from that of rescuing cattle and separate sentence may legally be passed for each offence. *AIR 1928 Mad 18.*

(12) When the accused are convicted under Ss. 147 and 323, it was held in the following cases, that separate sentences can be awarded. *AIR 1955 All 282; AIR 1953 All 726; AIR 1952 All 92.*

(13) When the accused are convicted under Ss. 323and 325, separate sentences cannot be awarded. *AIR 1968 Guj 218.*

14. Interference in revision.—(1) Where the accused has been convicted and there are concurrent findings by the lower Court, the High Court would not interfere in revision unless there are compelling reasons to differ from such finding. *1974 ChandLR (Cri) 167.*

15. Death of complaint—Abatement.—(1) Criminal proceedings once instituted whether upon a complaint or otherwise do not exterminate or abate merely by reason of the death of the complainant or the person injured. A prosecution under this section does not abate on the death of the complainant or the persons injured. *AIR 1943 Pat 379.*

(2) The acquittal of the accused under section 256 Criminal Procedure Code on the death of the complainant is illegal. *1916 Pat 152.*

16. Procedure.—(1) A conviction under S. 75, Police Act is a bar to a subsequent trial and conviction under S. 323 or S. 352. *AIR 1940 Mad 224.*

(2) A conviction for affray is no bar to a subsequent trial and conviction for causing hurt in that affray. *AIR 1955 Mys 138.*

(3) Where a person is assaulted by a police officer in order to coerce him to give statements under S. 164, Criminal P. C., a complaint made against the Police Officer for an offence under this section is not bad for want of sanction under S. 197, Criminal P. C., because in assaulting the complainant the Police Officer cannot be said to be acting in connection with his official duty. *AIR 1967 All 519.*

(4) Upon a conviction under this section no order under S. 106. Criminal P. C., can be passed unless there his a finding of fact that in causing hurt a breach of peace was involved. *AIR 1927 All 157.*

(5) Upon a conviction under this section and S. 147 an order under S. 106, Criminal P. C. can be passed. *AIR 1938 Oudh 195.*

(6) *Procedure*—Not cognizable—Summons—bailable—Compoundable—Triable exclusively by a Magistrate, Village Court.

17. Charge.—(1) In the absence of charge under this section, the conviction of the accused under the section cannot be sustained unless such charge can be spelt out from the words of the charge relating to some other sections included in the charge. *1978 WLN (UC) 401.*

(2) The charge should run as follows :

I, (name and office of Magistrate, etc.) hereby charge you (name of the accused) as follows :

That you, on or about the—day of—, at—, voluntarily caused hurt to X and thereby committed an offence punishable under section 323 of the Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

18. Practice.—Evidence—Prove: (1) That the accused by his act caused bodily pain, disease or infirmity to the complainant.

(2) That he did not act intentionally or with knowledge that if would cause hurt, etc.

Section 324

324 Voluntarily causing hurt by dangerous weapons or means.—Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials : Synopsis

1. Scope.—(1) This section may be read along with sections 39 and 47 PC. This section deals with the case of causing voluntary hurt by means of an instrument which, used as a weapon of offence, will cause death. The instrument must be one which is likely to cause death, the instrument must be one, not which is likely is 'liable' but which is likely to cause death. It must be one of which one can predicate that the probable result of its use will be one of virtues of its very nature, death. Poison is "that which when administered is injurious to health or life." The term "corrosive" substance means any substance which irritates the system, e.g. sulfuric acid, corrosive sublimate, etc. Where the offence under this section was committed by college students, it was held that whether more serious injuries than those caused could have been caused or not is wholly immaterial. However, if the students have acted like ordinary criminals, they would not be entitled to special treatment. The fact that the accused is a student is not mitigation of the offence of causing hurt with a knife *(AIR 1941 Pat 129).* The burden is on the accused to prove that he had a right of private defence. There is no presumption that the party

receiving more injuries was aggressed against. The right of private defence has to be proved with reference to all the facts of the case *(1974 CriLJ 300)*. Where the accused has not exceeded the right of private defence, they cannot be convicted under section 324 simply because death was caused. The charge should state that the weapon used was one of the kinds mentioned in the section. Merely describing it as a "dangerous weapon" is not sufficient. The offence under this section is compoundable. The composition of offences under sections 324 and 325 PC has the effect of acquittal of the accused. Where there was a complaint under S. 324 P.C. and the allegations therein made out a prima facie case under that section. The Magistrate had jurisdiction to try the case and thus jurisdiction did not cease if, afterwards, during the trial, the case transpired to be one under section 323 PC which was exclusively triable by Village Court *(1970.) PCriLJ 1878)*.

(2) Appellate division reluctant to grant leave for compromising offence under the section. Offence under the section though compoundable, Appellate Division of the Supreme Court declined to grant leave for compromise when the petitioners have been convicted of the offence under the section and no law-point agitated before the Court for grant of leave. The petition was dismissed. *Jiban Ali Bepari & another Vs. The State 1 BSCD 243.*

(3) Conviction and sentence, alteration of on technical ground by the Appellate Court—Conviction by the trial Court u/s 326/34 and sentence of 5 years' R.I.—On appeal the High Court Division altered the conviction to that u/s. 324/34 and reduced the sentence to 3 years' R.I—The conviction was altered just on a technical ground, discrepancy in the evidence of Medical Officer—Altered conviction challenged before the Appellate Division on the ground that no charge was framed u/s. 324 but the charge was framed u/s. 307—No illegality in conviction u/s. 324, PC, though the charge was framed u/s 307—No interfere by the Appellate Division. *Abdul Gafur & Anr. Vs. The State 5 BSCD 44.*

(4) Separate sentence under sections 147 and 324 P.C. not illegal. *Safar Ali Vs. State, (1972) 24 DLR 207.*

(5) No charge against the accused under sections 324 and 325 but the charge was under sections 322/149 and 325/149—No prejudice to him on his conviction u/ss. 324 and 325. *Ali Akbar Khan Vs. State (1982) 34 DLR 94.*

(6) The question of prejudice to the accused has to be judged by the facts and circumstance of each case. *Ali Akbar Khan Vs. State (1982) 34 DLR 94.*

(7) High Court relucntant to give permission for compromising offences under the sections. Offences under the sections though compoundable, High Court under its revisional jurisdiction is reluctant to grant leave for compromise when the accused persons have been rightly convicted. The High Court can record the compromise only in suitable cases in revision but this exceptional power should not ordinarily be used in a case where the proceedings disclose no irregularity or impropriety. *Hafizuddin Vs. State, (1969) 21 DLR 172.*

(8) Simple hurt and medical evidence—The evidence of a medical expert is merely an opinion which only lends support to the direct evidence of witnesses—If there are other evidences to prove the offence the medical evidence is not indispensable for proving a charge under Section 324 of Penal Code. Mofazzal alias *Mofazzel Hossain and another Vs. The State 7 BLD (HCD) 406.*

(9) The law is now settled that a fugitive has no right to seek any kind of the redress as against his grievance, if any, against the judgment and order of a court convicting him. *Md. Monsur Ali and others Vs. The State 23 BLD (AD) 208.*

(10) As the convict-Appellant having not given the final blow (injury No. 1) he cannot be incriminated for the offence of section 326 of the Penal Code but he must be found guilty under section 324 of the Penal Code as he had inflicted one of the other two injuries which is simple in nature. *Abdul Jalil Vs. State (Criminal) 4 BLC (AD) 12.*

(11) For voluntarily causing hurt by dangerous weapons we convict appellant Nos. 2, 3, 4 Dulu Mia, Hamidul Haque. Mustafizur Rahman respectively under section 324 of the Penal Code and sentence each of them to suffer rigorous imprisonment for three years. *42 DLR 3 AD.*

(12) Members of unlawful assembly—Rioting committed in prosecution of their common object—Accused Tayeb Ali assaulted PW 1—conviction of both the accused under section 148 PC and Tayeb Ali's conviction under section 324 PC based on good evidence—But their conviction under sections 302/149 not sustainable as their participation in assault upon deceased Bazlur Rahman doubtful *(Ref. 10 BCR (AD) 86. 41 DLR (AD) 147.*

(13) It clearly appears that neither party was in actual possession of the land but both the parties were tying to establish their possession by criminal force. In such a situation neither of them is entitled to protection of law. In such cases the participants will be liable individually for their respective acts. In view of the peculiar facts and circumstances of the case, the sentence of the appellants should be reduced. *7 BCR (AD) 71.*

(14) The accused and the prosecution witnesses are inimical to one another. There is not a signal independent disinterested witness in the case. Non-examination of any member of these families, in my opinion, makes the prosecution case a suspect, and entitles the appellants to benefit of doubt. In view of the expert opinion expressed in the Medical Jurisprudence it may safely be held that the gun shots having been fired from a distance of 40/55 cubits according to the evidence there could be no scorching around the wound. Therefore the doctor's evidence as regards the injury alleged to have been accused by gun shot fire is doubtful and the appellants have been acquitted. *6 BCR 75.*

(15) Prosecution proved the occurrence at the time and place it had occurred—accused took the plea that the place of occurrence was the disputed plot Nos. 848 & 849 and invoked the principle of right of private defence in exercise of the bonafide claim of right to the disputed lands—High Court Division elaborately discussed the evidence and found that there is neither any oral nor any documents evidence that there was any mark of violence in the field in the disputed lands. Conviction was upheld but the sentence was modified to serve the ends of justice. Appeal Dismissed. *4 BCR (AD) 438.*

(16) Separate sentences under sections 147 and 324 PC are not illegal. *24 DLR 207.*

(17) An offence under section 324 PC is not exclusively triable by the conciliation Court. The criminal court which had initial jurisdiction to deal with the matter has right to proceed with the trial of the case. *20 DLR 1076.*

(18) Care may be compoundable by person who received injuries not by complainant. *1 BLC 252.*

(19) This section prescribed a severer punishment for hurt caused by the instruments or means specified in the section. Where there is no finding that the instrument used was of the description referred to in the section a conviction under this section is not sustainable but the accused may be liable under S. 323. *1954 MBLJ 3 (HCR) 1065.*

(20) Where a dangerous weapon has been used this section will apply even if simple hurt is caused by such instrument. *(1975) 2 CriLT 524.*

-124

2. "Except in the case provided for by S. 334."—(1) Section 334 provides for a lighter punishment for the offence of voluntarily causing hurt on grave and sudden provocation. A case falling

under that section is excepted from the operation of this section as is indicated by the words "except in the case provided for by S. 334." *AIR 1981 All 189.*

3. Burden of proof—Evidence.–(1) The prosecution must prove that the accused voluntarily caused hurt, and that such hurt was caused by means of an instrument referred to in the section. In the absence of satisfactory evidence on this point, the accused cannot be convicted under this section. *AIR 1979 SC 1510.*

(2) In the absence of satisfactory evidence that the accused voluntarily caused hurt and that such hurt was caused by means of an instrument referred to in this section, the accused cannot be convicted under this section merely on the ground that the complainant had received certain injuries. *1978 UJ (SC) 924(929).*

(3) The non-examination of the Investigation Officer is a serious infirmity causing prejudice to the accused by depriving him of the opportunity to show the unreliability of witnesses by proving contradiction in earlier statements. *1972 CriLJ 976(977) (Mys).*

(4) Medical evidence is not essential for a conviction under the section where the Court has before it sufficient other evidence of a reliablie nature. *1978 CriLJ 1204 (Ker).*

(5) Injuries on accused not explained by prosecution—Prosecution case is rendered doubtful—conviction liable to be set aside. *(1983) 1 Chand LR (Cri) 282.*

(6) Because of non-examination of the investigation officer, some documents were not proved it was held that the accused in some measure were prejudiced. The conviction of the appellants was therefore set aside. *1982 UP (Cri) C 57 (All).*

(7) Where there was a great variance between the oral and the medical evidence and the F.I.R. was lodged after a great delay the oral evidence was held unreliable and the conviction under S. 324 was set aside. *1982 UP (Cri) C 50 (All).*

(8) The acquittal of the accused under S. 452 Penal Code would root out his conviction under S. 324 when the story of prosecution was that the accused had entered the house and then fired because if the story of entering the house was disbelieved then the other part of the story, namely, the firing inside the house would also to some extent receive a set back. *(1983) 1 Crimes 659(661) : 1983 All Cri LR 760 (All).*

(9) Conviction under S. 148 and S. 324 read with S. 149—Witness testifying that accused were armed with spear and pharsas—Evidence given by victim that these weapons were used by accused—Doctor opining that injuries could be caused by sharp weapon—Conviction is proper. *1982 AllLJ (NOC) 90.*

4. Right of self-defence.—(1) A conviction under this section is not proper where the injuries were caused by the accused while exercising the right of self-defence. *1970 SC Cri R 27.*

5. "By means of any instrument for shooting, stabbing, or cutting.—(1) Instruments not designed to cause bodily injury or death may, however, under certain circumstances, be capable of being used as weapons. Thus a crowbar or spade is not designed to cause bodily injury but may be used to cause bodily injury of death. A common bamboo strike is not dangerous weapon within the meaning of this section. *AIR 1937 Rang 8.*

(2) A lathi may or may not be a dangerous weapon. It depends upon the size, thickness etc., of the lathi which when used as a weapon of offence is likely to cause death. *AIR 1950 East Punj 209.*

(3) A dao has been held to be a deadly weapon. *(1865) 2 Suth WR (Letter Cri) 20.*

(4) A broken soda bottle is a dangerous weapon. *(1981 CriLJ (NOC) 115.*

(5) Though evidence cannot sustain conviction for grievous hurt, yet, there may be conviction under this section for causing hurt with a sharp weapon, etc. *1974 Rajdhani LR 54 (Delhi).*

(6) Accused inflicting burn injuries with the help of a burning fire wood—Offence committed is under S. 324 P.C. *AIR 1953 Orissa 308.*

(7) To drive out evil spirit from victim R and P beating victim with hot chimta and wooden chapti—After P went away, R beating victim for 15 or 20 minutes more—Conviction held proper. *1976 CriLJ 818 (Punj).*

6. "By means of any poison."—(1) Poison is defined as that which when administered is injurious to health or life. Some things administrated in small quantities are innocuous; but, administered in large quantities are harmful .In such cases it is not sufficient to show that the thing was administered with an intent to cause harm but there should be evidence that it was administered in such quantity as is noxious. *(1890) 5 QBD 307.*

7. Hurt resulting in death.—(1) There was nothing to establish that the accused intended to kill his father or that he intended to cause such bodily injury as was likely to cause his death. He hit his father in a fit of rage, possibly on account of the father's denial to pay his money. Held, that the accused could not be charged under S. 304 but that the offence fell under S. 324. *AIR 1958 Mys 48.*

(2) In absence of proof of common intention, accused other than the one who actually causes the death cannot be convicted under S. 302/34. *1977 CriLJ 421 (Mad).*

(3) When only one stick blow was given on the head of the deceased and this head injury ultimately led to death of the victim, the offence committed by the accused would be under S. 324 and not under S. 304, Part II, Penal Code. *1981 BomCR 27.*

8. Attack by several persons.—(1) Where the deceased was attacked by several persons and it is not possible, on the evidence, to infer any such common intention as is mentioned in S. 34, or such common object as is mentioned in S. 149, each of them will be responsible for his individual act only. *AIR 1975 SC 12.*

(2) Where death is caused and there is no evidence to show which of the accused inflicted the fatal blow and S. 34 is not applicable, the accused can be convicted only under this section and not of murder or culpable homicide. *AIR 1954 Punj 126.*

(3) When the medical evidence is uncertain as to which of the blows was the fatal blow, only the minimum intention should be attributed to the act of the accused and the conviction can be only under this section. *AIR 1966 Guj 221.*

(4) Where the common object of an unlawful assembly is established it is not necessary for the prosecution to prove that a particular accused caused a particular injury. *AIR 1956 Bom 183.*

(5) Accused B gave fatal blow, while accused C gave Takwa blows on the arm of the deceased causing simple injuries. As blows given by C were not on vital parts it could not be said that he had shared the intention of 'B' to cause death. So while 'B' was given life imprisonment 'C' held was guilty only under S. 324, P.C. *AIR 1977 SC 705.*

9. Sections 324, 326 and 307—Distinction between.—(1) There can be no presumption that the accused intended to cause death merely because he used a firearm to cause hurt. The intention of the accused person has to be established from the nature of the act actually committed by him and form other surrounding circumstances. *1969 CriLJ 252 (Delhi).*

(2) In order to bring the offence under Section 307 home to the accused the prosecution must establish that his intention or knowledge was of the description mentioned in S. 300. Where evidence is not sufficient to establish with certainty the existence of the requisite intention or knowledge he can only be convicted under this section. *AIR 1965 SC 843.*

(3) The act contemplated by S. 370 is an act which, by itself, must ordinary be calpable of causing death. The act of the accused falling short of this specification will amount only to an offence under this section or S. 326. *AIR 1965 SC 843.*

(4) Where from the act of the accused, an intention to cause death or knowledge that death is likely to be caused can be imputed to the accused, then the offence is one under Section 307 and not under this section. *AIR 1944 Sind 83.*

(5) Injury caused by thrust of spear—Injury not on the lungs or on any other vital organs of the body—it was doubtful if the hurt caused was of a nature endangering life—Proper section for conviction was S. 324 and not S. 326. *AIR 1963 Assam 151.*

10. This section and S. 325.—(1) The offence under this section is a minor form of the offence under S. 325 and if the accused is convicted under S. 325, a conviction under this section as well is superfluous. *AIR 1964 MadhPra 182.*

11. Charge and compounding.—(1) The charge must mention the word "voluntarily." *(1865) 2 SuthWR (Letter Cri) 20.*

(2) The fact must state that the hurt was caused "by means of an instrument which used as a weapon of offence is likely to cause death" namely.....; for then, attention of the Court would be attracted to the essential part of the offence viz., that the instrument used was such as was likely to cause death. *(1897-1901) 1 UppBurRul 318.*

(3) Where the accused are charged under Sections 148, 149 and 324 and the Court acquits them on the charge under S. 148 (rioting) they cannot be convicted for an offence under this section read with S. 149. the effect of acquittal under s. 148 amounts to a finding that either there was no unlawful assembly or that the hurt was not caused in pursuance of the common object of the unlawful assembly. *AIR 1966 Mys 53.*

(4) Where the accused are charged with being members of an unlawful assembly whose common object was to cause grievous hurt and the evidence shows that some of the accused have caused only simple hurt with dangerous weapons, such accused cannot be convicted under 324 read with Sec. 149. *AIR 1957 Punj 278.*

(5) A conviction under S. 109 for abetment of an offence under S. 324, would be illegal when the accused had not been charged with such abetment but only charged under S. 307. *AIR 1948 All 168.*

(6) An offence under this section can be compoundable with the permission of the Court. *AIR 1974 SC 1744.*

(7) Quarrel between college students—All accused with age group of 19-20 years—Conviction under S. 307 read with S. 149 altered to conviction under S. 324—Permission to compound offence accepted in view of happy relationship established in student community. *AIR 1981 SC 1240.*

12, Procedure .—(1) An offence under this section is not triable summarily. *(1887) 10 Mys LR No. 330 page 1053.*

(2) In a prosecution instituted upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion or on receiving a complaint, the procedure prescribed by S. 244 of the Criminal P.C. should be followed. *1968 AllLR 768.*

(3) *Procedure.*—Cognizable—Summons—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

13. Sentence.—(1) Where the accused are found guilty under Ss. 147 and 324 read with S. 149 separate sentences for the two offences can legally be given to the accused. *AIR 1914 Oudh 205.*

(2) Where the accused are convicted of offences under Ss. 324, 325 and 326, P.C., it is improper to give one sentence for all the offences, but if the cumulative sentence is such that it could be passed by the Magistrate in respect of any of the offences, there is no ground for interference in revision. *AIR 1942 Oudh 444.*

(3) The fact that the accused is a student is no mitigation of the offence of causing hurt with a bhala. *AIR 1941 Pat 129 (130) : 42 CriLJ 361; 1941 CriLJ 840(842)(P&H).*

(4) The fact that the injuries were simple or that five years had elapsed since incidence is no ground for reducing the sentence. *1974 CriLJ 234(237)(Raj).*

(5) Accused cut open the abdomen of the injured with a razor and was sentenced to one year's R.I. Held in appeal that there was no scope for reducing of sentence. *AIR 1979 SC 1703.*

(6) Where there is no evidence that the accused a lad of 18 began the assault or that the assault was vindictive the High Court held that sentence of R.I. for one year was sufficient. *AIR 1955 Pat 161.*

(7) Accused convicted under Ss. 324, 326 for throwing acid on face of girl—As the accused was a student and he had spent 14 months in prison. His sentence was reduced to the period already suffered and his fine was enhanced from Rs. 2500/- to 7500/-. *(1982) 2 SCC 395.*

(8) Murder case—Neither pre-concert nor meeting of mind between I and S—Conviction of 'I' under S. 302/34 not sustainable—'I' merely giving a takwa blow on ear causing simple hurt—Conviction of 'I' altered to one under S. 324, P.C.—'I' already in jail for 2.5 years—Sentence reduced to period already undergone. *AIR 1982 SC 70.*

(9) Conviction under Ss. 324, 325, 326, P.C.—Appellant surrendered and agreed to pay the fine on that day—The sentence imposed was reduced to six months' imprisonment and a fine of Rs. 7000/- to be paid to two injured persons equally. *(1982) 3 SCC 197.*

(10) Accused was convicted by trial Court u/s. 302 and under S. 324 and under S. 324 he was fined for Rs. 2000/- to be paid to the family of the bereaved. High Court recorded a finding that there was no premeditation. Supreme Court changed the conviction under S. 302 to one under S. 304 Part I. *AIR 1983 SC 652.*

(11) An accused convicted under this section can be put on security under S. 106 of the Criminal Procedure Code. *AIR 1932 Lah 435.*

14. Interference by High Court.—(1) Where convincing reasons are given by the lower Courts for relying on the prosecution witnesses, the High Court will not interfere with the concurrent findings of fact. *AIR 1969 Orissa 36(37): 1966 CriLJ 397; 1984 RajCri C 58(62)(DB).*

(2) Eye-witnesses giving graphic details regarding assault by accused and supposing deliberately the injuries on the person of the injured persons—Evidence on record consisting of evidence of interested and inimical witnesses—Unsafe to rely on such evidence—Conviction set aside. *(1984) 1 Crimes 478 (P&H).*

15. Practice.—Evidence—Prove: (1) That the accused caused by his act bodily pain, disease, or infirmity to the complainant.

(2) That he did such act intentionally or with a knowledge that it would cause the hurt.

(3) That it was unprovoked.

(4) That the accused caused it by means of an instrument for shooting, stabbing or cutting; or by means of any substance which it is deleterious to the human body to inhale, etc. or by means of any animal.

16. 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 of—, at—, voluntarily caused hurt to A by means of—which is an instrument for shooting (or stabbing etc.) and thereby committed an offence punishable under section 324 of the Penal Code, and within my cognizance.

And I hereby direct you be tried by this court on the said charge.

Section 325

225. Punishment for voluntarily causing grievous hurt.—Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *Grievous hurt resulting in death.*
3. *Attack by two or more persons—Liability of assailant.*
4. *Grievous hurt and right of private defence.*
5. *Charge.*
6. *Proof—Evidence.*
7. *Conviction.*
8. *Sentence.*
9. *Compundaing.*
10. *Revision and appeal.*
11. *Procedure.*
12. *Practice.*

1. Scope.—(1) An act which is not likely to cause death amounts to grievous hurt even though death is caused *(AIR 1953 Tri 9)*. The accusation of grievous hurt must be either in contemplation or must be likely result of the act done. It is manifest in the nature of things, it is difficult to obtain direct proof of what the offence thought was likely to happen. In all cases it is really a question of inference from the nature of the act committed by the offender, his conduct and the surrounding nature of the circumstances of the case. This section prescribes the punishment for grievous hurt. The offence under this section is intermediate between hurt and homicide. Where the accused had neither intention to cause death nor knowledge that his act was likely to cause death, but that was caused by his act, he cannot be convicted for murder or culpable homicide not amounting to murder. If the injury inflicted is grievous he can be convicted under section 325 *(1981 P CriLJ 498)*. If a large number of persons participate in a sudden fight arising from a land dispute, it would be really difficult for any one to state that any particular injury was caused by a particular person. Where the accused was mentioned as one of the assailants of the deceased in the FIR but the grievous hurt found on the person of the latter was not attributed to him, his conviction under section 325 PC cannot be maintained *(52 CrLJ 209)*. Where an injury has been caused by one of several persons and it is not known which of the persons concerned actually struck the fatal blow, it is not possible by the application of section 34 to convict any of the persons taking part in an offence under the second part of section 304, and the appropriate

section in view of the wording of section 34 is section 325 *(AIR 1929 Lah 456)*. When one man takes away the life of another, he should prove circumstances, which justify his doing so. Even assuming that he did so in his right of private defence, it still lay upon him to show that he did not exceed the right and the one us lay upon him to prove the circumstances from which the court might conclude that he was justified in going to such extreme length as causing grievous hurt by killing a man *(8 CWN 714)*. It is not the duration under which victim remains under treatment, but the duration in which the victim remains in severe bodily pain or is unable to follow his ordinary pursuits which make the hurt grievous one *(AIR 1931 Lah 280)*. In view of evidence in the case and the finding arrived at by the court it is open to the court to alter the conviction under section 325 read with section 149 to that under section 325 read with section 34 provided that such alteration does not cause any prejudice to the accused *(AIR 1952 All 941)*.

(2) Conviction and sentence u/s 325, 323 & 148—conviction u/s 148 set aside but that u/s 325/323 was maintained in appeal—Petitioner charged for and conviction of the principle offences u/s 325 and 323, PC but the trial and the appellant court found on evidence that he himself did not commit the offences, but merely abetted it—As there was no charge for abetment u/s 109, whether he could be convicted for abetment—Whether his conviction for the principal offence was sustainable—Omission or defect in the charge is curable u/s 537—Omission supplied by the Appellant Division at Special Level stage. Petition and his co-accused were convicted u/s 325, 323 and 148, PC and sentence to R.I. for six months—On appeal, the conviction u/s 148 was set aside but that u/s 325/323 was maintained at leave stage it was contended that the petitioner was charged for and convicted of the principal offence u/s 325 and 323, PC but the trial court and the appellate court found on evidence that the petitioner did not himself commit the offences, but merely abetted them and as such, conviction for the principal offences is not sustainable in law—As to the abetment, it was contended that he could not have been convicted for the abetment either as there was no charge for the abetment u/s 109 PC—The High Court Division in Criminal Revision before which the same arguments were raised took into consideration this aspect of the matter, but u/s. 537 Cr.P.C. Held: This view is correct, but neither the High Court Division nor the learned Appellate Court modified the conviction—Omission to frame an alternative Charge for abetment of the offences in this case does not stand in the way of convicting the petitioner for the abetment it is established on evidence—In this case abetment has been established on evidence. The appellate Court should have altered the order of conviction accordingly; however, this omission may be supplied by the Appellate Division—but it is not a ground for setting aside the conviction as a whole. The conviction of the petitioner is altered to that U/s 325/323 of the Penal Code read with section 109—The sentence is maintained—with this modification, the petition is dismissed. *Eiar Ali Shaikh & ors Vs The State, 6 BSCD 34.*

(3) Imprisonment should be imposed on conviction. A conviction under section 325 ought to have involved a sentence, however short, of imprisonment. In a conviction under section 325, a mere sentence of fine is not legal and the High Court, in the exercise of its revision jurisdiction, is bound to see that a legal sentence is imposed. *Wali Bauiya Vs. Ahizuddin (1953) 5 DLR 557.*

(4) Sections 325 and 326 distinguished—From a reading of the judgment, in the instant case it appears that the learned court blow after examining the testimony of the witnesses came to a finding that the prosecution had been able to prove beyond all reasonable doubts that the accused Amar Kumar Nag alias Ratu Nag caused grievous hurt to the complainant, and as the evidence does not show that it was casused by any instrument of shooting, stabbing or cutting or any instrument used as a weapon of offence, found that the accused could not be said to have caused grievous hurt by any instrument of

stabbing, punishable under section 326 of the Penal Code but as he had caused grievous hurt he would be found guilty under section 325 of the Penal Code and hence liable to be convicted not under section 326 but under section 325 of the Penal Code. For a person to be convicted for causing grievous hurt, he must not only have caused the grievous hurt in fact but also intended or knew that his action would be likely to cause grievous hurt, as any other reasonable man would know. *Amar Kumar Nag Vs. State, 41 DLR 134.*

(5) In case of provocation an accused is entitled to leniency in punishment and for the contribution of the complainant in the incident or the accident, a sentence of fine would meet the ends of justice. In the instant case, the entire incident was not only one-sided but in it the complainant had also contribution to a great extent by calling a man a thief in presence of others. In such a case of provocation an accused is entitled to leniency in punishment and for the contribution of the complainant in the incident or the accident, a sentence would meet the ends of justice *(Refer. PLD 1981 SC 127). Amar Kumar Nag Vs. State, 41 DLR 134.*

(6) Lumping together of several distinct charges in one trial is not permissible. charge under section 395 and 397 of the Penal Code relates to distinct offence for commission of dacoity. As soon as the accused appellants and others retreated from the said house, the commission of offence is complete. Thereafter on the following date when Nasiruddin, Fakhrul Ahmed were assaulted in the police station, charge under section 325/34 of the Penal Code, 302/34 of the Penal Code alleged to have been committed by accused appellants and others on the next morning when they committed murder of Gous by assaulting and charge under section 302/34 was also drawn against them. Piecing these distinct charges together against the accused appellants and others in one trial is not permissible under the provisions of the Code of Criminal Procedure. Adopting of a procedure prohibited by Code of Criminal Procedure is not accruable by section 537 CrPC. *40 DLR 377.*

(7) Disputed land—Order of Injunction granted by the trial Court was set aside by the lower Appellate Court—High Court Division stayed the said order—Appellants chased and attacked the informant and their party who were ploughing the disputed land—Question of possession raised—Non consideration of the effect of the stay order in determining the question of possession has caused failure of justice—Appeal allowed but case sent back on remand to the High Court Division for disposal of the Revision case in the light of the observations made. *7 BCR (AD) 162.*

(8) No charge against the accused under sections 324 and 325 but the charge was under section 324/149—No prejudice to him on his conviction under sections 324 and 325 *(Ref: 7 BCR AD 6; 34 DLR 95).* Offences under sections 324 and 325 compoundable. The High Court should record compromise. Separate sentences for offences which are not completely distinct offences but component part of another offence, are bad in law. But they can be legally awarded where distinct offences not made up of parts are proved to have been committed by one member was drawn for the said alleged offence. *21 DLR 172.*

(9) When evidence established that the case was one falling under section 325 Penal Code, but the Magistrate framed a charge under section 323 PC that will not make the case triable by a Conciliation Court. *18 DLR 725.*

(10) An officer to be worth his salt is expected to act strictly in discharge of his duties and has a right to do so but he must act within the bounds of the law. He cannot, however, claim to act tyrannically even in discharge of his official duties. To concede such a right would bring about disorder where order should be the goal of everybody. *14 DLR 248.*

(11) In order to sustain a conviction under this section, it must be shown that not only grievous hurt as defined in S. 320 has been caused, but also that the accused intended or knew himself to be likely to cause grievous hurt. *1978 CriLJ 1485.*

(12) The mere fact that death ensued as a result of the hurt will not be sufficient to hold the accused guilty of culpable homicide or causing grievous hurt as the victim might have been suffering from some latent disease or infirmity of which the accused was not aware. *AIR 1937 Mad 321.*

(13) Where accused did not inflict any injury on any vital part of the body of the victim and according to eye-witnesses he used the handle of the six in committing the assault and there was nothing to show that accused was inspired by the intention to commit the murder of the victim, only an offence under S. 325, could be said to be made out and not the offence of attempt to commit murder. *1981 CriLJ 1787.*

(14) In view of the distance from which the stone was thrown it could not be said that at the time when the accused threw the stone, he was aware that the stone would hit the deceased on the temple or any vital part of his body. On the basis that the accused threw the stone, it could not be said that he had knowledge that the said stone which hit would cause such an injury as was likely to cause his death. In the circumstances accused's conviction under S. 304 Part II P.C. could not be sustained the only offence for which the accused could be held guilty is the offence for causing grievous hurt punishable u/s. 325 P.C. *1983 WLN (UC) 292 (Raj).*

(15) Both S. 324 and this section are subject to the provisions of Ss. 334 and 335 respectively and hence, where the hurt or grievous hurt has been caused under grave and sudden provocation, the accused will be liable only to the lesser punishment under those sections. Under those sections, however, the provocation has to be both grave and sudden. *1978 CriLJ 411.*

2. Grievous hurt resulting in death.—(1) The second para. of S. 304 provides that whoever commits culpable homicide not amounting to murder, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death, shall be punished under that section. Where death has resulted it appears to be unsatisfactory to find a man guilty of grievous hurt, but the Legislatuer seems to consider that the intention to cause grievous hurt may be a more serious moral offence than the one committed with the knowledge that death is likely to occur, isasmuch as imprisonment is obligatory under this section and not under the 2nd part of S. 304. *AIR 1943 All 344.*

(2) Where the deceased had injury on the leg causing a fracture and some more on the head, and death resulted as a result of hemorrhage, the offence falls under S. 304 Part II and not under S. 325. *AIR 1982 SC 1183.*

(3) The line of demarcation between the offence falling under the second para. of S. 304 and the category of grievous hurt mentioned above is a very thin and subtle one. *AIR 1946 Bom 38,*

(4) In normal conditions any hurt which endangers human life must also be likely to cause death. *AIR 1917 Bom 259.*

(5) If death occurs after a grievous hurt and death is the result under normal conditions of the injury intended to be inflicted, it cannot be a case of grievous hurt. *AIR 1974 SC 1803.*

(6) Where the accused were armed with lathis and gandasa and assaulted the deceased on whose body grievous injuries were detected as disclosed by the post-mortem report and serious injuries to others as confirmed by medical report they were convicted because of the fact that a blow with a weapon like gandasa or lathis given without the intention or knowledge necessary to constitute homicide or

culpable homicide not amounting to murder and it accidentally falls on the vital part and proves fatal the case falls under this section. *1983 All LJ 55.*

(7) Accused convicted under Section 304 Part 1 of Penal Code for having intentionally and knowingly caused death of victim—Appeal against—Appreciation of evidence—Evidence showing that only one blow was given on chest with a lathi—No intention of causing death of deceased or intention to cause dangerous injury proved—Blow had been dealt on spur of moment and after sudden quarrel with a blunt weapon only—By dealing blow on chest of victim there was fracture of rib and which unfortunately pierced into spleen and ruptured it resulting in death of victim—Conviction altered from under Section 304 Part 1 to one under Section 325 of Penal Code for having caused grievous hurt. *(1984) 1 Crimes 722.*

(8) Where a person dealt a blow to another who fell down unconscious, the former thinking him to be dead, hung him a rope with a view to make it appear that it was a case of suicide and the victim died as result thereof it was held that the offence would be one of causing grievous hurt and not culpable homicide. *AIR 1953 Mad 239.*

(8) The assailant will be liable only under the section where a person voluntarily causes grievous hurt to another and the victim dies subsequent to the hurt:--

(a) a result of a fall. *AIR 1949 Mad 648(649): 50 CriLJ 896 (DB).*

(b) on account of some internal bodily defect not known to the assailant. *AIR 1932 Oudh 279.*

(c) as a result of negligent or wrong medical treatment. *AIR 1935 Oudh 446.*

3, Attack by two or more persons—Liability of assailants.—(1) It two or more persons attack another and cause several injuries one of which alone is grievous hurt and it is not possible to say which of the accused caused the injury which amounts to grievous hurt none of the accused can be convicted for any offence other than simple hurt, unless there is material to show that the grievous hurt was caused in furtherance of common intention to inflict an injury of that kind. *1979 WLN (UC) 480.*

(2) Injuries causing death—Injuries caused by two persons—Common intention not proved—One of the accused given benefit of doubt—Other cannot be convicted under s. 302 unless specific injuries caused by him proved—Accused, held, could be punished under S. 325 as all injuries cannot be said to have been inflicted by him. *1980 Chand CriC 144 (P&H).*

(3) If two or more persons join together and in furtherance of common intention to cause grievous hurt attack another and cause grievous hurt, all of them can be convicted under this section read with S. 34 irrespective of the identity of the person who caused the grievous hurt. *AIR 1976 SC 1537.*

(4) Where the common intention of the accused is to cause grievous hurt and one of the assailants gives a blow which proves fatal and the evidence does not disclose which of the assailants dealt the fatal blow, the accused cannot be convicted of culpable homicide, but are liable only under this section. *AIR 1972 SC 2056.*

(5) Where there was no common intention to kill the deceased and when it was not clear as to who inflicted the serious injury which was in the ordinary course of nature sufficient to cause death it was held that the accused could only be convicted u/s. 325 P.C. *1983 Raj Cri Cas 75.*

(6) Where the accused, more than five in member are exercising their right of private defence of property, but one of them exceeds the right of private defence and causes grievous hurt, he alone can be punished under this section and not the others. *AIR 1919 Lah 458.*

(7) A hit the deceased with back side of axe—Death of the deceased—M also causing injuries which were not such as to cause death—Conviction of A for murder upheld—conviction of M under S. 302 read with Sec. 34, P.C. altered to one under S. 325 as there was no common intention to cause death. *AIR 1975 SC 1506.*

(8) The mere fact that four persons who had comparatively assigned lesser parts have been acquitted is no reason to doubt the prosecution case. *1982 CriLJ (NOC) 36.*

(9) Fight between two parties with free exchange of stones—A and B of accused party causing one injury each to C of complainant party with stones—Injuries resulting in C's death for want of proper medical care—A and B are guilty under S. 325 and not under S. 300. *1979 CriLJ 558 (J&K).*

(10) Accused demolishing obstruction placed in their path—No unlawful assembly—Individual members causing grievous hurt liable. *1979 CriLR (SC) 398.*

4. Grievous hurt and right of private defence.—(1) Superficial injuries on person of accused—Not caused at time of occurrence—No obligation on prosecution to show how the injuries occurred. *AIR 1979 SC 1010.*

(2) Where the accused had a right of private defence and evidence did not show which of the accused gave a fatal blow and thus exceeded the right, none can be convicted either under S. 304 or under S. 325. *1979 WLN (UC) 23.*

(3) When the accused was attacked while he was active to maintain his possession of the portion of the house in his possession he and his associates were held within their right to inflict injury in exercise of his right of defence of his person or property. Their conviction under S. 323/149 set aside and they were acquitted. *1983 RajCriCas 227.*

5. Charge.—(1) Where an accused is convicted under this section by the application of S. 234 the absence of a specific mention of S. 34 in the charge sheet does not make the conviction and sentence invalid, if no failure of justice has been occasioned by the omission. *1961(1)CriLJ 625 (Assam).*

(2) Charges under Sec. 147, 323 and 447 P.C. against eight accused including petitioner—separate charge u/s. 325, P.C. against petitioner—Charges u/ss. 147, 323 and 447 not proved and acquittal of all accused—Held when evidence in regard to other accused was disbelieved, same evidence cannot be accepted for convicting petitioner alone u/s. 325 on same facts particularly when he was acquitted u/s. 447 P.C. *1984, CriLJ 203.*

(3) Where a complaint contains charges under this section as well as under S. 323 and the Magistrate frames a charge under S. 323, he can at a later stage of the trial add a new charge under this section in addition to the charge already framed. *AIR 1968 Guj 218.*

(4) There is no illegality in an accused being charged under S. 147 and also under this section, inasmuch as an offence under the former section is a substantive one. *AIR 1938 Oudh 95.*

(5) An accused charged under this section can also be charged with the auxiliary offence under S. 367. *AIR 1962 AndhPra 267.*

(6) 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 of—, at—, voluntarily caused grievous hurt to—, and thereby committed an offence punishable under section 325 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

6. Proof—Evidence.—(1) Before a conviction could be recorded for an offence under this section, strict proof must be adduced to show that the injury falls under any one of the eight categories mentioned in S. 320 *(1894) ILR 19 Bom 247.*

(2) Offence under—alleged weapons of offence not recovered from accused—Hence, no direct evidence to connect accused with alleged offence through the weapon—Accused could not be convicted under S. 325. *1982 CriLJ 254.*

(3) Where it was alleged that one of the two accused gave one blow with a kassi, a sharp-edged, weapon, in natural course it would have to be presumed that the accused would use the sharp-edge of the weapon first and when the post-mortem report did not indicate any injury caused by a sharp-edged weapon, the accused would be taken not to have caused any injury at all in the absence of evidence to show that the accused used the reverse blunt edge of the weapon in assaulting the deceased. *1981 AllLJ 972.*

(4) Where the medical report showed that the wounds or injuries were of grievous nature and there was satisfactory evidence of the assault and the injuries were recorded by the doctor in the injury register of the hospital the accused was liable to be convicted under this section. *1982 CriLJ 1420.*

(5) Doctor opining wound was stitched when the victim was admitted to hospital—Prosecution not explaining as to when and how the wound was stiched prior to the admission of the injured in the hospital—Police not lodging F.I.R. thought it has knowledge of the incident—Prosecution evidence nor reliable—Held it was unsafe to rely on the prosecution evidence and the accused was entitled to benefit of doubt. *1983 ChandCriC 503 (506, 507) (Delhi)*

(6) Grievous hurt—Proof—altercation between deceased and relatives of accused—Deceased beaten by them by kicks and fists—Accused on hearing call of his brother coming out of house and hitting deceased on head with lathi resulting in fracture of skull—Conviction of accused under S. 325, held proper. *1982 AllLJ (NOC) 55.*

(7) Police pursuing suspects on apprehension of offence with respect to opium—Suspects causing injuries—question whether opium belonged to assailants is of no significance. *AIR 1974 SC 1156.*

(8) Conviction could not be sustained once it was held that there was a free fight between both the parties and the accused were not aggressors. *(1982) 2 Chand LR (Cri) 295 (Delhi).*

(9) Where the petitioner asked the accused not to damage his standing crop and they began to abuse him and one of the accused gave a blow with the wooden piece while others held him and twisted his finger thus fracturing it, it was held that evidence should not be evaluated and it should only be considered whether the evidence adduced was enough for the commission of the offence. *1983 Chand Cri C 457 (P&H).*

(10) Complaint under S. 325—Delay in making solemn affirmation of what is stated in complaint—Absolutely no evidence on record to show that the medical report was in any way incorrect—No reason given for disbelieving prosecution witnesses—Order of acquittal by Magistrate set aside. *1981 BLJR 129 (133, 134) : 1980 CriLC 472.*

(11) Conviction under S. 325—Evidence—Inconsistent statements of alleged eye-witnesses even regarding the time of occurrence (morning or evening)—Inordinate and unexplained delay in filing F.I.R.—Attempt of relatives to bury the dead body of victim without filing any report—All these throw doubt on the truthfulness of prosecution case—Accused acquitted. *1980 WLN (UC) 144 (Raj).*

(12) Where the accused caused injuries to the victim and the injuries had been proved in accordance with law by the production of the doctor concerned and the victim was in factory hospital

for about 22 to 24 days it was held that the accused was not liable for conviction as it was not proved by producing the hospital nurse or attendant that the victim was in severe bodily pain for 20 days and that he was unable to follow his ordinary pursuits. *1982 AllLJ 1209.*

(13) Conviction of accused under S. 325—Accused, science teacher in govt. High School—Evidence of Head Master that accused was on duty on date of occurrence—Benefit of doubt should be given to the accused—conviction set aside in revision. *(1984) 1 Crimes 476 (P&H).*

(14) Throwing a stone at the face of complainant with force—Intention presumed. *AIR 1942 Mad 550.*

(15) Where the accused was alleged to have abducted his former wife and caused burn injuries on vital parts of the body and the wife gave contradictory statements before police and Court about rape by many persons and the accused was proved, by documentary and other evidence, to be in bank at the time of occurrence, the plea of alibi held, deserve to be accepted and conviction was liable to be set aside. *(1984) 1 Crimes 787 (P&H).*

(16) Where in a free fight between two groups injuries were sustained by both parties during the fight but the injuries, some of them serious, sustained by the accused party were not explained satisfactorily and also motive seemed to be on the side of complainant party, benefit of doubt would be given to the accused and their conviction under S. 325 would not be maintainable. *(1984) 1 ChandLR (Cri) 512 (516, 517) (P&H).*

(17) Where a group of persons armed with deadly weapons attacked the deceased and caused serious injuries to the deceased but the witness was unable to identify the accused persons who participated in the occurrence the accused could not be held guilty under S. 325. *1983 WLN (UC) 369.*

(18) Where a group of persons armed with weapons caused injuries to the deceased and out of the injuries to the deceased and no specific grievous injury is attributed to any specific person, none of the accused could be said to be guilty under S. 325. *1984 AllCriLR 187 (P&H).*

7. Conviction.—(1) Where an accused caused grievous hurt and also simple hurt to a person on the same occasion and is charged under this section and S. 323, and is convicted under this section, he cannot be convicted separately under S. 323. *AIR 1968 Guj 218.*

(2) Where a person is charged and convicted for murder, he cannot also be convicted and sentenced for causing grievous hurt caused in the course of the same Act. *AIR 1931 Lah 27.*

(3) Where the accused is charged for a major offence and such offence is not proved, he can be convicted for a lesser or minor offence if the evidence warrants such conviction. *AIR 1946 Bom 38.*

(4) In a case under S. 325 read with S. 149 if the common object of the unlawful assembly was not proved only that accused who inflicted the injury could be convicted. *1983 UPCriR 96 (All).*

(5) Where several persons are charged with being members of an unlawful assembly whose common object is to cause grievous hurt and grievous hurt is caused by some of them but rioting is not proved, the accused cannot be convicted under this section in the absence of a separate charge as required by of the Code of Criminal Procedure. *AIR 1955 SC 274.*

(6) When a Court draws up a charge under this section, it clearly intimates to the accused that, whether they caused hurt or not, they are guilty by implication of such offence and when they are acquitted of rioting, all the offences which they are said to have committed by implication also disappear and they cannot be convicted under this section. *AIR 1977 SC 709.*

8. Sentence.—(1) It is not legal to pass separate sentences where the accused are charged both under Section 147 and S. 149 read S. 325. *1901 PunLR (Cri) No. 52, P. 111.*

(2) The punishment provided for an offence under this section is a sentence of imprisonment extending up to seven years and a sentence of fine can only be in addition to such sentence of imprisonment which is obligatory. Hence, a sentence of fine only under the this section is contrary to law. *AIR 1972 Pat 50.*

(3) In awarding a sentence, the Court should take into account the weapon used, the manner in which the offence was committed and the consequence that ensued. *AIR 1956 MadhB 269.*

(4) Voluntarily causing grievous hurt—Sentence—Accused was alleged to have caused fracture to the index finger—Other accused had also suffered injuries in the occurrence—Accused who had caused the fracture with the blunt end of the gandasa was sentenced to 2.5 years' R.I. Court reduced the sentence to 6 months' R.I. looking to various circumstances of the case. *AIR 1982 SC 1466.*

(5) Where action of accused was wholly unjustified, no lenient view in the matter of sentence could be taken and imprisonment for 5 years was held to be justified. *1981 AllLJ 280.*

(6) In view of the facts and circumstances of the case, the nature of the injuries, the young age of the assailants and the matter relating to 6 years back, a lenient view was called for. *1982 WLN (UC) 365.*

(7) In cases not falling under S. 335 but coming under S. 325 a substantive sentence of imprisonment is necessary. *AIR 1972 Pat 50.*

(8) No premeditation—Heavy sentence need not be passed . *AIR 1953 All 491.*

(9) Accused adopting atrocious torture—Maximum punishment given. *AIR 1951 Trav-Co 159.*

(10) Probation of offences Act (1958), S. 4—Conviction under S. 325, Penal Code—Having regard to the circumstances of the case, nature of the offence and character of offender, held it was expedient to release offender in probation of good conduct for period of one year. *AIR 1977 SC 1991.*

(11) Criminal P.C.—Accused young boy on spur of moment causing grievous hurt to victim resulting in death—Accused already in detention in connection with case—Period of detention of 4 months could be set off under Cr.P.C. *1984 CriLJ 833.*

9. Compoundaing.—(1) An offence under this section is compoundable with the permission of the Court. But where the person to whom grievous hurt is caused is dead, the case is not compoundable by the heirs of the deceased. *AIR 1915 All 443.*

(2) When there is no valid reason for refusing permission to compound an offence under S. 325 offence should be allowed to be compoundable. *(1984) 1 Crimes 453 (P&H).*

(3) If the accused and the complainant are willing to compromise, the refusal of a third party (master of the complainant) is no sufficient reason to refuse compounding. *AIR 1914 Oudh 167.*

(4) An accused was convicted under Ss. 325/324. Later parties compounded the case, after High Court had confirmed the conviction. Parties filed the compromise deed in Supreme Court after obtaining special leave. Supreme Court allowed the compounding and acquitted the accused thus reversing the High court judgment. *AIR 1981 SC 2008.*

(5) Where the injured filed an affidavit that he wanted to compound the offence under section 325 the Supreme Court allowed the compromise and acquitted the accused of the charge under S. 325, as regards other offences the conviction was upheld. *AIR 1981 SC 1775.*

10. Revision and appeal.—(1) Where a Magistrate convicted an accused under S. 323 and passed a sentence of fine and the Sessions Court in appeal held that the offence fell under this section but maintained the sentence for the reason that it had no power to enhance the same, it was held by the High Court that the sentence was not legal as under this section the Court had to pass a sentence of

imprisonment and that the proper course for the Sessions Court would be to refer the matter to the High Court for making the sentence legal. *1955 AllWR (HC) 304.*

(2) The High Court has a discretion to interfere with the sentence passed by the lower Court, in proper cases. *AIR 1972 Pat 50.*

(3) In a proper case the High court can reduce the sentence of imprisonment in revision. *AIR 1964 Orissa 251.*

(4) Where, in a case under this section a sentence of fine only is passed, the High Court will not interfere in revision and pass a sentence of imprisonment especially in cases where there has been great delay. *AIR 1953 Punj 201.*

(5) Where an accused was charged and sentenced under this section read with S. 149 ante instead of under S. 333, the High Court did not interfere in revision on the ground that the sentence was not manifestly inadequate. *AIR 1931 Lah 31.*

(6) Supreme Court in appeal did not interfere with appraisal of evidence. *AIR 1974 SC 1156.*

11. Procedure.—(1) Where accused were acquitted on a charge under S. 325, simply because another view could be taken to the evidence acquittal should not be changed into conviction. *1983 UP Cri R 79.*

(2) F.I.R. showing that accused along with three others had caused dang injuries on the head of the deceased but in their statements u/s. 161, Cr.P. Code, the witnesses attributed dang injuries only to the petitioner and one more and to none else. Post-mortem report showing only one head injury which proved fatal. Held accused was entitled to bail. *1984 Chand Cri C 36.*

(3) **Procedure**—Cognizable—Summons—Bailable—compoundable—Triable by the Metropolitan Magistrate or Magistrate of the first class.

12. Practice.—Evidence—Prove: (1) That the accused caused hurt of any of the kinds described in section 320.

(2) That the accused intended or knew that he was likely to cause grievous hurt of any kinds so described.

(3) That the accused did so voluntarily.

Section 326

326. Voluntarily causing grievous hurt by dangerous weapons or means.— Whoever, except in the case provided for by section 335 voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with [1][imprisonment] for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *Corrosive substance.*
3. *Grievous hurt resulting in death.*
4. *"Voluntarily".*
5. *Attack by several persons—Common intention.*
6. *Unlawful assembly and grievous hurt.*
7. *Instrument used as a weapon of offence.*
8. *Right of private defence and grievous hurt.*
9. *Procedure.*
10. *Evidence and Proof.*
11. *Conviction.*
12. *Sentence.*
13. *Appeal.*
14. *Revision.*
15. *Charge.*
16. *Practice.*

1. Scope.—(1) The provision of this section can only apply to a person, who does a substantive act himself, namely, inflicts a blow which causes grievous hurt *(6 CWN 98)*. The act of the offender must have been done voluntarily. Unless the weapon used is deadly and the hurt intended or known likely to be caused was grievous there can be no conviction under this section *(AIR 1939 Mad 507)*. In all cases of voluntarily causing grievous hurt the evidence of the medical officer who examined and attended on the person to whom the hurt was caused should, if obtainable without unreasonable expense or delay, invariably be taken. Although section 326 provided for injury by corrosive substance, the nature of corrosive substance and the quantity of it and result following from it have always to be the determining factors in finding out whether or not the act complained of was likely to cause death. Tooth is an instrument for cutting and serves as a weapon of offence and defence and, consequently, an injury caused by teeth bite would be an offence under section 324 or 326, depending upon whether the injury is simple or grievous. The biting off on the tip of the nose by teeth would be an offence under section 326 *(1970 CriLJ 1235)*. Nose cutting is a very serious offence and sentence of six months' rigorous imprisonment under this section cannot be said to be excessive. When one person was killed and several others were injured in a fight between two parties, there was no proof as to which party was the aggressor. It was held that all the accused must be acquitted, because in the absence of a finding as to who was the aggressor the accused was entitled to acquittal *(PLD 1977 Quetta 32)*. The primary meaning of the word 'fracture' is 'breaking'. Unless a bone is cut through a mere cut in the bone would not make the injury grievous. It is the fracture or dislocation of a bone which falls under the definition of grievous hurt *(38 CrLJ 960)*. Cases of rioting in which a plea of private defence is raised should be decided strictly on their own facts and previous decisions are only useful in so far as they indicate the general principles which may apply to approximately similar set of facts *(19 CrLJ 983)*. For an offence under this section, a sentence of mere fine is not permissible. Normally, in cases of grievous hurt, where deadly weapons are used, the proper sentence to be imposed is a sentence of imprisonment. In order to believe the story of an apparently unjustified attack, it must be supported by an unambiguous and unimpeachable evidence. Where there is considerable unexplained delay in FIR prosecution witnesses change their statements from time to time, endeavouring to patch up weak link in prosecution case and resile from their statements and no material corroboration of earlier statements is available the accused must be given benefit of the doubt and acquitted *(1969 PCrLJ 1453)*.

(2) The bare fact that the complainant's left thumb was chopped off is enough to sustain the conviction of the appellants—complainant having been corroborated by his earlier statement in the F.I.R. and other witnesses—there is no necessity of looking for the medical evidence as to the injuries on the buttock. The prosecution simply produced the Admission Register to prove that the

complainant was admitted in the hospital and that he was there for 25 days. This Register, again, entered only one injury. No other injury was mentioned in the admission Register. *Osman Ali Bepari & another Vs. The State. 1 BSCD 244.*

(3) Conviction and sentence u/s. 326 read with Sec. 114, PC—When both the parties took part in the assault the sentence, whether may be reduced to the period already undergone—This period appeared to be two years—In view of the nature of the injuries and the weapons used by the appellants, for ends of justice, sentence was reduced from six years to four years and six months by the Appellate Division (other things remaining the same). *Md. Rezaul and ors. Vs. The State. BCR 1985 AD 415.*

(4) Offences under the section—Bail not a matter of right. Since an offence under section 326 is punishable with transportation for life, the accused could not claim to remain on bail as of right. *Golam Haider Vs. Karim Baksh (1963) 15 DLR (SC) 2.*

(5) Accused causing death, acting in the right of private defence of property. Intention to kill cannot be attributed to the accused though knowledge that he was likely to kill could be so attributed—Charge under section 302, P.C. but conviction under section 326—In the absence of appeal by the Crown, conviction under section 326 maintained and sentence enhanced under section 439 Cr. P.C. *Boga Vs. Crown (1954) 6 DLR (WPC) 130.*

(6) Appellant Nos. 2-6 cannot be convicted under section 326 of the Penal Code without framing any charge under section 34 or 149 of the Penal Code and without leading any evidence as to their acting in concert or in pursuance of any common object. *Ibrahim Mollah Vs. State (1988) 40 DLR (AD) 216.*

(7) Appellant Nos. 2-6 cannot be convicted under section 326 of the Penal Code without framing any charge under section 34 or 149 of the Penal Code and without leading any evidence as to their acting in concert or in pursuance of any common object. *Ibrahim Mollah Vs. State 40 DLR (AD) 216.*

(8) Whether grievous hurt caused by the blunt side of the spade falls under Section 326 of the Penal Code—If the weapon of offence is likely to cause death the offence shall come within the mischief of Section 326 of the Penal Code irrespective of the fact that the injury was caused by the blunt side of the weapon or by its sharp side—Spade is an instrument which, if used as a weapon of offence, is likely to cause death. *Mofazzal alias Md. Mofazzel Hossain and another Vs. The State 7 BLD (HCD) 406.*

(9) Ingredients of offence u/s 326—A hurt must conform to the ingredients of section 320 of the Penal Code in order to be grievous and punishable under section 326. When the evidence on record are not clear and specific as to the inflicting of the injury by the particular accused and the Medical Officer while examining the hurt did not mention as to the ingredient of the eighth clause of section 320, the sentence under section 326 of the Penal Code does not appear to be perfectly justified and accordingly the sentence is reduced under the circumstances from one u/s. 326 to that u/s. 324 of the Penal Code with the sentence already served. *Abdul Jalil Vs. The State—4, MLR (1999) (AD) 262.*

(10) Conviction—Sustainability—The conviction and sentence passed under sections 326 and 353 of the Penal Code on the basis of consistent ocular evidence of the occurrence taking place in broad day light cannot be interfered with by any other liberal construction not warranted by the facts and evidence on record. *Nura Miajee Vs. The State 2, MLR (1997) (AD) 86.*

-126

(11) Distinction between the demarcation line between the culpable homicide not amounting to murder and grievous hurt is thin. In the former case the knowledge or intention as to the likelihood of death and in the later the knowledge as to endangering life of the victim is the essence which makes

the difference between section 304 and 326 of the Penal Code. *Humayun Matubbar Vs. The State—4. MLR (1999) (HC) 176.*

(12) Neither the victim nor the doctor has told that victim sustained grievous hurt nor a scrap of paper has been brought on record to show that victim had been in hospital for more than 20 days in severe bodily pain or unable to follow his ordinary pursuit, the injuries sustained by the victim do not come under the mischief of section 326 and 326A of the Code. *Anaddi alias Ayenuddin and ors Vs. State (Criminal) 6 BLC 310.*

(13) As the convict-appellant not given fikal blow, he cannot be found guilty under section 326. *4 BLC (AD) 12.*

(14) Section 325 and 326 distinguished. In a border line case between section 323 and 325 of the Penal Code the accused would be entitled to the benefit of doubt and be convicted under section 323 of the Penal Code and not under section 325 *(Ref 1 BSCD 244). 41 DLR 134.*

(15) Principle of trial of counter-cases by the same court—Whether the same principle is applicable to the appellate court—Disposal of appeals by the same court for better appreciation of evidence preferable. High Court Division's observation is not founded upon correct appreciation of the principle governing the counter-cases. Neither of the parties in the case and counter-cases are entitled to protection of law as none of them were in actual possession. In view of the peculiar facts and circumstances of the case, the sentence of the appellants should be reduced. *7 BCR 71 AD.*

(16) Prima facie case against the accused persons on the basis of examination of 7 witnesses through a judicial enquiry by a Magistrate to whom the case was sent by the SDM after examination of the complainant. No exception can be taken to this. The observation by the High Court Division is unwarranted. No interference is called for. *7 BCR 168 AD.*

(17) Conviction of accused under section 148, 324, 149 and 326/149 of the Penal Code cannot be sustained merely on the basis of omnibus statement of the witness that they and several others came armed with weapons like leja and sarki. For coming to a definite finding whether each of the accused persons were members of the unlawful assembly and did commit the offence of rioting in prosecution of the aforesaid common object of the assembly, overt act of each accused and weapon used by each accused have necessarily to be considered. *34 DLR 94.*

(18) Court's primary duty is to find out as to whether evidence led by the prosecution is true and substantially proved the occurrence and the persons charged actually participated in the same. *1 BCR 70 SC.*

(19) Medical evidence seriously in conflict with ocular testimony and confirmatory circumstance available on record to suggest participation of accused in occurrence. One of two independent witnesses simply not supporting prosecution case while other given up as having been won over. Accused, held entitled to benefit of doubtful circumstances—Conviction and sentence set aside. *1982 PCrLJ 485.*

(20) In order to impose enhanced punishment under this section for causing grievous hurt such hurt should have been caused by any of the means mentioned in this section. *(1906) 7 CriLJ 362.*

(21) This section does not apply:—

(a) Where the hurt caused is not a grievous hurt. *AIR 1980 SC 106.*

(b) Hurt is not voluntarily caused or is caused by means other than those referred to in this section. *1967 KerLT 223.*

(22) Where in consequence of the injuries caused on the lower jaw by the spear, the victim was neither disfigured nor any deformity came on the jaw of the victim, the accused could be convicted only under S. 326 and not under S. 307. *1980 AllLJ 890.*

(23) Accused giving blow with 'knife' on abdomen of victim—Doctors who had examined and treated the victim not produced being unavailable—Nature of injuries proved to be grievous from medico-legal certificate and case sheet prepared by doctors in discharge of official duties—Victim not capable of following his ordinary pursuits for a month—Conviction of accused under S. 326, valid. *1982 CriLJ (NOC) 98.*

(24) Where the accused caused grievous hurt in a murderous attack to a victim (a friend) taken out for an evening stroll by abusing trust reposed by him and the grievous hurt resulted in permanent loss of the left hand index finger and fingers of right hand the accused were liable to be convicted under this section. *1981 CriLJ 840 (P & H).*

2. Corrosive substance.—(1) A causing of grievous hurt by throwing Sulphuric acid will come within this section. *(1970) 1 Malayan LJ 49.*

3. Grievous hurt resulting in death.—(1) Where the grievous hurt caused has resulted in the death of the victim the question whether the case falls under this section or S. 299 or 300 depends upon the intention or knowledge of the accused. If the grievous hurt was caused with the intention of causing death, but death has not actually resulted the accused should be found guilty under S. 307 rather than under this section. *AIR 1941 Mad 489(491) : 42 CriLJ 821 (DB).*

(2) Both accused convicted for murder simpliciter but acquitted of charge of S. 300 r/w S. 34—Injuries caused by one only sufficient in ordinary course of nature to cause death—No appeal preferred against acquittal of accused, injuries caused by whom were not sufficient in ordinary course of nature to cause death, on charge of S. 300 r/w S. 34—Held, accused, injuries caused by whom were not sufficient in ordinary course of nature, to cause death, could be convicted with aid of S. 34 in appeal filed by accused. Accused, however, was convicted of offence under S. 326 r/w S. 34. *1983 CriLJ 1411.*

(3) Where there is no intention to cause death or knowledge that the grievous hurt would be likely to cause death this section will apply. *AIR 1977 SC 893.*

4. "Voluntarily".—(1) The nature of the instrument and of the injuries will be valuable evidence in ascertaining the intention of the accused in using the instrument. *1955 Madh BLJ (HCR) 1239.*

(2) Accused had thrown bomb at deceased as a result of which she died—Held that the act done by accused was with the knowledge that it was likely to cause death but without any intention to cause such bodily injury as was likely to cause death and hence he was guilty under S. 304, Part II and not under S. 326. *1982 CriLJ (NOC) 94 (Orissa).*

5. Attack by several persons—Common intention.—(1) Where two or more persons join together with the common intention of causing grievous hurt only to another person and one of them armed with a deadly weapon attacks him in pursuance of the common intention and causes grievous hurt, all the accused will be liable only under this section, even if death ultimately results. *AIR 1979 SC 1755.*

(2) Where the common intention is to cause death, and death has resulted and the crime amounts to murder, the accused cannot be convicted under this section read with S. 34. *AIR 1954 SC 706.*

(3) Where one of the assailants exceeds the common intention to cause grievous hurt only and inflicts a fatal injury he may be liable individually for culpable homicide. *AIR 1935 Rang 299.*

(4) Attack by several persons—Only one of them intending to cause grivous hurt—Others cannot be convicted of grievous hurt but only of simple hurt if their common intention was to cause such hurt. *AIR 1977 SC 619.*

(5) Where in a murder case the eye-witnesses did not clearly state that accused continued to hold the deceased till assault was over by another accused and the evidence only showed that accused (appellant) had caught hold of deceased and had scuffled with him while the other accused had taken out knife and commenced assault, it was held that it could not be said that the accused (appellant) shared intention of the other accused to murder the deceased but the appellant was vicariously liable for offence under S. 326 read with S. 34. *AIR 1982 SC 1228.*

6. Unlawful assembly and grievous hurt.—(1) Where the common object of an unlawful assembly is to cause grievous hurt and a member of the unlawful assembly causes grievous hurt, all the members of the unlawful assembly are liable under this section read with S. 149. *AIR 1972 SC 860.*

(2) If any member of an unlawful assembly whose common object is only to cause grievous hurt, actually causes the death of the person attacked and it is not possible to ascertain who caused the death, all the members of the assembly will be liable only under this section r/w S. 149. *AIR 1967 All 437.*

(3) Where the accused are charged under S. 149 read with this section and there is no proof of the existence of the unlawful assembly, the accused cannot be convicted under this section. *AIR 1915 Cal 292; AIR 1981 SC 1219.*

(4) Persons charged under this section can be convicted under this section read with S. 149 if no prejudice is caused to the accused. *AIR 1956 Orissa 171.*

(5) Where the offence of grievous hurt is not committed in furtherance of the common object of the unlawful assembly, the other members of the assembly will not be liable under this section. *AIR 1972 SC 1221.*

(6) Charge against members of unlawful assembly under Ss. 326/149—Some members acquitted of that charge—Remaining members would also have to be acquitted of the same charge as otherwise it would be unfair and delf-contradictory to convict others. *AIR 1978 SC 1647.*

7. Instrument used as a weapon of offence.—(1) Grievous hurt caused by the following instruments used as weapons of offence has been held to be offence within the meaning of this section:—

(a) Axe. *AIR 1955 SC 216.*

(b) Dao or chavi or sharp weapon. *AIR 1953 Assam 28.*

(c) Knife or razor blade. *1969 CriLJ 691.*

(d) Revolver or gun. *ILR (1963) 15 Assam 552.*

(e) Hot ladle. *AIR 1935 All 282.*

(f) Arrow. *1954 MadhBLJ (HCR) 1314.*

(g) Jumper or cudgel or iron-shod stick. *AIR 1961 Mys 74.*

(3) A blunt piece of wood is not a dangerous weapon or one which, used as a weapon of offence, is likely to cause death. *AIR 1951 Trav-Co159.*

8. Right of private defence and grievous hurt.—(1) A person is entitled to resist and repel aggression against him or his property in the exercise of his right of private defence. *AIR 1976 SC 2423.*

(2) Under S. 97 the right of private defence extends not only to the defence of one's own body but also to that of the defence of any other person. *AIR 1969 NSC 134.*

(3) Charge of murder—Admitted enmity between two factions—Injuries on both sides—Nature of injuries on prosecution party and gunshot injuries on accused party suggesting that attack by accused party followed firing of pistol though nothing could be determined with certainty—Injuries on prosecution party inflicted after pistol was snatched resulting in death of one of them—Held accused had exceeded their right of private defence and were guilty under S. 326 r/w S. 149 though charge under S. 302 r/w S. 149 was not proved. *AIR 1980 SC 864.*

(4) A plea of private defence is not barred merely because accused also raises a plea of alibi. *AIR 1961 Mys 74.*

9. Procedure.—(1) In a case under this section, a Magistrate should ordinarily commit the accused to the Court of Session for trial, as the offence is punishable with a sentence of imprisonment for life or imprisonment up to ten years and fine. *(1892) ILR 16 Bom 580.*

(2) A magistrate of the first class empowered under S. 30 of the Code of Criminal Procedure to try such cases was held competent to try the case if he thought that a sentence of less than two years was sufficient; but if he thought that a heavier sentence was called for, he should commit the case for trial to the Court of Session. *AIR 1959 Punj 98.*

(3) Although offence under Sec. 326 is not compoundable yet when the parties are related and come to a compromise though the offence cannot be compounded yet the compromise can be taken into consideration in awarding a sentence. In instant case accused's sentence was reduced to period already undergone. *1983 ChandCriC 390 (P&H).*

(4) Where several accused including a police officer were prosecuted under Ss. 302, 326 and 307, and the offence under S. 302 was confined only against police officer, in the absence of sanction under S. 132, Cr.P.C., cognizance against police officer could not be taken, and as such though there was no scope for taking cognizance of offence under S. 302 against remaining accused, prosecution for offences under Ss. 326 and 307 could proceed against them. *1981 CriLJ 541.*

(5) Procedure—Cognizable—Summons—Not bailable—Not compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered.

10. Evidence and proof.—(1) As a general rule, in all cases of grievous hurt, the evidence of the Civil Surgeon who examined the injured person, if available without delay or expense must be taken. If not taken, the accused will be entitled to the benefit of the presumption which would arise from the prosecution withholding the best evidence. *(1872-1892) Low Bur Rul 292.*

(2) Assault by several persons—Victim receiving injuries caused by axes and spears including a fracture of frontal bone—Victim stating in F.I.R. that accused A had given him one blow with his (A's) stick on his head—In his evidence in trial Court victim stated that he was hit with axe on forehead by accused A and another accused—Only one incised injury found on forehead of victim—Serious infirmity in evidence of victim—Held in the facts and circumstances of the case that accused A could not be convicted for offences punishable under S. 326 read with S. 34. *(1983) 1 BomCR 476.*

(3) Injuries—both simple and grievous hurts were caused by sharp-edged weapon. Two of the injuries were declared grievous by probing into them by fingers without getting the injuries X-rayed. Held under these circumstances a charge u/s. 326 was unsustainable. *(1984) 1 ChandLR(Cri) 1 (P&H).*

(4) Where two gunshot wounds one in eye and another on abdomen were found on victim's body, the wound on abdomen only was attributable to shot fired by accused, and the same was not sufficient to cause death according to Doctor's opinion, the abdominal wound could be described as grievous injury, and the accused, could therefore, be held guilty under S. 326. *AIR 1981 SC 451.*

(5) Where in the First Information Report, it was specifically mentioned that the accused had during the course of fight left the place of occurrence and brought an axe from his home and gave a blow to the victim with it on his head and the statements in this regard were also corroborated by the medical evidence and the statement of the doctor also disclosed the injury to be of grievous nature, the conviction of the accused under S. 326 would be maintainable. *1982 CriLJ 36.*

(6) Where the accused was convicted under S. 326, and he was alleged to have given 'gandasa' blow on the right forearm of the injured, whose testimony was discarded by the trial Court in toto, one of the co-accused was acquitted by the trial Court, injury on the person of the co-accused was unexplained, inordinate delay occurred in lodging F.I.R. in such circumstances it would not be safe to maintain the conviction of the accused. *1984 ChandCriC 65 (P & H).*

(7) Charge of offence under S. 326/34—Prosecution failing to explain injuries sustained by accused which were no less serious than injuries sustained by prosecution party—F.I.R. not specifying the role of accused persons—Independent witnesses cited in report were not examined—Held, in the facts and circumstances of the case that the accused was entitled to acquittal. *1982 AllLJ 530.*

(8) In a dispute over theft of crop, the accused, armed with pharsas and lathis, beat the victims who died. There was a single blow on head and other injuries mostly on limbs and on non-vital parts as disclosed by post-mortem by doctor. The head injury was grievous. Considering the evidence and the circumstances it was held that the object was to cause grievous injury with dangerous weapons. *1983 RajLW 656.*

(9) An accused can be punished for an offence under S. 326, P.C. Where he is charged under S. 307 and though he is not originally charged under S. 326, P.C. *1984 Delhi Rep J 351.*

11. Conviction.—(1) If a person is charged under S. 397 and also under this section and if the charge under the former section is not proved the accused can be convicted under this section, provided the facts prove the offence. *AIR 1914 Mad 425 (428) : 13 CriLJ 730 (DB).*

(2) Where an accused is tried for murder, he can be convicted in the same trial for the minor offence under this section for causing grievous hurt. *AIR 1939 Pat 611.*

(3) As an offence under this section is not a minor offence in relation to an offence under S. 307 and hence ordinarily a person charged under S. 307 cannot be convicted under this section. *AIR 1956 Raj 39.*

(4) An accused can be charged with an auxiliary offence under S. 367 along with the main offence under this section; but as the offence under S. 367 cannot be tried by a Magistrate, committal by the Magistrate after framing of charges is justified. *AIR 1962 AndhPra 267.*

12. Sentence.—(1) In considering the sentence to be passed the nature of the injury, weapon used, and the part of the body on which the injury was caused are important factors to be considered. *AIR 1970 Guj 186.*

(2) Looking to the nature of the offence and the manner in which it was committed and also the nature of injuries and that it was not premeditated, the benefit of probation was granted to the petitioner. *1983 Raj Cri C 315.*

(3) An order to give security is uncalled for where a sentence of transportation or imprisonment is passed for an offence under this section. *(1909) 10 CriLJ 69 (76) (FB) (LowBur).*

(4) Where an accused person is convicted under S. 397 for dacoity of which grievous hurt is an integral part, separate sentences under S. 397 and this section should not be awarded in view of S. 71. *AIR 1916 Mad 582.*

(5) An offence under S. 328 being part of the offence under this section, separate sentences under the former and this section are not proper. *AIR 1949 Oudh 48.*

(6) Separate sentences cannot be passed under this section and S. 323 in a case of grievous hurt to a single person. *AIR 1927 Oudh 313.*

(7) Where an accused, a boy of 15 years was convicted under S. 326 r/w S. 149, only for being a member of unlawful assembly which chased the deceased but, no overt act was alleged on its part, sentence of 2 years' R. I. was imposed having regard to his age. *AIR 1980 SC 1716.*

(8) The fact that a quarrel which resulted in grievous hurt was a sudden one arising in the heat of passion or was due to provocation is a mitigating circumstance in favour of the accused in passing the sentence. *AIR 1943 Mad 681.*

(9) Accused throwing acid on the face of a young girl—Held accused committed a ghastly crime ruining the life of the girl—Conviction under Ss. 326 and 324—Accused a student and already in jail for 14 months—Imprisonment under S. 326 reduced to already suffered and fine enhanced from Rs. 2500/- to Rs. 7500/-. *(1982) 2 SCC 395.*

(10) Where an accused attempts to cause grievous hurt with a deadly weapon, the offence is punishable under this section read with Section 511. *(1904) 1 CriLJ 1078 (1082)(Lah).*

(11) Though an offence under this section is not compoundable, the fact that the parties who belong to one family have settled their dispute and compromised, may be considered in determining the quantum of the sentence and lesser sentence awarded. *AIR 1973 SC 2418.*

(12) Both the hands of the victim were almost maimed by the shots fired by the accused—Held that there was no scope for reducing the sentence of three years' R. I. *AIR 1979 SC 1432.*

(13) Assault resulting in death of victim—Boy of 14 years of age participating in a moment of excitement and some provocation—Conviction under Ss. 326 and 323—Sentence of imprisonment for a period of two years and three months respectively reduced to the period already undergone. *(1969) 2 SCWR 91.*

(14) In view of the fact that the accused had already suffered imprisonment for about four years held that ends of justice would be served if accused was let off with the term already suffered. *1966 Cri App Rep (SC) 303.*

(15) Conviction of accused under S. 302/149 altered to one under Ss. 326/149 by High Court in respect of accused other than actual assailant—Accused released on bail after he had already undergone sentence of about 2.5 years—Case pending in Supreme Court for about 6 years—Sentence reduced to period already undergone in respect of those accused. *AIR 1983 SC 166.*

(16) Occurrence took place 4.5 years back—Accused suffering from shock of alleged murder of his son that occurred a few days before occurrence—Accused 72 years old—Sentence of imprisonment for 7 years reduced to 2 years. *1984 CriLJ (NOC) 45 (Gauhati).*

(17) Sentence—Occurrence taking place about 3 years back—Sentence of one year reduced to 6 months—Fine of Rs. 400/- imposed in addition to the fine imposed by trial Court and in default in payment of fine to suffer further R.I. for 6 months. *1984 AllInd CriLR 193 (P&H).*

(18) Conviction under Ss. 324, 325 and 326 P.C.—Appellants surrendering and agreeing to deposit fine in the Court on the same day—Sentence reduced to six months rigorous imprisonment and a fine of Rs. 3500.00 to be paid by cash—Fine directed to be paid equally to two injured persons. *(1982) 3 SCC 197.*

13. Appeal.—(1) In an appeal against the acquittal of the accused on a charge under this section, the accused is not precluded from putting forward a case inconsistent with the finding leading to the conviction. *(1961) 2 Guj LR 274.*

(2) Where, while granting special leave for appeal, the scope of the appeal was limited to the applicability of the Probation of Offenders Act to the case, the Supreme Court refused to go into the question of the sufficiency of the evidence for a conviction under this section. *AIR 1973 SC 2427.*

14. Revision.—(1) Where in convicting an accused under this section, the Sessions Court relies upon the testimony of certain witnesses, it is not the province of the High Court, in a criminal revision to dispute the findings of fact fairly arrived at by the trial Court. *AIR 1919 Pat 534.*

(2) In an occurrence both complainant party and party of petitioners received injuries—Cross cases—Magistrate recorded conviction of petitioners and acquitted complainant side—Revision against—Held, both courts below cannot reject version of prosecution and introduce a new version of free fight which was case of neither of the parties—Benefit of doubt given to petitioner, their sentence and conviction set aside. *(1984) 1 Crimes 663 (P&H).*

15. Charge.—(1) Grievous hurt caused by sulphuric acid—Charge under Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958—Held charge should have been laid under S. 326, Penal Code. *(1970) 1 Malayan LJ 49.*

(2) 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 of—, at—voluntarily caused grievous hurt by means of which is an instrument for shooting or stabbing etc, and thereby committed an offence punishable under section 326 Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

16. Practice.—Evidence—Prove: (1) That there was the causing of grievous hurt by the accused.

(2) That is was caused voluntarily.

(3) That the accused received no provocation for the same.

(4) That such grievous hurt was caused by means of an instrument for shooting, etc, or by means of any instrument which is used as weapon of offence, is likely to cause death or by means of fire, etc, or by means of any poison, etc or by means of any substance which it is deleterious to the human body to inhale, etc, or by means of any animal.

Section 326A

[10][**326A. Voluntarily causing grievous hurt in respect of both eyes, head or face by means of corrosive substance, etc.**—Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt of the kind mentioned in—

10. Section 326A was inserted by Ordinance No. LXIX of 1984.

(a) clause 'secondly' of section 320 in respect of both the eyes either by gouging out the same or by means of any corrosive substance; or

(b) clause 'sixthly' of section 320 by means of any corrosive substance,

shall be punished with death, or [1][imprisonment] for life, and shall also be liable to fine.]

Cases and Materials

1. Scope.—(1) This section is new and inserted by Ordinance No LXIX of 1984 dated 1-28-84. This is one of the sections where there is provision for death sentence as in sections 121, 132, 194, 302, 303, 305, 307, 326A, 364A, 396 PC. This section applies only to the person who does substantive act himself namely, throws acid or corrosive substance which causes grievous hurt or death as defined in the section. The weapon used must be corrosive and the limit intended or known to be likely to be caused should be grievous. Although section 326A provided for injury by corrosive substance the nature of the corrosive substance and the quantity of it has not been mentioned. This section has been inserted because there was a menace of acid throwing throughout the country, so this legislation has been made to meet the seriousness of the offence and to curb the same. In organic acids like sulphuric, hydrochloric and nitric acid have a local chemical action of corroding and destroying the tissues they come into contact with coagulation, necrosis is produced by the precipitation of protein and may produce fatal consequences, if extensive. They act as irritants. Malicious persons occasionally resort to strong sulphuric acid to disfigure the face or ruin the person by throwing a quantity of it. Old electric bulbs or bottles filled with acid are often thrown in dustbins of the cities or thrown when the victim sleeps, or may be thrown at a beautiful young woman in zealous pursuit. Death may occur from the severe burn inflicted on the skin. Where the accused threw acid on his victim's face, eyes and other parts of the body which resulted in total blindness for life, the accused should be given death sentence.

(2) The offence of gouging out eyes falls with section 326A of the Penal Code. *Dilu alias Delwar Hossain Vs State, represented by the Deputy Commissioner, 48 DLR 529.*

(3) A plain reading of the section shows that all kinds of grievous hurts are not included in this new Section—Of the 8 kinds of hurts specified in Section 320 of the Penal Code only the 2nd and the 6th kinds of the grievous hurts caused in a particular manner and in particular parts of the body of the victim by particular means have been made offensive and punishable under Section 326A of the Penal Code, which if proved, the accused may be awarded the highest punishment of death—The offences under Section 326A are quite specific and distinctive having specific ingredients—In the absence of any finding that the victim sustained any permanent deprivation of his eyes either by gauging out the same or by means of any corrosive substance or that the victim suffered any permanent disfiguration of his head or face by any corrosive substance, the conviction under Section 326A of the Penal Code is not sustainable. *Alamgir and another Vs. The State 12 BLD (HCD) 472.*

2. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable Triable by Court of Sessions.

Section 327

327. Voluntarily causing hurt to extort property or to constrain illegal act.—Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer, or

-127

from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer, or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section may be read along with section 30, 39, 40 and 44 of the Penal Code. The word 'constraining' has been inserted with a view to make the section applicable to all cases where, if 'extortion' could not be proved, a compelling or constraining against the sufferer's consent would equally be an offence.

(2) The word 'property' must be taken to mean both movable and immovable property, and therefore the voluntarily causing of hurt to a person to compel him to give to the accused their shares in immovable property will be an offence under this section on the ground that the word 'property' was defined in General Clauses Act, as including both movable and immovable property. *AIR 1951 Hyd 91.*

(2) Accused charged with forcibly obtaining one thumb impression of complainant on plain sheet of paper—Discrepancy in the prosecution evidence regarding plain sheet of paper—Recovery of promissory note and certain receipts bearing two thumb impressions of complainant from accused immediately after the alleged occurrence and dated earlier to the date of occurrence. Held, that acquittal of accused under S. 327 P.C. was fully justified. *1983 Raj Cri Cas 166.*

2. Practice.—Evidence—Prove: (1) That the accused caused hurt.

(2) That the accused caused such hurt in order to extort from the sufferer, or person interested in him, some property or valuable security; or that the accused caused such hurt in order to constrain the sufferer, or a person interested in him to do something illegal, or to facilitate the commission of an offence.

3. Procedure.—Cognizable—Warrant—Not bailable—Compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate or Magistrate of the first class specially empowered by the Government.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge/Magistrate) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—voluntarily caused hurt to—for the purpose of extorting from the said—(or from a certain person interested in the said), to wit—a certain property, to wit—, and thereby committed an offence punishable under section 327 Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 328

328. Causing hurt by means of poison, etc. with intent to commit an offence.—Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an

offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *"Administers".*
3. *Supplying drug at the instance of the victim himself.*
4. *Mens rea.*
5. *Poison, etc.*
6. *"any person".*
7. *"Facilitate the commission of an offence".*
8. *Attempt.*
9. *Sections 307 and 328.*
10. *Liability where death occurs.*
11. *Onus of proof.*
12. *Procedure.*
13. *Charge.*
14. *Sentence.*
15. *Practice.*

1. Scope.—(1) This section is intended to punish persons who rob or ravish people by putting them out of their senses by means of stupefying drugs, which facilitates the crime and prevents its detection. Where the poison is administered under a misconception and without the knowledge that it is a poison, the section does not apply. An offence under section 328 is a part of the offence under section 326. Where, therefore, an accused has been sentenced under section 326, no separate sentence under section 328 can be passed in view of section 71 *(47 CrLJ 66).*

(2) This section and not S. 326 applies to acts not endangering life. *(1865) 4 Suth WR 4(5).*

2. "Administers".—(1) It is not necessary, in order to constitute an administering, that there should be a delivery by the hand. *(1830) 4 C and P 369.*

(2) Where a servant puts poison into the coffee pot and tells the mistress that she has put the coffee pot for her breakfast and the mistress drinks it, it would amount to administering poison. *(1830) 4 C&P 369.*

(3) Where the accused employed a 'Medicine man' for detecting the culprit who had stolen his cash and the latter administered poisonous substance to all the villagers stating that it would cause the belly of the thief to bulge and three persons exhibited symptoms of poisoning and suffered for a fortnight, it was held that the accused was rightly convicted of administering an unwholesome drug likely to cause hurt. *1 Weir 335(336).*

3. Supplying drug at the instance of the victim himself.—(1) Where a pregnant woman asked the accused to procure for her a drug for causing miscarriage and the accused procured it and gave it to her and she took it and had miscarriage, it was held that the accused was guilty of administering the drug with the intent of causing miscarriage. *(1856) 169 ER 945.*

(2) Supplying or procuring poison at the instance of the person desirous of taking it does not amount to administering the drug. *(1862) 31 LJMC 145 (146)*

4. Mens rea.—(1) For an offence under this section that the accused should have intention or knowledge referred to in the section. *1957 Jab LJ 841 (845).*

(2) In the absence of proof of knowledge or intention referred to in the section the accused cannot be found guilty under this section. *AIR 1955 Ajmer 48.*

(3) Where a boy of 16 persuaded another boy of 12 to give sweetmeats containing dhatura to a girl of 13 in order to make the girl interested in him and the girl took it and became delirious, it was held

that the accused had no intention to cause hurt or to commit a crime or to facilitate the commission of a crime but that he must be presumed to have had the knowledge that he might cause hurt thereby and hence was guilty of an offence under this section. *AIR 1924 All 215.*

5. Poison, etc.—(1) The thing administered must be capable of causing hurt. Where A gave her husband what she thought was poison, but which was really a harmless substance she cannot be held guilty of an offence under this section or of an attempt to commit an offence under this section. *(1896) 9 CPLR (Cri) 14.*

(2) The words 'or other thing' occurring in this section must be referred to the preceding words and be taken to mean 'other unwholesome thing' and not 'other thing' simply. *(1864) 1 Suth WR 7(7).*

(3) Compounder dispensing deleterious substance to his own doctor—Held, High Court rightly convicted accused. *AIR 1975 SC 241.*

6. "Any person".—(1) Where the accused with the object of detecting and punishing the stealers of his toddy, mixed a poisonous drug with it supposing that they might drink it and some soldiers who purchased the toddy from an unknown person drank it and got injured, it was held that the accused was guilty under this section. *(1868-69) 5 Bom HCR 59.*

7. "Facilitate the commission of an offence".—(1) Where A administers an intoxicating substance to B with a view to rob him while B is unconscious or stupefied it would be an instance of administering of poison, etc., for facilitating the commission of an offence. *AIR 1926 Bom 518.*

8. Attempt.—(1) The putting of poison in a place where it is likely to be found and taken will amount to an attempt to administer poison. *(1852) 6 Cox Cri C 14.*

(2) Where the accused was proved to have put some powder in the food which was found by the Chemical Examiner to contain poison but there was no evidence as regards the quantity of poison or of its probable effects on any one who might have taken it, the accused could only be convicted of an attempt to commit an offence punishable under this section. *(1909) 10 CriLJ 363 (Low Bur).*

9. Sections 307 and 328.—(1) Where the accused gave arsenic poison intending to cause death but through some cause or other the person to whom he administered the arsenic recovered, it was held that the accused was guilty of an attempt to commit murder under S. 307. *AIR 1921 Lah 108.*

(2) Section 307 postulates that the intrinsic capacity of the act must be to cause death. Where the accused administered a small dose of poison (opium) which was not a fatal dose, the offence made out is one under this section and not under S. 307. *(1970) 74 Cal WN 424.*

10. Liability where death occurs.—(1) Where the accused deliberately added an oleander to a bottle of liquor and gave it to the deceased which the latter sipped in small quantity and died in consequence, it was held that the accused, must have either intended to cause the death of the deceased or to have known that his act was so imminently dangerous as to make death a most probable result of his act and hence was guilty of murder. *AIR 1957 Pat 462.*

(2) Where the accused administered Dhatura poison in large quantities and caused the death of the victim, it was held that he must have known that his act was likely to cause death and so the accused was guilty of murder. *AIR 1918 All 283.*

(3) Where the intention is not to cause death or such bodily injury as is likely to cause death or which is necessarily fatal, etc., the act of the accused will amount to an offence under this section only even though death occurs. Thus, where a woman gave aconite powder to her husband by mixing it with his food, not with the intention of causing his death but with the intention of making him 'mad', it was held that the woman was guilty only of an offence under this section. *AIR 1943 Mad 396.*

(4) Where the Chemical Analysis did not disclose how much arsenic was found and there was no other evidence, it was held that it was doubtful whether the case would come under S. 302 or under this section or would amount to an offence at all. *AIR 1916 Cal 352.*

(5) Where the death was due to pneumonia caused by exposure and not due to the poison administered by the accused, the offence does not fall under S. 302 but only under this section. *AIR 1942 Mad 100.*

(6) Where the evidence was not sufficient to establish that the poison administered was a lethal dose, conviction of the accused was altered from S. 302 to this section. *AIR 1957 Andh Pra 456.*

11. Onus of proof.—(1) The prosecution must, as in all criminal cases, prove beyond doubt the guilt of the accused otherwise the accused must be acquitted. *1963 All WR (HC) 711.*

(2) Where accused was prosecuted under S. 328 for mixing endrine with milk and it was found that all persons who consumed the milk did not suffer from poisoning while the medical evidence and post-mortem examination also did not show that deceased died due to endrine poison alone, in absence of proof of intention to cause hurt accused could not be convicted u/s. 328. *1980 CriLJ (NOC) 167.*

12. Procedure.—(1) Offence u/s. 328 is triable by the Sessions Court, therefore neither the superintendent of the Central Jail nor the Inspector General of Prisons was competent to punish the petitioner prisoner in respect of the said charge of making over "Jamal Gota" to another convict for mixing the same with the food-stuff served to the prisoners and jail officials. *(1981) 1 Cal HN 34.*

(2) Procedure—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

13. Charge.—(1) Revision against refusal to frame charge under—Accused alleged to have sold methyl alcohol to P who on consuming the same became serious and removed to hospital—Chemical Analysis report stating that what was purchased by P from the accused was power alcohol and not methyl alcohol as alleged—In the circumstances refusal to frame charge under S. 328 was proper. *1980 Raj Cri C 145.*

(2) The charge should run as follows:

I, (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day—of—at—with intent to cause (or knowing it to be likely that you will thereby cause) hurt to—, (or with intent to commit or to facilitate the commission of the offence) of—upon the said—administered to (or caused to be taken by) the said—a certain poison (or a certain stupefying, intoxicating or unwholesome drug) to wit—and thereby committed an offence punishable under section 328 PC and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

14. Sentence.—(1) Where accused was a young boy of 19 years, as the accused had undergone imprisonment for a period of 14 months the Court reduced the sentence of imprisonment to one already undergone, the sentence of fine was maintained. *1978 Raj Cri C 163.*

15. Practice.—Evidence—Prove: (1) That substance in question is poison or any stupefying, intoxicating, or unwholesome drug etc.

(2) That the accused administered or caused the complainant to take such substance.

(3) That he did as above with intent to cause hurt or knowing it to be likely that he would thereby cause hurt or that the accused intended to commit or facilitate the commission of an offence.

Section 329

329. Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.—Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with [1][imprisonment] for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section is similar to section 327 and the difference between the two being that the offence under section 329 is grievous while the one under section 327 is simple. This section will apply only when the sufferer is constrained to do an illegal act *(52 CrLJ 704)*.

(2) The extortion referred to in this section has the same meaning as the word 'extortion' in S. 383. *(1908) 8 CriLJ 383 (Mad)*.

(3) Where the purpose of causing grievous hurt is to constrain the victim to do an act which is not illegal, this section will not apply. Thus, where by causing grievous hurt, a person is constrained to write off a debt or withdraw a suit, the writing off or the withdrawal of the claim not being an illegal act, the causing of grievous hurt will not amount to an offence under this section but may fall under S. 325. *AIR 1951 Sau 40*.

2. Practice.—Evidence—Prove: (1) That the accused caused grievous hurt.

(2) That it was done voluntarily.

(3) That if the accused caused it to be done with a view to extort from the sufferer or any person interested in him or to constrain the sufferer or any person interested in him to do an illegal thing or to facilitate the commission of an offence.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session..

4. Charge.—The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—voluntarily caused grievous hurt to X for the purpose of extorting from the said X or (from a person interested in the said X) namely a property (describe it) and thereby committed grievous hurt punishable under section 329 PC and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 330

330. Voluntarily causing hurt to extort confession or to compel restoration of property.—Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable

security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Illustrations

(a) A, a police-officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(b) A, a police-officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(c) A, a revenue officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(d) A, a Zamindar, tortures a raiyat in order to compel him to pay his rent. A is guilty of an offence under this section.

Cases and Materials

1. Scope.—(1) This section may be read along with section 30, 39 and 327. The principal object of this section is to prevent torture by the police but the section covers every kind of torture for whatever purpose it may be intended. This section requires that the assault should be proved to be solely for the purpose of extorting confession on restoration of property. Offences under this section are most difficult to detect *(37 CrLJ 811).*

(2) The essential ingredient of the section is that the accused should have voluntarily caused hurt. *(1870) 4 Suth WR (Cr) 59.*

(3) In the absence of proof that the accused have voluntarily caused hurt for the purpose specified under S. 330 no offence will be made out. *1978 WLN (UC) 364 (Raj).*

(4) Illustrations (c) and (d) of S. 330 show that it is immaterial whether the claim or demand be legal or illegal. The claim or demand should be one which the victim owes to the accused and not one which the accused owes to the sufferer. *AIR 1951 Sau 40.*

(5) What must be extorted is a confession of an offence, or misconduct. Mere extortion of a promise is not sufficient. *AIR 1924 Lah 167.*

(6) Extorting a promise from the complainant to restore the woman that was alleged to have been abducted does not fall within the purview of S. 330. *AIR 1924 Lah 167.*

(7) Deterrent and exemplary sentence is called for, when once an offence under this section is satisfactorily established. *AIR 1936 Lah 471.*

(8) Where the boy was tortured by his hands being tied together, wrapped with cloth and kerosene oil poured over it and set fire to, in order to extort from him a confession of theft, the sentence was raised to one year's rigorous imprisonment. *AIR 1955 Mad 424.*

(9) The assault on the deceased did not take place while he was trying to swallow up the currency note and the assault took place some time after that. It was a cool and calculated act on the part of the appellants to punish him for an act of indiscretion—Conviction under section 330, maintained. *14 DLR 248.*

(10) The accused who were police officers were placed on their trial under sections 330 and 323 PC for beating a man assaulting a woman in connection with a theft. They were found guilty of the charges. Held Sanction under section 197 CrPC for the prosecution of the appellant was not at all necessary. *9 DLR 594.*

(A) Sanction:—(1) If a person accused of an offence under this section is a police officer and facts come to light subsequently in the course of evidence at the trial which establishes the necessity for obtaining sanction of the Government, as the case may be (vide S. 197, Criminal P. C.), in that event the Court must dismiss the complaint on the ground that the accused could not be prosecuted without sanction of the Government concerned. *AIR 1967 All 519.*

(B) Taking cognizance:— (1) There is nothing debarring a Magistrate from exercising his jurisdiction to take cognizance of private complaints made against a police officer for an offence under this section. *1968 CriLJ 1240(1250) (Orissa).*

(C) Compounding:—(1) The offence under S. 330 is not compoundable. Acquittal of the accused for an offence under Ss. 323 and 504 on composition, is not a bar for his further trial for an offence under this section. *1957 CriLJ 158 (Raj).*

(2) A police officer torturing a suspect in his custody, though inspired by the admirable motive of discovering the truth, is guilty of an offence under this section. *1978 CriLJ (NOC) 286 (All).*

(3) A policeman who stands by acquiescing in an assault on a prisoner committed by another policeman for the purpose of extorting a confession is guilty of abetment of an offence under this section. *AIR 1940 Nag 186.*

(4) Where a policeman takes active part in the assault, he would be guilty of the substantive offence itself. *AIR 1940 Nag 340.*

(5) Where the accused had no intention of causing death or knowledge that his act was likely to cause death, his offence would only be one under this section even though the sufferer dies subsequently. *AIR 1964 Andh Pra 548.*

2. Practice.—Evidence—Prove: (1) That the accused caused hurt.

(2) That the accused caused such hurt in order to extort from the sufferer, or a person interested in him, a confession or some information.

(3) That such confession or information was required., as possibly leading to the detection of an offence, or of some misconduct.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—at—voluntarily caused hurt to XY for the purpose of extorting from the said XY (or from a certain person interested to the said XY, to wit—) a certain confession (or information) to wit—which might lead to the detection of the offence of—(specify the person in respect of whom and the place where, the offence was committed) and thereby committed an offence punishable under section 330 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 331

331. Voluntarily causing grievous hurt to extort confession or to compel restoration of property.—Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or any prson interested in the sufferer any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to

restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section and section 330 are similar, the only difference being that this is an aggravated form and the hurt caused is grievous. This section seeks to punish if suspect is tortured causing him grievous hurt.

(2) Where the accused (Police Officers) tortured B to extort a confession and the torture resulted in the death of B, and the case is not one falling under S. 299 or 300 of the Code, they will be liable under S. 331. *AIR 1917 Lah 342.*

(3) In a trial on a charge under this section, it would not be safe to rely upon the uncorroborated testimony of the complainant and convict the accused on that testimony. *AIR 1955 NUC (Punj) 2528.*

(4) Section 53 of the District Police Act provides that all prosecutions whether against a police officer or a person other than a police officer (e. g., a member of the Fire Service above the rank of a fireman must be commenced within 3 months after the act complained of, if the act is one which has been done or intended to be done under any of the provisions of the Police Act. The protection of the Act also extends to acts done or intended to be done under the provisions of any other law conferring powers on the police in respect of arrests, search and investigation. *AIR 1964 SC 33.*

(5) Conviction under section 302 changed to one under section 331. Accused charged and convicted by Sessions Court under section 302—Grievous injuries caused by hands and striking with shoes to make the deceased confess and restore stolen property—Conviction changed on appeal to section 331, and sentence reduced. *(1952) PLD (Lah) 275.*

2. Practice.—Evidence—Prove: (1) That the accused voluntarily caused grievous hurt.

(2) That the accused caused such grievous hurt to extort from the sufferer or other person interested in him—

(a) a confession or information leading to the detection of an offence or misconduct; or

(b) to constrain such person or restore, or to cause the restoration of, any property or valuable security; or

(c) to discharge any claim or demand; or

(d) to give information regarding restoration of any property or other valuable security.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge/Magistrate) hereby charge you (name of the accused) as follows:

That you, on or about the—day—of—at voluntarily caused grievous hurt to X for the purpose of extorting from him (or from a person interested in him) a confession or information which may lead to the detection of the offence or misconduct or for the purpose of constraining the said X to restore or cause to be restored any property or to give information which may lead to the restoration of any property or valuable security and you have thereby committed an offence punishable under section 331 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 332

332. Voluntarily causing hurt to deter public servant from his duty.—Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials : Synopsis

1. Scope.—(1) This section may be read alone with sections 21 and 39 of the Penal Code. The words "in the discharge of his duty as such public servant" in this section mean in the discharge of a duty imposed by law on such public servant in the particular case and do not cover an act done by him in good faith under colour of his office. A public servant arresting a person under an invalid warrant is not so acting *(34 CrLJ 460)*. The protection is afforded to public servant under three classes of cases: (a) where he is engaged in the discharge of his duties as such Government servant; (b) when hurt is caused to prevent a public servant from discharging his duty as such public servant; (c) when hurt is caused in consequence of anything done or attempted to be done by that person in the lawful discharge of his official duties as such public servant. The protection given is confined to lawful duty performed by a public servant and not in respect of all his acts. The duty must be lawful. Illegal searches, arrests without warrant, acts flagrantly illegal are not protected *(AIR 1941, 345, 34 Oudh CrLJ 460)*.

(2) DESA Employee is public servant—Victim Abdul Malek an employee of DESA is a public servant within the meaning of section 21 clause 12(b) of the Penal Code and as such the charge under section 332 of the Penal Code has been perfectly justified warranting no interference. *Taleb Hossain @ Abu Taleb Hossain Vs. The State. 6 MLR (AD) 219.*

(3) The essential ingredients of the offence under S. 332, P.C. are:—

(1) Hurt must have been caused to a public servant; and (2) It must have been caused—

(a) while such public servant was acting in the discharge of his duty as such, or

(b) in order to prevent or deter him from discharging his duty as public servant, or

(c) in consequence of his having done or attempted to do anything in the lawful discharge of his duty as public servant. *(1983) 56 Cut LT 231 (Orissa)*.

2. "Voluntarily causes hurt".—(1) Push on neck given to public servant—Held, assuming that push was no hurt, accused would still be punishable under S. 353. *(1965) 31 CutLT 851.*

3. "Public servant".—(1) The following are public servants within the meaning of the section:

(a) An Octroi Officer. *AIR 1935 Sind 245.*

(b) A Village Talayari. *AIR 1944 Mad 183.*

(c) A Commissioner of Court. *ILR (1947) 1 All 187.*

(d) An Amin of Court. *1934 Mad WN 271.*

4. "In the discharge of his duty as such public servant".—(1) In order that this section may apply, the public servant must have been acting in the discharge of his duty as such public servant. *(1975) 41 Cut LT 167.*

(2) A Police Constable attempting to arrest a person without a warrant in a case in which he has no power to arrest without warrant cannot be said to be acting in discharge of his duty as such public servant in the particular case. *AIR 1941 Oudh 385 : 42 CriLJ 501 ** 1977 RajCriC 216(218)(DB).*

(3) Where a Police Constable engaged in maintaining law and order at a wrestling match was hustled by the accused, while discharging his duty, the accused were held guilty under this section. *AIR 1926 All 168.*

(4) A public servant does not cease to be a private citizen and hurt caused to him, even if he was not acting in discharge of his duties as public servant would be punishable under Section 323 or 352 as the case may be. *AIR 1921 Sind 51.*

(5) The words "duty as such public servant" mean duty imposed by law on such public servant in the particular case and do not cover acts done by him in good faith under colour of his office, but not imposed on him by law. *1955 Madh BLR (Cri) 393.*

(6) It is necessary for the Court to consider whether, in the particular case, the public servant acted in the discharge of his duties or not. If he was so acting, this section will apply. *AIR 1967 Orissa 1.*

(7) It is the duty of Patwari not to make entries in the official records, which ought not to be made, and if he refuses to do so, he can be said to be discharging a negative duty. If the accused causes hurt to him in order to compel him to make such entries, the offence will fall under the section. *AIR 1941 Oudh 267.*

5. "With intent to prevent or deter".—(1) Where the intention in causing hurt to a public servant is not to prevent or deter him from discharging his duty but to dishonour him, as where an Inspector of Police was struck by the accused while he was giving evidence, it was held that this section did not apply but that the case fell under S. 355 of the Code. *(1907) 6 CriLJ 22 (All).*

(2) An intention on the part of the accused namely, to prevent or deter the public servant from discharging his duty is an ingredient of the offence. *AIR 1978 SC 1441.*

(3) If the accused was aware of this fact then he cannot resist the act of the public servant and will be guilty of an offence under this section. *1968 SCD 477.*

(4) An assault on a public servant while in office as a sequel to a previous private quarrel is not covered by this section. *AIR 1978 SC 1441.*

6. "In consequence of anything done".—(1) Where a Naib-Tahsildar had made a report against a Patwari in the discharge of his duty and, as a consequence, was assaulted by the accused, the case was held to fall within this section. *AIR 1952 All 933.*

(2) The expression "in consequence" includes the motive which actuates the accused to cause voluntary hurt to the public servant. *1964 (1) CriLJ 254 (Raj).*

7. Appreciation of evidence.—(1) Accused abusing and assaulting with chappal a Govt. servant doing official work—Testimony of eye-witnesses consistent and convincing—Medical evidence fully corroborating the assault—Held offences were fully proved. *1978 CriLJ 734 (Kant).*

8. Burden of proof—Benefit of doubt.—(1) Burden of proof is on the prosecution to satisfy the Court that the facts of the case are such as to fulfil the requirements of this section. *AIR 1917 All 54.*

(2) Where it was not clear that the complainant was being beaten either in consequence of something done in his official capacity or to deter him from performing his official duty, the accused was given the benefit of doubt and was convicted not under S. 332 but under Section 323 of the Code. *AIR 1955 NUC (Ajmer) 4753.*

9. Charge and conviction.—(1) When the main incident of rioting consisted in causing hurt to the police constable, it was held that there need not be a separate charge and conviction for an offence under this section. *(1912) 13 CriLJ 460 (461) (Lah).*

(2) None of the accused were charged for having formed an unlawful assembly with the common object to give beating to Patwari. Evidence showing only L caught hold of Patwari and tried to snatch away the muster roll. Held that he alone was guilty under S. 332, P.C. *1981 RajCriC 372.*

(3) Where the accused to resist arrest caused simple injury by a knife on the left side of the chest of the police constable he was held guilty of offences under Ss. 324 and 332, P.C. but not under S. 307, P.C. *(1984) 25 (1) Guj LR 188.*

10. Sentence.—(1) A deterrent sentence should be given for an offence under this section. *1893-1900 Low Bur Rul 192.*

(2) Separate sentences under this section and under S. 147 are not illegal in view of amendment of S. 35 of the Criminal P. C. *AIR 1926 Lah 521.*

(3) Accused convicted of an offence u/s. 332, P.C and sentence to rigorous imprisonment for three months and fine of Rs. 500.00—On appeal sentence modified to R. I. of 29 days already undergone converting unexpired portion into additional fine of Rs. 1500.00 to meet the ends of justice. *(1981) 4 SCC 507.*

(4) Accused not a previous convict hence his conviction under S. 332, P.C. was reduced in revision by High Court from three months R. I. to two months R. I. maintaining fine of Rs. 200.00. *1982 UPCriR 298 (All).*

11. Procedure.—(1) No sanction under S. 195(1), Criminal P. C., is required before taking cognizance of an offence under this section. *ILR (1962) Cut 610.*

(2) Conviction under Ss. 302, 332, P.C.—Case committed to and partially tried by one Additional Sessions Judge—Conviction recorded by another Additional Sessions Judge—Trial by another Additional Sessions Judge is no trial in view of S. 409(2), Cr.P.C.—Conviction not maintainable—However, offence being grave retrial ordered. *1982 CriLJ 90.*

(3) Cognizable—Warrant—bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first and second class.

12. Practice.—Evidence—Prove: (1) That the accused hurt.

(2) That the person so hurt was a public servant.

(3) That such public servant was then discharging his duty as such.

13. 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 of—at—voluntarily caused hurt to X a public servant, in the discharge of his duty as such public servant, and thereby committed an offence punishable under section 332 of the Penal Code and within my cognizance.

And I here by direct that you be tired by this court on the said charge.

Section 333

333. Voluntarily causing grievous hurt to deter public servant from his duty.—Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) Where a public servant exceeds his powers and illegally puts a man in danger of life or limb, the victim has a right of private defence. Thus where a constable was wrongly handled by way of self-defence while he exceeded his lawful right by firing upon the accused and caused serious injury to prevent him from doing further harm, no offence was made out *(AIR 1932 Lah 75).* The hurt caused under it must be grievous. This section provides for the aggravated form of the offence which the preceding section deal with. Under this section whoever causes grievous hurt to a public servant he can be convicted: (i) when grievous hurt is caused while the public servant is acting in the discharge of his lawful duty as such public servant; (ii) when he is prevented from performing his duty as such public servant; and (iii) when the public servant is assaulted in consequence of anything done or attempted to be done in the discharge of his duty as such public servant. The motive and object of the accused in preventing or assaulting the Government servant are irrelevant if the public servant exceeds his jurisdiction.

(2) Under this section a person who causes grievous hurt to public servant can be convicted under three circumstances: (1) Where grievous hurt is caused while he is acting in the discharge of his duty as such public servant; (2) Where he is prevented or deterred from discharging his duty as such public servant; (3) Where he is assaulted in consequence of anything done or attempted to be done by him in the discharge of his duty. *AIR 1935 All 563.*

(3) An accidental causing of hurt is not an offence under S. 333. *AIR 1972 SC 1273.*

(4) When the public servant is acting in the discharge of his duty, then grievous hurt caused to him will amount to an offence under this section. *AIR 1979 SC 1706.*

(5) Where interference with discharge of duty by public servant was from another public servant, setting aside of sentence of imprisonment by taking lenient view was not called for. *AIR 1979 SC 1706.*

2. Practice.—Evidence—Prove: (1) That the accused voluntarily caused grievous hurt.

(2) That the person who was grievously hurt was a public servant.

(3) That when the grievous hurt was caused (a) the public servant was discharging his duty as such public servant; (b) that the grievous hurt was caused with the intention of preventing him or deterring

him from discharging his duty as such public servant; (c) the said grievous hurt was caused in consequence of anything done or attempted to be done by the public servant in the lawful discharge of his duty.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge/Magistrate) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—voluntarily caused grievous hurt to X, a public servant in the discharge of his duty as such public servant and thereby committed an offence punishable under section 333 of the Penal Code and within my cognizance.

And I hereby direct you be tried by this court on the said charge.

Section 334

334. Voluntarily causing hurt on provocation.—Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred [9][taka], or with both.

Cases and Materials

1. Scope.—(1) This section deals with voluntarily causing hurt on a grave and sudden provocation. Grave and sudden provocation mutilates voluntarily causing of hurt if the offender does not intend or himself knows that he is not likely to cause such hurt or grievous hurt to any other person. The provocation received must be both sudden and grave. It must be received from the person assaulted and the blow should be directed against his provocation.

(2) If the provocation is only sudden but not grave the offence will not be one punishable either under this section or S. 335. So also, if the provocation is only grave but not sudden, the act will not amount to an offence under this section or S. 335. *AIR 1953 Orissa 308.*

(3) Where the provocation is neither grave nor sudden, then clearly there will be no offence under this section or S. 335. *AIR 1939 Pesh 230.*

(4) Where there is considerable interval of time between the provocation and the assault by the accused, then the accused will not be entitled to the benefit of plea of grave and sudden provocation. *AIR 1929 Lah 739.*

(5) Where the act attributed to the accused is a deliberate and pre-designed one, then, it rules out the existence of grave and sudden provocation. *AIR 1915 Bom 120.*

(6) Where the accused was slapped and abused by his father on a complaint having been made to him by the complainant and 2-3 hours later the accused went to the shop of the complainant and gave him repeated dagger blows which were aimed at his neck, a very delicated and valuable part of human body, it was held, that it would not, by any stretch of imagination, be called grave provocation. Hence the offence did not fall under S. 334 but was under S. 307. *1983 PakLD 32 (SC).*

2. Sentence.—(1) Where the Magistrate imposed a sentence of fine of Rs. 10/- and in default R. I. for 10 days he committed an error, because the imprisonment in default of payment of fine ought not to exceed one-fourth of the maximum imprisonment provided for in the section. *(1884) 7 MysLR No. 251, p. 330.*

3. Plea—Onus.—(1) Where there are sufficient materials in the prosecution evidence from which the Court can come to the conclusion that the accused had acted on grave and sudden provocation, it can hold so irrespective of whether accused sets up that plea or not. *1957 NagLJ 184.*

4. Practice.—Evidence—Prove: (1) That the accused caused bodily pain, or infirmity.

(2) That he did so voluntarily.

(3) That he caused it on account of grave and sudden provocation.

(4) That he neither intended nor knew himself to be likely to cause hurt to any person other than the person who gave the provocation.

5. Procedure.—Not—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate, Village Court.

6. 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 of—at—voluntarily caused hurt to X, on grave and sudden provocation given to you by X and not intending to or knowing it to be likely that you would thereby cause hurt to X and you have thereby committed an offence punishable under section 334 Penal Code and within my cognizance.

And I hereby direct that you be tired by this court on the said charge.

Section 335

335. Voluntarily causing grievous hurt on provocation.—Whoever [11][voluntarily] causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand [9][taka], or with both.

Explanation.—The last two sections are subject to the same provisos as Exception 1, section 300.

Cases and Materials

1. Scope.—(1) An offence falls under this section only when the injury caused is a grievous hurt as defined in the Penal Code. The provocation and its effect must be sudden as well as grave, and the deprivation of the power of self-control must continue in order to benefit a man who kills another under circumstances of grave provocation. Where the deceased makes indecent assault upon accused's minor sister-in-law, the provocation is grave and sudden and the accused can rightly be convicted under section 335 Penal Code. Injuries inflicted with the help of burning fire-wood cannot be considered as a

11. Inserted by the Indian Penal Code Amendment Act, 1882 (VIII of 1882), s. 8.

grievous hurt as they do not come within the specific items of the injuries mentioned in the definition of grievous hurt nor do they endanger life *(1953 CrLJ 1713)*. The onus of proving sudden provocation lies on the accused.

(2) Assaulting dafadar—If the accused can be convicted under section.—A dafadar, being a public servant only for the limited purposes of section 68(2) of the Code of Criminal Procedure, cannot be regarded as a public servant when he is going to remove a nuisance under orders of the President of Union Board and, therefore, the people who assaulted him cannot be convicted under section 353. *Chand Khan Vs. Crown 1 PCR 21.*

(3) Where the accused persons found the wife of one of them in company of another person in her own house it was held that the accused person had grave and sudden provocation as a result of which they cut the noses of the wife and that other person and hence they were liable to be convicted under S. 335/34 instead of S. 326/34. *AIR 1972 SC 1273.*

2. Practice.—Evidence—Prove: (1) That the accused caused bodily pain, or infirmity to another.

(2) That he did so with the intention or knowledge of causing grievous hurt.

(3) That the grievous hurt was, in fact, caused.

(4) That the accused did it when he was under grave and sudden provocation.

(4) That he neither intended nor knew himself to be likely to cause grievous hurt to any person other than the person who gave the provocation.

3. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—at—voluntarily caused grievous hurt to X on grave and sudden provocation given to you by the said X on grave and sudden provocation given to you by Y and not intending to cause hurt to X, and thereby committed an offence punishable under section 335 of the Penal Code and within my cognizance.

And I hereby direct that you be tired by this court on the said charge.

Section 336

336. Act endangering life or personal safety of others.—Whoever does any act so rashly or negligently as to endanger human life or the safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty [9][taka], or with both.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *"Whoever does any act".*
3. *"Rashly or negligently".*
4. *"As to endanger human life or personal safety of others".*
5. *Procedure.*
6. *Practice.*
7. *Charge.*

1. Scope.—(1) This section may be read along with sections 52 and 304A. This section refers to acts done neither intentionally nor knowingly but rashly or negligently. Rash and negligent acts,

which endanger human life or the personal safety of others, are punishable under this section even though no harm follows. They are additionally punishable under section 337 if they cause hurt or grievous hurt.

(2) Where rash or negligent act results in damage to property it gives rise to a civil liability in damages. Where rash or negligent acts are such as to endanger human life or the personal safety of others, it gives rise to a criminal liability. The rashness or negligence in such cases may be termed criminal rashness or negligence. *(1909) 9 CriLJ 393 (Cal).*

2. "Whoever does any act".—(1) It is only an act which is not unlawful but which is done with criminal rashness or negligence that is punishable under this section. *AIR 1925 All 396.*

3. "Rashly or negligently".—(1) This section and Ss. 337, 338 and 304A do not apply to acts which amount to offences and which are deliberately and intentionally committed. *AIR 1966 Bom 13.*

(3) A person in charge of a temple omitting to enclose a well situated in the path which pilgrims and devotees usually take to visit the temple by his licence and invitation is guilty of negligence endangering the safety of a large number of pilgrims. *AIR 1915 Cal 295.*

4. "As to endanger human life or personal safety of others".—(1) Where the defect is such as will not materially affect his efficiency as a driver, the mere fact that he drove the car without spectacles is not sufficient, by itself, to amount to criminal rashness or negligence. *AIR 1918 Bom 230.*

(2) Where accused threw stones on the iron roof of a house, it was held that the act was not one endangering human life or safety and that this section did not apply. *(1900-1902) 1 LowBurRul 45.*

5. Procedure.—(1) Where during the course of the trial of the accused on a charge for an offence under S. 353 of the Code, the facts disclose an offence under S. 336, a charge under S. 336 could be added if the accused is not prejudiced thereby. *ILR (1959) 11 Assam 470.*

(2) This section should not be applied where the facts constitute a grave offence. *AIR 1916 Low Bur 98.*

(3) Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate.

6. Practice.—Evidence—Prove: (1) That the accused did the act in question.

(2) That it was done rashly or negligently.

(3) That it was such as to endanger the life or personal safety of others.

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 of—at—acted (mention the rash or negligent act done) so rashly or negligently as to endanger human life or the personal safety of others and thereby committed an offence punishable under section 336 of the Penal Code, and within my cognizance.

And I hereby direct that you be tired by this court on the said charge.

Section 337

337. Causing hurt by act endangering life or personal safety of others.—Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred [9][taka], or with both.

Cases and Materials : Synopsis

1. Scope.—(1) This section may be read with sections 33 and 304A. Mere negligence or rashness is not enough to bring a case within the ambit of this section or section 338. Negligence or rashness proved by evidence must be such as would necessarily carry with it a criminal liability. Whether such liability present may depend on the degree of culpability having regard in each case to the particular time, place and circumstances. The causing of hurt by negligence in the use of gun falls within the purview of this section rather than of section 286.

(2) Acts done with the intention of committing a crime cannot be said to be rash or negligent acts but will be punishable under other sections. *1955 CriLJ 173(2) (Madh Bha).*

(3) The main ingredients of an offence under this section are:—

(a) the act of the accused must have been the cause of the hurt. *1970 UJ (SC) 845.*

(b) the act must have been done with criminal rashness or negligence in the sense that rashness or negligence is of such a degree as to endanger human life or personal safety of others. *AIR 1962 Mad 362.*

2. "Rashly or negligently".—(1) A rash act is not the same thing as a negligent act. the two are distinguishable and one is exclusive of the other. *1975 Rajdhani LR 145 (Delhi).*

(2) The same act cannot be rash as well as negligent. *AIR 1970 Punj 137.*

(3) Overspeeding of truck without sounding horn and without light—Collision with another truck—Former truck driver held guilty of rash and negligent driving. *1971 Cri App Rap (SC) 244.*

(4) A person who is charged with negligence cannot claim the benefit of an error of judgment when he exercised none. *AIR 1925 Sind 233.*

3. "Hurt".—(1) The hurt caused must be the direct result of the negligent or rash act. *AIR 1970 Mad 198.*

(2) Where the accused, a snake charmer administered certain pills to his disciples and after an interval they fell ill, there was no proof that they had not taken anything else in the interval—Held that the illness could not be said to be the direct result of the eating of the pills and that the accused could not be held guilty under this section. *AIR 1964 Orissa 173.*

(3) The negligence to be imputed depends upon the probable and not the actual result. *AIR 1943 PC 72.*

4. Accident distinguished from negligence.—(1) A big party of about hundred members went for shooting pigs—Suddenly a boar rushed towards the accused—The accused fired at the boar but missed the boar and the shot struck the leg of a member of the party—Held that the case was one of accident and not of rash or negligent shooting and that the conviction under this section could not be sustained. *AIR 1931 Lah 54.*

5. "So as to endanger human life or the personal safety of others".—(1) The rashness or negligence must be such as to "endanger human life or the personal safety of others" for criminal liability. The rashness or negligence must show a disregard for human life or personal safety of others. *AIR 1962 Mad 362.*

(2) The law distinguishes between negligence which originates a civil liability and the one on which a criminal prosecution can be founded. In criminal cases there must be means rea or guilty mind, i.e. rashness or guilty mind of a degree which can be described as criminal negligence; mere carelessness is not enough. *AIR 1970 Punj 137.*

(3) Criminal is the gross and culpable neglect or the failure to exercise that reasonable and proper care and precaution to guard against injury either to the public or to an individual in particular which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. *AIR 1968 SC 1319.*

(4) Lorry negotiating down gradation turns on right side—Driver failing to drive in proper manner considering the situation, topography and circumstances existing at that time—Dashing against car—Held, driving was rash and negligent. *1973 CriLJ 1682 (1684) (Mys.).*

(5) Driver owes a duty to the public to keep a lookout on the road, especially when approaching a pedestrian crossing. *AIR 1966 Bom 122.*

6. Negligence by medical practitioner.—(1) A doctor is not criminally responsible for injury suffered by the patient as a result of the medical or surgical treatment by the doctor unless the doctor's negligence or incompetence passed beyond a matter of compensation and showed such disregard for life and safety as to amount to a crime against the State. *AIR 1943 PC 72.*

(2) Where an eye operation, causing injury, was alleged to have been made by an unqualified medical practitioner, it is the Court's duty to call for evidence on the question whether he was qualified by his certificate to perform the operation. *AIR 1964 Raj 242.*

7. Rash and negligent driving.—(1) An offence under S. 279 is distinct from an offence under this section or under S. 338 and a person convicted of an offence under this section or S. 338 can also be convicted of an offence under S. 279. *AIR 1956 Madh B 141.*

(2) A person can be convicted for offences both under S. 337 and under S. 279. *AIR 1969 Guj 62.*

(3) An offence under S. 279 is a noncompoundable offence while that under S. 337 is compoundable. The acquittal of a person charged with both offences under S. 279 and this section, by reason of the composition of the offence under S. 337 does not result in the acquittal of the accused for the offence under S. 279. *AIR 1960 Bom 269.*

(4) If the two offences are committed in the same transaction S. 71 will govern the case. *AIR 1956 Madh B 141.*

(5) Section 71 cannot be applied to offences under Ss. 279 and 338. *AIR 1968 Guj 240.*

8. Abetment of offence under this section.—(1) A motor driver allowed an unlicensed person to drive the motor car—He upset the car injuring the passengers thereby—Held that the unlicensed person would be guilty under this section, but that the driver could not be convicted of abetment of the offence inasmuch as he never intended that the car should be driven rashly or negligently. *AIR 1930 Sind 64.*

9. Sanction.—(1) Where a telegraph messenger of the Government, rode his bicycle rashly and negligently and knocked down a girl, it was held that the accused was riding the bicycle in execution

of his duty and that the accused could not be prosecuted without the sanction of the Government as provided by S. 270 of the Government of India Act, 1935. *AIR 1948 Nag 274.*

10. Joint trial for offences under Ss. 279, 337 and 426.—(1) Where the series of acts that took place were: (i) rash and negligent driving of the bus by the driver of the bus; (ii) rash and negligent driving of the car by the driver of the car; (iii) consequent collision and damages to the bus and the car and injuries to the driver of the car—Held, that though all the three acts were independent they formed a series in one transaction within the meaning of S. 220 (1), Criminal P.C. The offences committed were under Ss. 337, 426 and 279, P.C. and the connection between them was established by the result that followed. The drivers of the two vehicles could be tried together. *AIR 1962 Raj 155.*

11. Procedure.—(1) Where the accused was charged under Ss. 304A, 337 and 338 and under Ss. 465, 471 or 193. P.C. in the alternative for forging entries in order to conceal his offence of criminal neglect, there was misjoinder of charges. *AIR 1925 Sind 233.*

(2) Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate, Village Court.

12. Burden of proof and evidence.—(1) Where the identity of the offending driver was not established beyond dispute and all witnesses were interested, accused was not liable to conviction having been given benefit of doubt. *1979 Chand LR (Cri) 119 (Punj).*

(2) In case under S. 337 where an injury is caused injured witnesses are the best witnesses and conviction can be recorded on their evidence if it inspires confidence. *1983 Cur LJ (Civ&Cri) 279.*

13. Sentence.—(1) The High Court found that the driver was drunk and drove the vehicle rashly, negligently and at an excessive speed but as there was not enough proof of being drunk the sentence of 18 months' R. I. was reduced by the Supreme Court to term undergone. *(1971) 1 SC WR 99.*

(2) Where an accused was convicted under Ss. 279, 337 and 338, for causing hurt due to rash and negligent driving, on his pleading guilty to the charge but it was found that the accident was caused due to some other reason and could not be attributed directly to accused, in view of the age of accused (28 years) and the fact that it was his first offence, sentence of fine only, was sufficient instead of jail sentence. *1980 Bom CR 351.*

14. Practice.—Evidence—Prove: (1) That the accused did an act.

(2) That he did so rashly or negligently.

(3) That it was such as to endanger human life or personal safety of others.

(4) That the hurt was actually caused.

15. Charge.—The charge should run as follows:

I (name and office of the Magistrate) hereby charge you (name of accused) as follows:

That you, on or about the—day of—at—caused hurt to X by doing an act (describe the act) rashly or negligently so as to endanger human life or personal safety of others and thereby committed an offence punishable under section 337 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 338

338. Causing grievous hurt by act endangering life or personal safety of others.—Whoever causes grievous hurt to any person by doing any act so rashly or

negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to [12][five thousand taka], or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Abetment of rash driving.*
3. *Rash and negligent act.*
4. *Intention.*
5. *Offence under Ss. 279 and 338.*
6. *Contributory negligence.*
7. *"Grievous hurt".*
8. *Sentence.*
9. *Burden of proof.*
10. *Composition.*
11. *Procedure.*
12. *Practice.*
13. *Charge.*

1. Scope.—(1) Section 338 is aggravated form of the offence from section 337. Where the driver of a motor car while drunk drove his car on the wrong side rashly, he is negligent in not seeing a cart in front of him collided with it. The accused was held guilty under this section *(35 CrLJ 296).* Where a motor driver is being prosecuted for an offence under this section it cannot be said that the car has been used by the accused for the commission of the offence within the meaning of section 516A CrPC and it is illegal for a Magistrate to detain the motor car pending conclusion of the trial *(32 CrLJ 347).*

(2) Rash and negligent act. Death and grievous hurt caused by—Ample evidence available to prove that besides deceased, prosecution witness also suffered grievous hurt in occurrence. Petitioner convicted under section 338 Penal Code. *1983 P CrLJ 1095.*

2. Abetment of rash driving.—(1) A, a truck driver allowing B to drive truck with full knowledge that B had no licence—B causing grievous hurt by rash and negligent driving—A sitting by side of B when offence was committed—A, held was rightly convicted under S. 338 read with Ss. 107 and 114, Penal Code. *AIR 1947 Nag 113.*

3. Rash and negligent act.—(1) The words "does an act so rashly or negligently" occurring in S. 338 have the same meaning as the words "rash or negligent act" used in S. 304A. *(1909) 9 CriLJ 393 (Cal).*

(2) Where the accused owning a paddy field in a jungle tract, discharged a gun in the direction of a footpath close to his field, along which the complainant was passing, and the shot hit him in the leg which had to be cut off, and the accused knew that the foot-path was generally used by the public, the accused was guilty of culpable negligence within the meaning of this section. *(1912) 13 CriLJ 703.*

(3) Where a hakim advertising himself as skilful in eye operation, performed an operation with a pair of tailor's scissors and needle and sutured the wound with ordinary thread and the most ordinary precautions were neglected, the hakim was guilty of a rash and negligent act endangering human life. *AIR 1915 Bom 101.*

(4) Where a motorist hits against a person walking along the road, no presumption can be drawn that the accident was due to the motorist's negligence. Such presumption may arise if the motorist was driving at an excessive speed. *AIR 1939 Rang 209.*

(5) Where a truck loaded with timber was parked at night on the road with logs projecting beyond the limits but without red flag and danger light, and an accident occurred resulting in death of

12. Subs. by Ord, No. X of 1982, s. 6. for "one thousand taka."

passengers of a bus coming from behind at reasonable speed and hitting against the projecting logs at midnight, the accident was not directly referable to the rash and negligent driving of the bus driver. *ILR (1982) 1 Ker 359.*

4. Intention.—(1) In absence of a criminal intention a conviction under S. 338 is not justified. *(1950) 16 CutLT 181.*

5. Offence under Ss. 279 and 338.—(1) A person not guilty of dangerous driving under S. 116 of the Motor Vehicles Act cannot be guilty under S. 338. *AIR 1950 Mad 71.*

(2) The fact that the accused had already been convicted of an offence under S. 121 of the Motor Vehicles Act is no bar to a conviction under the Penal Code. *AIR 1953 Pat 56.*

6. Contributory negligence.—(1) If the accused was guilty of negligence, he cannot plead in defence that others also were guilty of negligence. *(1847) 2 C and K 368.*

(2) When an accident resulted in an injury to the cyclist who himself was negligent and it was also noticed during investigation that there was a little mechanical defect in the vehicle for which the vehicle driver was not found responsible the driver was acquitted on a charge under S. 338. *1978 Chand LR (Cri) 136.*

7. "Grievous hurt".—(1) Where a hakim performed an eye operation on a patient rashly and negligently but there was no complete loss of sight, the hakim was guilty of an offence under S. 337 and not under S. 338, as the hurt was not grievous. *AIR 1915 Bom 101.*

(2) This section will apply only where the grievous hurt caused is the direct result of the rash or negligent act, and not a remote result of the act. *AIR 1970 Mad 198(200): 1970 CriLJ 705.*

8. Sentence.—(1) Where an act constitutes an offence both under S. 279 (rash driving) and also an offence under this section it is illegal to award two separate sentences. *1935 MadWN 924(924).*

(2) Where the accused driver of a motor vehicle was drunk and was rash and negligent in his driving, and thereby caused grievous hurt to a person, the award of 3 months' rigorous imprisonment was excessive but that a fine of Rs. 100.00 or in default 3 months' rigorous imprisonment would meet the ends of justice. *AIR 1933 Oudh 568.*

9. Burden of proof.—(1) Where there is no definite evidence of rash or negligent driving the driver cannot be convicted under this section or S. 299 or 304A. *AIR 1933 Oudh 391.*

(2) Injured witnesses are the best witnesses and conviction can be recorded on their evidence only if their evidence inspires confidence. *1983 Cur LJ (Civ & Cri) 279.*

(3) Accused charged for causing injury by firing gun—Dark night—Accused identified merely from his voice—Conviction cannot be based on such identification. *1981 CriLJ 1060.*

10. Composition.—(1) The offence of causing grievous hurt is not compoundable unless it falls under S. 335 or 338. *(1884) Oudh SC 74, p. 85.*

11. Procedure.—(1) Where an accident took place when the two lorries were coming in opposite direction collided together, then the persons involved in the accident could be tried together in one and same case for offences under Ss. 279, 337, 338 and 304A. *1982 MadLJ (Cri) 273.*

(2) Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate.

12. Practice.—Evidence—Prove: (1) That the accused did an act rashly and negligently.

(2) That such act endangered human life or personal safety of others.

(3) That such act caused grievous hurt.

13. 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 of—at—caused grievous hurt to X, by doing an act (describe it) so rashly or negligently as to endanger human life or the personal safety of others and thereby caused an offence punishable under section 338 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 338A

[13][**338A. Causing grievous hurt by rash driving or riding on a public way.**— Whoever causes grievous hurt to any person by driving any vehicle or riding on any public way so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to [14][two years], or with fine, or with both].

Cases and Materials

1. Scope.—(1) For giving adequate punishment in cases of rash and negligent driving of vehicles, this provision has been made. Section 338A is a minor offence of section 304B. Therefore, if the accused is convicted of an offence under section 304B he cannot be convicted also under section 338A. Speed by itself, on an open public highway where a vehicle is not crossing another vehicle or animals, where, there are no travellers or obstructions so long as the vehicle is under control may not amount to a rash act but it is the duty of drivers of public vehicles to slow down in crowded highways and thoroughfares and when crossing animals, to see that the road is clear and visible when overtaking and passing other vehicles, to keep the vehicle under control, and to give way to other vehicles to pass or cross. A driver of a bus who was driving the bus with defective brakes and other defects at such a high speed that in trying to stop the vehicle, on being signaled to stop he was unable to control the vehicle which capsized as a result of which one passenger was killed and another severely injured, was guilty under this section *(PLD 1966 Lah 745)*. Where the motor driver is being prosecuted for an offence under this section it cannot be said that car has been used by the accused for the commission of that offence within the meaning of section 516A CrPC and it is illegal for a Magistrate to detain the car pending conclusion of the trial *(33 CrLJ 347)*.

2. Practice.—Evidence—Prove: (1) That the accused drove rashly and negligently on any public way.

(2) That such act endangered human life or personal safety of others.

(3) That such act caused grievous hurt.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—at—caused grievous hurt to X by doing an act (describe) so rashly or negligently on a public way (name of the way) as to endanger human life or the personal

13. Inserted, *ibid.*, after section 338, s. 7.

14. Subs. by Ord, No. XLVIII of 1985, s. 6. for "five years".

safety of others and thereby committed an offence punishable under section 338A of the Penal Code within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Of Wrongful Restraint and Wrongful Confinement

Section 339

339. Wrongful restraint.—Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

Cases : Synopsis

1. ***Scope.***
2. ***"Voluntarily".***
3. ***Right to proceed—General.***
4. ***"In any direction".***
5. ***Right to proceed in a public street or place.***
6. ***Landlord and tenant.***
7. ***Obstruction to vehicle in which or animal on which a person proceeds.***
8. ***Obstruction to person proceeding with animal but not riding on it.***
9. ***Obstruction to carrying corpse along public road.***
10. ***"Proceed".***
11. ***"Obstructs".***
12. ***Exception.***
13. ***Sections 79 and 341.***
14. ***Hurt and restraint.***
15. ***Mischief and restraint.***
16. ***Robbery and restraint.***
17. ***Magistrate's power to order removal of obstruction.***

1. Scope.—(1) This section defines wrongful restraint. Wrongful restraint means keeping a man out of a place where he wishes to go has a right to be. This section requires two essentials: (a) Voluntary obstruction of a person; and (b) The obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed. This slightest unlawful obstruction to the liberty of the citizen to go when and where he likes to go provided he does so in a lawful manner, cannot be justified and is punishable under this section.

(2) Exception to the section. Obstruction over land or water not an offence when it is caused in good faith. Exception to section 339 of the Penal Code which defines wrongful confinement which is punishable under section 341, provides that obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct is not an offence within the meaning of section 339 of Penal Code. *Kabir Ahmed Vs. S.D.O. Chittagong Sadar South, (1967) 19 DLR 623.*

(3) Every subject has the liberty to go when and where he likes to go provided he does so in a lawful manner. Every impediment offered to the exercise of such liberty would, subject to some

exceptions, be unlawful and may constitute the offence of wrongful restrain, under S. 339 or S. 340. *AIR 1954 Mad 247.*

2. "Voluntarily".—(1) Where the accused locked the outer door of a house in the occupation of the complainant during the temporary absence of the complainant and his family, the accused have "voluntarily" obstructed the complainant from entering the house. *(1910) 11 CriLJ 708 (Mad).*

3. Right to proceed—General.—(1) A person cannot be convicted for the offence of wrongful restraint if he has not a right to proceed in the direction in which he was proceeding at the time of his restraint. *AIR 1916 Mad 696.*

(2) That the complainant had the right to proceed must be proved by the prosecution. *(1910) 11 CriLJ 495 (Lah).*

4. "In any direction".—(1) The words "in any direction" would include a vertical direction and that if A had a right to go up to the roof of his house or come down from the roof or to go up a mountain or to get up a ladder and he was wrongfully prevented from doing so by B, B will be guilty of an offence under this section. *AIR 1927 Bom 369.*

5. Right to proceed in a public street or place.—(1) An obstruction by a person of one community to a person of another community from passing by a public way is an offence under this section. *AIR 1927 Mad 938.*

(2) A religious procession of one community cannot be stopped by another, when the same is proceeding along a public road. *AIR 1925 PC 36.*

6. Landlord and tenant.—(1) A tenant is entitled to be in possession of the demised premises, even though he may be a tenant holding over. *AIR 1919 Bom 97.*

(2) A landlord who prevents a tenant from entering a privy and bath room of which he is a tenant by locking their doors technically commits an offence under S. 339. *AIR 1950 Cal 157.*

(3) Where the accused was convicted under S. 341 for wrongfully restraining the complainant, who was his tenant from going to a certain urinal, the conviction could not stand unless it was proved that the complainant had a right to use the urinal. *AIR 1930 Cal 760.*

(4) A fisher woman who occupies, on payment of rent, a particular stall in a fish market has a right to be at that stall and cannot be thrown out of it without due process of law. Hence preventing her from exercising her right to go to the stall is an offence under this section. *AIR 1954 Cal 192.*

7. Obstruction to vehicle in which or animal on which a person proceeds.—(1) Where A is travelling in a vehicle in a particular direction in which he has a right to proceed, B cannot compel him to get down from that vehicle or walk or proceed in any other manner or in any other direction. If B does so, it will amount to a wrongful restraint within the meaning of this section. *AIR 1964 Cal 286.*

(2) A person who is travelling, riding on an animal and proceeding in a particular direction cannot be compelled by another to get down or walk or proceed in any other manner or in any other direction. *AIR 1950 Mad 233.*

8. Obstruction to person proceeding with animal but not riding on it.—(1) Where a person is proceeding with animals, as where he takes bulls with him for ploughing, and the animals are beaten and driven away by the accused, it was held, that the accused were guilty of wrongful restraint. *AIR 1954 Mad 247.*

(2) Where the accused prevented the complainant from using a mot to which he had yoked his bullocks on the slope to a well which existed for that purpose—Held, that the accused were guilty under this section. *AIR 1926 Bom 118.*

9. Obstruction to carrying corpse along public road.—(1) Where certain persons carried a corpse along a public road and the accused obstructed the carrying of the corpse along that way, they were guilty of an offence under this section. The fact that the obstruction was only to corpse being carried along the road and not to the persons carrying it is no defence. *(1963) 2 MadLJ 80.*

10. "Proceed".—(1) "Proceed" includes proceeding by outside agency. the word is not limited to proceeding on one's own legs or by physical means within one's power. *(1935) 39 CalWN 396.*

11. "Obstructs".—(1) In order that A may be said to obstruct B from proceeding in a particular direction, it is not necessary that A should physically prevent B when B is impeded in his progress. *AIR 1954 Mad 247.*

(2) It is necessary that a person should be physically impeded by the act of accused. In other words, the obstruction must be physical. *AIR 1954 Mad 247.*

(3) The "obstruction" must be to a person proceeding in a certain direction. Mere obstruction to his carrying out certain works such as white-washing or repairing a wall, etc., is not enough. *AIR 1927 Bom 369.*

(4) Where a licence or passport is necessary under the law for a person to proceed to a particular place, a refusal by the officer who is to issue the licence or passport, to issue it or the delay caused by him issuing it, is not an offence within this section, if the officer did not physically prevent him from going without a licence or passport. *AIR 1954 Mad 247.*

(5) A menace or threat creating a fear of physical obstruction would be within this section. *AIR 1959 Punj 134.*

(6) Where A broke open the lock and entered into the house of B during his absence, and on his return B went to the house and was prevented by A from entering it, it was held that the date of the obstruction must be taken to be the date when B was prevented from entering the house and not when A had entered the house in the absence of B. *AIR 1960 Bom 139.*

12. "Exception."—(1) Where A claims a private right of way over B's Property and B in good faith believes that A has no such right and obstructs him in his attempt to proceed on that way, the proper remedy of A in such a case lies in the Civil Court. *AIR 1964 J and K 4.*

(2) For the sake of the preservation of peace, any individual who sees it broken, may restrain in liberty of him whom he sees breaking it so long as his own conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence and the danger of their renewal continues, the affray itself may be said to continue. *AIR 1921 Mad 458.*

(3) Failure of the accused to plead that his case comes under the Exception does not deprive him of his right to show, on the evidence, that he is entitled to the benefit of the Exception. *AIR 1950 Assam 82.*

(4) Where A obstructs B so that B may be attacked by C, A cannot be considered to have acted in good faith. *AIR 1964 Cal 286.*

13. Sections 79 and 341.—(1) Where a police officer acting under S. 129, Criminal P. C., is entitled to take into custody those who form themselves into an unlawful assembly and cause a disturbance of the public peace, he cannot be held liable for wrongful restraint in view of S. 79 of the Code. *1937 Mad WN 1243.*

14. Hurt and restraint.—(1) In every case of assault of hurt certainly there will be a momentary restraint of the person injured; but the gist of the offence under S. 341 is that there must be restraint when there is a desire to proceed in a particular direction. *AIR 1957 Orissa 130.*

15. Mischief and restraint.—(1) Servants of the complainant loaded certain things in their cart in order to remove them from one hat to another hat—Accused who were the servants of the person to whom the hat belonged asked the cartmen not to remove the things and on their refusal turned the carts upside down and things fell down to the ground where they remained for some days—Held that the offence made out is one under S. 425 of the Code and not under S. 339. *(1886) ILR 12 Cal 55.*

16. Robbery and restraint.—(1) Where the accused stood before the victims of theft armed with lathis but without using any force removed the ornaments from the victims the mere presence of the accused armed with lathis in front of the victim is not sufficient to constitute wrongful restraint in law. *AIR 1959 Orissa 171.*

17. Magistrate's power to order removal of obstruction.—(1) A Magistrate has no power to pass an order under S. 341 of the Code that the obstruction should be removed. *1954 CriLJ 1005.*

Section 340

340. Wrongful confinement.—Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Illustrations

(a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(b) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

Cases : Synopsis

1. Scope.—(1) Wrongful confinement is a species of wrongful restraint. The essential ingredient of this offence is physical obstruction to the movement of a person. The mere keeping of a watch on a person without in any way hindering his movement by physical impediments in his way does not fall under this section.

(2) "Wrongful confinement" is a wrongful prevention of a person from proceeding beyond certain circumscribing limits. Where there was no desire to proceed in a certain way on the part of the complainant it cannot be said that there was obstruction though the accused may have intended and even expressed his intention to restrain the complainant should he move from his present position. *AIR 1957 Orissa 130.*

(3) Wife not detained against her will and without her consent by her parents—Wife completing 21 years of age during pendency of appeal before Supreme Court—Petition for writ of Habeas Corpus by husband for production and release of his wife—Petition must fail. *AIR 1982 SC 938.*

2. Physical presence of confiner not necessary.—(1) Physical presence of the obstructor is not necessary to constitute the offence of wrongful confinement. *AIR 1924 Mad 31.*

3. Wrongful restraint, an element of the offence.—(1) There must not only be a wrongful restraint but the victim must also be kept in the confinement, so that he would not be free to move out of the confinement. *(1898) 3 Mys CCR No. 140, page 484.*

(2) A mere temporary detention of persons at a police station by the police for the purposes of search or investigation or generally for the purpose of enquiry into a crime does not amount to an offence of wrongful confinement but that it may amount to such an offence where the detention is serious and protracted enough to amount in law to a real and unauthorisd prevention from proceeding beyond certain circumscribed limits. *1930 MadWN 723.*

4. Duration of confinement.—(1) The duration of the confinement is immaterial except from the purpose of determining the gravity of the offence so as to affect the sentence to be passed. *1894 Upp Bur Rul 172.*

5. Imprisonment and confinement.—(1) The words false imprisonment as used in the law of torts would include a confinement anywhere. *(1865) 2 Mad HCR 396.*

(2) A person cannot be said to be confined where there is a way of escape open to him. *AIR 1951 Orissa 142.*

6. Arrest.—(1) Submission by the complainant to the arrest does not detract from the accused's acts or diminish its legal effect. The compelling of a person to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action is imprisonment on the part of the person who exercise the exterior will. *AIR 1929 Cal 730.*

(2) If a process-server arrests a person who is exempted from civil arrest under Section 135 of Civil P.C. believing himself in good faith to be justified in doing so, no offence under this section is committed. *AIR 1940 Rang 112.*

7. Confinement justifiable by law.—(1) Where a police officer enters a house for search without a valid warrant for the purpose, he will be a trespasser and if there is any incidental confinement of the officer, it would not be illegal. *(1955) 59 Cal WN 649.*

(2) Where the confinement of public officer is continued beyond need it will be a wrongful confinement. *1952 CriLJ 1023 (Mad).*

8. Malice or intention.—(1) A person may be guilty of wrongful confinement though he acts without malice but the restraint must be voluntary. *(1889) ILR 13 Bom 376.*

(2) Mens rea does not enter into an offence under S. 342 at all. *AIR 1929 Cal 730.*

9. Wrongful confinement when there is already a legal confinement.—(1) If a prisoner is confined in a particular part of a prison without legal authority for such confinement, that confinement is a wrongful one, notwithstanding that his confinement in the prison at large may be legal. *(1902) 6 CalWN 511.*

10. Sections 342, 365 and 368.—(1) Where in a case relating to the abduction of a minor girl, the principal accused were acquitted of the offence of wrongful confinement, it is illegal to fine the others guilty of the offence under S. 368 read with S. 109. *AIR 1929 Cal 767.*

11. Attempt.—(1) Where, during the course of an assault the complainant was pushed and dragged towards the pial of his house there was no attempt to wrongfully confine the complainant. *(1893) 16 MysLR No. 253, page 397.*

12. Illustrative cases.—(1) Police Officer entered into the house in the joint possession of the complainant and the accused, with their consent in order to prevent a breach of the peace—He was beaten and confined by the accused—Held that the accused was guilty under Ss. 332 and 342 of the Code. *AIR 1951 Ajmer 37.*

(2) First accused brought the complainant (his mistress) to a brothel house kept by the second accused and left her there—Second accused kept guard over her and allowed her to go out on rare occasions and under proper control—First accused was aware of the conditions under which the complainant—Living in that house—Held that both accused were guilty of the offence of wrongful confinement. *AIR 1917 Bom 2.*

(3) Where the accused confined a girl of 9 years in a room made her lie on a bed sat on her and undressed himself the accused was rightfully convicted under Ss. 342 and 354. *AIR 1953 MadhB 147.*

(4) Person likely to commit breach of public peace and tranquillity—His arrest without warrant is not justified—The constable who arrested a person without warrant because in his opinion the action of the person would result in breach of peace was held to be punishable under S. 342 Penal Code. *AIR 1965 All 164.*

Section 341

341. Punishment for wrongful restraint.—Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred [9][taka], or with both.

Cases and Materials

1. Scope.—(1) This section prescribes the penalty for an offence under section 339.

(2) Unless a cognizable offence, such as one under section 341 Penal Code has been investigated into by the police and report thereof submitted to the Magistrate, the Magistrate cannot simply, because it is a cognizable offence, try the offence himself—such case in ordinary course is triable by the Conciliation Court. *Jamshed Ali Vs. The State 20 DLR 503.*

(3) Where a police officer summons witnesses to be questioned during investigation and keeps them under restraint and there is no evidence regarding wrongful confinement, he will be guilty under S. 341 and not under S. 342. *1970 SCD 449.*

(4) Accused the boarder of the car, assaulted R and did not allow him to get up after he had fallen down, held, committed an offence under S. 341. *1983 WLN (UC) 311.*

(5) Prosecutrix knowing accused not only by face but also by name—Accused not specifically incriminated in her F. I. R.—Other evidence to show that accused were fictitiously implicated—Accused entitled to acquittal .*1983 CriLJ 607.*

(6) Accused acquitted from charge under S. 341—No error committed by trial Court in appreciating the evidence of eye-witnesses further the conditions necessary for interference by High Court in revision wanting, held, not a fit case for interference. *1983 MahLR 589 (Bom).*

(7) Where, on a complaint against the accused for an offence under Ss. 342 and 392 of the Code, the Magistrate proceeded to take evidence according to the procedure in warrant cases, but after

recording the evidence thought that the offence was one under S. 341 and convicted the accused under S. 341 without framing a charge, the procedure was irregular. *AIR 1927 All 270.*

(8) An offence of wrongful restraint is compoundable by the person restrained and it is not necessary that a composition should be arrived at after a complaint was filed into Court. *AIR 1927 All 375.*

(9) An accused can be convicted for an offence under S. 341, on a charge under Section 448 of the Code, if the accused had not been prejudiced by such alteration. *AIR 1937 Rang 250.*

(10) Where the accused are charge-sheeted under S. 341 of the Code, the Magistrate after hearing the evidence is entitled to frame an additional charge under S. 506 of the Code. *AIR 1931 Oudh 73.*

(11) Where the offence under S. 341 is involved in the offence of unlawful assembly a separate sentence of fine under S. 341 is not called for. *AIR 1961 Mys 57.*

(12) Where several persons commit an offence under this section and the crime would not have been committed but for the presence and support of one of them a higher punishment in his case is justified. *AIR 1951 All 504.*

12. Practice.—Evidence—Prove: (1) That the accused obstructed a person.

(2) That such obstruction was voluntary.

(3) That such obstruction prevented him from proceeding in the direction in which he had a right to proceed.

13. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by Magistrate, Village Court.

14. 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 of—at—wrongfully restrained X (name of the person) and thereby committed an offence punishable under section 341 Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 342

342. Punishment for wrongful confinement.—Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand [9][taka], or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Wrongful confinement.*
3. *Charge.*
4. *Trial.*
5. *Compounding.*
6. *Evidence—Proof.*
7. *Sanction for prosecution of public servant committing offence under this section.*
8. *Sentence.*
9. *Separate sentences.*
10. *Procedure.*
11. *Practice.*

1. Scope.—(1) This section provides for punishment for the offence of wrongful confinement defined under section 340 Penal Code. Duration of confinement is a relevant consideration to be taken into account in awarding punishment. Delay in making complaint is almost fatal.

(2) An offence under section 342 of the Penal Code which is not included in the schedule of the Special Powers Act cannot be the basis of conviction as the same is a non-scheduled offence. Had the original offence charged been one under Penal Code then the learned Judges by application of section 238 of the Penal Code could come to a finding that the offence constitutes a minor offence and in that view could have convicted the appellant under a minor offence, but here the original offence charged was exclusively triable by the Special Tribunal and in that view the alteration of the conviction from a scheduled offence to an offence which is only referable under Penal Code is not legally permissible. *Abdur Rahman and others Vs. State 51 DLR (AD) 33.*

(3) Petitioners convicted and sentenced udder sections 342 and 395 P.C. separately by trial Court; sentence imposed under section. 342 P.C. being found illegal on appeal that does not affect the sentence imposed under section 395 P.C. *Md. Ismail Vs. State, (1969) 21 DLR (SC) 161.*

(4) Misjoinder of charges under sections 147 and 342 Penal Code—Trial vitiated. *10 DLR 134.*

(5) This section is not confined to offences against public servants but is a general section and makes a person who wrongfully confines another guilty of the offence under this section. *AIR 1972 SC 886.*

(6) Where the confinement is for 3 days or more the offence will fall under S. 343. But where the confinement is for 3 nights which is not more than 2 days the offence is one under this section and not S. 343. *1967 JabLJ 234 (SC)*

2. Wrongful confinement.–(1) An accused who forcibly brings back the searching officer, after he had conducted the search and left the place and threatens him with assault unless he writes a memo recording the search, commit an offence under this section, even if the search was in violation of law. *AIR 1972 SC 886.*

(2) 'Gherao' will amount to wrongful confinement under certain circumstances. *AIR 1968 Cal 407.*

(3) The Court can in its discretion allow the accused to sit behind or near his counsel but if for certain reasons the Court withdraws the privilege no offence under S. 342 can be made out because all that is done is in good faith. *(1980) 1 CalHN 276.*

(4) Where a police officer keeps persons under wrongful restraint, though there is no evidence of wrongful confinement he is guilty of offence under S. 341 and not under S 342. *1978 SCD 449.*

3. Charge.—Making a false charge of wrongful confinement (the offence being a cognizable offence) falls within the purview of S. 211 of the Code. *AIR 1930 Cal 711.*

(2) Order framing charges under Ss. 342 and 365—Statement of accused under S. 161, Cr. P.C. disclosing that after taking complainant to the Police Station, the S. H. O. asked accused to take away complainant with him. Who then confined the complainant at certain place and afterwards released him after tying his hands and blindfolding him—Held, in view of statement of accused it could not be said that offence under S. 342 was not disclosed but statement did not disclose offence under S. 365–Order framing charge upheld to the extent it directed framing of charge under S. 342. *1983 RajLW 360.*

(3) 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 of—at wrongfully confined X, and thereby committed an offence punishable under section 342 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

4. Trial.—(1) An offence under S. 342 is not triable summarily. *(1969) MadLJ (Cr) 287 (Ker).*

(2) The offence under S. 342 being triable as summons case, if the Magistrate discharges the accused after taking evidence the order of discharge should be treated as an acquittal of the accused. *1969 CurLJ 732.*

5. Compounding.—(1) Where a petition of compromise is filed under S. 342 the Magistrate should accept it, and if it is rejected and accused convicted the conviction is illegal. *1883 AllWN 245.*

6. Evidence—Proof.—(1) Mere ownership of a house where a person was wrongfully confined dose not render the owner of the house liable to be punished under S. 342 unless there is evidence to the effect that he took part in the wrongful confinement or abetted it. *AIR 1951 All 637.*

(2) Where the testimony of the prosecution was corroborated by other evidence in respect of some of the accused while it was not corroborated in respect of others the former accused were convicted under S. 343 while the latter were acquitted. *1973 AllCriR 391 (394).*

(3) Charge that girl was kidnapped and wrongfully confined by the accused—Girl found to be 16 years of age (major) ôn medical examination—Evidence as regards her confinement absent—Held, accused could not be convicted. *1982 UP (Cri) C 35.*

(3) Complainant alleged to have been tied with rope by accused—Medical evidence and another prosecution witness corroborating story of prosecution in all material particulars—Offence under S. 342 held proved. *(1983) 2 Crimes 701.*

(4) Complainant for offence under S. 342—complainant alleging that she was not allowed by the accused to move out of her house—No evidence to show that she made attempt to move out of her house when the accused were there and they really obstructed her—No statement of her husband to that effect either—Accused cannot be convicted for offence under S. 342. *(1984) 1 BomCR 466.*

7. Sanction for prosecution of public servant committing offence under this section.—(1) If an offence under this section has been committed by a public servant acting as such, he cannot be prosecuted for the offence unless a sanction u/s. 197 Cr. P. C. is obtained. *1966 CrLJ 269 (Punj).*

(2) Where accused—Government officers were proceeded against for offences under S. 342 read with Ss. 147, 144, 330 they can raise a preliminary objection that they were protected under the Customs Act. Section 155 and Section 197 Cr. P. C. *1978 MadLW (Cri) 199.*

8. Sentence.—(1) Where the judgment-debtor was evading the execution of the decree for two years and the decree-holder was afraid to go to the village of the judgment-debtor and hence the judgment-debtor was arrested while returnig from Court, the decree -holder was sentenced to pay a fine of Rs. 20 only. *AIR 1916 Lah 318.*

(2) Where it appeared that the accused, a Police Sub-Inspector, in effecting the arrest without a warrant acted without malice and had relied on the word of the Sub-Magistrate, an imprisonment of one day was considered to be sufficient punishment. *AIR 1942 Sind 106.*

(3) Accused convicted under Ss. 342 and 376 P.C.—Accused is 15 years of age at the time of occurrence—Benefit of Children Act, given to accused and he was released on probation of good conduct. *1983 All CriR 536.*

(4) Appeal against sentence—Occurrence taking place in 1975—Most of accused persons being of age about 60 years at time of appeal—Benefit of S. 4 of Probation of Offenders Act given to accused. *1982 Raj CriC 80.*

9. Separate sentence.—(1) Where the offences of wrongful confinement and dacoity committed by the accused were not parts of the same transaction S. 71 of the Code is not applicable and separate sentences are not illegal. *AIR 1962 Manipur 7.*

(2) Section 106, Criminal P. C. is applicable to offences under Ss. 147, 324, 375 and 342 read with S. 149, (order to execute bond for keeping the peace), but separate sentences are not legal. *AIR 1939 Mad 787.*

10. Procedure.—(1) Seven persons charged for offence under Ss. 342, 395—Six of them acquitted as no case made out against them—Conviction of seventh accused could not be sustained for both the offences. *1980 CriLJ NOC 83 (Gauhati).*

(2) Accused (a police officer) keeping the victim prosecutrix in police post on ground of compeleting certain investigation—Accused not allowing victim to go with her father—Victim not allowed to talk with any person—Conviction of accused under S. 342—Appeal by accused dismissed. *(1984) 1 Crimes 193 (DB) (P&H).*

(3) Cognizable—Warrant—Summons—Bailable—Compoundable—Triable by any Magistrate, Village Court.

11. Practice—Evidence—Prove: (1) That the accused obstructed the complainant.

(2) That such obstruction was voluntary.

(3) That the effect of such obstruction was to restrain the person from proceeding beyond a certain limit.

(4) That the restraint was wrongful.

Section 343

343. Wrongful confinment for three or more days.—Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) The period of three days will be counted from the time that the co-complainant is illegally confined.

(2) The essence of an offence under Ss . 343 and 365 is wrongful confinement. *1980 AllLJ 101.*

(3) A confinement for three nights which is not more than 2 days is not under S. 343 but will fall under S. 342. *1967 JabLJ 234 (SC).*

(4) An accused found guilty of the offence of abetment of abduction of a woman under Ss. 109 and 498 and of the offence of wrongful confinement cannot be sentenced for both offences as they are not distinct offences. *1864 SuthWR (Cr) 21.*

2. Practice.—Evidence—Prove: (1) That the accused obstructed the complainant.

(2) That such obstruction was voluntary.

(3) That the effect of such obstruction was to restrain that person from proceeding beyond a certain limit.

(4) That the restraint was wrongful.

(5) That such restraint was for a period of three or more days.

3. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate.

4. 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 of—at—wrongful confinement X, for—days and thereby committed an offence punishable under section 343 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 344

344. Wrongful confinement for ten or more days.—Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Cases and Materials

1. Scope.—This section deals with wrongful confinement for ten days and more.

(2) As the victim Hosne Are had been confined in Khulna for 7/8 days when section 344 of the Penal Code requires wrongful confinement for ten days or more, the conviction and sentence under section 344 of the Penal Code is not sustainable in law. *Abul Kalam & others Vs. State (Criminal) 5 BLC 270.*

(3) Wrongful confinement necessitates proof of physical obstruction or that the person wrongfully confined would have been physically prevented if he had tried to go out. *Samundar Khan Vs. The State, 15 DLR 115 WP.*

(4) A was arrested under S. 478 of the Civil P.C., 1882 (corresponding to O. 38 R. 1. of the present Code) and brought before the Court—Judge orally ordered the Bailiff to keep him in custody—Bailiff in turn orally ordered a process server to take charge of A—Process server detained A in his own house from 26th June to 28th July—In a prosecution of the Bailiff and the process server, held that the oral order of the Judge was without authority, that S. 78 of the Penal Code did not apply to the case and that as the mistake, if any, of the officers was one of law and not of fact. S. 79 also did not apply and that they were therefore guilty under this section. *(1908) 8 CriLJ 68 (Low Bur)*

(5) As the offence is punishable with imprisonment as well as fine a sentence of fine only is not a legal one. *(1862-1863) 1 Bom HCR 39.*

2. Practice.—Evidence—Prove: (1) That the accused obstructed the complainant.

2) That such obstruction was voluntary.

(3) That the effect of such obstruction was to restrain that person from proceeding beyond a certain limit.

(4) That the restraint was wrongful.

3. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the frst or second class.

4. 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 of—at—wrongfully confined X for—day and thereby committed an offence punishable under section 344 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 345

345. Wrongful confinement of person for whose liberation writ has been issued.—Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

Materials

1. Scope.—(1) There must be knowledge on the part of the accused that a writ of liberation has been issued. Mere belief is not sufficient.

2. Practice.—Evidence—Prove: (1) That the accused kept a person in confinement.

(2) That such confinement was wrongful.

(3) That a writ of liberation had been duly issued.

(4) That the accused knew of such writ when he kept the person wrongfully confined.

3. Procedure.—Cognizable—Summons—Bailable—Not compoundable—Triable by any Magistrate.

4. 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 of—at—wrongfully confined X, at the time of such wrongful confinement that a writ for the liberation of the said X had been duly issued, and thereby committed an offence punishable under section 345 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 346

346. Wrongful confinement in secret.—Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

Cases and Materials

1. Scope.—(1) To render a person liable under this section it must be shown that wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered.

(2) A person is only liable under this section if t is shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. *(1882) ILR 9 Cal 221.*

(3) The dismissal of the case against the accused under S. 347 amounts to an acquittal and a subsequent complaint for the same offence is not maintainable. *1973 All CriR 101.*

2. Practice.—Evidence—Prove: (1) That the accused wrongfully confined a person.

(2) That the accused prevented him from proceeding beyond a limit imposed.

(3) That such confinement was secret (a) so as not to be known to any person interested in the confinee or to any public servant, (b) so that the place where the confinee was confined may not be known to or discovered by any such person or a public servant.

3. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate.

4. 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—of at—wrongfully confined X in such a manner that the confinement may not be known to any person or to any one interested in the confinee or any public servant or that the place of confinement may not be known to or discovered by any person or public servant and you have thereby committed an offence punishable under section 346 Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 347

347. Wrongful confinement to extort property or constrain to illegal act.—Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section may be read along with section 30, 40, 329, 330 and 342 of the Penal Code. Where under fear of injury a person was made to put his thumb impression on a paper becomes a valuable security the accused was held guilty of the offence under this section *(34 CriLJ 81).*

(2) The offence under S. 347 includes the offence of wrongful confinement punishable under S. 342. *AIR 1941 Sind 36.*

(3) Accused charged complainant with theft of an article belonging to a certain person—complainant denied the charge—Accused threatened to take him to the police station, tied him with a turban cloth and took him towards the police station—On their way they detained him in an orchard where they made a proposal for payment of Rs. 50 for his release—The complainant then got himself released by making the payment—Held that the action of the accused in keeping the complainant tied was an act which amounted to wrongful restraint and the threat to take the complainant to the police station on a charge of theft thus putting him in fear of injury and the obtaining of the amount from him under such threat amounted to a wrongful confinement for the purpose of extortion. *AIR 1952 Pat 379.*

(4) Where the accused were found to have intentionally put the old man in fear of injury to himself and thus to have dishonestly induced him to place his thumb impressions on the pieces of paper, the accused were guilty under S. 347. *AIR 1932 Pat 335.*

(5) Where it was alleged that a Police Officer illegally detained a person with the object of extorting money but the Court found that no money passed the elements of an offence under S. 347 were wanting. *AIR 1930 Oudh 505.*

(6) Where from the complaint, the allegations of the offence under Ss. 220 and 347, Penal Code, attract the application of S. 197, Criminal P. C. prior sanction is necessary for prosecution. *AIR 1947 Sind 60.*

2. Practice.—Evidence—Prove: (1) That the accused confined a certain person.

(2) That such confinement was wrongful.

(3) That such confinement was of the purpose of (a) extorting from the confinee or any person interested in him property or valuable security; or (b) constraining the doing of an illegal act by the confinee or any person interested in him; or (c) giving any information facilitating the commission of any offence.

3. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

4. 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 of—at—wrongfully confined X for the purpose of extorting from the said X (or from a certain person interested in the said X, to wit—Y) a certain property, to wit—, and thereby committed an offence punishable under section 347 Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 348

348. Wrongful confinement to extort confession or compel restoration of property.—Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Cases and Materials

1. Scope—(1) This section may be read along with sections 30, 40 and 330 Penal Code. This section corresponds to section 330 substainally; the only difference being the nature of the act made punishable. A police officer detaining a person not concerned with investigation for more than 24 hours is punishable under this section *(43 CriLJ 3)*. A claim for restitution of conjugal rights falls within this section *(AIR 1936 Pesh 19)*.

(2) The formal arrest of a person is not necessary to constitute "wrongful confinement." It is sufficient if a person is prevented form proceeding beyond certain limits. *1979 CriLJ NOC 210.*

(3) Where the detention by the Police is serious and protected enough to amount in law to a real unauthorised prevention from proceeding beyond certain circumscribing limits, it would amount to an offence of wrongful confinement. *1930 MadWN 723.*

(4) Police Officer detaining a woman not concerned with investigation for more than 24 hours is guilty under S. 348. *AIR 1941 Mad 720.*

(5) The words "to satisfy any claim or demand" in this section cannot be limited to a claim or demand to property. A claim to restitution of conjugal rights falls within these words of the section. *AIR 1936 Pesh 19 (20): 1937 CriLJ 344.*

(6) Where the police had taken certain suspects to a place and made them stay there against their will it was held that the restraint was unlawful. *AIR 1940 Nag 186.*

(7) Where police officers were prosecuted under Ss. 323, 330, 342, 194, 195 and 196, Penal Code, and it was contended that a sanction under S. 197, Criminal P. C. was necessary before prosecution, held that it was no part of the officer's duty to put a person under unlawful restraint in order to extort a confession from him and a sanction for prosecution under S. 197, Criminal P. C. was not necessary. *AIR 1967 All 519.*

2. Practice.—Evidence—Prove: (1) That the accused confined a person wrongfully.

(2) That such confinement was for the purpose of—(a) extorting a confession from the confince or any person interested in him; or (b) of obtaining any information leading to the detection of an offence or misconduct; or (c) for the purpose of constraining the confinee or any person in whom he is interested to restore or to cause restoration of any property or valuable security or to satisfy any demand or claim; or (d) to give information which may lead to the restoration of any property or valuable security.

3. Procedure.—Cognizable—Summons—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

4. 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—of at—wrongfully confined X for the purpose of extorting from him (or any one in whom he is interested) any confession or (any information leading to the detection of any offence of misconduct) or for the purpose of constraining the confince or any person in whom he is interested to restore or cause restoration of any property or valuable security or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security and you have thereby committed an offence punishable under section 348 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Of Criminal Force and Assault

Section 349

349. Force.—A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is

wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling:

Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First: By his own bodily power.

Secondly: By disposing any substance in such a manner that the motion, or change or cessation of motion, takes place without any further act on his part, or on the part of any other person.

Thirdly: By inducing any animal to move, to change its motion, or to cease to move.

Cases

1. Scope.—(1) The 'force' used in this section is used in connection with human body *(15 CriLJ 720).* It does not relate to inanimate objects. Where the accused raised lathis to strike a person who had to flee to save himself, were guilty of using criminal force *(15 CriLJ 231).*

(2) There is a clear distinction between 'force' defined under S. 349 and 'criminal force' defined under S. 350. *1982 CriLJ NOC 11.*

(3) The words "is said to use force to another" clearly imply that the person against whom the force is said to be used is present. A cannot be said to use force against B while B is absent. *AIR 1934 Lah 454.*

(4) The word "another" refers to a human being. A motion or change of motion or cessation of motion caused to property without affecting a human being is not a "use of force to another" within the meaning of this section. *AIR 1969 Goa 45.*

(5) Where the accused raised lathis to strike a person who had to flee to save himself, they were guilty of using force by their own bodily power. *AIR 1923 All 333.*

(6) Act of snatching away books of account which the Assistant Superintendent was holding amounts to use of force as contemplated by S. 349. *AIR 1967 SC 170.*

(7) Where force is used against a person by X at a sign and signal from Y, Y cannot be said to have used force to such person. *AIR 1939 Oudh 81.*

(8) Inducing an animal to move may amount to using force under this section even though the word "rescue" in S. 24 of the Cattle Trespass Act implies the use of force of violence. *AIR 1923 Mad 608.*

(9) Where the accused caused the animals to cease to move they were using force as defined in this section. *AIR 1930 All 820.*

(10) A human being is not an animal and if A without moving himself induces B to move against C, a cannot be said to have used force against C. *AIR 1939 Oudh 81.*

Section 350

350. Criminal force.—Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the

use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Illustrations

(a) Z is sitting in a moored boat on a river. A unfastens the moorings and thus intentionally causes the boat to drift down the steam. Here A intentionally causes motion to Z and he does this by disposing substances in such a manner that the motion is produced without any other action on any person's part. A has therefore intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(b) Z is riding in a chariot. A lashes Z's horses , and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therefore used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z. A has used criminal force to Z.

(c) Z is riding in a palanquin. A intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by this own bodily power. A has therefore used force to Z; and as A has acted thus intentionally without Z's consent, in order to the commission of an offence. A has used criminal force to Z.

(d) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(e) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z or with Z's clothes, or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes or something carried by Z. Here if the throwing of the stone produce the effect of causing any substance to come into contact with Z or Z's clothes, A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he has used criminal force to Z.

(f) A intentionally pulls up a woman's veil. Here A intentionally uses force to her, and if he does so without her consent intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(g) Z is bathing, A pours into the bath water which he knows to be boiling.. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling; A has, therefore, intentionally used force to Z; and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.

(h) A incites a dog to spring upon Z, without Z's consent. Here if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z.

Cases

1. Scope.—(1) The criminal force must be used against a person without his consent for the commission of an offence, with the intention or knowledge or likelihood of causing injury, fear or annoyance.

(2) Where the use of force is without the consent of the person to whom the force is used the use of force will become the use of criminal force. *AIR 1968 Raj 241.*

(3) A motion, change of motion, or cessation of motion caused to property or inanimate objects cannot amount to "criminal force" as defined in this section though such causing was done with the intention or knowledge referred to in S. 350. *1972 CriLJ 1212.*

(4) 'Criminal force' defined under S. 350 is intended to mean criminal force as applied to a person and not as applied to an inanimate object or substance. *1982 CriLJ (NOC) 11.*

(5) There is no element of criminal force as defined in S. 350 in requiring an accused to give his specimen of hair for purpose of identification. *1971 CriLJ 1405.*

(6) Where A is carrying a pot of lahn and B strikes at the pot with the intention of causing injury, fear or annoyance to A, B must be held to use criminal force. *AIR 1941 Lah 297.*

(7) Where the complainant's allegation is not that any "force" or "show of criminal force" was used to him, the remedy of the complainant lies in the Civil Court and an order under S 456, Criminal P. C., would be illegal. *AIR 1968 Raj 241.*

Section 351

351. Assault.—Whoever makes any gesture, or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

Illustrations

(a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(c) A takes up a strike, saying to Z "I will give you a beating". Here, through the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

Cases : Synopsis

1. *Scope.*
2. *Assault.*
3. *"Whoever."*
4. *"Gesture or preparation".*
5. *Intention or knowledge.*
6. *"Cause any person present to apprehend, etc."*
7. *Explanation.*
8. *Justifiable act.*

1. Scope.—(1) A mere threat to use force if a person persists in a course of conduct does not amount to assault.

2. Assault.—(1) The essential elements in the definition of assault in this section are:

(a) that the accused made a gesture or preparation to criminal force;

(b) that the same was made in the presence of the person of whom the said gesture or preparation was made;

(c) that the accused knew or intended that such gesture, etc., would cause that other person to apprehend that criminal force would be used against him; and

(d) that such gesture or preparation did cause in the mind of the other person that the accused would use criminal force against him. *(1974) 40 CutLT 155.*

(2) Whether a particular gesture or preparation amounts to an assault or not will depend upon the facts of the case. A particular act may not amount to an assault in one case, but the same act taken along with other surrounding circumstances may amount to an assault in another case. *AIR 1935 Pat 214.*

(3) Where the two persons indulged in a fight otherwise than in the course of sport, with the common consent and the bodily injury was caused to one of the participants the act of causing bodily injury would amount to assault notwithstanding that there was common consent and the fact that whether the fight took place in private or public place would be immaterial. *(1981) 3 WLR 125.*

3. "Whoever."—(1) A person in uniform be he officer N. C. O. or private is no more than any one else entitled to assault another subject of the King whether in peace or in time of war. *AIR 1945 PC 46.*

4. "Gesture or preparation."—(1) Apprehension created by the gesture or preparation of the accused must be that the accused is about to use criminal force then and there. *1970 CriLJ 264.*

(2) A preparation normally speaking consists in devising and arranging the means necessary for the commission of an act. *AIR 1962 All 22.*

(3) The mere gesture or preparation with the intent or knowledge referred to in the section is itself an offence under this section. *AIR 1962 All 22.*

(4) Pointing of gun loaded or unloaded to a person at a short distance, will certainly create an apprehension of violence unless done in protection of person or property. *AIR 1946 PC 20.*

(5) If the person threatened with gun knows that the gun is unloaded, it will not be assault. *AIR 1946 PC 20.*

(6) Cases in which it was held that an assault would be committed:

(a) Forcing a person to medical examination without his consent. *AIR 1932 All 524.*

(b) Fetching a sword and advancing with it towards the complainant. *1882 Pun Re No. 45 Cr 75 (76) (DB).*

(c) Lifting one's lota or a lathi. *AIR 1951 MadhBha 42.*

(d) Hitting the complainant. *1957 AllLJ 308.*

(e) Throwing bricks into another's house. *AIR 1932 All 322.*

(f) Preparation to fight. *AIR 1954 All 650.*

(g) Advancing with a threatening attitude to strike blows. *(1830) 4 C and P 349.*

5. Intention or knowledge.—(1) Where there was any intention to cause apprehension that criminal force is about to be used or knowledge that the gesture is likely to cause such apprehension in any particular case will depend upon the facts of the case. *1956 All WR (HC) 488.*

6. "Cause any person present to apprehend, etc."—(1) Where A pointed a gun at B which B knew to be unloaded and had no well grounded fear of physical harm. A was held not guilty of assault. *(1840) 9 C and P 483.*

(2) Where the offender who had a gun, ran away with it without attempting to aim at any person no offence of assault can be said to be committed. *AIR 1950 Kutch 23.*

(3) Where apprehension that arises is not from person making the gesture or preparation but from somebody else, it does not amount to assault. *AIR 1939 Oudh 81.*

7. Explanation.—(1) Mere words unaccompanied by any gesture or preparation suggesting an intention to use criminal force is not an assault though it may amount to the offence of criminal intimidation within the meaning of S. 503. *AIR 1959 Mad 342.*

(2) An officer of Court attached certain cattle belonging to B—B used abusive language to A and went away threatening to return and teach A a lesson—Soon after he did come back with a lathi and with companions, sufficiently close of the officer—Held, that B was guilty of assault. *AIR 1935 Pat 214.*

8. Justifiable act.—(1) Pointing of a gun in self-defence is not an offence. *AIR 1948 Nag 28.*

Section 352

352. Punishment for assault or criminal force otherwise than on grave provocation.—Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred [9][taka], or with both.

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

Cases and Materials : Synopsis

1. *Scope.*
2. *Illustrative cases.*
3. *Cases falling under the General Exceptions.*
4. *Husband and wife.*
5. *Criminal intimidation and assault.*
6. *Rioting and criminal force.*
7. *Extortion and assault.*
8. *Abetment.*
9. *Assault under grave and sudden provocation.*
10. *Charge.*
11. *Abatement.*
12. *Sanction.*
13. *Effect of acquittal.*
14. *Procedure.*
15. *Sentence.*
16. *Interference in revision.*
17. *Practice.*

1. Scope.—(1) This section may be read along with sections 96 to 100 and Exception 1 of 300. This section provides punishment for assault or use of criminal force when there are no aggravating circumstances. Where two persons bring cases of mutual assault the Magistrate cannot use evidence given in one case as evidence in the other and a conviction based on such evidence cannot be upheld *(41 CriLJ 247).*

(2) Mere assault or use of criminal force would by itself, be an offence even if the assault is made or the criminal force is used for a most righteous purpose. *1889 Pun Re (Cr) No. 4. P. 7.*

(3) Where the charge is under S. 354 but the evidence of the prosecutrix is exaggerated and the truth of her story has therefore to be doubted, the benefit of the doubt must be given to the accused and he should only be convicted under this section for simple assault. *AIR 1977 SC 1614.*

2. Illustrative cases.—(1) Cases in which accused would be guilty under this section:

(a) Where the accused entered into a temple and assaulted its pujaris. *(1897) 2 Mys CCR 341.*

(b) Where the accused pushed the complainant and dragged him towards the pial of a house. *(1977) 44 CutLT 194.*

(c) Where the accused stopped the complainant and catching hold of her hand, threatened to snatch her water pot. *(1887) 10 MysLR 1049.*

(d) Where the decree-holder raised the purda of the door, in spite of protests by the judgment-debtor's wife a purdanashin lady, and on the door being closed by the lady pushed the door open violently. *AIR 1934 Sind 52.*

(e) Pointing a loaded pistol at any one is an assault under S. 352. *1979 CriLJ 1275.*

(2) Cases in which the accused would not be guilty under this section:

(a) Where the accused puts his hand on the shoulder of a vaccinator and asks him a legitimate question. *AIR 1954 MadhBha 33.*

(b) Where a Railway servant removes a person who is obstructing other passengers from getting into the train. *(1910) 11 CriLJ 451.*

3. Cases falling under the General Exceptions.—(1) Where the harm caused or likely to be caused is a trivial one falling under S. 95 of the Code, the accused would not be liable to be punished under this section. *AIR 1914 Bom 126 WN 73.*

(2) Where the Amin took into his head to arrest the accused without any rhyme or reason the accused could justifiably assault and use criminal force to protect his liberty. The accused could not therefore be convicted either under S. 332 or S. 352. *1982 UP (Cri) C. 60.*

4. Husband and wife.—(1) If husband uses criminal force in taking away his wife, he will be guilty of an offence punishable under S. 352. *AIR 1935 All 916.*

5. Criminal intimidation and assault.—(1) A mere thereat is not an assault but would however fall under S. 503 of the Code. *AIR 1959 Mad 342.*

6. Rioting and criminal force.—(1) Persons may riot without actually committing an offence under this section and the theory that S. 147 embraces S. 352 is fallacious. *AIR 1928 Mad 21.*

7. Extortion and assault.—(1) Where the victim is assaulted by the accused and his thumb impression forcibly taken upon a blank piece of paper the offence falls only under S. 352 and not under S. 383. *AIR 1941 Pat 129.*

8. Abetment.—(1) Master ordering servant to chastise or beat X—Servant holding X and master instead of beating and plunged X suddenly produced a spear-head and plunged it into X—Held, that the servant was only guilty of abetment of ordinarily assault punishable u/s. 352. *AIR 1935 All 346.*

(2) A person ordering the accused to beat the complainant without taking any part himself in the beating is guilty of abetment of assault. *AIR 1918 Mad 1038.*

9. Assault under grave and sudden provocation.—(1) Accused holding certain celebrations at night of a recognised festival X , a neighbour who was disturbed by the noise took away one of their drums—Accused thereupon assaulted X—Held, that the accused acted under provocation and was given a light sentence under S 352. *AIR 1917 All 30.*

10. Charge.—(1) Charged for assaulting a public servant while in discharge of his duty not proved—Magistrate convicted accused under S. 352 for assaulting a witness—Held, that the conviction was not sustainable as no further steps under S. 191, Criminal P. C. were taken before the Magistrate convicted accused for assaulting a witness. *(1902) 6 CalWN 202.*

(2) Where an accused is sent up on a police report for trial for an offence under the City Police Act, the trying Magistrate can alter the charge and convict him of an offence punishable under this section. *AIR 1926 Bom 255.*

(3) In a charge under S. 147 of the Code (rioting) the accused can be convicted of an offence punishable under this section but not for a charge for abetment of assault. *AIR 1922 Mad 110.*

(4) Where the accused is tried and convicted on a charge under S. 426 his conviction cannot, on appeal, be altered to one of assault punishable under this section. *AIR 1936 Pat 536.*

(5) 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—assaulted or used criminal force to X (the person assaulted or the person against whom criminal force was used) and thereby committed an offence punishable under section 352 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

11. Abatement.—(1) On the death of the complainant proceeding in a complaint for an offence punishable under S. 352 abates in view of Section 256, Criminal P. C. *AIR 1915 Cal 708.*

12. Sanction.—(1) Offence under S. 352 is not one mentioned under S. 195 of the Criminal P. C., and therefore a charge for an offence punishable under this section does not require sanction under S. 195, Criminal P. C., for the initiation of proceedings. *(1904) 1 CriLJ 525 (Cal)*

13. Effect of acquittal.—(1) Where a person charged with an offence under S. 352 is acquitted he cannot be tried, on the same facts on a charge under S. 323 of the Code. *AIR 1953 Cal 197.*

14. Procedure.—(1) Where two persons bring cases of mutual assault the Magistrate is not entitled to use evidence given in one case as evidence in the other case. *AIR 1940 Cal 59.*

(2) Offence of assault either committed in private room or in the open street it creates a breach of the peace and Magistrate may take action against the person under S. 106, Criminal P. C. *AIR 1933 All 609.*

(3) Not Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate, Village Court.

15. Sentence.—(1) Where Railway Servant's act was not only grossly illegal but also amounted to casting aspersions on the lady passenger who was the victim of the assault, the maximum sentence should be awarded. *AIR 1954 SC 711.*

(2) Assault on a citizen for appealing to the Police needs a deterrent sentence. *AIR 1926 Bom 255.*

(3) Admonition was held sufficient in the interests of justice. *AIR 1952 Ajmer 13.*

16. Interference in revision.—(1) High Court will not interfere in revision with concurrent findings of fact by the lower Courts arrived at on proper grounds. *AIR 1969 Orissa 36.*

(2) Accused (a teacher) convicted under S. 352 for kissing a boy (student)—Revision—Allegation of teeth bite on cheek contradicted by boy's brother and Investigating Officer—Boy's evidence found wholly unreliable–Charge under S. 352 against accused not made out—Accused entitled to acquittal. *(1984) 1 Crimes 177 (P&G).*

17. Practice.—Evidence—Prove: (1) That the accused made a gesture or preparation to use criminal force.

(2) That the same was made in the presence of the complainant.

(3) That he intended, or knew, that it was likely that such gesture, etc., would cause that complainant to apprehend that such criminal force would be used.

(4) That such gesture, etc. did cause the complainant to apprehend the same.

(5) That the accused received no grave or sudden provocation from the complainant.

Section 353

353. Assault or criminal force to deter public servant from discharge of his duty.—Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to [15][three years], or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Assault must have been made or criminal force used.*
3. *Assault or use of criminal force must be against public servant.*
4. *"In the execution of his duty".*
5. *Execution of warrant for arrest or attachment.*
6. *Execution of search warrant.*
7. *Cases relating to vaccination.*
8. *Other cases.*
9. *"To prevent or deter".*
10. *"In consequence of anything done".*
11. *Procedure.*
12. *Charge and conviction.*
13. *Prisons Act and section 353.*
14. *Bar of trial.*
15. *Sentence.*
16. *Practice.*
17. *Charge.*

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15. Subs. by Ord. No. X of 1982, s. 8, for "two years".

1. Scope of the section.—(1) This section may be read along with sections 21, 351 and 349. This section is an aggravated form of assault or use of criminal force. The distinctions between assault and affray are that assault may take place either in a public or private place but an affray must always be committed in a public place. An assault is an offence against a person or of an individual but an affray is an offence against the public place. An assault may be committed even by one person but an affray must be committed by two or more persons. In the case of an assault the punishment provided is slightly higher than that provided in the case of an affray. Assaulting or using criminal force is to deter a public servant from the discharge of his duty. The terms "prevention" and "deterrence" are not synonymous. In the first place, prevention does not mean only deterrence by physical force but by other means as well. Secondly, the distinction seems to be with reference to the stage of interference by the accused *(AIR 1953 Mad 936).* 'In the execution of his duty as such public servant', means in the discharge of a duty imposed by law on such public servant in the particular case, and does not cover an act done in good faith under colour of his office *(14 CrLJ 512).* Where the procedure for the search of a house by the officer is not strictly legal, the accused cannot be punished under section 353. A police officer even if not under duty is empowered to arrest an offender; and if assault inflicted with a knife the accused can be held guilty *(AIR 1954 All 368).* A charge under this section requires no sanction for initiation of proceedings *(6 CWN 202).*

(2) Elements of the offences—Mere refusal to comply with the order of the public servant, not an offence. Section 353, P.C. prescribes punishment for assaulting or using criminal force to any public servant in the execution of his duty as such public servant with intent to prevent or deter him from discharging his duty. Mere refusal to produce some documents as required by a public servant does not come within the mischief of section 353 of the Code. *State Vs. Bazlus Sattar (1967) 19 DLR 234.*

(3) For offence falling under section 353, summons rather than warrant should be issued when the party is a respectable man. It may be observed here that the maximum punishment for an offence under section 353, P.C. is R. I. for two years or fine or both. In this case the learned Sub-Divisional Magistrate appears to have gone rather too far in issuing warrants against the accused without summoning them. The accused are responsible persons holding some position in society and the learned Sub-Divisional Magistrate would have exercised his discretion properly if he had merely summoned them. *The State Vs. Bazlus Sattar, (1967) 19 DLR 234.*

(4) A dafadar, being a public servant only for the limited purposes of section 68(2) of the Code of Criminal Procedure, cannot be regarded as a public servant when he is going to remove a nuisance under orders of the president of a Union Board and, therefore, the people who assaulted him cannot be convicted under section 353 Penal Code. *1 PCR 21.*

(5) Assault on public servant not committed in consequence of anything done or attempted to be done as a public servant but due to personal grudge against him—Conviction under S. 353 not sustainable. *1978 CriLJ 1514 (Gau).*

2. Assault must have been made or criminal force used.—(1) Assault or use of criminal force is a necessary ingredient of the offence under this section. *1963 (1) CriLJ 559 (Tripura).*

(2) Whether a particular act amounts to an assault or the use of criminal force depends upon the facts and circumstances of the particular case. *AIR 1935 Pat 214.*

(3) Where the accused picks up a gun and escapes from the house by running away without attempting to shoot at the police or even aiming the gun at them, he cannot be said to have assaulted or used criminal force to the police within the meaning of this section. *AIR 1950 Kutch 23.*

(4) Where at a gesture from the accused, his men move towards the public servant threateningly, the accused is not guilty under this section. *AIR 1939 Oudh 81.*

(5) Police officer asking accused to stop his car—Accused fleeing away by driving the car with speed and hitting motor cycle whereupon the police officer was sitting—Held no offence of assault on public servant or using criminal force so as to deter him from discharging his duties as public servant was made out. *1984 CriLJ 27 (AP).*

3. Assault or use of criminal force must be against public servant.—(1) Invigilator is a public servant—Assault on him while discharging his duties in examination hall—Accused is guilty under this section. *1971 All CriR 610.*

(2) A resistance to an arrest made by Civic Guard is not within this section until an order calling out the members of the Civic Guards to duty was notified in the Police Gazette. *AIR 1944 Cal 79.*

(3) It is no excuse for a person accused of assaulting a public servant that, he was not attired in his departmental livery, if the person knew at the time that he was discharging his duties as a public servant. *AIR 1951 Madh B 42.*

(4) Before proceeding to convict an accused under this section, a Magistrate should deal with the question of guilty knowledge on the part of the accused and the question as to whether he knew that the person assaulted was a public servant. *AIR 1933 Sind 174.*

(5) A police constable must be considered to be always on duty as a police officer when interfering with breaches of the public peace within his station limits and jurisdiction whether in mufti or in uniform. *AIR 1950 Mad 365.*

4. "In the execution of his duty".—(1) The words duty as such public servant mean duty imposed by law on such public servant and do not include acts done in good faith and under colour of his office. *1955 Madh BLR 393.*

(2) The words "in the execution of his duty" in this section can apply only when the public servant is discharging his duty imposed on him by virtue of his office. Duty imposed on him by virtue of his office will include the performance of all acts which are so integrally connected with his duty attached to his office so as to form part of it. *AIR 1975 SC 1685.*

(3) Where a Co-operative Extension Officer returning to his headquarters after attending a Co-operative Society Meeting, he was not doing an act connected with his duty and a person assaulting him is not guilty of an offence punishable under this section. *AIR 1960 Ker 200.*

(4) A police constable doing guard duty in judicial lock up is discharging his duty imposed on him by law. *AIR 1924 Lah 257.*

(5) A sales tax officer is entitled to search for and take possession of the account books of the assessees and if in the exercise of such duty, he is assaulted, by the accused, the latter will be guilty under this section. *(1970) 2 SCR 151.*

5. Execution of warrant for arrest or attachment.—(1) Where A public servant is acting under a legal warrant and his act cannot be said to be not justifiable in law an assault on him or the use of criminal force to him is an offence punishable under this section. *1966 All LJ 914.*

(2) A resistance to an arrest or attachment which is illegal as being without jurisdiction is not an offence either under S. 353 or S. 352. *1979 SimLR 233.*

(3) Where the public servant attempts to effect an arrest or attachment in the exercise of jurisdiction, but his act is not strictly justifiable by law, he cannot be said to be acting in "execution

of his duty" within the meaning of this section, and a resistance to it is not an offence under this section. *(1973) 2 MysLJ 17.*

6. Execution of search warrant.—(1) Where a search is made by a public servant under legal authority a resistance to it is an offence under S. 353. *(1970) 2 SCR 151.*

(2) Where public servant acts in the exercise of jurisdiction but the act is not justifiable by law, even then S. 353 will not apply as he cannot be said to be acting in "execution of his duty" in doing a thing not justified by law. *AIR 1960 SC 210.*

(3) Where the public servant has acted in good faith under colour of his office, he will be protected by S. 99 of the Code and a resistance to his act would be an offence under S. 183 or S. 352 or any other section as the case may be. *AIR 1946 Nag 261.*

7. Cases relating to vaccination.—(1) A vaccinator insisting on vaccinating a child in opposition to the wishes of its parent or guardian is not acting in execution of his duty. The vaccinator renders himself liable to a charge of assaulting the child, if he insists on vaccinating it and the parents of the child have got a right of private defence and if they assault the vaccinator and do not exceed the right of private defence, they do not commit an offence under this section. *(1941) ILR 28 All 481.*

(2) Even in place where vaccination has been made compulsory, if the vaccinator vaccinates a child without the consent of the father of the child he cannot be said to be discharging his duty as such public servant and therefore if he is assaulted in such act the person obstructing or assaulting cannot be said to have committed an offence under S. 353. *AIR 1954 MadhB 33, 531.*

8. Other cases.—(1) Sales tax officer trying to get hold of account books which were being clandestinely removed is acting within the execution of his duty—Use of criminal force to prevent him from getting hold of the account books is an offence within this section. *(1970) 2 SCR 151.*

(2) Constables taking accused to dispensary—Assault on constable—Right of private defence—No offence under S. 352 or 353 committed. *AIR 1959 Bom 284.*

9. "To prevent or deter".—(1) The accused under this section must have acted with the intention of preventing or deterring the public servant from discharging his duty as such public servant. *(1972) 1 CutLR (Cri) 422.*

(2) The terms 'prevention' and 'deterrence' are not synonymous. In the first place prevention does not mean only deterrence by physical force but by other means as well. Secondly, the distinction seems to be with reference to the stage of interference by the accused. *AIR 1953 Mad 936.*

10. "In consequence of anything done".—(1) Expression "in consequence of anything done....." as used in S. 332 and this section includes the motive which actuates the accused to cause the voluntary hurt or commit the assault as well as the cause of such assault. *1964 (1) CriLJ 254 (Raj).*

(2) Where a searching officer had conducted a search and left the place and the accused more than one in number, forcibly brought him back and threatened him with a lathi to write and give a memo that he had searched the premises, they were guilty under S. 342 and S. 353. *AIR 1972 SC 886.*

11. Procedure.—*(A) Sanction:* (1) Where, in the course of the same transaction, offences under S. 353 as well as under S. 228 of the Code are committed, they cannot be split up and the accused cannot be tried for an offence under this section alone by-passing the provisions of S. 195. Criminal P.C. *AIR 1968 All 342.*

(2) Where the accused committed an assault while obstructing a Sales Tax Officer from carrying out a search and he was prosecuted for an offence punishable under S. 353 only, and not tried for an

offence under the Sales Tax Act for causing obstruction, since it required sanction of the Collector, the trial for an offence under this section alone is not improper. *AIR 1967 SC 170.*

(3) Where the accused was prosecuted for an offence under S. 353 and S. 186, the offences were distinct and the prosecution under S. 353 was not invalid though that under S. 186 was barred for want of sanction under S. 195, Criminal P.C. *AIR 1966 SC 1775.*

(4) Congnizable—Warrant—Not bailiable—Not compoundable—Tirable by Metropolitan Magistrate or Magistrate of the first or second class.

12. Charge and conviction.—(a) Where a conviction under S. 353 is found to be not sustainable on the ground of the illegality of the act of the public servant, the conviction could not, in appeal, be altered to one under S. 323 of the Code. *AIR 1964 Pat 493.*

(2) A conviction for an offence under this section by a trial Court can be altered in appeal to the lesser offence under S. 189 of the Code. *AIR 1927 Oudh 296.*

(3) Where charge was for an offence u/s. 147 and no charge was framed for an offence u/s. 353 High Court set aside conviction for an offence under this section and ordered a retrial. *AIR 1915 Cal 181.*

(4) Where the acts committed by accused persons constitute different offences they can be convicted for each of the offences. *AIR 1928 Pat 115.*

13. Prisons Act and Section 353.—(1) An offence by a prisoner falling under S. 353 is cognizable and police can investigate into this offence and submit a charge-sheet and the Court can take cognizance of the offence on such a charge-sheet. *AIR 1960 Raj 288.*

14. Bar of trial.—(1) Acquittal of the accused in a trial for an offence under S. 353 is no bar to a subsequent trial on the same facts for an offence under S. 186. *1962 KerLT 493.*

(2) An offence under the Prevention of Food Adulteration Act is distinct from an offence under S. 353 committed by pushing out the Food Inspector from the accused's shop and the pendency of a prosecution for the former offence is no bar to a prosecution for the latter offence. *1979 CriLJ 414.*

15. Sentence.—(1) Public servants are entitled to such protection as the criminal Courts can afford by passing deterrent sentences in cases where gross personal violence is offered to them in the lawful execution of their duty. *(1961) 63 BomLR 294.*

(2) When the resistance offered to public servant is merely a technical assault heavy punishment is not required. *AIR 1931 Pat 342.*

(3) Accused alleged to have pushed Food Inspector—No corroboration from the record—Accused acquitted of the charge under Food Adulteration Act—Concurrent finding of conviction under S. 353 by three lower Courts—Supreme Court did not interfere but held that no substantive sentence was necessary—Accused ordered to be released on bond of good conduct for one year. *1982 SCC (Cri) 131.*

(4) A sentence of R. I. for 3 months was not considered to be harsh in a case of assault on a Tax Officer. *AIR 1965 Pat 8.*

(5) Offences under S. 225 and under Section 353 were committed in the course of the same transaction—Court sentenced the accused only with fine under S. 225 and imposed imprisonment for the offence under S. 353—Held, that if the Magistrate felt that a sentence of imprisonment was necessary, the proper course for him would have been to inflict a sentence of imprisonment for each offence and to direct them to run concurrently. *AIR 1954 HimPra 68.*

(6) Famine work—Patwari supervisor refusing to mark a person present who was in fact absent—Patwari while going home assaulted by accused 'A' along with 6 others—Participation of other

accused except A doubtful—Charge under S. 147 not framed against accused—Accused 'A' held alone was guilty under Ss. 332 and 353. P.C.—However sentence of fine under S. 332 only was passed against him. *1981 RajCriC 372.*

16. Practice.—Evidence—Prove: (1) That the person assaulted, etc., was a public servant.

(2) That the accused assaulted, or used criminal force to such public servant.

(3) That when the accused assaulted, etc., him, he was acting in the execution of his duty as such public servant. Or

That such assault, etc., was committed with intent to prevent or deter such public servant from discharging his duty, as such. Or

That such assault was committed in consequence of something done, or attempted to be done, by such public servant in the lawful discharge of his duty.

17. 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—of at—assaulted (or used criminal force to) X, a public servant, to wit—in the execution of his duty as such public servant (or with intent to prevent or deter the said X from discharging his duty as such public servant), and thereby committed an offence punishable under section 353 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 354

354. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials : Synopsis

1. Scope.—(1) Woman is defined as a female human being of any age (Section 10). What constitutes an outrage to female modesty is nowhere defined. This will differ according to the country and the race to which the woman belongs. Women of one nationality may have different standards of modesty from women of another nationality. This section deals with an aggravated form of assault or use of criminal force and is enacted in the interests of decency and morals. In order to constitute offence under this section there must be an assault or use of criminal force to any woman with the intention or knowledge that her modesty will be outraged. The charge under this section is one which

is very easy to make and very difficult to rebut, and when such a charge is made it is necessary to see whether it is supported by independent evidence besides that of the woman herself, or is corroborated by her conduct and the surrounding circumstances and is consistent with ordinary probabilities.

2. "Whoever".—(1) An offence u/s. 354 can be committed by any man or woman if the assault or use of criminal force is made with the necessary knowledge or intent. *AIR 1953 Madh Bha 147.*

3. "Woman".—(1) The word "woman" denotes a female human being of any age. *(1912) 13 CriLJ 858 (Bom).*

4. Section does not offend the Constitution.—(1) Section 354 does not offend against the Constitution. *AIR 1953 MadhBha 147.*

5. Assault or criminal force.—(1) Mere exposure by the accused of his private parts to a woman would not be sufficient to constitute an offence under S. 354, though it may amount to an indecency. *1963 (1) CriLJ 391 (Tripura).*

(2) If the accused took liberty with the girl with her consent, then he is not guilty as it would not amount to an assault or use of criminal force with an intention to outrage her modesty. *(1913) 14 CriLJ 149.*

(3) The fact that a person is in love with a woman does not authorise him to pull that woman by the hand and hair in the presence of others and such an act amounts to an assault outraging the modesty of the woman. *(1912) 13 CriLJ 53.*

6. Intention or knowledge.—(1) Where an accused is tried for an offence under S. 354 and an assault is proved the next question to be considered is whether he did so with intent to outrage the woman's modesty or with knowledge that it would be outrage. *AIR 1954 SC 711.*

(2) Where the dress of a woman gets loose in a scuffle, and not due to any deliberate act on the part of the accused, but as a direct result her own violence during the struggle the accused cannot be convicted of an offence under S. 354 as there is no such intention or knowledge on the part of the accused as is mentioned in the section. *AIR 1936 Oudh 379.*

7. Outraging the modesty of a woman.—(1) With intent to outrage her modesty commits an offence punishable under S. 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. *AIR 1967 SC 63.*

(2) The best witness in a case of outraging the modesty of a woman is the woman herself. *AIR 1955 NUC (Raj) 996.*

8. Assault under this section and attempt to commit rape.—(1) Whether a particular act done (with the requisite intention) towards the commission of an offence is sufficiently proximate to its commission to constitute an attempt or is so remote as to constitute only a preparation for its commission depends upon the facts and circumstances of each case. *AIR 1925 Rang 247.*

(2) For an offence of an attempt to commit rape, the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit offence consists chiefly in the greater degree of determination. *1984 CriLJ 786.*

(3) Where the accused felled the prosecutrix on the ground, made her naked, exposed his private parts and actually laid himself on the girl and tried to introduce his male organ in her private parts the act amounted to an attempt to commit rape. *AIR 1967 Raj 149.*

9. Burden of proof—Evidence.—(1) The best witness in a case under this section is the woman herself against whom the offence is said to be committed and there is no warrant for laying down the

wide proposition that in a case under S. 354 or for the matter of that in any case relating to a sexual offence, excepting rape, independent corroboration of the prosecutrix's evidence can be insisted upon. *AIR 1953 Pepsu 155.*

(2) What she said at or about the time of occurrence being part of res gestae can be corroborative evidence of her evidence and conviction can be based on such testimony. *AIR 1953 Cal 332.*

(3) Prosecutrix somewhat exaggerating the story—Benefit of doubt must go to the accused—Held, it was appropriate to alter conviction from S. 354 to S. 352. *AIR 1977 SC 1614.*

(4) Where two accused were prosecuted under S. 354 and S. 366, one cannot be convicted on the same evidence on which the other was acquitted. *1983 SCC (Cri) 316.*

10. Joinder or alteration of charge.—(1) Where the complainant's evidence showed that the accused was attempting to commit rape, the case should not be dealt with as a case under S. 354. *1962(1) CriLJ 343 (MadhPra).*

(2) Where the accused was charged for house trespass with intention to commit an offence under this section and the accused admitted that he had illegitimate intimacy with the woman and had gone there on her invitation, the accused could be convicted under S. 451 for house trespass with intent to commit adultery though he was not originally charged for it. *AIR 1960 MadhPra 375.*

11. Sentence.—(1) Criminal assault on an innocent woman or small defenseless girl with intent to outrage her modesty publicly and in open daylight in a high-handed manner merits a substantial sentence of imprisonment. *AIR 1934 Lah 36.*

(2) An accused who was about 21 years of age and a first offender and was on bail for three years was released on probation of good conduct instead of being sent to jail. *1980 ChandLR (Cri) 29.*

12. Procedure.—(1) Bench Magistrates have no jurisdiction to try the offence under S. 354 summarily. *(1900-1902) 1 LowBurRul 63.*

(2) Cognizable—Warrant—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

13. Interference in revision.—(1) Concurrent finding by two Courts below on the basis of evidence on record maintaining conviction under Section 354—No lady will come forward to level false allegations—Conviction rightly recorded—No case for interference in revision. *1984 All Ind CriLR 163 (P&H).*

14. Practice.—Evidence—Prove: (1) That a woman was assaulted or criminal force used.

(2) That an assault or use of criminal force was made on her.

(3) That the accused intended to outrage her modesty or that her midesty was likely to be outraged.

15. 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 of—at—assaulted (or used criminal force to) X, a woman, intending to outrage (or knowing it to be likely that you would thereby outrage) the midesty of the said X by such assault (or criminal force), and thereby committed an offencc punishable under section 354 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 355

355. Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.—Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) The offence under this section is to dishonour by means of assault or use of criminal force. This section makes an exception in the case of an assault or use of criminal force on grave or sudden provocation. The intention to dishonour the person assaulted or to whom criminal force shown is an essential ingredient of the offence *(27 CrLJ 1003)*. Assault with a shoe and kicking a person, are offences under this section.

(2) A mere wordy altercation in the absence of gesture on the part of the accused will not fall within the ambit of S. 355. *(1970) 2 MadLJ 442.*

(3) Where an assault was on a senior by his subordinate in the office during office hours and in the presence of others the circumstances do not lead to an inference that there was any intention to dishonour. *1978 BLJ 824.*

(4) In order to bring the case under S. 355 the burden of proving the absence of grave and sudden provocation is on the prosecution. *AIR 1927 Nag 47.*

(5) Sanction under S. 197, Criminal P.C., is not necessary for prosecuting a public servant for an offence under S. 355. *AIR 1947 Sind 60.*

(6) Separate charges and separate convictions for offences under Ss. 352 and 355 are quite legal but there can be only one sentence and it should not exceed the maximum sentence provided for the major offence. *AIR 1923 Lah 91.*

2. Practice.—Evidence—Prove: (1) That there was the assault or use of criminal force by the accused.

(2) That the accused intended thereby to dishonour the person assaulted, etc.

(3) That he did not receive grave or sudden provocation from the person so assaulted, etc.

3. Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

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 assaulted (or used criminal force to) X, intending by such assault (or criminal force) to dishonour that the said X and thereby committed an offence punishable under section 355 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 356

356. Assault or criminal force in attempt to commit theft of property carried by a person.—Whoever assaults or uses criminal force to any person in attempting to

commit theft on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) This section may be read along with sections 378 and 511. This section generally applies to pick pocketiers. The offence under this section will be complete as soon as the person attempting to steal touches the person to be robbed.

(2) This section is applicable to cases of assault or of using criminal force to a person while attempting to commit theft and not to those cases in which theft has actually been committed. *RatUnCrC 3.*

(3) Assault on a woman with intent to steal her basket amounts to an offence under this section. *(1887) 10 MysLR 1032.*

2. Practice.—Evidence—Prove: (1) That the accused assaulted or used criminal force to another person.

(2) That other person was wearing or carrying the property attempted to be stolen.

(3) That the accused committed assault in attempting to steal such property.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate.

4. 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—of—at assaulted (or used criminal force to) X in attempting to commit theft of certain property—to wit, which the said X was then wearing (or carrying), and thereby committed an offence punishable under section 356 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 357

357. Assault or criminal force in attempt wrongfully to confine a person.—Whoever assaults or uses criminal force to any person in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand [9][taka], or with both.

Cases and Materials

1. Scope.—(1) This section may be read with sections 340 and 511 Penal Code. This section deals with an assault or use of criminal force against some person.

(2) Where the complainant was dragged and pushed towards the pial of a house during the course of assault, the case fell under S. 352 and not under S. 357. *(1893) 16 MysLR 397.*

(3) Where the accused put safa round the neck of a boy on his refusal to accompany him and dragged him for a distance with the result that the boy died the case fell within S. 357 and not under S. 304. *AIR 1931 Lah 275.*

2. Practice.—Evidence—Prove: (1) That the accused committed an assault or used criminal force against some person.

(2) That he did so in attempting to wrongfully confine that person.

3. Procedure.—Cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

4. 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—of—at assaulted (or used criminal force to) X, in attempting wrongfully to confine the said X, and thereby committed an offence punishable under section 357 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 358

358. Assault or criminal force on grave provocation.—Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred [9][taka], or with both.

Explanation.—The last section is subject to the same *Explanation* as section 352.

Cases and Materials

1. Scope.—(1) The word "last section" in the Explanation appears to be wrong. It should have read as "this section", and this section is also subject to the Explanation as contained in section 352.

(2) An exercise of the right of private defence cannot be a grave and sudden provocation. *(1893) 16 MysLR 390.*

(3) Where the accused uses criminal force on grave and sudden provocation given by the patrol, who abused the accused, the accused is liable to be convicted under S. 358. *AIR 1934 All 872.*

(4) Where a bill collector was distraining of doors which are not moveable and was assaulted, the accused was guilty under Section 358 and not under S. 353 of the Code. *AIR 1915 Mad 501.*

2. Practice.—Evidence—Prove: (1) That the accused assaulted or used criminal force to any person.

(2) That such person knew that such criminal force was intended to be used or knew that it was likely to be used.

(3) That the accused received grave and sudden provocation from the complainant.

3. Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by Magistrate, Village Court.

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate) charge you (name of the accused) as follows:

That you, on or about the—day—of—at assaulted (or used criminal force to) to X under grave and sudden provocation from the said X and you have thereby committed an offence punishable under section 358 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Of Kidnapping, Abduction, Slavery and Forced Labour

Section 359

359. Kidnapping.—Kidnapping is of two kinds: kidnapping from [16][Bangladesh], and kidnapping from lawful guardianship.

Cases

1. Scope.—(1) "Kidnapping" literally means child stealing. Under the Code the word means carrying away any human being regardless of age or sex.

(2) The words 'kidnapping' and 'abduction' do not include the offence of wrongful concealment or keeping in wrongful confinement a kidnapped person. *AIR 1947 Pat 17.*

(3) The expression "from lawful guardianship" means "out of the keeping or custody of the lawful guardian". *AIR 1926 Cal 467.*

(4) The offence of kidnapping from lawful guardianship is not a continuing offence. As soon as the minor is actually removed out of the custody of his or her guardian the offence is complete. The offence is not a continuing one as long as the minor is kept out of guardianship. Abduction, on the other hand, is a continuing offence. A person is abducted not only when he or she is first taken from any place but also when he or she is removed from one place to another. Again, there may be an abduction without the removal of a person from lawful guardianship. *AIR 1931 All 55.*

Section 360

360. Kidnapping from [16][Bangladesh].—Whoever conveys any person beyond the limits of [16][Bangladesh] without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from [16][Bangladesh].

Cases

1. Scope.—(1) This section defines the offence of kidnapping from Bangladesh. The offence will be complete only when the limits of Bangladesh are crossed.

(2) Where medical witness says that the age of the child kidnapped was 13 years but offered no reason—But according to the father's estimate the age was above 14 years—Father's statement preferred. *Rafiq Ahmed Vs. State (1961) 13 DLR (WP) 65 : 1961 PLD (Kar) 679.*

(3) Where there is no charge of kidnapping from lawful guardianship under S. 361, conveying a minor above 12 years of age out of India, with his consent is not an offence. *AIR 1918 Bom 205.*

(4) Where a woman raised an alarm while being kidnapped and narrated the story of rape committed upon her, to a witness immediately after being released by the kidnappers the inference is clear that she did not give her consent and it is not negatived by the fact that she demanded money after sexual intercourse. *1963(2) CriLJ 562.*

Section 361

361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or

16. Substituted for "Pakistan" by Act VIII of 1973, 2nd Sch w.e.f. 26-3-1971.

any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Cases and Materials : Synopsis

1. *Scope, object and applicability of section.*
2. *This section and S. 360.*
3. *This section and S. 363.*
4. *This section and S. 366.*
5. *This section and S. 498.*
6. *"Abduction" and "kidnapping"—Distinction.*
7. *"Takes or entices"—General.*
8. *"Taking"—Meaning of.*
9. *"Enticement"—Meaning of.*
10. *Minor going of his or her own accord.*
11. *Accused inducing minor to leave guardian's protection.*
12. *"Minor".*
13. *Age of kidnapped person.*
14. *Person of unsound mind.*
15. *"Out of the Keeping of the lawful guardian".*
16. *"Lawful guardian".*
17. *Guardianship—Hindu Law.*
18. *Guardianship—Muhammadan Law.*
19. *Explanation—Person entrusted with care or custody of minor.*
20. *Explanation—Relative rights of legal guardian and person entrusted with care or custody of minor.*
21. *Guardian's consent.*
22. *Consent of kidnapped minor.*
23. *Exception.*
24. *"Unlawful"—Meaning of.*
25. *Mens rea.*
26. *Kidnapping not a continuing offence.*
27. *Kidnapping from kidnapper.*
28. *Abetment.*
29. *Marriage of minor girl by guardian against her wishes.*
30. *Evidence and onus of proof.*
31. *Evidence and burden of proof—Age of kidnapped person.*
32. *Procedure.*
33. *Place of enquiry.*
34. *Charge.*

1. Scope, object and applicability of section.—(1) The expression "taking" in this section is not confined to mere physical taking. The expression "taking out of the keeping of the lawful guardian" must, therefore, signify some act done by the accused, which may be regarded as the proximate cause of the person going out of the keeping of the guardian or, in other words, an act but for which the person would not have gone out of the keeping of the guardian as he or she did. Where it was found that one girl alleged to be kidnapped by the accused had written letters in which she was desperately calling him to come and take her away and she was soon after discovered with the accused or under his control, it is legitimately open to a Court of law to assume that he finally yielded to the solicitations and made it possible for her to get away and that is sufficient "taking" in law for the purpose of section 363 of the Penal Code *(29 CriLJ 635)*. Enticing is one way of "taking". It amounts to inducing the

minor to go of her own accord to the kidnapper. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire on the other. This can take many forms difficult to visualise and describe exhaustively. There is an essential distinction between the two words "take" and "entice". The mental attitude of the minor is not of relevance in the case of taking. Enticement need not be confined by any single form of allurement. Anything which is likely to allure a minor girl will do. It need not be always sweetmeats or money, it can also be offer of sexual intercourse. In order to support a conviction for kidnapping a girl from lawful guardianship the ingredients to be satisfied are: (a) that the girl was under the age of 16; (b) that she was in the keeping of a lawful guardian; (c) that the accused took or enticed such person out of such keeping and such taking was done without the consent of the lawful guardian. The most essential ingredient of the offence is that the minor should have been "taken" by the accused "out of the keeping" of his lawful guardian. The word "taking" as used in this section does not mean a continuing or a continuous act. The "taking" which constitutes an offence is complete as soon as the girl is removed from the keeping of the lawful guardian. The mere fact that minor leaves the protection of the guardian does not put her out of the guardian's keeping. The object of the section appears to be to protect minors and persons of unsound mind from exploitation. All that is required under this section is that a minor, male or female, must not be taken away or enticed from their guardianship. No intention need be established in such cases *(10 CrLJ 295)*. The words "lawful guardian" in section 361 are used in a wide sense. They are made by the explanation to that section to include any person lawfully entrusted with the care or custody of a minor *(AIR 1935 Pat 170)*. The consent of the minor to his being taken away or the consent of the guardian of the minor given under a misrepresentation is immaterial and ineffective. In the matter of age the statement of the doctor unsupported by any other reliable evidence is of no value *(6 DLR 178 WP)*. The doctor has got to give valid reasons why he concluded that the girl was below 16 years *(13 DLR 65 WP)*. Where the doctor without carrying out any X-ray examination of the bones of the girl, forms his opinion on other characteristics like height, breast, teeth, etc., the opinion of the doctor is in no way better than the opinion of a lay man and is not entitled to the weight which the court will attach to the opinion of an expert under section 45 of the Evidence Act. Examination by a radiologist for the ascertainment of the age of the girl by an ossification test gives some degree of accuracy in finding out the approximate age of the girl *(PLD 1964 Dac 228)*.

(2) *Ingredients*—The ingredients of this section are:

(a) The accused committed the offence of kidnapping by taking or enticing.

(b) The person kidnapped at the time of the offence was under 14 years if a male or under 16 years if a female.

(c) Such person was in the keeping of the lawful guardian.

(d) Such taking was done without the consent of the lawful guardian.

(3) Intent, question of—Under Section 361 it is immaterial when a girl below 16 years is kidnapped. For a charge under section 366 for kidnapping a minor with intent that she may be compelled to marry against her will, the age must be below 16 years. Charge must state from whose guardianship the minor was taken away, without which the charge cannot be sustained. *Rafiq Ahmed Vs. State (1916) 13 DLR (WP) 65=1961 PLD (Kar) 679.*

(4) For the purpose of the custody of the girl age of majority laid down in the Majority Act, 1875 read with the Guardians and Wards Act, 1890 i.e. the age of 18 years, is the determining factor to decide whether the girl is to be given to the custody of the guardian—Reference to the age of 16 years

in case of a female minor in section 361 is for the commission of the offence of kidnapping punishable under section 363 of the Penal Code only. Medical report is based on superficial observation and too general in nature—The school-leaving certificate has been issued by the headmaster of the school and is positive as to the date of birth of the girl and also as to the source thereof. Principle of admission by *non-traverse*—Applicability of—The age of the kidnapper not having been challenged the principle of admission by *non-traverse* will apply. *Krishna Pada Dutta Vs. Bangladesh 42 DLR 297.*

(5) Determination of age of a person in custody for the purpose of her guardianship—Isolated statement of her father in such a case in respect of her age cannot be accepted as true unless it is supported by corroborative evidence. If a girl is found below 16 and taken away without the consent of the guardian then it will be an offence and the guardian will be entitled to her custody. Even if it is presumed that at time of occurrence of her kidnapping the detenu was minor but now when she is found major the Court has no jurisdiction to compel her to go with her father. *Manindra Kumar Malakar Vs. Ministry of Home 43 DLR 71.*

(6) Age of victim in relation to offences under the Penal Code—The minor to be taken out of custody of the lawful guardian as under section 366 must be a minor under 16, and 18 years would be referable only to section 366A when she would be taken away from place to place by inducement with intent that she may be seduced to illicit intercourse. *Tapash Nandi Vs. State 45 DLR 26.*

(7) Age of majority and guardianship—Decision as to custody of a minor pending criminal proceedings—Neither personal law nor Majority Act is relevant for the purpose. The statute that holds good is the Penal Code. If the allegations are that of kidnapping of a minor girl, then for the purpose of her custody, the court has to proceed on the basis that she is a minor if she is under 16. If however the allegations are that of procreation of a minor girl, the court has to proceed on the basis that a girl is a minor who is under 18. *Wahed Ali Dewan Vs. State and another 46 DLR (AD) 10.*

(8) To constitute an offence of kidnapping the requirement of law is that the person against whom the offence is committed must be under 16 years of age, if a male, and under 18 years of age, if a female. The consent of the minor in a case of kidnapping is a matter of no legal consequence. *Abdul Karim V. The State. 22 BLD (HCD) 523.*

(9) When the victim girl, Anjali Rani as Court witness says that she is aged 20 years and the medical report dated 18-5-94 submitted on the basis of a report prepared by a Radiologist shows that Anjali Rani was of 16.5 to 17.5 years of age which was proved by two doctors and as such on the date of occurrence the age of Anjali Rani was about 16 years. *Haren Halder Vs. Md. Akkas Ali & ors. (Criminal) 3 BLC 455.*

(10) Reference to the age of 16 in the case of a female minor in section 361 of the Penal Code is only for the purpose of commission of the offence of kidnapping punishable under section 363 of the Penal Code and not for the purpose of diciding whether the girl is sui juris *(Ref 13 DLR 65 WP). 10 BCR 43.*

(11) The age of the female minor child in section 361 Penal Code and in section 552 CrPC, should be increased from 16 years to 18 years. *2 BCR 41.*

(12) Determination of the age of a girl whether she is minor or not within the limit of the age mentioned in section 361 of the Penal Code. Two doctors who examined the girl gave two different ages as to her age. In such a case the matter should be reported to a third doctor for determination of her age. In the meanwhile it is ordered that the girl may stay where she likes. *30 DLR 187.*

(13) Under Muhammedan Law the father is the legal guardian of the minor children. The legal guardian has in law constructive custody of the minor children. He can also claim that he bonafide

believed himself entitled to their custody and thus not guilty of kidnapping his own children when he removes them from the hizanat of the minor. *20 DLR 45 WP.*

(14) Kidnapping from India or from lawful guardianship is made punishable by itself irrespective of any particular intent with which the offence is committed. *AIR 1964 Punj 83.*

(15) The elements of the offence of "kidnapping" as defined in this section are as follows:

(i) The person kidnapped must be a minor or a person of unsound mind.

(ii) The age of the kidnapped person must be under 16 years in the case of a male or under 18 years in the case of a female.

(iii) The minor or person of unsound mind must have been in the keeping of a lawful guardian.

(iv)The kidnapping must be from the keeping of the lawful guardian of the minor, or in the case of a person of unsound mind, from the keeping of the lawful guardian of such person.

(v) The offender must have taken away or enticed a minor or a person of unsound mind from the keeping of the lawful guardian.

(vi) Such "taking" or "enticing" must be without the consent of the lawful guardian. *AIR 1954 Mad 62.*

(16) This section applies in the case of minor girls irrespective of the question whether the girl is married or unmarried. *AIR 1957 Him Pra 42.*

2. This section and S. 360.—(1) The word "consent" must be understood in the light of the explanation contained in S. 90. Hence, consent known by the kidnapper to be given under fear or misconception, or consent of an insane person or of a person under 12 years of age, will be no consent for the purpose of this section. *AIR 1918 Bom 205.*

3. This section and S. 363.—(1) The mere fact that a person who is a minor, according to the legal age of majority, but is above the ages specified in this section, is kidnapped from his lawful guardian will not make S. 363 applicable, although that section only uses the expression "whoever kidnaps from lawful guardianship" and does not specify that the person kidnapped must be below the particular age stated in S. 361. *AIR 1933 Bom 417.*

4. This section and S. 366.—(1) A charge of kidnapping a woman for the purpose of illicit intercourse under Section 366 cannot be sustained unless it is proved that the kidnapped person was a minor girl below the age mentioned in this section and further was kidnapped from the keeping of her lawful guardian. *AIR 1965 SC 574.*

(2) So far as this section is concerned the mere fact of the kidnapping of a minor girl from the keeping of her lawful guardian, is an offence irrespective of any intention of the part of the accused to have illicit sexual intercourse with her or to subject her to such intercourse. Such intention is necessary only for a charge under S. 366 and not one under this section. *AIR 1949 All 587.*

(3) In the absence of an intention on the part of the accused to have illicit sexual intercourse with the kidnapped minor girl the offence will fall under this section and not u/s. 366. *AIR 1969 All 216.*

5. This section and S. 498.—(1) The object of S. 498 is the protection of the rights of the husband rather than of the married woman herself. But the object of this section is the protection of the minor. *AIR 1965 SC 942 (944).*

6. "Abduction" and "kidnapping"—Distinction.—(1) Under this section the consent of kidnapped person (minor or person of unsound mind) will not legalise the kidnapping in the absence of the consent of the lawful guardian. *AIR 1953 Punj 258.*

7. "Takes or entices"—General.—(1) The gist of the offence under this section is the taking or enticing away of a minor within the specified age limits or a person of unsound mind out of the keeping of the lawful guardian. *AIR 1965 SC 942.*

(2) The two words 'takes' and 'entices' as used in S. 361. P. Code are intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in S. 361, P. Code. But if the guilty party has laid a foundation by inducement, allurement or threat etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then, prima facie, it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him. The question truly falls for determination on the facts and circumstances of each case. *AIR 1973 SC 2313.*

(3) "Kidnapping" under this section is constituted not only by taking or carrying away a person, but also by enticing him or her, i.e. alluring him or her to go away from the protection of the guardian. *AIR 1973 SC 819.*

(4) The taking or enticing under this section need not be by means of force or fraud in order to constitute an offence under the section. *AIR 1973 SC 2313.*

(5) Merely taking care of minor boy who has been kidnapped by accused's brother and left with him, when accused was no party to the kidnapping, is no offence under this section. *AIR 1933 Lah 392.*

8. "Taking"—Meaning of.—(1) "Taking" means causing to go, escorting, or getting into possession. *AIR 1968 Punj 439.*

(2) "Taking" does not require the use of force. *AIR 1973 SC 2313.*

(3) There must be proof that the accused has played some active part in the minor leaving his or her lawful guardian's house and taking shelter in his house. *AIR 1968 Punj 439.*

(4) If the accused actively brings about a minor girl's stay in his house while she is proceeding to the house of a near relation after leaving her husband's house of her own accord, by playing upon her weak and hesitating mind, it amounts to "taking" the girl within the meaning of this section. *AIR 1949 Orissa 22.*

(5) Where the accused came to the Kotha where the minor girl was sleeping, woke her and took her away with them, it was held that they were guilty under this section. *AIR 1968 Punj 439.*

(6) "Taking" means physical taking. *AIR 1914 Oudh 126.*

(7) Where there is no physical "taking" (or enticing) no offence can be committed under the section. Thus, merely getting a girl married without the consent of the father of the guardian does not amount to "taking" or kidnapping where the girl, at the time of the marriage has been staying with some relations with the consent of the guardian and has not been removed from there. *AIR 1914 Oudh 126.*

(8) The "taking" under this section need not be by a single act but may be by a series of acts and will be complete with the last of such acts. *AIR 1949 Orissa 22.*

(9) The question at what point of time the act of "taking" or kidnapping is complete is a question of fact in each case. *AIR 1949 Orissa 22.*

(10) The distance for which the kidnapped person was removed is immaterial in determining whether he or she was kidnapped. *AIR 1968 Punj 439.*

(11) The mere fact that the accused was present at the door of the house from which a girl was kidnapped by another person does not mean that the accused participated in the act of kidnapping in the absence of any overt act by such person in furtherance of the act of kidnapping or of anything which could show his complicity in the crime. *AIR 1933 Oudh 62.*

9. "Enticement"—Meaning of.—(1) The distinction between the two words "taking" and "enticement" may be stated thus: "Taking" is independent of the mental attitude of the kidnapped person. "Enticing" means inducing a person by some inducement to leave the guardian's home. *AIR 1955 AndhPra 59.*

(2) The inducement need not be immediately prior to the person leaving the custody of his lawful guardian. It is sufficient if the accused had at some earlier stage solicited or persuaded such person to do so. *AIR 1973 SC 2313.*

(3) Enticement need not be confined to any single form of allurement. Anything which is likely to allure the minor girl will do. It need not be always sweetmeats or money. It can also be offer of sexual intercourse. *AIR 1969 All 216.*

10. Minor going of his or her own accord.—(1) Where a minor who is of the age of discretion leaves the parent's or the guardian's home of his or her own accord and goes with the accused, the accused cannot be charged with the offence of kidnapping under this section, as in such a case the accused cannot be said to take or entice the minor from the keeping of his or her guardian merely because the accused has not restored the minor to the guardian or tried to persuade the minor to go back to the guardian. *AIR 1973 SC 819.*

(2) Where a parent or guardian tries to thrust an unwanted husband on a minor girl and she runs away from the parent's or guardian's house and seeks the protection of strangers who give her such protection, they do not commit the offence of "kidnapping". The dividing line between taking a minor girl from the keeping of the lawful guardian and helping a run-away and abandoned minor may be fine but is real. *AIR 1967 All 158.*

(3) Gist of offence under this section is removal of the minor from the guardian's keeping without the guardian's consent and consent of the minor himself or herself is immaterial except for the purpose of showing whether the accused was responsible for the removal of the minor. *AIR 1973 SC 819.*

(4) Even where the accused did nothing immediately before the girl's departure from her guardian's place to induce her to leave the home, the accused would be guilty under this section, if prior to the girl's leaving her guardian's home he had played on her mind and induced her to run away from her home. *AIR 1973 SC 2313.*

11. Accused inducing minor to leave guardian's protection.—(1) Although the section speaks of "taking" or "enticing" from the keeping of the guardian, the section is not inapplicable merely because the minor has left the guardian's home and is away from the home. It cannot be presumed merely from the fact of the minor having left his parent's or guardian's home that he has no intention of going back and in such cases it must be presumed that he is still in the guardian's keeping and to take him away when he is in that condition would clearly amount to an offence under this section. *(1970) 72 PunLR 943.*

12. Minor.—(1) The age of minority must be determined according to the Majority Act, 1875. Thus, a Muhammedan girl, who has attained puberty, is not regarded as a minor under the Muhammedan Law. But, if she is a minor according to the Majority Act of 1975, she will be regarded as a minor for the purpose of this section and if she is below 18 years, "taking or enticing" her from the keeping of her lawful guardian will be an offence under this section although she is not a minor according to the Muhammedan Law. *AIR 1915 Mad 636.*

13. Age of kidnapped person.—(1) Under this section two conditions are necessary before an accused can be convicted of an offence: (i) the person kidnapped must be a minor according to law, and (ii) he or she must be below the age specified in the section. *AIR 1933 Bom 417.*

(3) Kidnapping a boy above the age of 16 years from his guardian's keeping is not an offence. Similarly, kidnapping a girl above 18 years of age from her guardian's keeping is not an offence under this section. *AIR 1955 SC 574.*

14. Person of unsound mind.—(1) An unconscious girl is not a person of unsound mind and kidnapping of such a girl does not fall within this section, unless she is a minor and also under the age of 18 and the kidnapping is shown to be from the keeping of her guardian. *AIR 1939 Lah 224.*

15. "Out of the keeping of the lawful guardian".—(1) The word "keeping" connotes the fact that it is compatible with the independence of action and movement of a minor. The relationship between the minor and the guardian is not dissolved so long as the minor can at will take advantage of the guardian's protection and come back to it. So long as the minor is in such a situation, taking away the minor would be an offence under this section. *AIR 1957 Orissa 29.*

(2) The word "keeping" in the section implies, neither prevention nor detention but rather maintenance, protection and control manifested not by continuous action but available on necessity arising. *AIR 1955 All 78.*

(3) To constitute an offence under this section the "taking" need not be from house of the guardian. *AIR 1955 All 412.*

(4) Even where the minor girl is kept by her father at the house of a relative and she is kidnapped from that house, the kidnapping will be from the keeping of the father or the guardian as she must be deemed to be continuing under the guardianship of her father and to be in his keeping even when she is staying in the friend's house. *AIR 1965 SC 942.*

(5) It cannot be said in every case, irrespective of the circumstances of that particular case, that merely because the father, mother or other guardian had driven out the minor from the house, the driving out was of a permanent character and that the guardian had permanently abandoned the guardianship. In such a case taking away or enticing the minor will be an offence under this section. *AIR 1958 Orissa 224.*

(6) Just as a guardian can abandon the guardianship, it is also open to a minor to leave the protection of the guardian of his or her own accord. *AIR 1957 Cal 589.*

(7) The fact that a minor can abandon the protection of the guardian does not mean that he can consent to being taken away from the keeping of the guardian so as to absolve the person, taking him away, from liability for an offence under this section. *AIR 1957 Cal 589.*

(8) The tie between the minor and his guardian cannot be dissolved merely on the guardian being suddenly struck with some disease or infirmity so long as the minor is within the protection or care of the guardian or depends upon him for his or her maintenance. *AIR 1955 All 78, 252 (DB).*

(9) Removal by force against the will of a minor girl from one place to another in the same house by the accused will not amount to taking away the girl from the keeping of the guardian where the protection of the guardian was at her disposal immediately she stood in need of it. Hence, this section will not apply to such a case and the offence would only be one against the person of the girl. *AIR 1955 NUC (Assam) 5524.*

16. "Lawful guardian".—(1) A lawful guardian will include the following categories:

(a) a natural guardian under the law applicable to the minor,

(b) a testamentary guardian, i.e. a guardian appointed by the minor's father by will,

(c) a guardian appointed by the Court under the relevant statutory provisions. *1891 AC 388.*

(2) A legal guardian will clearly be a "lawful guardian" within the meaning of this section and the removal of the minor or person of unsound mind from the keeping of such guardian will amount to an offence under this section. *AIR 1954 Bom 339.*

(3) A person appointed guardian by the Court will be a lawful guardian. *AIR 1919 All 36.*

(4) A minor boy cannot be the guardian of his minor sister, for the purpose of this section, even though both the parents of the girl are no more. *AIR 1929 Lah 835.*

(5) Among Christians the father has no preferential right to the guardianship of children and their removal by the mother from the custody of the husband, even after she had renounced the Christian religion and become a Hindu, is not an offence under this section. *AIR 1927 Lah 496.*

17. Guardianship—Hindu law.—(1) Under the Hindu law the father of a minor, whether a boy or a girl, is the natural guardian of the minor. *AIR 1955 Andh 59.*

(2) After the husband's death, the guardianship of his minor widow will vest in the husband's father in preference to her own mother and other maternal relations. *AIR 1960 All 479.*

(3) The Hindu father of a minor girl, who becomes insane, does not thereby instantly cease to be the lawful guardian of the minor and taking away the minor girl from his guardianship will be an offence under this section. *AIR 1955 All 78.*

18. Guardianship—Muhammadan law.—(1) Under the Muhammadan law, the mother is entitled to the custody (hizanat) of her male child until he has completed the age of 7 years and of her female child until she has attained puberty. *AIR 1968 Ker 21.*

(2) The right of the Muhammedan mother continues even after she is divorced by the father of the child. *AIR 1934 All 722.*

(3) Under the Muhammadan law, the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian of the child. The father alone, or, if he be dead his executor (under the Sunni law) is the legal guardian. *AIR 1918 PC 11.*

(4) The custody by the mother of the child is only a custody held on behalf of the father. Hence, a father who removes from the custody of the mother cannot be guilty of the offence of kidnapping of the minor child from the keeping of his lawful guardian under this section. *AIR 1968 Ker 21.*

(5) In the case of a Muhammadan minor girl the guardianship of the mother will continue even after her marriage till she attains puberty. *AIR 1952 Tripura 27.*

(6) After the mother's death, the mother's mother becomes the guardian of a minor girl till the girl attains puberty, in preference to the girl's father and other paternal relations. *AIR 1959 MadhPra 99.*

19. Explanation—Person entrusted with care or custody of minor.—(1) The Explanation does not mean that a person who would otherwise be a lawful guardian would cease to be a lawful guardian under this section where there is another person to whom the care or custody of the child is lawfully entrusted. The right of such latter person will always be subject to the right of the natural guardian. *AIR 1968 Ker 21.*

(2) Removal of the child from the custody of person to whom care and custody of the child has been lawfully entrusted by the natural guardian will not be an offence. *AIR 1968 Ker 21.*

(3) If the removal is with the consent of person lawfully entrusted with the custody of the child there would be no offence under the section. *AIR 1943 Pat 212.*

(4) In view of the Explanation the words "lawful guardian" in this section will include not only the de jure guardian of a minor but also the de facto guardian the object being the protection of children and minors and to avoid exposing them to the danger and risk of being kidnapped by unscrupulous persons and criminals merely because they are not in the keeping of persons who are strictly their guardians in the eye of the law. *AIR 1954 Bom 339.*

(5) Where the legal guardian of a minor entrusts the care and custody of the minor to another person, such person would be a "lawful guardian" within the meaning of this section by virtue of the Explanation as against the whole world except the natural guardian. *AIR 1954 Bom 339.*

(6) Entrustment of the care and custody of a minor within the meaning of the Explanation may be inferred from a well-defined and consistent course of conduct governing the relations of the parties. *AIR 1962 Pat 121.*

(7) Proof of formal entrustment of the custody of the child is not necessary. *AIR 1919 Pat 27.*

(8) Any person, who is lawfully in charge of a minor, may be regarded as his lawful guardian under the explanation to this section, even though there may be no formal entrustment of the minor to such person by the minor's legal guardian. The words "lawfully entrusted" only signify that the care and custody of the minor should have arisen in some lawful manner. *AIR 1958 Bom 381.*

(9) Even a volunteer taking upon himself the duties of care and custody of a minor, who has no one to protect him or her will be a lawful guardian for the purpose of this section and Explanation. *AIR 1954 Bom 339.*

(10) Children in an orphanage must be regarded as being under the lawful guardianship of the Superintendent of the orphanage, and taking away a minor child from the orphanage without the consent of the Superintendent would be an offence. *AIR 1954 Bom 339.*

(11) A person, who obtains the custody of a minor by unlawful means cannot be regarded as the lawful guardian. *AIR 1954 Bom 339.*

(12) The mere fact that a boy is employed by another does not make the latter the lawful guardian of the boy in the absence of proof of entrustment of the boy to the employer by his father or guardian. *AIR 1919 Pat 27.*

20. Explanation—Relative rights of legal guardian and person entrusted with care or custody of minor.—(1) Where a person other than the legal guardian is treated as a "lawful guardian under the Explanation to the section (by reason of being lawfully entrusted with the care or custody of a minor) the rights of such person are subject to those of the legal guardian. *AIR 1931 Cal 446.*

(2) The effect of the Explanation to the section is only to extend the meaning of the expression "lawful guardian". *AIR 1943 Pat 108.*

(3) The effect of the explanation is only to extend the meaning of the expression "lawful guardian" for the greater protection of minors and children and not to limit or take away the rights of the legal guardian or to make them subject to the right of the person who had been given charge of the child for the time being. *AIR 1952 Tripura 27.*

(4) It is only the natural guardian of a minor who can claim a higher right to the custody of the minor than the person who has been actually taking care of her. Such right cannot be claimed by a person merely on the ground of his being a relative of the minor unless he is the natural guardian. *AIR 1962 Pat 121.*

(5) Where the custody of a minor girl is handed over to her mother by decree or order of the Court, the mother becomes the lawful guardian of the minor girl even against the father of the girl, and if the father removes by force the girl from custody of the mother, he would be guilty of an offence under this section read with S. 363. *AIR 1958 Bom 381.*

21. Guardian's consent.—(1) In order to constitute an offence under this section, the "taking" of the minor or person of unsound mind from the custody of the lawful guardian must be without the consent of such guardian. *(1913) 14 CriLJ 149.*

(2) It is for the prosecution to prove that the "taking" from the guardianship was without the consent of the guardian and not for the accused to prove that such taking was with the consent of the guardian. *1968 CriLJ 832 (DB) (MadhPra).*

(3) The word "consent" in this section must be understood in the light of S. 90, under which a consent given under fear or misconception will not be "consent" within the meaning of the Code. Hence, a consent of a guardian given on a misrepresentation of facts being one given under a misconception, is not valid for the purpose of this section. *AIR 1916 Lah 414.*

22. Consent of kidnapped minor.—(1) Under this section removing a minor from the keeping of the lawful guardian without the guardian's consent is an offence. The consent of the minor himself or herself is no defence to a charge under the section. *1976 CriLJ 363.*

(2) The underlying policy of the section is to uphold the lawful authority of parents or guardians over their minor wards and to throw a ring of protection round the girls in their charge and to penalise the conduct of persons who corrupt or attempt to corrupt the morals of minor girls by taking improper advantage of their immaturity and inexperience. *1980 AllLJ 82.*

(3) The mere fact that the minor girl, who is kidnapped, has consented to being taken away will not exonerate the accused. *AIR 1958 Orissa 224.*

23. Exception.—(1) The Exception is that the section is not applicable to a case in which the person who removes the child from another's custody believes himself, in good faith, to be entitled to the lawful custody of the child. There is no question in whatever of any authority to remove the child from his or her lawful guardian. *AIR 1938 Cal 475.*

(2) Where in a divorce suit a decree was passed dissolving the marriage and ordering the wife to deliver up the son born of the marriage to the husband and the decree was forwarded to the High Court for confirmation under Section 17 of Act 4 of 1869 and the husband obtained custody of the son, but soon after the wife removed him from the husband's house before confirmation of the decree by the High Court, it was held that the wife could not be charged with kidnapping as, till the confirmation of the decree the parties would continue to be husband and wife, and the wife would continue to be entitled to the custody of the child under the law. *AIR 1914 Cal 609.*

24. "Unlawful"—Meaning of.—(1) Where the object of removing a child is to give her in marriage to another in contravention of the provisions of the Child Marriage Restraint Act, the object will be an "illegal" one, as the carrying out of the object will be an offence under the above Act. *AIR 1933 Rang 98.*

(2) The word "unlawful" is not confined to what is "illegal" under S. 43 ante but is a wider term than "illegal". *(1935) 39 CalWN 396.*

(3) In its general connotation the word "unlawful" means what is not justifiable by law: nor is it synonymous with the word "immoral" as is shown by the fact that the section uses the words "immoral or unlawful purpose". *(1935) 39 CalWN 396.*

25. Mens rea.—(1) Under this section the mere fact that a minor boy or girl was taken away or enticed from the keeping of the lawful guardian of the minor is sufficient to constitute the offence. It is not necessary that the accused must have done the act with any particular intent. *AIR 1924 Oudh 335.*

26. Kidnapping not a continuing offence.—(1) The offence of kidnapping from lawful guardianship consists in the "taking" or "enticement" of a minor, within the specified age limits, from the "keeping" of the lawful guardian and is complete the moment such "taking" or "enticement" is over and hence is not a continuing offence as abduction is. *(1900) ILR 27 Cal 1041.*

27. Kidnapping from kidnapper.—(1) This section deals with kidnapping from lawful guardianship. Kidnapping from a kidnapper is not an offence under this section. Thus, where A kidnaps a minor girl from the custody of her husband, the lawful guardian under the law, and B subsequently takes away the girl from A. B's offence will not fall under this section. *AIR 1961 Bom 282.*

(2) Where A kidnaps a minor girl from the keeping of B the lawful guardian, and C subsequently kidnaps the minor girl from the keeping of A for the purpose of subjecting her to illicit sexual intercourse. C will not be guilty of an offence under S. 366. *AIR 1961 Bom 282.*

28. Abetment.—(1) Where A and B conspired to kidnap a minor from the keeping of lawful guardian and in pursuance of the conspiracy actual kidnapping is done by A and B is not present at the spot but is watching at a distance at some other place, B is guilty of abetment of the kidnapping, though he is not actually present at the spot from where the kidnapping is made. *(1904) 1 CriLJ 561 (All).*

(2) Where once the kidnapping is over, i.e. where once the minor has been removed from the keeping of the lawful guardian, helping the kidnapper thereafter in any way will not amount to abetment of the kidnapping, as kidnapping is not a continuing offence. *AIR 1916 All 210.*

29. Marriage of minor girl by guardian against her wishes.—(1) Where the legal guardian for marriage of a Hindu girl gets her married, he will not be committing an offence, even if he takes some money from the other side by consenting to the marriage. *AIR 1960 All 479.*

(2) The willingness or otherwise of a minor Hindu girl to marry a particular person is not a matter for consideration at the time of her marriage. So, it will be difficult to make a distinction between a marriage brought about by the agency of a kidnapper, and a marriage with the help of her relations so far as her personal desire and consent are concerned. But, where the taking away of the girl from the keeping of her lawful guardian without his consent is proved, the person so taking her away will be guilty of kidnapping under this section and liable to punishment under S. 363. *AIR 1919 All 36.*

30. Evidence and onus of proof.—(1) The burden of proving the intention of the accused to kidnap from lawful guardianship is, as in every criminal case, on the prosecution. The prosecution must prove some kind of inducement of the accused or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. *1990 Bom CR 744.*

(2) The intention to take away or entice the boy or girl from the keeping of the lawful guardian has to be proved by the prosecution, and the mere fact that a minor boy or girl is found in the company of

the accused will not by itself and without anything more prove that it was the accused's intention to take away the minor from keeping of the lawful guardian. Direct evidence of a guilty intention on the part of the accused is not necessary however and the intention can be proved from circumstantial evidence. *AIR 1955 All 78.*

(3) In cases of doubt the benefit of doubt must be given to the accused. *AIR 1967 All 523.*

(4) In a prosecution under S. 366, the evidence of the kidnapped or abducted girl who is nearly 18 years of age, must be taken with considerable caution. *AIR 1957 HimPra 42.*

31. Evidence and burden of proof—Age of kidnapped person.—(1) Although the person kidnapped may be below the age of majority under the Majority Act the offence of kidnapping will not fall under this section, if the minor is not also below the age specified in the section. The burden of proving that the kidnapped minor was below the age specified in the section is on the prosecution. *AIR 1955 SC 574.*

(2) The evidence of the kidnapped girl herself is not inadmissible, and if credible, is legally sufficient for conviction. *1967 MPLJ (Notes) 91; (1867) 7 SuthWR 68(1)(68).*

(3) Where there is other evidence like extract from the school register, medical opinion testimony of parents and relatives showing the girl to be below 18 years of age, the mere fact that the horoscope was not put in evidence is no ground for holding that her age was not proved to be below 18 years. *1978 CriLJ 1494 (1495) (Cal); 1960 MadWN 674.*

(4) Entry in the Kotwari book, if genuine, can be taken into consideration and will be strong evidence in proof of the age of the girl kidnapped. *(1968) 1 CriLJ 686 (MadhPra).*

(5) Although the opinion of the medical expert as to age is not inadmissible, yet in the absence of any explanatory statement by the doctor as to the factors which individually or cumulatively were significant, his opinion cannot carry much weight. *(1969) 7 GujLR 378.*

(6) What is known as the "ossification" test is often applied for determining the age of minor girl. *1978 CriLJ 1494.*

32. Procedure.—(1) The offence of kidnapping from lawful guardianship, not being a continuing offence where a girl is kidnapped from the keeping of the lawful guardian in Kathmandu in Nepal and then brought into India, the offence is complete in Nepal itself, and therefore must be regarded as having been committed out of India. In such a case, under S. 188 of the Criminal P. C., the certificate of the Political Agent in Nepal was held to be necessary before an Indian Court can take cognizance of the offence in India, notwithstanding the presence of the accused as well as the kidnapped girl in India. *(1997) ILR 19 All 109.*

(2) In a case where there are several accused jointly tried, the evidence against each accused should be scrutinised to see what part was played by him in the "taking" or "enticing". *AIR 1938 Cal 475.*

(3) Where a number of alternative decisions are possible on the evidence, it is the duty of the Judge to clear the ground and be quite sure that each accused or counsel clearly understands the case that the particular accused has to meet. *AIR 1923 All 285.*

33. Place of inquiry.—(1) Where a girl kidnapped from place A is raped in place B it will be a 'transaction' within the meaning of S. 235 of the Cr.P.C. The offences are so interlined that the inquiry can be had at either of the places. *AIR 1970 Raj 250.*

34. Charge.—(1) In the charge of the offences of abduction and kidnapping, there must be separate charges in respect of each of the offences inasmuch as the two offences are not identical but different ones. *AIR 1927 Cal 644.*

(2) Where the Magistrate frames an additional charge under S. 363, when there was no material in the evidence to support such charge, and convicted the accused thereon, the conviction was set aside. *AIR 1928 Lah 898.*

(3) In the absence of prejudice the accused could be convicted under S. 366 though charged only under S. 361. *AIR 1970 Guj 178.*

(4) The charge need not specify when the "taking" started and where and when it was completed, provided it is clear from the evidence that there has been a "taking" of the girl from the keeping of the guardian. "Taking" may be constituted by a series of acts. *AIR 1949 Orissa 22.*

Section 362

362. Abduction.—Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Cases : Synopsis

1. Scope of the section.—(1) Abduction becomes a criminal act only when it is done with one or the other of the intents specified in section 364, 365 and 366 Penal Code. Where no force or deceit is practiced on the person abducted, a conviction cannot stand. The force or fraud must have been practised upon the person—Actual force is required and not show or threat of force. "To induce" means "to lead into". It connotes a leading of the woman in some direction in which she would not otherwise have gone. There must be a change of mind caused by an external pressure of some kind, unlike kidnapping, abduction is a continuing offence and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place to another. The deceit practised on the mind of the girl in the start continues to work as she moves from one place to another, and accompanies the accused in pursuance of the promises held out to her *(25 CrLJ 1082).* Abduction is a continuing offence. Consent of the person "moved" if freely and voluntarily given, condones abduction but in kidnapping consent of the person "taken" or "enticed" is wholly immaterial.

(2) *Ingredients*—This section requires two essentials:

(i) Forcible compulsion or inducement by deceitful means.

(ii) The object of such compulsion or inducement must be the going of a person from any place.

(3) The ingredients necessary to constitute an abduction of a person are—

(i) that the person must have been made to go from any place, and

(ii) that such going must have been—

(a) under compulsion by the use of force, or

(b) induced by deceitful means. *AIR 1953 Punj 258.*

(4) Abduction as such is by itself not punishable as a substantive offence. *AIR 1959 Mad 274.*

(5) There can be no abduction when no force is used, or inducement made by deceitful means in taking away a person. *AIR 1971 SC 2064.*

2. "By force compels".—(1) The word 'force' in this section means actual force and not merely show of force or threat of force. *AIR 1949 All 710.*

(2) Threatening with a pistol is using force within the meaning of the section. *AIR 1972 SC 2661.*

3. "By any deceitful means induces".—(1) It is not necessary according to the definition of abduction in this section that force must be used in every case. It is sufficient if by deceitful means a person is induced to go from any place. *1980 All Cri C 222.*

(2) The expression 'deceitful means' is wide enough to include the inducing of a girl to leave her guardian's house on a pretext. *AIR 1951 Raj 33.*

(3) "To induce" means 'prevail on', 'persuade'. There must be a change of mind caused by an external pressure of some kind. *AIR 1934 Sind 164.*

(4) Where a young married girl, little more than a child was induced to go along with the accused on the representation that she would be married to a rich man, it was held that even if the girl went with the accused willingly she could not be said to have done so with the knowledge that she would be committing a criminal offence by undergoing a second marriage; thus her consent could only have been under a misapprehension and therefore no consent in the eye of law; the element of deceit was therefore present and so there was abduction within the meaning of this section. *AIR 1943 Pat 212.*

4. Person going of his own free will.—(1) Where the prosecutrix accompanies the accused of her own free will without any inducement or use of force, no offence is committed either of kidnapping or abduction. *1977 AndhLT 391.*

(2) Most of the witnesses stated that on being persuaded by the accused persons the victim went inside his house and came properly dressed to accompany the group. It could not, therefore, be said that the victim was abducted by the accused persons. *AIR 1984 SC 911.*

5. "Any person".—(1) The force or the deceitful means should be employed towards the person sought to be abducted and not towards any other person. *1956 AllLJ 849.*

(2) Where the accused requested the complainant to send his daughter with him to cook food for some guests and the complainant acceded to the request and sent his daughter with the accused, it was held that there was no abduction within the meaning of the section as it could not be said that the complainant's daughter was taken away from his house by the accused by force or by deceitful means. *1956 AllLJ 849.*

6. Abduction a continuing offence.—(1) Abduction is a "continuing offence" and a person is being abducted not only when he is first taken away from any place but also when he is subsequently removed from one place to another. *AIR 1951 Raj 33.*

(2) Where it was conceded by the counsel that charge under Section 148 related to murder taking place at a place other than place of abduction subsequent to alleged abduction of victim and did not relate to abduction, the common object would not be available for sustaining conviction for abduction. *AIR 1984 SC 911.*

(3) Court cannot charge a man with committing an offence de die in diem (= from day to day) over a substantial period. *AIR 1937 Bom 1.*

(4) Normally an offence is committed only once. But offences can be committed from day to day and it is offences falling in this latter category that are described as continuing offences. *AIR 1955 Bom 161.*

7. "To go from any place".—(1) An essential ingredient in the definition of abduction is that a person must have been induced to go from any place. In the absence of this element there can be no 'abduction' as defined in the section. Where the accused came on to the roof of a house and awakening a woman who was sleeping there asked her to accompany them and on her refusal they lifted her up in

order to carry her away but dropped her and ran away on her raising an alarm, it was held that the action of the accused amounted only to an attempt to abduct. *AIR 1925 Lah 512.*

8. Kidnapping and abduction—Distinction.—(1) Kidnapping differs from abduction in several respects. *AIR 1927 Cal 644.*

(2) Kidnapping as defined in Ss. 360 and 361 is by itself a substantive offence punishable under S. 363 whereas mere abduction as defined in S. 362 is by itself not a substantive offence. It is only where the abduction is made in the circumstances stated in Section 364, 365, 366, 367 and 369 that it is an offence. *AIR 1967 All 528.*

(3) In 'kidnapping' consent of the person enticed is immaterial. In 'abduction' consent of the person removed, if freely and voluntarily given, condones it. In 'kidnapping' the intent of the offender is irrelevant, but in 'abduction' it is the all important factor. *AIR 1953 Punj 258.*

9. Abduction and wrongful confinement.—(1) Where the accused along with other persons forcibly entered a liquor shop and took away the shop owner and his colleagues in a truck for some distance and then dropped them, it was held that there was no wrongful confinement and that the proper charge should have been under S. 362 and not under S. 342. *1969 BLJR 216.*

10. Abetment of abduction.—(1) Actual abduction may be abetted, but when the offence is complete, abetment cannot be proved against persons who may have taken a subsequent part in the proceedings of the parties. *(1923) 24 CriLJ 921.*

(2) Certain persons conspired to induce a girl to accompany them, their intention being to make her over to the accused for marriage to his brother. She was brought to a place where the accused arrived according to a pre-arranged plan. The girl was not however made over to the accused at that place but they all started by train from that place to another place and there told the accused to take charge of the girl. The girl was, however, not ready to accept the company of the stranger whereupon the accused caught hold of her hand and dragged her. It was held that the accused could not be convicted of the abetment of the original offence of abduction; but this was a separate offence of abduction when he tried to compel the girl by force to go along with him on her refusal to accompany him. *AIR 1925 Oudh 328.*

11. Burden of proof.—(1) The burden of proof is on the prosecution to prove a forcible compulsion. It cannot be presumed that the accused must have had a guilty intention unless they prove that they were innocent. *AIR 1934 Sind 164.*

(3) Inducement cannot be presumed from the mere fact that a minor girl is found with a man. *AIR 1934 Sind 164.*

Section 363

363. Punishment for kidnapping.—Whoever kidnaps any person from [16][Bangladesh] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *Lawful guardianship.*
3. *Consent of the minor.*
4. *Kidnapping—When complete.*
5. *Evidence and proof.*
6. *Abetment.*
7. *Charge and conviction.*
8. *Sentence.*
9. *Procedure.*
10. *Practice.*
11. *Charge.*

1. Scope.—(1) This section should be read with section 361, and the offence of kidnapping from lawful guardianship penalised by this section is the officer which is defined by section 361. The offence of kidnapping under section 363 consists soley in the taking of a minor from the keeping of a lawful guardian *(34 CrLJ 1239)*. Certain principles have been involved in finding out what acts will be deemed sufficient to constitute abandonment of a guardian by a minor girl. Although a minor may not be competent to give her consent to her taking she is competent to leave the protection of the guardian of his or her own accord (*51 CrLJ 1486; AIR 1954 Mad 62; AIR 1950 Cal 406*). If it was proved that at the instigation of the accused the minor left her father's guardianship, the accused cannot be convicted under this section *(AIR 1961 MP 104; 1961 CrLJ 513)*. For the purposes of this section, the intention of the offender, his motive, the means employed by the accused; and the consent of the girl, are all irrelevant. Kidnapping is an offence against guardianship and the moment the minor is taken or enticed away out of the keeping of her lawful guardian the offence is complete. In a prosecution of kidnapping the age of the person has to be proved by the prosecution. This section may be read with the Cruelty to Women (Deterent Punishment) Ordinance No LX of 1983 dated 3-10-83.

(2) Kidnapping girl under sixteen years of age leaving parent's house of her own accord and going over to her paramour—Paramour taking girl to accused and seeking his assistance in getting married with girl—Mere taking of girl in circumstances of case, does not establish removal of girl by accused from legal guardianship of parents. *Banney Khan Vs. State (1966) 18 DLR (WP) 28.*

(3) Kidnapping from lawful guardianship. The offence under section 363, P.C. is not a continuing offence. A minor is deemed always to be under lawful guardianship, within the freedom which is allowed to him, e.g., such as he can be shown to be accustomed to practice. Thus, for instance, if he had been left by the others on Ayub Park, it would not be possible to say that the persons responsible for taking him to Ayub Park were guilty of kidnapping him from lawful guardianship, since it would have been possible for the boy to return home the same evening. But when he was taken from Ayub Park to the bus-stop; that being a place from which movement was possible to a number of places outside Rawalpindi, an action may be seen of which the result was likely to be and eventually was that the boy would not be allowed to return home the same evening. At this stage, it would be possible to say that the boy was taken out of the lawful guardianship of his father. *Muhammad Razzaq Vs. State, (1967) 19 DLR (SC) 379.*

(4) Ascertainment of the age of the girl, on a charge of kidnapping, the question to be duly gone into upon due consideration of all facts and circumstances. *Gannendra Nath Vs. Abdul Khaleque (1963) 15 DLR 272.*

(5) Physical examination for verification of girl's age can only be with her consent. *(1963) 15 DLR 272.*

(6) A father being a natural guardian of the minor child, according to some judicial authorities, cannot be held guilty of kidnapping, for his taking away the child from the custody of the mother without the consent of the mother. *Kazi Mohammad Elias Vs. Ferdous Ara 41 DLR 516.*

(7) A minor to be taken out of the lawful custody of her guardian as under section 363 must be a minor under 16. A minor under 18 would be referable to section 366A. She cannot be allowed to go whether she attains the age of 18 years. *Dr. Bimal Kanti Roy Vs. State and others 46 DLR 541.*

(8) Custody of a victim girl, if the allegations are that of kidnapping of a minor girl out of the keeping of the lawful guardian. Kidnapping of a minor girl out of the keeping of the lawful guardian is an offence under Section 363 of the Penal Code. For the purpose of custody of the victim girl as may be prayed for in the criminal Court in a pending proceeding, the Court has to proceed on the basis that the female is a minor under sixteen years of age as laid down in section 361 of the Penal Code. For

proving the offence of kidnapping the minority of the victim will have to be established at the trial. *Md. Wahed Ali Dewan Vs. The State and another, 14 BLD (AD) 32.*

(9) Offence of Kidnapping—Consent of minor is immaterial—When it is proved by consistent evidence that the minor victim girl was kidnapped by enticement, the conviction and sentence awarded upon the accused are perfectly justified. The consent of the minor is immaterial and is of no legal consequence. *Abdul Karim Vs. The State 7 MLR (HC) 341.*

(10) The essential ingredients of the offence of kidnapping a minor from lawful guardianship are:

(i) that the age of the minor is less than 16 years if the minor is a male and less than 18 years if the minor is a female;

(ii) that the minor was taken or enticed away;

(iii) that the minor was in the keeping of his or her lawful guardian; and

(iv) that the guardian did not consent to his or her removal. *1975 WLN (UC) 113.*

(11) This section can have no application to a case where the person alleged to be kidnapped from the lawful guardian is not a minor or where the case is not of taking away the person from India to a place outside India. *AIR 1959 Mad 274.*

(12) Person in public custody—Determination of age for guardianship—The isolated statement of the father in such a case in respect of age of the detenue (his daughter) cannot be accepted as true unless it is supported by other independent corroborative evidence—The petitioner prayed for declaration of illegal detention and claimed custody of the girl on the ground of minority—This he could be entitled to if the girl was found below 16 and if she was taken away without the consent of the guardian. Examination by court—Examination for ascertaining detenue's age—We examined the girl personally, and from our knowledge, experience and human perception we felt that the detenue is quite major and was not below 16 when she left her father's house. Person in public custody—Question of giving her to father's custody. Even if it is presumed that at the time of occurrence (alleged kidnapping) she was minor but now, if she is found major, the court has no jurisdiction to compel the major girl to go with her father. *10 BLD 85.*

(13) Detention of a girl in custody, she not being an accused and may at best be a witness, is illegal. Report of the Investigation Officer regarding the age of the girl supported by the horoscope and other material evidence, go to prove that the girl was a minor has been preferred over the report of the Civil Surgeon to the effect that the girl's age is over 18 years and as such, she was a major. Rani Bala is a Hindu girl. Although there is a claim that she has embraced Islam yet that claim is to be proved at the regular trial. *17 DLR 544.*

(14) Nor will the section apply where neither taking away nor enticement is established. *(1971) 2 SC Cri R 16.*

(15) In order to constitute an offence of kidnapping simpliciter under this section it is not necessary that there should be an intention on the part of the accused to make an unlawful use of the minor. *1980 AllLJ 101.*

(16) This section, as well as S. 372 (selling minor for purposes of prostitution, etc.) is applicable to married as well as unmarried female minors. *AIR 1957 Him Pra 42.*

2. Lawful guardianship.—(1) Where an orphan girl was maintained by one X, but to whose care she had not been confided by her parents, X cannot be considered as her lawful guardian. *(1894) 17 Mys LR No. 475 p. 716.*

3. Consent of the minor.—(1) Consent of the minor to the act of the accused in taking or enticing the minor out of the keeping of the lawful guardian is no defence to a charge under this section. *(1974) 1 CriLT 485 (Him Pra).*

(2) A distinction must be made between those cases where the accused takes or entices a minor out of the keeping of the lawful guardian with the minor's consent and those cases in which the minor has of her own accord without any inducement offered by accused abandoned the guardianship of her parents, without any 'animus revertendi' (= the intention of relurning) and joins the accused, and in the latter case, no offence under his section is made out. *AIR 1967 All 158.*

(3) Where the minor alleged to have been taken by the accused had left her father's protection; knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, the accused could not be said to have taken her away from the keeping of the lawful guardian. Something more has to be established by the prosecution viz., that some kind of inducement was held out by the accused person or he took an active part in the formation of the intention of the minor to leave the house of the guardian. *AIR 1965 SC 942.*

(4) What will be sufficient to constitute an abandonment of a guardian by the minor depends upon the facts and circumstances of each case. *AIR 1954 Mad 62.*

(5) It is not necessary for a conviction under S. 366 that the accused should know definitely who the guardian of minor girl is whom he finds wandering about and makes use of her for his own ends. *AIR 1937 All 182.*

4. Kidnapping—When complete.—(1) The offence of kidnapping from lawful guardianship is complete when the minor is actually taken from the keeping of the lawful guardian. It is not an offence continuing so long as the minor is kept out of such guardianship. *(1900) ILR 27 Cal 1041.*

(2) Whether the kidnapping is complete or not is a question of fact and must in each case be decided upon the evidence. *AIR 1928 Pat 159.*

(3) The question whether the kidnapping is complete or not cannot be raised for the first time before the High Court. *AIR 1915 Mad 636.*

(4) Minor girl first removed from uncle's house to his threshing floor and next day removed from village by accused—Held taking was not complete till her removal from village. *AIR 1916 Lah 230.*

5. Evidence and proof.—(1) In law, no corroboration of the evidence of the minor girl kidnapped is necessary to substantiate the charge. But where her story is of an unnatural character and is self-contradictory, it is not safe to place reliance on the testimony unless it is corroborated by independent evidence. *AIR 1956 Nag 74.*

(2) Where it was not stated in the complaint that the girl alleged to be kidnapped was a minor nor were other necessary ingredients of the offence disclosed in the evidence, it is illegal for the Magistrate to 'suo motu' (= of his own accord) frame a charge for an offence under this section. *AIR 1928 Lah 898.*

(3) Where there was extraordinary delay in laying information before the Police and there was also a possibility that the minor girl said to be kidnapped was over 16 years of age, it was held that the probabilities were that the minor went away of her own accord and hence the offence was not made out. *AIR 1918 Lah 37.*

(4) Mere knowledge on the part of the accused that his brother had kidnapped the minor could not make the accused liable under this section or under S. 368. *AIR 1933 Lah 393.*

(5) In order to hold that the accused "enticed" away the girl, it is necessary to have some evidence to the effect that the accused had given her some temptation or promise or assurance or allurement which had the effect of an irresistible force upon the girl. *1983 CriLJ 1819.*

(6) Where testimony of the prosecutrix clearly established that she was treated kindly by the accused and it was of her own vocation and perhaps out of fear of disgrace at the hands of the family,

which subsequent events established, that she chose to remain with the accused. Held, the accused were entitled to benefit of doubt. *1983 Chand CriCas 379.*

(A) Proof as to age.—(1) To constitute the offence of kidnapping from lawful guardianship it must be proved that the girl kidnapping is under 18 years of age and the burden is on the prosecution to prove it. *1977 Raj Cri C 362.*

(2) A doctor's estimate about the age does not amount to proof but is merely an opinion. *AIR 1916 PC 242.*

(3) Investigation under S. 363 against accused for abduction of girl—Determination of age of girl—Educational Institute's Certificate produced by accused showing age of girl was above 18 years—Investigation agency neither ascertaining age of girl from educational institute or any other place not ascertaining whether date of birth as certified by them and produced before court was genuine or false—Prima facie, age of girl as disclosed by the certificate of educational institute is to be taken as correct. *1982 CriLJ (NOC) 24.*

(4) Accused charged under Ss. 363, and 366 P. C.—Accused pleading that victim was 21 years of age on the date of alleged offence and that they had married each other and living as husband and wife—Accused placing on record Photostat copy of Matriculation Examination Certificate of girl issued by the School Education Board and also fixing photographs showing the girl garlanding him. This certificate had not been controverted on behalf of the prosecution. Held, the proceedings were liable to be quashed. *1983 All CriLR 750.*

(5) Overwriting in the entry without proper attestation regarding sex of the child in the birth register of the Municipal Committee. Radiologist not examined to prove the skiagrams taken by him. Adverse inference was drawn against him—Possibility of prosecutrix being over 18 years of the age could not be ruled out and since she was a consenting party, the conviction of the accused deserved to be set aside. *1982 Chand Cri C 76.*

(6) If two inferences are possible about the age of the minor, one that she was more than 18 years and the other that she might be below 18 years, the benefit of doubt should go to the accused. *1966 All Cri R 348.*

6. Abetment.—(1) Kidnapping is not a continuing offence and there could be no abetment of it after minor had been taken completely out of the keeping of guardian. *(1911) 12 CriLJ 94 (Lah).*

7. Charge and conviction.—(1) A person charged of an offence of kidnapping cannot be convicted for abetment of kidnapping where such alteration of the offence charged would prejudice the accused. *1957 CriLJ 688 (Raj).*

(2) Where two separate charges have been framed against accused person—One under this section and another under S. 366—And he is acquitted of the charge under S. 366, he can nevertheless be convicted for the offence under this section. *AIR 1951 Assam 168.*

(3) Where the accused kidnapped a five year old girl out of the keeping of her guardian and subsequently committed rape on her, but there was no proof of any intention of committing rape at the time of the kidnapping, it was held that the convictions under S. 375 and under this section were valid. *AIR 1969 All 216(220) : 1959 CriLJ 585 (2).*

8. Sentence.—(1) Sentence is a matter of discretion with the trial Court unless the sentence awarded is so grossly inadequate; the High Court normally will not interfere and particularly so where the State has not chosen to apply for enhancement of sentence. *1966 CriLJ 210.*

(2) Where the lower Court had passed a lenient sentence in consideration of facts not appearing in evidence, it was held that the offence should be viewed with sternness and the offenders should not be lightly dealt with. *AIR 1965 Raj 90.*

(3) On a conviction for an offence under this section a sentence of fine is not essential along with a sentence of imprisonment. But a sentence of fine alone is illegal. *AIR 1949 All 587.*

(4) Court reduced the sentence from 2 year's R. I. to one year's R. I. where the motive of the accused was honorable (in that he wanted to marry the girl). *AIR 1928 Pat 159.*

(5) Where the girl was a willing party to the kidnapping by the accused who were a middle aged couple, the sentence of 7 year's and 4 year's R. I. respectively imposed by the trial Court were reduced to 3 years and 2 years S. I. by the Court. *AIR 1948 Oudh 1*

(6) The girl kidnapping was on the verge of eighteen years of age. Accused kidnapping her and got married with her. They were also in correspondence with each other prior to that. The accused was sentenced by the trial court. After having suffered three months' R. I, he was released on bail. In appeal Supreme Court held that sentence already undergone was enough. *1966 CriApp Rep (SC) 421.*

(7) Three accused convicted for kidnapping and sentenced—Circumstances of the case and evaluation of the role of accused justifying modification—Conviction maintained but sentence modified. *1981 CriLR (SC) 229.*

(8) Where it was proved that the accused took a minor girl with him from a shop where she was left by her father without the consent of her father on the pretext that she was called by her father the accused was convicted under S. 363 P. C., instead of S. 366 and looking to his tender age of 21 years, without any previous conviction to his discredit and the fact that the lapse occurred due to familiarity with the girl and her parents was replaced on probation of good conduct for 2 years after 7 years' proceedings. *1982 WLN (UC) 389.*

(9) If a person abducts woman with intent to rape her, and then commits rape on her, he cannot be awarded separate sentences under S. 376 and under this section. *AIR 1926 Lah 212.*

(10) Person taking part in process with criminal knowledge of kidnapping—he is guilty to same extent as first man who initiates process of kidnapping. *1983 CriLJ (NOC) 81 (Gauhati).*

9. Procedure.—(1) A minor cannot be the guardian of his sister. So he cannot institute a complaint of kidnapping of his sister. *AIR 1921 Lah 316.*

(2) A person charged with having committed the offence of kidnapping at a place outside British India cannot be tried by a Court in British India though the person kidnapped may be concealed or detained in British India. *AIR 1917 Cal 612.*

(3) Kidnapping—Girl found major—Held, direction regarding handing over her custody on superdari to her father was unwarranted—She ought to have been allowed to go where she liked. *1982 CriLJ (NOC) 125.*

(4) Petitioners/Accused challenging F. I. R., registered under Sections 363/366 P. C.—Prosecutrix starting before the High Court that she was wife of one of the petitioners—F. I. R. not disclosing any offence—Held, it was harassment of citizen and Court could exercise its inherent powers to quash the F. I. R. & subsequent proceeding. *1983 Chand Cri Cas 264.*

(5) Magistrate should not assume jurisdiction by trying cases for an offence under this section, which really fall under S. 366. *AIR 1924 Lah 718.*

(6) Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

10. Practice.—(A) For kidnapping from Bangladesh—Evidence—Prove: (1) That the person kidnapped was at the time of the offence in Bangladesh.

(2) That the accused conveyed such person out of Bangladesh.

(3) That he did so without his consent or the consent of another person legally authorised to consent on behalf of that person.

(B) *Kidnapping from lawful guardianship.*—Evidence—Prove: (1) That the person kidnapped was then a minor under fourteen years of age if a male, sixteen years of age if a female, or was insane.

(2) That such person was in the keeping of a lawful guardian.

(3) That the accused took and enticed such person out of such keeping from lawful guardianship.

(4) That the accused did so without the consent of the lawful guardian.

11. Charge.—The charge should run as follows:

(A) I, (name and office of the Magistrate) hereby charge you (name of the accused) as follows:

That you, on or about—the day—of—at— kidnapped X out of Bangladesh without the consent of that person (or some person legally authorised to so consent on his behalf) and thus kidnapping the person from Bangladesh and thereby committed an offence punishable under section 363 Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

(B) I (name and office of the Magistrate) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—kidnapped X a minor (below 14 years of the age if a male or 16 years of age if a female) or any person of unsound mind or took or enticed out of keeping of the lawful guardianship without his consent and thereby committed an offence punishable under section 363 Penal Code and within my cognizance.

And I hereby direct that you be tired by this court on the said charge.

Section 364

364. Kidnapping or abducting in order to murder.—Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with [1][imprisonment] for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) A kidnaps Z from [16][Bangladesh], intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

Cases and Materials : Synopsis

1. *Scope.*
2. *"Kidnaps."*
3. *"Abducts."*
4. *"In order that."*
5. *Charge.*
6. *Sentence.*
7. *Procedure.*
8. *Practice.*

1. Scope.—(1) This section provides for the punishment of a specific offence and is not intended as an indirect method of punishing persons who are suspected but not proved to have committed murder. Before a court can act on circumstantial evidence the circumstances proved must be complete and of a conclusive nature so as to be fully inconsistent with the innocence of the accused and are not explainable on any other hypothesis except the guilt of the accused. As there was sufficient interval between the death of the boy and the recovery of the body, the link in the chain of the circumstantial evidence does not appear to be fully complete. In this circumstial evidence, the accused was entitled to benefit of doubt under sections 302 and 364. On a plain reading of the section it appears that it has no application to case where the object of the kidnapper is to hold the person kidnapped for ransom *(14 CriLJ 167; 27 CriLJ 64).* In order to bring a case under this section it would be necessary to establish that the abductor at the time of abduction intended to put the abducted person in danger of being murdered *(AIR 1940 Cal 561).* There can be no kidnapping of a dead person *(AIR 1975 SC 1252).*

(2) Ingredient of the offence u/s. 364—Provisions of the section, when attracted and when not—Dead body of the abducted person found—Charge u/s. 364, if permissible—Charge framed u/s. 302/34, PC and conviction u/s. 364/34 whether valid—Sec 236 Cr. P. C. whether applicable. Held:—Conviction u/s. 364/34 is illegal and Sec 236, Cr. P. C. cannot be invoked in aid of conviction u/s. 364 if charge u/s. 302 or u/s. 302/109 fails. *Hafez Abul Khair & another Vs. The State, 6 BLR (AD) 67=1 BSCR 34=29 DLR (SC) 2.*

(3) Whether an offence u/s. 364 is congnate to an offence u/s. 302 or a minor offence in relation to sec. 302. Held:—An offence u/s. 364 is not a minor offence to the offence u/s. 302. The offence u/s. 364 is a distinct and specific offence. *Hafez Abul Khair Vs. The State, (Ibid).*

(4) Abduction followed by murder—Question as to frame of charges—The law in respect of the charge of the offence of abduction followed by murder and recovery of dead body. A, the deceased with others were taken to Razakar camp, and on the next day one D under the order of the petitioner killed the deceased by a Rifle shot. The trial ended in their conviction under the Ist and 2nd charges and each of them were sentenced to one year's R. I. under the Ist charge and transportation for life under the 2nd charge. They were, however, acquitted of the charge u/s 302/34. On appeal D was acquitted while the conviction & sentence against the petitioner was maintained by the High Court. Held:—(i) When the prosecution case was abduction of the deceased followed by murder and the recovery of the dead body, the only appropriate charge should have been u/s. 302 if the abductors were murders themselves, if not then u/s. 302/109. After the recovery of the dead body there was no scope for a charge u/s. 364, because the offence of abduction culminated in the offence of murder. The said offence merged into the graver offence of murder for the commission of which the deceased was abducted. Alternative charge u/s. 302/109 was framed along with a charge u/s. 302, but no order was passed with respect to the alternative charge 302/109, (ii) When the direct charge of murder failed but the abduction followed by murder was proved, the petitioner should be convicted u/s. 302/109 instead of u/s 304. The sentence passed should be read as one passed u/s 302/109 PC, instead of u/s 304 Penal Code. *Afsar Ali Moral Vs. The State, 29 DLR (SC) 269.*

(5) Abducted person, when murdered, the charge should be under section 302. When the person abducted was in fact murdered, there can be no scope for a charge under section 364. The abductor should be charged either with murder pure and simple or at least with abetment of murder. *Mazaharul Huq Vs. Crown (1949) 1 DLR 173.*

(6) Charge of abduction for murder—Circumstances to be proved. In order to establish a charge of abduction in order to murder, when the case is one of abduction by deceitful means, it is not enough for the prosecution merely to prove certain circumstances under which the abducted person was induced to go, nor even to prove a mere misrepresentation. The prosecution must prove that there was a misrepresentation, that the particular misrepresentation was the result of a plan to murder and that it was one by which the abducted person was himself deceived and was induced to go. *53 CWN (1DR) 169.*

(7) A charge for abducting in order to murder will not be legal when dead body of the abducted man has been found. *Sher Ali Biswas Vs. State, (1958) 10 DLR 374.*

(8) Charge for murder and abduction for murder should be distinct. *Sher Ali Biswas Vs. State, (1958) 10 DLR 374.*

(9) In a case under section 364, it is necessary that the prosecution must prove not only that there was a misrepresentation but they must also prove that this misrepresentation was in furtherance of a plan to murder. *Sher Ali Biswas Vs. State, (1958) 10 DLR 374.*

(10) Section applicable when abduction in order to murder is proved even though the murder is not proved. Accused was charged under sections 302/109 P. Code. Murder not having been proved, the charge of abetment of murder failed. Question arose whether, if the evidence of abetment is accepted, the accused can be held guilty under section 364. Held: Section 364 provides for the punishment of specific offence which does not depend upon the ultimate result of the abduction mentioned in the section. The person abducted may or may not be murdered or the prosecution may not succeed in proving murder; but, if other facts and circumstances prove that a conclusion can safely be drawn that the purpose of abduction was to murder or so dispose of the victim as to put him in danger of being murdered, the offence under section 364 stands established. To substantiate a charge under section 364, the murder of the abducted person is not necessary to be proved. If murder by the abductor is proved, he is guilty of murder, or if the victim has been murdered by any person other than the abductor, then the latter is guilty of abetment of murder. If the facts and circumstances prove that the purpose of abduction was either to murder or to so dispose of the victim as to put him in danger of being murdered, the charge under sec. 364 stands substantiated. The proof of the intention is indeed difficult and this must be carefully kept in view in drawing a conclusion from the facts and circumstances of each case. The intention spoken of in this section is referable to the point of time when abduction takes place. *Akaluddin Vs. State, (1963) 15 DLR 466.*

(11) This section not attracted where death of the abducted person only is proved but there is nothing to show that abduction was for the purpose of murder. It was contended that where murder was not proved but death of abducted person is proved the abductor is punishable under section 364. Held: This view cannot be accepted. If only the death of the abducted person is proved and no opinion can be given as to the cause of his death then it cannot legally be presumed that there was abduction for the purpose contemplated in section 364, as death might occur due to various reasons and in that case section 364 is not attracted because this section contemplates abduction for the purpose of murder or putting the victim in danger of being murdered. *Hafez Abul Khair Vs. State, (1977) 29 DLR (SC) 2.*

(12) This section is attracted where after abduction the abducted person is not heard of and the fear is he might be murdered—Where the abducted man is indeed murdered and the body has been found then the proper charge that can be laid is under sec. 302 or sec. 302 read with sec. 109 against the abductor, according to the state of evidence. *Hafez Abul Khair Vs. State (1977) 29 DLR (SC) 2.*

(13) Abduction followed by murder—Charged under section 364 not maintainable. *Baripada Debnath Vs. State, (1967) 19 DLR 573.*

(14) Elements that a charge to be established on a charge of abduction in order to murder under section 364. Abduction is of itself not an offence and to be punishable it must be accompanied by a *mens rea* described in section 364 of the Code. Such *mens rea*, intention or purpose can be referable only to the point of time when abduction or kidnapping allegedly took place. This primary object can be gathered from the facts and circumstances of each case as such an intention or purpose or object may not be susceptible of direct proof which nevertheless must be proved to substantiate a charge under section 364 of the Penal Code. In the absence of direct proof the prosecution must prove such an impeachable fact and circumstance which would lead a reasonable man, a man of ordinary prudence, to the irresistible conclusion that the object or the purpose of the alleged abduction or kidnapping was that the victim may be murdered or with the knowledge that murder would be the likely result though actual murder need not be proved. Any fact or circumstances lacking in those essential particulars as to *mens rea* would not substantiate a charge under section 364 of the Penal Code. *Shahjahan Vs. State (1981) 33 DLR 97.*

(15) The proved criminal acts constitute an offence of abduction for murder. *State Vs. Fazal, (1987) 39 DLR (AD) 166.*

(16) If at the trial the story as given against the alleged offender is omitted from the one given in F. I. R. it has always been viewed with great suspicion. *Md. Ali Haider Vs. State, (1988) 40 DLR 97.*

(17) F.I.R. enables the Court to see what was the prosecution story at the initial stage and to check up the subsequent embellishment. *Md. Ali Haider Vs. State, (1988) 40 DLR 97.*

(18) 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 P. W. 2 cannot be discarded. *Md. Ali Haider Vs. State, (1988) 40 DLR 97.*

(19) Murdered man abducted alive and subsequently a few days later found dead. Charge falls appropriately under section 364 rather than sec. 302/109 *(10 DLR 374 distinguished).* The case reported in *(1958) 10 DLR 374* cannot be treated as an authority for a wide and general proposition that whenever abduction is followed by murder no charge under section 364 of the Penal Code can be framed against the accused and that the charge must, of necessity, be one under sections 302/109 of the Penal Code. *Nur Muhammad Vs. State. (1964) DLR 228.*

(20) Abduction of the deceased followed by murder, proved: Charge should be u/s. 302, if the abductors were murderers; if not, the charge should be u/s. 302/109. In such a case no scope for laying a charge u/s. 364. *Afsar Ali Vs. State, (1977) 29 DLR (SC) 259.*

(21) A charge under section 364 against an accused who is also charged under sections 302 or sections 302/109 is condemned. Application of sec. 364 as distinguished from the ingredients of sec. 302 or Ss. 302/109—Difference between the two should be kept apart. *Hafez Abul Khair Vs. State (1977) 29 DLR (SC) 2.*

(22) Offence u/s. 364 is a lesser offence than offence u/s. 302 but it cannot be said that offence u/s. 364 is a minor offence compared to offence u/s. 302—Offence u/s. 364 not cognate to offence u/s. 302. *Hafez Abul Khair Vs. State (1977) 29 DLR (SC) 2.*

(23) It cannot be said to be a minor offence to the offence of murder u/s. 302. S. 364 deals with a specific and distinct offence by itself and without framing a charge u/s 364 a conviction thereunder will

not be valid–Where dead body of the abducted man is found and it is further found that he has been murdered then proper charging will be u/s. 302. or Ss. 302/109, as the case may be. *Hafez Abdul Khair Vs. State (1977) 29 DLR (SC) 2.*

(24) Charge u/s. 364 having fallen through—the accused should in this state of evidence be tried u/ss. 302/ 109. The pertinent question that arises for consideration is whether the appellants should be set at liberty as their conviction and sentence under sections 364/34 with the aid of section 238 Cr. P. C. have been set aside or there ought to be an order for their retrial on an appropriate charge under sections 302/109 when on a misconception of law they were convicted under sections 364/34. We have given our anxious consideration to this aspect of the case and we are of the view that in the circumstances of the present case there ought to be an order for retrial of the appellants on a proper charge under sections 302/109. *Hafez Abul Khair Vs. State (1977) 29 DLR (SC) 2.*

(25) When the body of the deceased is found and the offence of murder is established, it is section 302 or ss. 302/109 of the Penal Code that is applicable and no charge u/s. 364 can, in such a case, be laid. *Shahjahan Vs. State (1981) 33 DLR 97.*

(26) 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. *Soleman Vs. State 42 DLR 118.*

(27) If at the trial the story as given against the alleged offender is omitted from the one given in FIR it has always been viewed with great suspicion. *Md. Ali Haider Vs. State 40 DLR 97.*

(28) FIR enables the Court to see what was the prosecution story at the initial stage and to check up the subsequent embellishment. *Md. Ali Haider Vs. State 40 DLR 97.*

(29) 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 PW2 cannot be discarded. *Md. Ali Haider Vs. State 40 DLR 97.*

(30) It was not denied by the appellant that victim Shefali was his wife and living with him in the same house just before her alleged missing. If that be so, he is under the obligation to explain what has happened to Shefali who was with him before her missing. *Abdul Majid Vs. State (Criminal) 55 DLR 486.*

(31) It is a well settled law that the theory of "last seen together" is a weak type of circumstantial evidence on which a conviction can be based—In the absence of any evidence establishing a link between the accused and the murder, an order of conviction for murder is not sustainable. *The State Vs. Srree Ranjit Kumar Pramanik 12 BLD (HCD) 284.*

(32) Offence under this Section is attracted even though the victim was not in fact murdered in consequence of the abduction with the intention of murder. *Al-haj Abdul Gani Vs. The State 12 BLD (HCD) 490.*

(33) Last seen—If the evidence of PWs 1 and 2 are read along with the evidence of PW 5 it is found that the victim Seru Mia was last found in the company of the accused persons including the appellant Md. Salim which amply proves strong circumstantial evidence pointing to the guilt of the accused persons for committing the offence of kidnapping of the victim. *Md. Selim Vs. State (Criminal) 4 BLC 261.*

(34) So far as kidnapping for the purposes mentioned in the section is concerned, it is an aggravated form of the offence under Section 363. *AIR 1957 SC 381.*

(35) This section deals with a special case of enhanced punishment for a particular type of abetment of murder. *AIR 1947 Cal 35.*

(36) The section provides for the punishment of a specific offence and is not intended as an indirect method of punishing person who are suspected but not proved to have committed murder. *AIR 1937 Cal 578.*

(37) Murder and Kidnapping—The two offences are co-extensive. There can be no conviction for both the offences in the same trial—If abduction is followed by murder no charge can be framed for abduction. 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 or the guilt 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 *(Ref 42 DLR 118). 10 BLD 179.*

(38) A number of criminal cases pending between the parties on the day of occurrence the eye-witnesses were sitting in the hut and discussing the case but in the ejahar the eye-witness PW 2 stated that he had brought PW 4 for the talk while he had been returning from the bazar, he omitted this part of the story while deposing in Court. Inconsistent statements in the evidence of two eye-witness has exposed the utter improbability of the prosecution case. The only reason for the murder as attributed by the PWs 2 & 4 is that he came to rescue PW 4 and offered resistance to the abduction of PW 4. The defence evidence of PW 4 and his Bhaira is not worthy of credit. The defence case appears to be more probable as it fits in human manure and conduct and as such appellants are entitled to acquittal as a matter of right in the facts and circumstances of the case. *10 BCR 45 AD.*

(39) A clear case of benefit of doubt emerged in favour of the accused—Dead bodies were not proved—No disinterested witness examined. There is direct, positive and impregnable evidence that the accused persons along with others tied the deceased Khijir with a rope, assaulted and dragged him all the way to the ditch after which his whereabouts were not known. The accused cannot be acquitted, straight acquittal caused gross miscarriage of justice. The respondents are convicted udder section 364 of Penal Code *(Ref 39 DLR 166 AD) 7 BCR 253 AD.*

(40) Prima facie case against the accused persons on the basis of examination of 7 witnesses through a judicial inquiry by a Magistrate to whom the case was sent by the SDM after examination of the complainant. No exception can be taken to this. The observation by the High Court Division is unwarranted. no interference is called for. The accused will face the trial and it will be decided on evidence. *7 BCR 168 AD.*

(41) If cognizance of a case had not been taken when the law changing the forum of trial come into force. Mere fact that FIR had been lodged or charge-sheet has been submitted before the change of forum will not make the case triable under the repealed law. *38 DLR 86.*

(42) Special Tribunal has no jurisdiction to try the accused petitioners under section 364 of Penal Code and any attempt to continue to try petitioners is an abuse of the process of the court. *5 BCR 17.*

(43) The prosecution obviously was anxious to suppress the FIR from the court. It seems probable that the prosecution has made a substantial departure from the FIR story and has introduced a fresh set of witnesses who were not named in the FIR. Accused acquitted. *2 BCR 230.*

(44) No scope for a under section 364 of the Penal Code in case of abduction followed by murder. Abduction should be charged either with murder or with abetment of murder. Abducted person when found murdered trial should be under section 302/109. A fugitive from justice is not entitled to any protection of the court. *1 BCR 13.*

2. "Kidnaps."—(1) If a person who is not a minor as defined in S. 361 ante is conveyed from one part of the country to another it is not "kidnapping" within the meaning of Section 360 or 361, but it may amount to abduction of the person if he is induced to go from one place to another within the country by deceitful means. *(1932) 33 CriLJ 514 (Oudh).*

3. "Abducts."—(1) Where a perosn is charged with abduction by deceltful means in order to murder, it is not enough for the prosecution merely to prove certain circumstances under which the abducted person was induced to go, nor even to prove a mere misrepresentation. The prosecution must be proved not only that there was a misrepresentation, but that the particular misrepresentation was the result of a plan to murder and that it was one by which the abducted person was himself deceived and was induced to go. *AIR 1949 Dacca 21.*

(3) Where the only evidence is that the accused accompanied the boy alleged to be abducted and that the boy was subsequently found to have been murdered there is no legal evidence that the boy was abducted much less that the object of abduction was to get him murdered. *AIR 1939 Mad 593.*

4. "In order that."—(1) There must therefore be an intention on the part of the offender either to murder or to have the kidnapped or abducted person murdered, or to dispose of or to have him disposed of with the knowledge that such disposal will put him in danger of being murdered. *AIR 1963 SC 1074.*

(2) The intention to the accused at the time of kidnapping of abduction is a matter of inference from the acts done at the time of kidnapping or abduction or thereafter. *AIR 1979 SC 1410.*

(A) Illustration.—(1) A abducts a boy and sends repeated letters to the father of the boy demanding ransom and threatening murder of the boy if the ransom is not paid. A commits an offence under this section. *AIR 1957 SC 381.*

(2) A and B were proved to have left together and were last seen together, A alone returned without B, B was not seen or heard of thereafter. It was held that this was not sufficient to show that A abducted B in order that he might be murdered, there being many possible explanations of B's disappearance. *AIR 1927 Lah 658.*

(3) A was abducted by B and beaten with his hands tied behind his back. A was found shot dead next morning. It was held that the object of abduction was to murder. *AIR 1954 Hyd 88.*

(4) A was abducted by B and others. They had weapons with them at the time of abduction. A was found murdered the next day, Held, that taking into consideration the previous history of the quarrels between the parties, the circumstances raised a presumption that B and others abducted A with the intention of murdering him. *AIR 1933 Lah 1035.*

(5) A was assaulted by B and his body was dragged towards a certain place. There was no evidence to show whether A was dead or alive at the time he was dragged. The assault was made before abduction. There was possibility that A might have been dragged to another place for concealment of his body held that B could not be convicted under this section. *AIR 1936 Oudh 44.*

(6) Accused acquitted under Ss. 302 and 364 but convicted under S. 201—Approver's evidence treated as unreliable in regard to the former two offences, but as reliable for the purpose of the conviction under section 201 as it was corroborated by the evidence as to the discovery of the dead body at the intance of the accused. *AIR 1979 SC 1280.*

(7) Charge under S. 148 related to murder taking place at place other than place of abduction subsequent to alleged abduction of deceased and did not relate to abduction—Common object as stated, would not be available for sustaining conviction for abduction. *AIR 1984 SC 911.*

5. Charge.—(1) When the case for the prosecution is that the person abducted has been murdered by the abductor or other person there can be no scope for a charge under S. 364. The abductor should be charged with murder pure and simple (S. 302) or with abetment of murder (S. 302/109). However, in such cases where the evidence to establish the charge of murder is weak or inconclusive, the prosecution is prone to adopt this device of adding or preferring a charge under S. 364 in the hope that a jury which may hesitate to find the accused guilty of murder on such slender evidence, may be induced to find against him on the lesser charge, but such procedure is unfair and improper and should not be adopted. *AIR 1953 Hyd 249.*

(2) Where the charge described the offence as falling under the first part of the section and in the summing up to the jury the Judge repeatedly explained the offence as falling under the second part and also concluded his charge by referring to both parts of the section it was held that the conviction was bad for want of proper charge. *AIR 1949 Dacca 21.*

(3) The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—kidnapped (or abducted) X in order that the said X might be murdered (or might be so disposed of as to be put in danger of being murdered), and thereby committed an offence punishable under section 364 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

6. Sentence.—(1) Where two persons are equally liable for the offence under the section there is no justification for awarding different sentences to the accused. *AIR 1957 SC 381.*

7. Procedure.—(1) Where one of the offences complained of in the case was under S. 364 triable exclusively by Court of Session, the Magistrate's action summoning the accused after recording the statement of the complainant only was quashed. S. 202(2) of Criminal P. C, being mandatory, the Magistrate ought to examine on oath all the witnesses of the complainant before summoning the accused if the offence complained of was exclusively triable by a Court of Session. *1982 CriLJ 1270.*

(2) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

8. Practice.—Evidence—(A) Prove: (1) That there was the kidnapping by the accused.

(2) That he so kidnapping the person in question in order (a) that such person might be murdered; or (b) that such person might be so disposed of as to be put in danger of being murdered.

(B) Prove for abduction—

(1) That the accused compelled the person to go from the place in question.

(2) That he so compelled that person by force or that he induced that person to do so by deceitful means.

(3) That he so abducted the person in question in order that (a) such person might be murdered, or (b) such person might be so disposed of as to be put in danger of being murdered.

Section 364A

[17][**364A. Kidnapping or abducting a person under the age of ten.**—Whoever kidnaps or abducts any person under the age of ten, in order that such person may be

17. Section 363A was inserted by the Criminal Law Amendment Act, 1958 (Act XXXIV of 1958), s. 2.

murdered or subjected to grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person, shall be punished with death or with [1][imprisonment] for life or with rigorous imprisonment for a term which may extend to fourteen years, and shall not be less than seven years.]

Cases and Materials

1. Scope.—(1) Evidence, appreciation of—Incident a broad day light occurrence, seen by natural witnesses and further supported by medical evidence—Victim a minor girl of 6 and possibility that father of girl would give consent to infamy of his infant daughter to oblige landlord allegedly interested to eject accused, ruled out—conviction and sentence maintained in circumstances. *Fazal Din Vs. The State, 1983 PCLJ 932.*

(2) This section may be read with sections 361 and 362. The object of the section is to punish child lifters. It is difficult to comprehend truly in its entirety the continuous mental torture and the agony of the poor parents whose minor girl had been abducted or kidnapped and they had no clue of her for a long period. Every moment of their life must have been miserable and the deterrent death sentence is the only sentence which is called for in the particular circumstances of the case and for curbing such social evils for dealing with such type of criminals *(PLD 1979 Lah 695).* Kidnapping may be committed without assault or wrongful restraint of confinement. A child, for example, who is decoyed from its guardian, who soon forgets his home, and who consents to remain with the kidnapper, cannot be said to have been assaulted or restrained. The age of the child must be proved by the prosecution.

2. Practice.—Evidence—Prove: (1) The person in question is under the age of ten years.

(2) That such person was in the keeping of a lawful guardian.

(3) That the accused took such person out of such keeping.

(4) That the accused did it with the intention to commit murder or subject to grievous hurt or slavery or to lust of any person or may be so disposed of as to put in danger of being murdered or subject to grievous hurt, or to salvery, or to the lust of any person.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the day of—at—kidnapped (or abducted) X, a person under the age of ten, in order that the said X might be murdered (or subjected to grievous hurt, or to slavery, or to the lust of any person) or might be so disposed of as to be put in danger of being murdered (or subjected to grievous hurt, or to slavery or to the lust of any person) and thereby committed an offence punishable under section 364A of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 365

365. Kidnapping or abducting with intent secretly and wrongfully to confine person.—Whoever kidnaps or abducts any person with intent to cause that person to

be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *Intention.*
3. *Evidence and proof.*
4. *Charge and conviction.*
5. *Sentence.*
6. *Procedure.*
7. *Practice.*
8. *Charge.*

1. Scope.—(1) The essence of an offence under section 365 being also kidnapping, an accused who cannot be convicted under section 363 cannot be convicted under this section *(1957 CriLJ 688)*.This section deals with kidnapping or abduction of a person with the intention of causing such person to be secretly and wrongfully confined. Secrecy in such cases is part of the plan and no special penalty is attracted by reason of kidnapping or abduction having been done secretly. The intention of the abductor while abducting a person can be inferred from his subsequent conduct *(37 CrLJ 827)*. This girl was of easy virtue and although, she was set on the path of depravity mainly by the accused she perhaps was not adverse to what was happening to her. It was held that, in these circumstances heavy sentence was not called for *(AIR 1970 SC 658)*.

(2) The Tribunal has committed gross illegality by taking cognizance and framing charge thereof under sections 365/342 and 387 as sections 365 and 342 of the Penal Code were never in the schedule of the Special Powers Act and the trial of joinder of scheduled offence non-scheduled offence vitiated the trial as a whole. *Mokim alias Md. Mokim Vs. State (Criminal) 55 DLR 81.*

(3) When a kidnapped boy has been sold by the kidnapper to a third person, the latter is not guilty of kidnapping. *12 DLR 393.*

(4) A mere abduction, as such and by itself, is not an offence. *1971 CriLJ 1222.*

(5) The gravamen of the offence under this section is the intention to keep the wrongful confinement, a secret. Where there is no secrecy about the wrongful confinement, this section will not apply. *AIR 1925 Lah 614.*

2. Intention.—(1) The intention referred to in the section must exist at the time of the kidnapping or abduction. *AIR 1914 Cal 589.*

(2) The intention can be inferred from the subsequent acts and conduct of the kidnapper or abductor. *AIR 1968 All 170.*

(3) An offence under this section is clearly made out when there is a finding that the woman in question had been forcibly dragged out of her house and was kept locked up in a room in the house belonging to the accused. The fact that the house was in the 'abadi' will not take the act out of the mischief of this section. *AIR 1954 All 51.*

3. Evidence and proof.—(1) The failure by the abducted person to identify his kidnapper is of no great importance, if there is sufficient independent evidence to establish the identity of the accused as the person who kidnapped the person. *AIR 1967 All 528.*

(2) A, the victim of the abduction, left the house with B, of her own accord. Subsequently, other accused persons five in number, forcibly took her away in a jeep when she was on her way back home. In the absence of any evidence of conspiracy between B and the other accused, it was held that B was not guilty of kidnapping though his conduct may be open to suspicion. It was also held that the wife

of one of the accused who was keeping the child of the victim on her lap, while the victim was being forcibly taken away in the jeep was guilty of an offence under this section read with S. 149. The driver of the jeep who had knowledge of the purpose for which the jeep was being used was also held guilty of the offence under this section read with S. 149. *AIR 1968 All 170.*

4. Charge and conviction.—(1) The essence of an offence under this section is also kidnapping. Therefore, when the accused cannot be convicted under S. 363, he cannot be convicted of an offence under this section. *1957 CriLJ 688.*

(2) An offence under this section is, within the meaning of S. 222, Criminal P.C., a minor offence as compared with the offences under Ss. 366 and 376. The High Court can convict an accused of an offence under this section without a specific charge therefore, when the accused had been charged and tried for an offence under Sec. 366 or 376. *AIR 1954 MadhB 97.*

5. Sentence.—(1) The accused abducted a certain woman merely in order to put pressure upon her friends to restore a young girl whom they had abducted. The woman was let off as soon as the girl was restored. No harm was also done to the woman. Under the above circumstances, it was held that a heavy sentence of imprisonment ought not to be imposed on the accused. *AIR 1916 Lah 269.*

(2) Where the real offence is rape and abduction is an aggravating circumstance, separate sentences under both the sections should not be given. *AIR 1926 Lah 114.*

(3) The fact that the wife acted under the influence of her husband while helping her husband in committing an offence under this section, cannot affect her guilt but may be taken into consideration in passing the sentence on her. *AIR 1968 All 170.*

(4) Abduction for extortion—Sentence—No extenuating circumstances—Accused taking active part in abducting and torturing victim and demanding ransom—No ground exists for reducing sentence. *AIR 1979 SC 1493.*

(5) Mitigating factor—Existence of illicit relationship between accused and abducted girl over long period—Sentence reduced. *AIR 1970 SC 658.*

6. Procedure.—(1) Where in a previous trial for assault, the accused could have also been charged for an offence under this section, but were not so charged and tried, it was held that a subsequent trial on a charge under this section was not barred by S. 300, Criminal P.C. *(1906) 3 CriLJ 93 (All).*

(2) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

7. Practice.—Evidence—Prove: (1) That there was kidnapping by the accused or abduction by him.

(2) That the accused thereby intended that the person kidnapped or abducted should be kept in wrongful or secret confinement.

8. 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 of—at—kidnapped (or abducted) one X with intention to cause the said X to be secretly and wrongfully confined, and thereby committed an offence punishable under section 365 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 366

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [18][and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, shall also be punishable as aforesaid].

Cases and Materials : Synopsis

1. Scope.—(1) This section may be read along with the Nari O Shishu Nirjatan Ain (= Women and Children Repression Act), 2000. This Act has been enacted to provide for necessary provisions in order to suppress very strictly the repressive offences against women and children. This section, however, deals with the kidnapping or abduction of a woman with the intention of forcibly marrying her or forcing or seducing her to illicit intercourse. If the girl was sixteen or over, she could only be abducted and not kidnapped, but if she was under sixteen she could be kidnapped as well as abducted if the taking was by force or the taking or enticing was by deceitful means *(57 Cal 1074)*. The word 'abduction' implies that the woman is led away or is induced to stray away from the path of rectitude. The act of seduction is done when the girl is drawn away from the virtuous course and then made to yield her chasity. Seduction implies surrender of her body by a woman who is otherwise reluctant or unwilling, to submit herself to illicit intercourse in consequence of persuasion or flattery, blandishments or whether such surrender is for the first time or is preceded by similar surrender on earlier occasions. But where a woman offers herself for intercourse for money—not casually but in the course of her profession as prostitute—there are no scruples nor reluctance to be overcome, and surrender by her is not seduction within the meaning of the Code. When young girls of marriageable age are abducted, the initial presumption is that the abduction was with the intention or having sexual

[18]. Inserted by the Indian Penal Code (Amendment) Act, 1923 (Act XX of 19230, s. 2.

intercourse with them either forcibly or with their consent after seduction. Where the accused pursued a girl for a number of months in order to arouse in her feelings of 'love' for him. When they had become sufficiently intimate with each other he impressed on her mind that he could not live without her. He even went to the length of suggestion that even if they could escape for a day they could accomplish their object. After the girl left her father's place as a result of persuasion the accused took her from place to place for six days during which they were found to have been sharing the same bed. It was held that the intention of the accused in removing the girl out of the keeping of her lawful guardian was to seduce her to illicit intercourse.

Every act done "against the will" of a person, no doubt, is done "without his consent", but an act done "without the consent" of a person is not necessarily "against the will", which expression imports that the act is done in spite of the opposition of a person to the doing of it. Having regard to the expression "against the will" and "without the consent" of a person and the fact that in section 366 Penal Code it is specially provided that the woman may be compelled, or knowing it to be likely that she will be compelled, to marry "against her will." The provisions of section 90 Penal Code are not to be applied to section 366 Penal Code *(AIR 1933 Rang 98)*. Where a girl had gone out of her father's house and went with the accused willingly and without anybody having exercised any compulsion on her no charge under section 366 can be made out against the accused *(AIR 1949 All 710)*. An offence of kidnapping is not a continuing offence *(24 CriLJ 921)*. Even though the offence of abduction is a continuing one, any person joining the accused at a subsequent stage cannot be held to be equally guilty of the offence under section 366 if he was not associated with him from the very beginning unless a charge of conspiracy is established against him *(52 CriLJ 227)*. Kidnapping and abduction are two distinct offences and their ingredients are entirely different. In kidnapping consent of the person enticed is immaterial. In 'abduction' consent of the person removed, if freely and voluntarily given, condones it. In 'kidnapping' the intent of the offender is irrelevant, but in 'abduction' it is an all-important factor. 'Kidnapping from lawful guardianship is not a continuing offence for as soon as the minor is removed out of his or her guardianship the offence is completed, but the person is being abducted not only when he is first taken from any place but also when he is removed from one palace to another. Intention is the main ingredient of an offence under section 366 and if the intention is established then the offence is completed. It is not necessary for the prosecution to prove that sexual intercourse has taken place. In a case under section 366, it is the duty of the prosecution to prove that abduction took place with the requisite intention. The essence of the section is compulsion. The object of the section is "to uphold the lawful authority of parents or guardian over their wards, to throw a ring of protection round the girls themselves and to penalise sexual commerce on the part of the persons who corrupt or attempt to corrupt the morals of minor girls by taking improper advantage of their youth and inexperience *(AIR 1967 All 158)*". On a charge under section 366, the question of the age of the woman abducted is material inasmuch as she was less than sixteen years of age, her consent to the act referred to in section 366 is in law immaterial. The onus of proving the girl's age is on the prosecution and no conviction can be sustained if the evidence is inconclusive *(AIR 1937 All 353)*. Birth and school entry certificate are suspicious, and medical evidence and ossification tests are also unconvincing, the prosecution version of the girl being below 16 years, was disbelieved *(1968 PCriLJ 529)*. Where the only evidence as to age is the evidence of the girl herself, it would be wrong for the court to rely on the evidence *(PLD 1964 Dac 255)*. In a case under section 366 Penal Code the evidence of the abducted woman is not doubt important but it has to be received with caution. The court has to consider the evidence in the light of circumstances disclosed in evidence and the inherent

probability or improbability of the evidence lead to judge whether the story of the woman is true or otherwise. The second limb of the section deals with a few of the methods of compulsion namely abuse of authority or criminal intimidation or any other compulsion employed by an accused or inducting any woman to go from any place with intent that she may be, or knowing that she is likely to be, forced or seduced to illicit intercourse and that the offenee is made punishable, the punishment being the same as for the offence in the first limb. In order to convict a person under the second limb it is necessary to show that some method of compulsion was employed by the accused.

(2) Charge under section 366 when woman above the age of 16 years is abducted. When the age of the girl is above 16 years and the allegation is that she might be compelled to marry against her will, the accused ought to have been charged under section 366 for abducting her with intent that she may be compelled to, or knowing it to be likely that she would be compelled, to marry against her will. *Ear Ali Vs. State (1959) 11 DLR 249, 59 PLD (Dac) 750.*

(3) Intention to commit the offence under the section will be inferred from human nature being what it is—Burden to prove the contrary is on the accused. *Siddique Vs. State (1959) 11 DLR 321.*

(4) Corroboration of the evidence of the prosecutrlix—The rule that corroboration is required of the evidence of the prosecutrix in a case of a sexual offence like rape is not rigidly applicable in case of a mere abduction charge which is not a sexual offence. *Shah Alam Vs. Crown (1958) 10 DLR 237.*

(5) It is not necessary under section 366 that the girl should be kidnapped with the intent of contracting a valid marriage. If the girl is kidnapped with the intention of compelling her to go through a form of marriage whether, valid or not, case would come within the mischief of the section. *Adam Ali Vs. Crown (1950) 2 DLR 374.*

(6) The essential question is intent or knowledge. In a charge under section 366 the essential question is whether the accused had the particular intent or knowledge mentioned in the section. The character, conduct and the capacity or incapacity of the woman to consent to marry or have illicit intercourse must, indeed, be taken into account in determining whether the accused had this intent or knowledge, but these are not fundamentals of an offence under section 366. *Adam Ali Vs. Crown (1950) 2 DLR 374.*

(7) Though the Muslim law confers guardianship of marriage of a minor girl on the paternal cousin in certain circumstances, it excludes him from the guardianship of her person for the reason that he is not within the prohibited degree. The position is this, that though paternal cousin has right to contract a marriage he has no right to kidnap the minor form the custody of the guardian of the person or to compel her to ratify and accept the marriage contracted by him. *Adam Ali Vs. Crown (1950) 2 DLR 374.*

(8) Charge must state the guardian from whose custody the minor was kidnapped. The appellant were charged under section 366, with kidnapping one R alleged to be a female under the age of 16 but the charge itself did not state from whose lawful guardianship R was kidnapped. Held: No conviction on the charge of kidnapping could be sustained. *Santosh Kumar Vs. Crown (1950) 2 DLR 23.*

(9) When the charge of abduction recited that the accused abducted R with the intention that she might be compelled to marry some person against her will, but R definitely stated that the marriage was not one to which she was compelled or forced against her free will. Held: The prosecution had not been able to show that R was abducted with the intention that she might be compelled or that accused knew it to be likely that R will be compelled to marry some person against her will. *Santosh Kumar Vs. Crown (1950) 2 DLR 23.*

(10) The charge says: "I leave the entire matter for consideration as to whether you would accept the evidence of identification and recognition of 3 accused persons by Jahura. You can base your conviction on the sole testimony of a signal witness if you fully accept her evidence as true. But I must warn you, gentlemen, that it is seldom safe to accept the uncorronborated testimony of a solitary witness in the absence of corroboration in material particulars." Held: This is a proper charge. *Habibur Rahman Vs. Crown (1954) 6 DLR 361.*

(11) Abduction charge fails when circumstances militate against the assumption of guilt. The accused being charged under section 366 P.C. for abducting the wife of the complainant, he (the accused) producing certified copy if the Kambinnama to show that the wife had divorced her husband (complainant) in exercise of the right of talak-e-tawfiz given to her by the husband as embodied in the kabinnama. The genuineness of the certified copy of the kabinnama was not challenged. The wife P. W. I asserted before the Court that she had exercised her right of talak-e-tawfiz. Held: The circumstances as disclosed in the case raise a doubt as to the subsistence of the marriage between the complainant and his former wife and the benefit of such a doubt ought to have been given to the defence . *Golam Kader Vs. State (1972) 24 DLR 110.*

(12) If it is found that the woman alleged to have been kidnapped or abducted is a consenting party and no act was committed by the accused against her will, then the accused cannot be brought within the mischief of section 366 of the Penal Code. *Nurul Islam Vs. State Vs. Shila Prava Shah, (1971) 23 DLR 126.*

(13) In a case under section 366 P.C. if no direct evidence can be found as to the actual intention of the abductor of kidnapper the said intention shall have to be inferred from the circumstances of the particular case. *Nurul Islam Vs. State (1971) 23 DLR 126.*

(14) Evidence of the woman or the girl raped by force and against her will cannot be rejected on the ground of being an accomplice, as in such cases she is victim of outrage. *Abdul Quddus Vs. State, (1983) 35 DLR 373.*

(15) In sexual offence where the woman is grown up, corroboration of her statement is ordinarily required but such corroboration is insisted upon where the victim is a minor. *Abdul Quddus Vs. State, (1983) 35 DLR 373.*

(16) Joint trial under sections 366 and 368. It could not be disputed that abduction is a continuing offence, as kidnapping is. The offence of concealment in terms of section 368 P.C. of an abducted or kidnapped person would thus fail to be committed in course of the same transaction with the offence of abduction or kidnapping. Therefore, joint trial of 3 persons one under section 366 and 2 under section 368 is not illegal. Section 366 P. Code speaks of an intention to marry and not that intention must be proved to have been accrued into effect. *Ayazullah Vs. State (1971) 23 DLR 76.*

(17) Abduction or kidnapping of girl below 16 years—Intention necessary to constitute the offence. *Ananda Vs. State 41 DLR 533.*

(18) Refusal of prayer for *Ad interim* stay while issuing Rule in criminal revision, when not proper—The appellant clearly stated before the High Court Division while obtaining the Rule that she gave birth a child just five months ago and it would be injurious to her health as also to the baby if both were to be placed under any type of custody at that critical stage—High Court Division should have appreciated that in such circumstances operation of the impugned order would have spelt disaster to both the baby and the mother—High Court Division's exercise of discretion not proper. *Mrs. Azima Begum Vs. Md. Yusuf Khan & Ors. 43 DLR (AD) 53=BCR 1990 AD 285=12 BLD (AD) 183.*

(19) Kidnapping of minor girl—Question of the custody of the minor kidnapped girl—The birth of a newly-born child by the kidnapped minor girl—Whether the birth of the body changed the character of the case—Whether the appellant along with her newly born child should be ordered at the post natal critical stage to remain in judicial custody to the detriment of the health of the baby and the appellant—The exercise of jurisdiction in not granting ad-interim stay was not proper. *10 BCR 285 AD.*

(20) Determination of the age of a girl whether she is minor or not within the limit of the age mentioned in section 361 of the Penal Code. Two doctors who examined the girl gave two different ages as to her age. In such a case the matter should be reported to a third doctor for determination of her age. In the meanwhile it is ordered that the girl may stay where she likes. *30 DLR 187.*

(21) Joint trial under sections 366 and 368 is not illegal. Section 366 Penal Code speaks of an intention to marry and not that intention must be proved to have been carried into effect. *23 DLR 76.*

(22) Physical examination for verification of girl's age can only be with her consent. Ascertainment of the age of girl, on a charge of kidnapping the question to be duly gone into upon due consideration of all facts and circumstances. *15 DLR 272.*

(23) In a charge under sections 363 and 366, Penal Code, where the question of the girl's age is of fundamental importance, the dispute about her age cannot be resolved satisfactorily upon the sole verbal statement of the girl herself. *15 DLR 269.*

(24) Jurisdiction not vested in Magistrate to detain a person who is sui juris (= independent). *15 DLR 148.*

(25) 'Taking' not confined to actual physical taking but includes leaving the guardian's protection under persuasion. *15 DLR 18 WP.*

(26) Liberty of a subject cannot be interfered with except in accordance with law. The Petitioner being major her movements cannot be restricted. *8 DLR 295.*

(27) To convict a person under the latter part of S. 366, Penal Code, it is essential that he is found to have practised some "criminal intimidation" or employed "any other method of compulsion." *AIR 1950 Assam 37.*

(28) Intention or knowledge of the particular description mentioned in this section is a necessary ingredient of the offence under this section. *AIR 1979 SC 1494.*

(29) A mere kidnapping of an adult person of sound mind or a mere abduction of a person is not as such and by itself an offence, but is an offence when done under the particular circumstances stated in Ss. 364, 365, 366, 367 and 369. *AIR 1979 SC 1494.*

2. There must be kidnapping or abduction.—(1) The first essential to be established for an offence under this section is that the accused kidnapped or abducted a woman. In the absence of such proof no offence under this section is established. *1968 SCD 903.*

(2) Where A abducts a person and at a subsequent stage A is joined by B, B cannot be said to have abducted the person. *AIR 1951 Raj 33.*

(3) Accused charged with offences under Ss. 366 and 376—Girl above 18 years of age —No evidence to show that he had compelled the girl by force to go from her house with him or had for that end put her under fear in any manner—Girl stating that he had given her allurements by telling her that he would give her good food etc.—Held it could not be a case of kidnapping but only be a case of abduction, and when abduction had not been proved the offence under S. 366 could not be held to have been made out. *1982 UP (Cri) C 77 (All).*

3. Intention.—(1) The essential ingredient of an offence under this section is that at the time of committing the offence the accused intended or knew that it was likely that the abducted or kidnapped woman might or would be compelled to marry a person against her will or that she might or would be forced or seduced to illicit intercourse. *1980 Mad LJ (Cri) 56*

(2) The intention of the accused at the time when he committed the act of kidnapping or abduction is the basis and the gravamen of the offence under this section. If the accused kidnapped or abducted the woman with the necessary intent, the offence is complete, whether or not the accused succeeded in effecting his purpose; and even if, subsequently, the woman, in fact consented to the marriage or the illicit intercourse took place and thus the element of compulsion or seduction is removed. *AIR 1933 Rang 98.*

(3) If the accused pleads that he had any other intention than that which is suggested by the nature of the circumstances of the case, the burden lies upon him under S. 106, Evidence Act, to prove that intention. *AIR 1938 Lah 474.*

(4) A young girl of 13 was held not to be capable of entertaining an intention as set out in the section. *AIR 1916 Lah 352.*

(5) Where marriage was not practicable between the abductor and the abducted woman, it was held that the intention of the accused was to seduce the woman to illicit intercourse. *AIR 1938 Cal 551.*

(6) Ordinarily, when a body of persons is alleged to have abducted a girl with the intention of compelling her to marry one of the abductors or a stranger it is reasonable to suppose that the abductors, other than the abductor whom the girl was going to be compelled to marry, would not have the intention of seducing her to illicit intercourse. The subsequent conduct of the accused in making improper overtures does not necessarily lead to the inference that he had the intention of seducing the girl at the time of abduction. *AIR 1951 Assam 95.*

4. Knowledge.—(1) Knowledge on the part of the accused at the time of abduction or kidnapping that the woman would be compelled to marry against her will or that she would be seduced or forced to illicit intercourse is sufficient to constitute an offence under this section. *(1953-54) 6 SauLR 329.*

(2) The words "she will be compelled to marry a person against her will" are of wide amplitude. When a young girl of 13 is being sent to an unknown place for the purpose of being sold, it is not an unlikely expectation in the minds of those who are conniving at the affair that there was a possibility of her being married against her will or of her being subjected to forcible illicit intercourse. *AIR 1964 Punj 357.*

(3) Married girl of 14 years—Accused marrying girl to another person and taking money from him as bride price—Girl's mother consenting party—Held that the accused were guilty of offences under Ss. 420 and 366. *AIR 1943 Pat 212.*

5. "Compelled".—(1) Where a girl is imprisoned and is given no food or drink; and is completely under the grip of A, A's repeated requests to the girl that she should marry him amount to trying to compel her to marry against her will. *AIR 1951 Orissa 142.*

6. "Woman".—(1) Word 'woman' would include minor female. *1878 PunRe (Cri) No. 8, p.19.*

7. "Marry against her will".—(1) Where A takes a girl below 18 years of age from the keeping of her lawful guardian without the consent of such guardian and the girl is a consenting party to the marriage for which she is so taken A's act will be an offence of kidnapping from lawful guardianship under S. 361 of the Code inasmuch as the consent of the kidnapped minor is no defence to a charge of

an offence under S. 361. The offender will not be guilty under this section but will be guilty only under S. 363. *AIR 1933 Rang 98.*

(2) The word "marry" in this section means, as in S. 494, going through a form of marriage whether the same is, in fact, valid or not. *AIR 1967 Mad 409.*

8. "Forced".—(1) The word 'forced' as used in this section is used in its ordinary dictionary meaning and would include forced by stress of circumstances. *AIR 1930 Cal 209.*

9. "Seduced to illicit intercourse".—(1) A person taking a minor girl between the ages of 12 and 18, even with her consent, from the custody of the guardian but without the consent of such guardian, will be guilty of kidnapping. If such kidnapping is done with the object of seducing her to illicit intercourse it will be an offence under this section. *1968 SCD 435.*

(2) No compulsion is necessary to be proved in a case where a person takes a minor girl from the custody of her guardian but without the consent of such guardian. *AIR 1964 Punj 83.*

(3) The word 'seduced' should not be given the narrow meaning of inducing the girl or the woman to part with her virtue for the first time. Even though the girl may have, by the first act of seduction, surrendered her virtue, subsequent acts of seduction for further acts of illicit intercourse will also come within the meaning of the word 'seduction'. *AIR 1961 Bom 282.*

(4) The words 'illicit intercourse' used in this section do not necessarily mean the sexual intercourse of a man with a married woman (who is not his wife) but only mean the sexual intercourse between a man and a woman who are not husband and wife whether the woman is another man's wife or not is not material. *AIR 1952 Trav-Co 379.*

(5) It is not necessary to bring the guilt home to the accused under this section that there must be definite evidence that all the accused taking part in the abduction had intercourse with the woman abducted. *AIR 1952 Trav-Co 379.*

(6) Where in a case the accused claimed that he was married to the girl alleged to be kidnapped and where it had been admitted by the girl that, there had been sexual intercourse between them, it was held that the mere cohabitation affords an inference of greater or less strength that a marriage has been solemnised between them, that the law presumes against vice and immorality and that it was the duty of the prosecution to prove the negative. *AIR 1934 Sind 119.*

(7) The term 'seduction' implies that the woman is led away or is induced to stray away from the virtuous course and then made to yield her chastity. But where the deviation on the part of the girl is the result of the promptings of her own inclinations and she herself permits or encourages improper sexual relations as opportunity comes her way, without the aid of any artifice or wile on the part of the man, there is no seduction. *AIR 1979 SC 1276.*

(8) Though the words 'seduction' and 'illicit intercourse' are distinct, more emphasis should be laid on the words 'illicit intercourse' rather than on the word 'seduction'. Any act on the part of a person to lead a woman astray from the path of rectitude is seduction and if it is followed by intercourse, it will be seduction for illicit intercourse. *AIR 1955 Andhra 59.*

10. Section 79 and this section.—(1) A mother-in-law cannot be said to be justified in law, in abducting her widowed daughter-in-law and compelling her to marry against her will and is not protected by S. 79 of the Code. *AIR 1929 Lah 713.*

11. Abetment of abduction.—(1) A woman cannot be punished for abetting her own abduction. *1875 Pun Re (Cr) 14, page 18.*

(2) The removal of an abducted person to several places by the abductor constitutes an offence at every such place and whoever assists him at any stage would be guilty of abetment. *1962 (2) CriLJ 712 (Punj).*

12. Persons who may be guilty of kidnapping or adduction.—(1) Where A abducts a girl and passes her on to B, who takes her to C forcibly and C marries her without her consent, B can be convicted under this section as the abduction continues when B takes the girl from A. But C cannot be convicted under S. 366 read with S. 34 in the absence of any evidence to show a prior consent between B and C. *1968 Pat LJR (SC) 644.*

(2) Where in a case for offences under Sections 363 and 366 it had not been found as a fact that either the kidnapped girl was subjected to rape or she had received any injuries on any part of the body in an attempted rape and there was no evidence to indicate that the object behind the kidnapping was to marry the girl against her will or against the will of her guardian or to subject her to sexual intercourse contrary to law it was held that the accused should be convicted under S. 363 and not under S. 366. *1983 All WC 625.*

(3) The circumstance that prosecutrix aged about 27 or 30 years did not raise alarm when the accused aged 19 asked her to accompany them under a threat as alleged and she sustained no injuries in the act of sexual intercourse was held to indicate that she was a willing party to the act and was not abducted for illicit sexual intercourse. The accused were acquitted of offence u/s. 366/376, P.C. *1983 RajCriC 212.*

(4) Where two sisters (one major and one minor) walked out of the lawful guardianship of their father on their own accord and thereafter eloped with the accused who committed rape with their consent it was held that the charges under Ss. 363 and 366 were not proved beyond doubt and the accused were entitled to be acquitted of the said charges. There was no 'taking' in the legal sense by the accused of the girls from the lawful guardianship of their father. *1983 All CriLR 629 (P&H).*

13. Burden of proof and appreciation of evidence.—(1) The burden of proof is on the prosecution to prove the existence of all the elements necessary to establish the offence. Thus, in a charge of kidnapping a minor, it is for the prosecution to prove that the minor, if a girl, was below 18 years of age or in the case of a minor boy that he was under 16 years of age and that the guardian did not consent to her or his removal. *AIR 1970 SC 1029.*

(2) The question of the age of the prosecutrix under this section and S. 376 is always important. *AIR 1970 SC 1029.*

(3) It is not necessary for the prosecution to prove that the woman was compelled to leave not only her house, but was compelled to go from place to place. *AIR 1926 Cal 320.*

(A) Proof of age.—(1) Medical evidence on age cannot be of mathematical precision and it is all the more risky to convict somebody solely on the basis of medical evidence which is likely to vary. If, of course, there is a yawning gap, say something between 13 and above 18, medical evidence can be relied upon to say that it is not beyond 18. But in borderline cases, it would not be proper to solely rely on the medical evidence regarding the age of the girl victim. *(1972) 38 CutLT 1238.*

(2) An entry in a school certificate is not reliable with implicit faith against medical evidence. Where there is conflicting evidence as to age, the benefit of the uncertainty should be given to the accused. *AIR 1970 Punj 450.*

14. Uncorroborated testimony of the prosecutrix.—(1) It is extremely dangerous and permissible only in exceptional cases to convict a man of a sexual offence on the uncorroborated

testimony of the complainant. The kind of corroboration required in such cases must be independent evidence that is to say evidence of some witnesses other than the girl herself. *AIR 1970 SC 1029.*

(2) The rule is not that corroboration is essential before there can be a conviction but that the necessity of corroboration as a matter of prudence except where the circumstances make it safe to dispense with it, must be present in the mind of the Judge before a conviction without corroboration can be sustained. *AIR 1973 SC 469.*

(3) Where the prosecutrix has made several divergent statements and it is also shown that she is accustomed to sexual intercourse, her evidence that she was induced by deceitful means or compelled by force to go with the accused must be corroborated by independent evidence. *AIR 1970 SC 1029.*

15. Age of the prosecutrix.—(1) The question of age of the prosecutrix in cases under Ss. 366 and 376 is always of importance. It is particularly so in a case where the medical evidence shows that the prosecutrix has been used to sexual intercourse. An unproved and unexhibited school certificate cannot be relied upon for the purpose of ascertaining the age. *AIR 1970 SC 1029.*

(2) An entry of the date of birth in a non-Government School's General Register is admissible in evidence, under S. 35 of the Evidence Act, but its evidentiary value depends on other factors. Where the parents of the victim were not examined as to the age of the victim, the entry referred to was held insufficient to prove the age. *AIR 1970 Guj 178.*

(3) The ages given in the school certificates are not dependable for determination of the precise date of birth of a student, to whom the entry as to the date of birth in the school records pertains. *AIR 1970 Punj 450.*

(4) In a case under S. 366/376 in order to prove the age of the prosecutrix, evidence of father, school certificate and birth certificate were disbelieved. evidence of doctor held could not be enough to prove the age correctly because it is gathered by the physical examination of the girl only. *1980 Chand CriC 65 (66) (Punj).*

16. Charge and conviction.—(1) Where the accused are charged under this section, it should appear plain to them whether they are being charged with kidnapping or with abduction and whether the intent alleged was an intent to compel the victim to marry against her will or whether the kidnapping or abduction was with the knowledge that it was likely that the girl would be forced or seduced to illicit intercourse. *AIR 1933 Cal 194.*

(2) Alternative charges of kidnapping and abduction should not be framed in one charge. It is desirable that there should be separate charges in the alternative for these offences. *AIR 1946 Cal 493.*

(3) The ingredient of the two offences i.e. of kidnapping and abduction being obviously different, the accused is entitled to know which of the charges he is asked to meet. *AIR 1927 Cal 644.*

(4) On a charge of kidnapping a conviction for abduction cannot be recorded when that charge was not sought to be proved against the accused and there was neither evidence on record to warrant the conclusion that the girl was compelled or induced by any deceitful means to go from her father's place nor was any question put to the accused in her examination under S. 342. *AIR 1955 SC 574.*

(5) If a complaint made by the husband described in its heading as one under S. 368 and this section, fulfils all the requirements of a complaint under S. 497 and clearly makes an accusation of an offence under that section, then, if the adultery complained of is proved, a conviction under that section will not be illegal on the ground that there has been no complaint as required under S. 199, Criminal P.C. *AIR 1934 Lah 945.*

(6) Though an accused is acquitted of a charge under S. 366, there is no bar in law to his being convicted on a charge of conspiracy to commit an offence of kidnapping. *AIR 1952 Cal 831.*

(7) Where two persons are charged, one for an offence under this section for kidnapping a woman and there is no charge of abduction against him, and the other was charged under S. 368 for concealing the woman knowing her to be kidnapped or abducted and the former is acquitted of the charge under this section, the latter cannot be convicted of concealing a woman knowing her to be kidnapped and the case of confining the woman knowing her to be abducted should not go before the jury, because the former accused was not charged with abducting the woman. *AIR 1945 Cal 432.*

(8) Where one of the accused (appellant) was convicted under Ss. 366 and 354 P.C. and the Sessions Judge had found that the evidence against both the accused was co-extensive but he felt a "lingering doubt" about the complicity of the co-accused and acquitted him, on appeal it was held that there was no difference between the case of the accused and co-accused and the accused (appellant) should also be acquitted. *1983 SCC (Cri) 316.*

(9) Where a Magistrate who had no jurisdiction to try a case for an offence under this section convicted the accused for an offence under this section and S. 420, it was held that the conviction under S. 420 was not vitiated by reason of the fact that the Magistrate had no jurisdiction to try an offence under this section. *AIR 1947 Pat 23.*

(10) Acquittal for an offence under this section is no bar for convicting the accused under S. 363 for kidnapping simpliciter. *AIR 1951 Assam 168.*

17. Procedure.—(1) Abettor of offence under S. 366, Penal Code, can be tried with principal offender at place where principal offence committed. *1962(2) CriLJ 712 (Punj).*

(2) If the Magistrate finds that a pirma facie case is made out, he should further enquire into and find out whether there is evidence for committing the accused on a charge under this section. *AIR 1924 Lah 718.*

(3) The prosecution cannot, at will, give up the charge for an offence under this section. The procedure laid down in S. 321, Criminal P. C., will have to be followed. *AIR 1951 Mad 900.*

(4) After the trial is over, an order for the custody of the girl with reference to whom the offences were committed is wholly without jurisdiction. *AIR 1934 Cal 756.*

(5) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered, (in normal cases). Triable by Special Triabunal under Act XIV of 1974 in cases of offences punishable under the Nari O Shishu Nirjatan Ain (= Women and Children Repression Act) of 2000, for offence punishable under section 376 of the Penal Code.

18. Place of trial.—(1) The consequence of kidnapping is not the essential fact of the offence of kidnapping so as to attract S. 179 of the Cr.P.C. *1971 CriLJ 141 (All).*

(2) Where a woman kidnapped from one place is raped upon at a different place, the offences of kidnapping and rape are to be tried separately by courts within whose jurisdiction the acts are committed. *1983 CriLJ 1574.*

19. Sentence.—(1) If the kidnapping or abduction is for forcing the woman to illicit intercourse, a heavy sentence is called for. *AIR 1979 SC 1948.*

(2) The fact that the accused is 55 years old does not justify a lenient sentence for an offence under this section. *AIR 1936 Sind 233.*

(3) A certain amount was paid by the accused to the father of the girl for getting his consent for the marriage. But the girl died before marriage. A panchayat was held and the father was asked to return only half the amount received by him to the accused. Not satisfied with this, the accused kidnapped the cousin of the deceased girl and went through a form of marriage with her. No further harm was done to the kidnapped girl. Under the above circumstances, the High Court reduced the sentence passed upon the accused from 5 years' R. I. to 2 years' R. I. *AIR 1954 Pat 218.*

(4) Consent of the victim though it may not be a defence to a charge under this section (as in the case of kidnapping from lawful guardianship) may yet be taken into account in awarding sentence. *AIR 1970 SC 1029.*

(5) The question of sentence is a matter of discretion of the trial court and the S. C. on appeal by special leave does not, as a rule, interfere with the exercise of such discretion. *(1971) 3 SCC 934.*

20. Practice.—Evidence—Prove: (1) That there was kidnapping by the accused; or abduction by him.

(2) That the person so kidnapped or abducted is a woman.

(3) That the accused then intended, or knew that it was likely.

(a) That such woman might or would be compelled to marry a person against her will. Or

(b) That she might or would be forced or seduced to illicit intercourse.

Under the second part of the section, prove:

(1) That the accused induced a woman to go from any place by criminal intimidation, or abuse of authority, or by compulsion.

(2) That the accused did so with intent, or knowledge that it was likely, that the woman might or would be forced or seduced to illicit intercourse with some person.

21. 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 of—at—kidnapped (or abducted) a woman X (by criminal intimidation or abuse of authority or by other methods or compulsion) induced the said X namely,—with intent that she may be compelled to (or knowing it likely that she will be compelled to) marry Y against her will or in order that X may be forced (or seduced) to illicit intercourse or knowing it likely that she will be forced (or seduced) to illicit intercourse and thereby committed an offence punishable under section 366 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 366A

[19][**366A. Procuration of minor girl.**—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.]

19. Sections 366A and 366B were inserted, *ibid.*

Cases and Materials : Synopsis

1. Scope and applicability of the section.—(1) This section and section 366B should be read with section 5 of the Women and Children Repression Act, 2000 (Act VIII of 2000). This section and section 366B have been added to give effect to certain Articles of International Convention for the suppression of the traffic in woman and children and to punish the export and import of girls for prostitution. The aim of this section is to prevent immorality, and its provisions are incorporated more with the desire of safeguarding the public interest of morality than the chastity of one particular woman. Often it may happen that a girl under eighteen may desire to leave her husband to better her prospects elsewhere. Such a desire would not save her helper from a conviction under this section *(30 CrLJ 985)*. The essential ingredient of an offence under this section is that accused intended or knew that it was likely that the girl might be or would be seduced to illicit intercourse with another person. In the absence of evidence as to such intention or knowledge on the part of a person he cannot be held guilty of the offence under this section, however reprehensible his conduct might have been otherwise *(34 CrLJ 220)*. The expression "illicit interoourse" in section 366A means sexual intercourse between a man and a woman who are not husband and wife. The word 'seduced' should not be taken to have the narrow meaning of inducing a girl to part with her virtue for the first time but that even though a girl may have by the first acts of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse is also meant to be included *(50 CrLJ 293)*. There is 'seduction' when a woman is induced to consent to unlawful sexual intercourse by enticement and persuasions overcoming her reluctance and scruples. It occurs where a man abuses the simplicity and the confidence of a woman to obtain by false promise what she ought not to give. It is criminal offence where a female under eighteen years has been induced to surrender her chastity to an unlawful sexual intercourse.

(2) Justice demands that the appellant be given an opportunity to cross-examine the witnesses as some of them were examined in the absence of the appellant. Admittedly, the case is pending before the Special Tribunal constituted under the aforesaid Special Powers Act as the alleged offence is triable under the Special Powers Act. It is an admitted fact that certain witnesses have been examined in the absence of the appellant when he was absconding. It is further admitted that the prosecution has not yet closed the case and the same is fixed for further evidence next week. As the prosecution has not yet closed the case and as some of the witnesses have been examined in the absence of the appellant when he was produced before the Tribunal under arrest, subsequently during the midst of trial the tribunal ought to have afforded an opportunity to the appellant to cross-examine the witnesses already examined. Justice demands that such an opportunity ought to have been given to the appellant. *Jamil Siddique Vs. State 41 DLR 30.*

(3) For sustaining a charge of kidnapping a woman for unlawful purposes the alleged victim must be in between 16 and 18. If she is above 16 but below 18 and if no force is used to go with the accused it will not be an offence under the Penal Code or the Ordinance for deterrent punishment. *Monindra Kumar Malaker Vs. State 42 DLR 349.*

(4) 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. *Ananda Vs. State 41 DLR 533.*

(5) The FIR was lodged under section 366A of the Penal Code. The offence under section 366A is related to a girl under the age of 18 years and not under the age of 16 years. *Nurunnahar Khatun Vs. State 46 DLR 112.*

(6) In an interlocutory matter concerning custody of a girl, to give a final judgment on her age is to decide an aspect of the merit of the case which is decisive of the case itself. After the decision has been given that the girl is quite major above 18 years, can there be any purpose for a trial which is still pending? The learned Judges should have made it very clear that the finding made by them as to the age of the girl was only for the purpose of deciding the present custody of the victim girl and the trial Court was free to take its own decision upon considering the evidence to be led in the case. That having not been done, it must be said that the impugned judgment suffers from at least impropriety having usurped the powers of the trial Court in a pending criminal case. *Khairunnessa Vs. Illy Begum & another 48 DLR (AD) 67.*

(7) Age of girl—Physical appearance—Physical appearance may not always provide a correct guide for ascertaining the age of a girl child who is growing up. In some cases physical development may take place which may be regarded as precocious while in some other cases there may not be as much development as is natural with the passage of time. Having regard to the fact that the available materials supported the claim of the mother that the girl was aged about 15/16 years except the statement of the girl herself, the High Court Division cannot be said to have acted judiciously in ingnoring the materials and relying on the statement of the girl and their own observation of the girl. The mother has a reasonable grievance to make against the judgment which does not seem to have been passed upon a proper appreciation of the materials on record and far less keeping in view the welfare of the victim girl alleged to be a minor. *Khairunnessa Vs. Illy Begum and another 48 DLR (AD) 67.*

(8) Kidnapping a woman for unlawful purposes—If the alleged victim is below 16 years her father is entitled to her custody but if she is above 16 years she becomes a major and she is entitled to go anywhere according to her will—For the purpose of Section 366A of the Penal Code the victim must be between 16 and 18 years—If she is above 16 but below 18 and if no force is used to go with the accused, it will not be an offence. *Manindra Kumar Malaker Vs. The State 10 BLD (HCD) 119.*

(9) Kidnapping—Bail of accused—may be granted when the victim girl in her statement stated that she went with the accused of her own accord—When the trial is being delayed for no fault of the accused and when the victim girl in her statement recorded under section 164 Cr.PC. stated that she went with the accused of her own accord the accused in such circumstances is entitled to the privilege of bail pending trial. *Nurul Amin @ Bada Vs. The State—1, MLR (1996) (AD) 251.*

(10) Kidnapping—Determination of age of victim—Statements of parents—While determining the age of victim girl more weight should be given to the statements of the parents than the emotional statement of the victim girl when her age hinges in the twilight of majority. *Badiur Rahman Chowdhury Vs. Nazrul Islam and another—1, MLR (1996) (AD) 444.*

(11) Offence of kidnapping—Determination of the age and custody of a victim minor girl—In deciding the age and present custody of the victim girl in a pending criminal case the High Court Division cannot surpass the powers of the trial court. Physical appearance may not always provide a correct guide for ascertaining the age of a girl child who is growing up. In particular case having regard

to the facts and circumstances all the available materials on record must be taken into consideration rather than solely relying on the statement of the victim girl and her physical appearance. *Khairunnessa Vs. Illy Begum and another—1, MLR (1996) (AD) 148.*

(12) A minor to be taken out of the lawful custody of her guardian as under section 363 must be a minor under 18 would be referable to section 364A. She cannot be allowed to go whether she attains the age of 18 years. *46 DLR 541.*

(13) Age of a majority and guardianship—Decision as to custody of a minor pending criminal proceedings—Neither personal law nor Majority Act is relevant for the purpose. The statute that holds good is the PC. If the allegations are that of kidnapping of a minor girl, then for the purpose of her custody, the court has to proceed on the basis that she is a minor if she is under 16. If however the allegations are that of procuration of a minor girl, the court has to proceed on the basis that a girl is a minor who is under 18. *46 DLR (AD) 10.*

(14) Statement of a victim girl in custody of the accused—The court should give more importance to the words of the parents to those of a wayward daughter who is currently enamoured with romanticism, in deciding the custody. But in the peculiar circumstances of the case the Appellate Division refused to interfere with the factum of her custody. *16 BLD (AD) 263.*

(15) The minor to be taken out of custody of the lawful guardian as under sections 361 and 366 whether must be minor under 16 years of age—Held 18 years would be referable only to section 366A when she would be taken away from place to place by inducement with intent that the girl may likely be seduced to illicit intercourse with "another person". *(45 DLR 26), 12 BLD 637.*

(16) Gist of offence lies in exercise of effective control over minor for unlawful or immoral purpose. Wife, co-accused with husband, keeping actual control over girl under 18 years of age and taking money from persons who outraged girl's modesty, held, guilty of offence under section 373 rather than section 366A. *3 PCrLJ 120.*

(17) This section was enacted by Act 20 of 1923 to give effect to certain Articles of the International Convention for the Suppression of Traffic in Women and Children signed by various nations at Paris on May 4, 1910. *AIR 1962 SC 1908.*

(18) The section is aimed at procurers. The prosecution must therefore prove that the accused intended that the girl would be forced or seduced to illicit intercourse with some one other than himself or that the accused knew that it was likely that she would be so forced or seduced. *AIR 1945 Cal 432.*

(19) The aim of the provisions of this section is to prevent immorality and the provisions are framed more with the desire of safeguarding the public interest in morality that the chastity of the particular woman. The consent therefore of the minor against whom the offence is committed is immaterial. The consent might have been induced and any reason given by the accused to move the girl from one place to another is sufficient inducement. Once the offence of inducement is proved, the girl's subsequent willingness will neither prevent the act from being an offence nor reduce the gravity of the offence. *AIR 1929 All 709.*

2. "Inducement by any means whatsoever".—(1) To "induce" means 'to lead into'. It connotes a leading of the woman in some direction in which she would not otherwise have gone. There must be a change of mind caused by an external pressure of some kind. *AIR 1934 Sind 164.*

(2) B and K induced a girl to go with them offering to take her to her destination but with the real object of selling her for illicit intercourse, and afterwards A, D, M and P took her from place to place

with the object of selling her but there was no evidence to show that A, D, M and P offered any inducement to the girl to go from one place to another with the requisite intention or knowledge. It was held that the offence under Section 366A was complete when B and K induced the girl to leave her place and what happened afterwards did not constitute a fresh offence under that section chargeable either against B and K or against other accused who just took her from one place to another and passed her on from hand to hand. *AIR 1932 Lah 555 (557).*

3. "Girl under the age of eighteen years".—(1) To constitute an offence under this section the element of age is the crucial one and strict and exact evidence of age is essential. Where there is no proper evidence of age, the judge should strongly emphasise this feature of the case and clearly direct the jury that, if they are not completely satisfied that the girl was under eighteen, they are bound to acquit the accused of his offence. *AIR 1939 Pat 536.*

4. Intent or knowledge.—(1) One of the principal ingredients of the offence under this section is that the girl is induced to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person. *AIR 1962 SC 1908.*

(2) Where, a woman even below 18 years follows the profession of a prostitute, that is, where she is accustomed to offer herself promiscuously for money to customers and in following that profession she is encouraged or assisted by some person, there is no offence committed by such person under this section, for it cannot be said that the person who assists a girl in carrying on her profession of prostitution acts with intent or knowledge that she will be forced or seduced to illicit intercourse. *AIR 1962 SC 1908.*

(3) The fact that the girl who is induced to go from any place is handsome is no evidence at all to show the intention of the accused that she should become an inmate of a brother. *AIR 1939 Cal 290.*

5. "Seduced to illicit intercourse".—(1) Seduction to illicit intercourse contemplated by the section does not mean merely straying from the path of virtue for the first time. The verb 'seduce' is used in two senses. It is used in its ordinary and narrow sense as inducing a woman to stray from the path of virtue for the first time; it is also used in the wider sense of inducing a woman to submit to illicit intercourse at any time or any occasion. It is in the latter sense that the expression has been used in Ss. 366 and 366A, which sections partially overlap. *AIR 1962 SC 1908.*

(2) Seduction implies surrender of her body by a woman who is otherwise reluctant or unwilling to submit herself to illicit intercourse in consequence of persuasion, flattery, blandishment or importunity whether such surrender is for the first time or is preceded by similar surrender on earlier occasion. *AIR 1962 SC 1908.*

6. "With another".—(1) Inducement to go from any place must have, for its object, seduction by another person and not by the person who himself induces the woman to leave. *ILR (1975) Cut 163.*

(2) The person who induces a girl of an age between the years 16 and 18 without force or fraud to go from any place with the intention that she should have illicit intercourse with himself does not commit any offence. *AIR 1933 Cal 362.*

7. This section and S. 366.—(1) The points of difference between S. 366 and this section merely concern the manner of the inducement and the age of the girl and are irrelevant for deciding the question whether the offence is a continuing offence. *AIR 1936 Lah 850.*

8. This section and Section 498.—(1) The offence under this section may be committed either in respect of a married girl or of an unmarried girl, whereas the offence under S. 498 is committed only in respect of a married girl. Secondly, in the offence under this section the taking or enticing amounts to

abduction of the girl whereas under S. 498 the taking or enticing away does not amount to abduction. Thirdly, the offence under this section may be committed despite, the offender's ignorance of the married status of the victim, while under S. 498 the actual or constructive knowledge of the offender regarding the married status of the girl is an essential element of the offence. Fourthly, the offence under this section is a major offence while that under S. 498 is a relatively minor offence being punishable only with imprisonment extending to two years while the offence under this section is punishable with imprisonment which may extend to 10 years. Hence a conviction under S. 498 cannot be altered to one under the present section. *AIR 1934 Lah 122.*

9. Charge.—(1) In the trial for the charge under S. 368, Penal Code, a conviction under S. 366A, may be made even though no specific charge under that section is framed, as both are cognate offences However, an acquittal of the charge under S. 368 precludes a fresh trial on a charge under S. 366A Therefore an appeal against the acquittal is the proper procedure to claim conviction either under S. 368 or under S. 366A alternatively. *AIR 1933 Nag 259.*

(2) The charge should run as follows:

I (name and office of the Judge, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—induced X (a minor girl under the age of eighteen years) to go from (name of the place) or to do any act or acts (name them) with the intent that the said X may be, or knowing that it is likely that the said X will be, forced (or seduced) to illicit intercourse with Y (specify the name) and thereby committed an offence punishable under section 366A Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

10. Proof.—(1) Where a married girl was induced to go to another place with the assurance that she will be married to another suitable person, here evidence that she was sought to be sold by the accused to some person, though it is not of an accomplice, has to be corroborated by other evidence, either direct or circumstantial, as a rule of prudence (and not of law). *1962 MPLJ (Notes) 230.*

11. Procedure.—(1) Since the offence under this section is a continuing offence, if the same is committed at one place and its abetment at another, both the principal offender and the abettor may be jointly tried where the offence was committed or where it was abetted. *AIR 1931 All 55.*

(2) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered (in normal case)—Triable by Special Tribunal under Act XIV of 1974 in case of offence punishable under the Woman and Children Repression Act, 2000 (Act VIII of 2000) and for offence punishable under section 376 of the Penal Code.

12. Punishment.—(1) Where the accused was convicted for an offence under this section and sentenced both to the detention at Borstal School under S. 25 of the Prevention of Crime (Young Offenders) Act, 1930 (Act 3 of 1930) and also to receive 20 lashes under the Whipping Act (4 of 1909) the additional sentence of whipping was held to be illegal, as such sentence could be awarded in addition to the sentence under the Penal Code and not in addition to punishment under any other Act. It was further observed that the detention in Borstal School was not the proper sentence for such an offence and the sentence of whipping alone was proper. *AIR 1934 Rang 123.*

13. Practice.—Evidence—Prove: (1) That the accused induced a girl.

(2) That the said girl was a minor below 18 years of age.

(3) That the accused induced her with intent that she may be or knowing it to be likely that she will be forced or seduced to illicit intercourse.

(4) That such illicit intercourse will be a person other than the accused.

(5) That as a result of the inducement the girl was caused to go from any place or to do any act.

Section 366B

[19][**366B. Importation of girl from foreign country.**—Whoever imports into [16][Bangladesh] from any country outside [16][Bangladesh] any girl under the age of twenty one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person,

[20][* * * * * * * * *]

shall be punishable with imprisonment which may extend to ten years, and shall also be labile to fine.

Cases and Materials

1. Scope.—(1) This section deals with extraterritorial offences penalising importation into Bangladesh of girls below the age of 21 years for illicit intercourse or prostitution, where the case of the prosecution is not that the girls imported into Bangladesh with the intent that they may be or knowing it to be likely that they will be forced or seduced to illicit intercourse, a conviction is wholly unjustified *(52 CrLJ 217); AIR 1951 Raj 33.*

2. Practice.—Evidence—Prove: (1) That the accused imported into Bangladesh a girl below the age of 21 years.

(2) That the girl was imported from outside Bangladesh.

(3) That the accused imported the girl with intent that she may be or with the knowledge that she is likely to be forced or seduced to illicit intercourse with a person other than the accused.

3. Procedure.—Cognizable—Warrant—Not bailable—Not Compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate (in normal cases)—Triable by Special Tribunal under Act XIV of 1974 in cases of offences punishable under the Woman and Children Repression Act VIII of 2000 and of offences punishable under section 376 of the Penal Code.

4. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—imported into Bangladesh from—(a country outside Bangladesh) X, a girl under the age of twenty one years with intent that she may be (or knowing it to be likely that she will be) forced (or seduced) to illicit intercourse with another person Y namely—and thereby committed an offence punishable under section 366B, Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

20. Second paragraph of section 266B was omitted by the Babgladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule (with effect from the 26th March, 1971).

Section 367

367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.—Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person , or knowing it to be likely that such person will be so subjected or disposed of , shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section punishes the kidnapping or abduction of any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt or slavery or to the unnatural lust of any person, while S. 364 punishes kidnapping or abduction in order that the victim may be murdered or may be so disposed of as to be put in danger of being murdered. An additional factor which is not found in S. 364 is that even knowledge (apart from intention), on the part of the abductor or kidnapper that the victim is likely to be so subjected is sufficient to make the kidnapping or abduction an offence under this section. *AIR 1962 AndhPra 267.*

(2) High Court not accepting story of murder by accused nor recording a finding that grievous hurt was caused to deceased by accused alleged to have abducted deceased—Conviction under S. 367 not warranted. *AIR 1984 SC 911.*

(3) This section may be read along with sections 11, 320, 370, 371 and 377 of the Penal Code. Kidnapping of boys for sodomy or for causing grievous injury is covered under this section. Kidnapping or abduction has to be established to invoke this section and without proof of abduction there cannot be any conviction under this section.

(4) The offence under this section is an auxiliary offence to the main offence under S. 325 or S. 326 and as the former offence is exclusively triable by a Court of Session, the accused can be legally committed to the Court of Session for both the offences. *AIR 1962 Andh Pra 267(270).*

2. Practice.—Evidence—Prove: (1) That there was kidnapping by the accused, or abduction by him.

(2) That he so kidnapped or abducted the person in question—

(a) in order that such person might be subjected to grievous hurt, slavery, etc. or to unnatural lust, etc.;

(b) in order that such person might be so disposed of as to be put in danger thereof.

(c) Knowing it to be likely that such person would be so subjected or disposed of.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate specially empowered.

4. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—kidnapped (or abducted) X in order that the said X may be subjected (or may be so disposed of as to be put in danger of being subjected) to grievous hurt (or

to slavery or to the unnatural lust of) or knowing it to be likely that such person will be so subjected or disposed of and thereby committed an offence punishable under section 367 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 368

368. Wrongfully concealing, or keeping in confinement, kidnapped or abducted person.—Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person , shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

Cases and Materials : Synopsis

1. *Scope.*
2. *Knowledge.*
3. *Concealment.*
4. *Charge and conviction.*
5. *Evidence and proof.*
6. *Procedure.*
7. *Practice.*
8. *Charge.*

1. Scope.—(1) This section refers to some other party who assists in concealing any person who has been kidnapped and not to the kidnappers. Therefore in the absence of any allegation of wrongful concealment or confinement by the accused of the kidnapped girl, there can be no conviction under this section (*AIR 1933 Lah 392, 34 CrLJ 1177).* This section presupposes that the offence of kidnapping or abduction has taken place. Section 368 Penal Code is one of those sections in which subsequent abetment is punished as a substantive offence.

(2) Joint trial under sections 366 and 368 is not illegal. *23 DLR 76.*

(3) Section 368 Penal Code can be brought into operation only after the offence of kidnapping or abduction has been committed, irrespective of whether it has reached its final stage or not though the act of wrongful confinement or concealment can sometimes form part of the same transaction as the act of kidnapping or abduction. *6 PLD 84 Lah.*

(4) This section deals with the case of wrongful concealment or confinement of a person kidnapped or abducted. To constitute an offence under the section the prosecution must establish the following ingredients: (a) The person in question has been kidnapped or abducted; (b) He must have knowledge that the person said to be confined or concealed has been kidnapped or abducted; (c) He must wrongfully conceal or confine that person. *AIR 1973 SC 201.*

(5) The section presupposes that the offence of kidnapping or abduction has taken place, so that any one wrongfully concealing or confining the person kidnapped or abducted is guilty under this section. But where kidnapping or abduction is not proved, wrongful concealment or confinement of a person does not constitute an offence under this section. *AIR 1937 All 182.*

(6) The offence under this section consists of something more than a mere wrongful confinement. *AIR 1941 Cal 315.*

(7) Where the person was neither kidnapped nor wrongfully concealed or confined, then no offence under this section is made out. *AIR 1933 Lah 392.*

(8) The words 'kidnapping' and 'abduction' do not include the offence of wrongful confinement or keeping in confinement a kidnapped person. *AIR 1947 Pat 17(20) : 48 CriLJ 18.*

2. Knowledge.—(1) Knowledge means the state of mind entertained by a person with regard to existing facts which he has himself observed or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt. *AIR 1932 Oudh 28.*

3. Concealment.—(1) Concealment means withdrawal, from actual observation of others, of the person kidnapped or abducted and not merely taking her away to a long distance. *AIR 1939 Lah 26.*

4. Charge and conviction.—(1) In a trial for an offence under this section, a conviction under S. 366A can be recorded even though no specific charge is framed under that section. *AIR 1933 Nag 259.*

(2) Where the person charged with kidnapping is acquitted, the accused charged with concealing the kidnapped person must also be acquitted. He cannot be convicted on a charge of confining the victim treating her as an abducted person. *AIR 1945 Cal 432.*

5. Evidence and proof.—(1) The prosecution has to prove that the accused concealed the girl or kept her in wrongful confinement. The fact that the accused said that they wanted to sell the girl is not sufficient for a conviction under this section. *AIR 1926 Lah 384.*

(2) A person who merely helped in getting kidnapped girl married without taking any part in the concealment or confinement of the girl is not guilty of offence under this section. *AIR 1924 Oudh 335.*

(3) It is the duty of the prosecution in a case under this section to place the first information report before the Court. *AIR 1935 All 63.*

6. Procedure.—(1) The offence under this section is not exclusively triable by the Court of Session. *AIR 1935 All 63.*

(2) If the concealing and kidnapping formed part of the same transaction an accused charged under this section can be jointly tried with an accused charged under S. 366. *AIR 1941 Cal 315.*

(3) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

7. Practice.—Evidence—Prove: (1) That the person in question has been kidnapped or abducted.

(2) That the accused knew of such kidnapping or abduction.

(3) That he, having such knowledge, wrongfully concealed or kept such person in confinement.

8. Charge.—The charge should run as follows:

I (name and office of the Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—wrongfully concealed or confined (mention the name) knowing that the said—had been kidnapped or had been abducted and thereby committed an offence punishable under section 368 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 369

369. Kidnapping or abducting child under ten years with intent to steal from its person.—Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any moveable property from the person of such

child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section may be read with sections 24 and 22 of the Penal Code. This section deals with kidnapping or abduction of a child below ten years of age with intent to steal property from the person of the child.

(2) The section deals with the kidnapping or abduction of a child under ten years with the intention of stealing movable property from its person. *(1873) 7 MHCR 375.*

(3) A, kidnapping 1.5 year old girl—Relieving her of the gold ornaments and throwing her into the pond—Prosecution evidence was found to be unreliable—Also story regarding arrest of A was unbelievable—A cannot be said to have committed an offence punishable under S. 369. *1981 CriLR (SC) 218.*

(4) Actual theft is not necessary for the application of this section. Intention to steal is enough though the subsequent theft furnishes evidence of the intention to steal. Where it was proved that a child with jewellery on his person was seen in the arms of the accused and that the jewellery was disposed of by the accused, the offence of kidnapping was held to fall under this section. *(1912) 13 CriLJ 249.*

(5) Where the offence of kidnapping, though technically established, was in fact a part of the transaction which led to the murder of the kidnapped child, the punishment of transportation for life awarded for murder would be sufficient (it was held) to cover every act done by the accused with the object of killing his victim and robbing him of his ornaments. *AIR 1920 Lah 512.*

2. Practice.—Evidence—Prove: (1) That there was the kidnapping by the accused, or abduction by him.

(2) That the person kidnapped or abducted was a child under the age of ten years.

(3) That the accused thereby intended to take moveable property from that child's person.

(4) That such intention was dishonest.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—at—kidnapped (or abducted) X, a child then under the age of ten years, with the intention of taking dishonestly any moveable property, to wit—from the person of the said X, and thereby committed an offence punishable under section 369 Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 370

370. Buying or disposing of any person as a slave.—Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section of the Code relating to slavery was enacted for the suppression of slavery, not only in its strict and proper sense, namely, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but also in any modified form where an absolute power is asserted over the liberty of another. This section does not prohibit slavery. It only penalises those who receives, retains or detains persons against their will and disposes them of or export or import them *(19 CriLJ 17)*.

(2) This section deals with the buying or disposing of persons as slaves and the next section deals with dealing in slaves. History of the law relating to slavery and the circumstance under which this section was framed stated. *(1880) ILR 2 All 723*.

(3) A transaction punishable under this section would not have been any offence against any law, though it was forbidden by proclamation prior to the passing of the Penal Code. *AIR 1918 Mad 647*.

(4) The section is directed against attempts to place persons in the position of slaves, or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property services or conduct in any respect. *(1880) ILR 2 All 724*.

(5) The sections (367, 370 and 371) of the Penal Code were enacted for the suppression of slavery, not only in its strict and proper sense, viz. that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another. *(1884) ILR 7 Mad 277*.

(6) Where the evidence showed that an accused committed the offence of removing certain children from the custody of their guardian with his consent, and exporting them to strangers, out of India, the accused should be committed on a charge for an offence under S. 370 or for abetment of such offence. *(1909) 9 CriLJ 66*.

2. Practice.—Evidence—Prove: (1) That the accused imported, exported etc. the received or the person in question as a slave; or that the accused accepted, received or detained the person in question as a slave.

(2) That he did so against the will of that person.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—at—imported (or exported or removed, or etc.) a person to wit—as a slave (or accepted, or deceived or detained against his will a person to wit, as a slave) and thereby committed an offence punishable under section 370 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 371

371. Habitual dealing in slaves.—Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall punished with [1][imprisonment]

for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Materials

1. Scope.—(1) This section seeks to punish a habitual dealer of slaves. A habitual slave dealer is a professional slave dealer.

2. Practice.—Evidence—Prove: (1) That the accused imported, exported, removed , brought, sold trafficked or dealt with in slaves.

(2) That he did so habitually.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable —Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge , etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—habitually imported, exported, removed, bought, sold, trafficked or dealt with in slave (name the slave dealt with) and thereby committed an offence punishable under section 371 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 372

372. Selling minor for purposes of prostitution, etc.—Whoever sells, lets to hire, or otherwise disposes of any [21][person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[22][*Explanation I.*—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section "illicit intercourse" means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of

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21. The words within square brackets were substituted for the words "minor under the age of eighteen years with intent that such minor shall be empoloyed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by section 2 of the Indian Criminal Law Amendment Act, 1924 (Act XVIII of 1924). The word "eighteen was previously substituted for the word "sixteen" by s. 2 of the Indian Penal Code (Amendment) Act, 1924 (Act V of 1924).

22. Ins. by the Indian Criminal Law Amendment Act, 1924 (XVIII of 1924).

the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a *quasi*-marital relation.]

Cases and Materials : Synopsis

1. Amendments.—(1) The effect of the amendment is merely to enlarge the scope of the 'intent', so that whereas previously, it was an offence only where the intention of the accused was to use or employ the person disposed of for the purposes mentioned in the section during the minority of such person, under the amended section, the intention to use or employ the person for the specified purposes at any age is sufficient to create the offence. Hence, under the amended section disposing of a minor girl, even with the intention of using her for purposes of prostitution etc., after she attains majority is an offence, whereas previously such an act was not an offence. *AIR 1937 Cal 250.*

2. Scope of the section.—(1) This section applies to married as well as unmarried females under the age of eighteen years, and is applicable even where the girl concerned is a member of the dancing girl caste. The offence under this section is committed even though the girl, prior to sale or purchases was leading immoral life. The idea underlying prostitution is that a woman should surrender her body for a monetary consideration to someone who is not in law entitled to have sexual intercourse with her. The position of a mistress is not necessarily that of a prostitute. The relationship is of a more permanent nature than the casual relationship implied in prostitution. Having a stray paramour would not constitute a woman being a prostitute *(30 CrLJ 787).* A brothel includes any house, room or place which if used for purposes of prostitution for the gain of another person or for mutual gain of two or more prostitutes. To establish that premises are used as a brothel, what needs to be proved is that people of opposite sexes come there and have illicit sexual intercourse on the premises. A brothel is a place resorted to by persons of both sexes for the purpose of prostitution. The offence is complete when the accused has done all he could do intentionally and consciously expose a minor girl to the danger of degradation even if all the ceremonial accompaniments for initiation of the prostitutes were complete or not *(2 CrLJ 500).* The words 'sale' and 'let on hire' imply transfer of the person of the minor and is held complete the moment the contract is signed. There is no difference in selling a woman as a mistress of a person or taking her to be used as prostitute *(36 CrLJ 571).*

(2) The provisions of the sections 372, 373, 375 and 479, show that laws put some restrictions, but such occurrence of intercourse, the maintenance of brothel and prostitution are not totally barred. *Sultana Nahar, Advocate Vs, Bangladesh, represented by the Secretary, Ministry of Home Affairs, Government of the People's Republic of Bangladesh and others (Spl. Original) 2 BLC 430.*

(3) This section and S. 373 should be read together. Both sections are correlative of each other being aimed against trafficking in girls under the age of eighteen years. The words 'sell', "lets to hire'

and "otherwise disposes of" in this section correspond with 'buys', 'hires' and "otherwise obtains possession of" in S. 373. *AIR 1937 Cal 250.*

(4) The mischief aimed at by Ss. 372 and 373 was traffic in minors under sixteen years for purposes of prostitution in its perfectly well understood sense or for any unlawful and immoral purpose of a like description. As a result of the amendment of the two sections by substitution of "eighteen" for "sixteen' and by insertion of the words "or illicit intercourse" in the main body and addition of Explanation II their scope is enlarged and traffic in minors up to eighteen years for the purpose of illicit intercourse is also sought to be prohibited. *(1878-1880) ILR 2 All 694.*

3. Chastity of minor girl if necessary, before selling, letting, etc.—(1) The policy of the Penal Code was to 'protect the chastity" of minors and to assure to them the freedom of choosing married life when they attain their age. *(1888) ILR 11 Mad 393.*

4. "Sells, lets to hire or otherwise disposes of."—(1) The words 'sells or lets to hire' necessarily connote a transaction for consideration, while the words 'otherwise disposes of' may represent a transaction with or without consideration. Thus, if an accused person simply makes over a minor girl to another for the purpose of prostitution he or she will be said to have disposed of the girl for prostitution. All these transactions in respect of the minor involves two parties. *AIR 1942 Bom 23.*

(2) A brothel-keeper letting a girl to a customer for a signal act of sexual intercourse is not guilty under this section as the kind of possession of the girl which he gives is not of the nature contemplated by the section. *AIR 1919 Mad 892.*

(3) Taking a minor girl to a brothel and bringing her back after six or seven nights during which the girl prostituted herself would amount to disposal of the girl envisaged by the section. *AIR 1928 Bom 336.*

(4) Where the accused, himself a customer of a brothel, met a minor girl in the street who had fled from her house on account of ill-treatment of her step-mother and direct her to the brothel in order that she may be useful for the business of the brothel, his act did not amount to disposal of the girl within the meaning of the section. *AIR 1925 Mad 716.*

5. Dedication of girls to temple.—(1) Unless the dedication of a minor girl to the temple or idol is complete there can be no disposal of the girl envisaged by the section as there is no change made in the position or circumstances of the minor. The ceremony consisting of tying a talimani to a minor girl, worshipping a basin (kalash) of water and distributing food may be a preliminary step before disposing of the girl for the purpose of prostitution but that does not complete the disposal of the girl to the temple or idol and hence it is no offence. *AIR 1925 Bom 478.*

(3) Performance of a Gejjee ceremony on a minor girl is also merely a preliminary and not the final ceremony of dedication and hence does not amount to disposal of the girl. *AIR 1920 Bom 63.*

6. Giving girl in adoption to prostitutes.—(1) Prostitution is not the essential object or necessary consequence of an adoption by a dancing girl but is an incident due to social influences. But if a minor girl is given in adoption to a dancing girl with the intention that the girl may continue the profession of the adoption mother then the parent giving in adoption can be said to dispose of the minor for prostitution. *(1888) 11 Mad 393.*

7. "Any person under the age of eighteen years.—(1) The "person under the age of eighteen years" may be a married or unmarried girl and may be male or female. *1879 Pun Re No. 12 (Cr) 34.*

8. "Shall, at any age, be employed."—(1) It was necessary to prove that the accused intended or knew it to be likely that the girl was to be employed for prostitution before the completion of her

sixteenth year but that if the circumstances showed that the girl was to be used for purposes of prostitution, it was for the accused to prove that he or she intended to put off the employment until the completion of the sixteenth year. *AIR 1922 Cal 531.*

9. "Illicit intercourse"—Explanation II.—(1) Expression "illicit intercourse" has to be distinguished from 'prostitution.' Sexual intercourse of a girl with a stranger on one occasion would only amount to illicit intercourse but not prostitution, as prostitution connotes promiscuous intercourse with men. If marriage is the intention with which sale of a minor Hindu girl is effected it cannot be said to be for the purpose of illicit intercourse, even if the marriage that subsequently takes place is found to be one not strictly in conformity with the tenets of the Hindu law. *AIR 1954 HimPra 43.*

10. "Unlawful and immoral purpose."—(1) In a case of handing over a minor girl to a third party with intent that the girl should be made to resemble a jat female and be used for the purpose of cheating other persons and obtaining money, it cannot be said that the purpose was immoral though it was unlawful. *AIR 1915 All 390.*

(2) The purpose of prostitution is undoubtedly an immoral one. It is immaterial whether it is also unlawful or not as the purpose is specifically mentioned in the section. So also is the purpose of illicit intercourse specifically mentioned. To sell a married woman as a mistress of another person comes within the section, such sale being for illicit intercourse. *AIR 1934 All 324.*

11. Intention or knowledge.—(1) Girl of an offence under this section and S. 373 consists in the intention or knowledge referred to in the section. In the absence of such intention or knowledge, mere buying, selling letting etc., of a minor girl is not an offence under this section. *(1905) 2 CriLJ 500.*

12. "For the purpose of prostitution."—(1) "Prostitution" is the offering of the person for promiscuous sexual intercourse with men. Making over a minor girl to a person for one act of sexual intercourse with him is not a disposal for prostitution. *(1894) 21 Cal 97.*

(2) Prostitution is proved if it be shown that a woman offered her body commonly for lewdness for payment. *(1918) 1 KB 635.*

13. Procedure.—(1) The forum of trial is the place of disposal of the minor. If the sale has taken place outside the jurisdiction of the Court it is not competent to try the accused. *AIR 1951 Ajmer 68.*

(2) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, District Magistrate, Additional District Magistrate, Chief Metropolitan Magistrate or Magistrate of the first class specially empowered.

14. Charge.—(1) If the accused let to hire her daughter to several visitors for the purpose of prostitution each transaction in an offence and so should form a separate charge and no more than these such charges can be combined for joint trial. *(1936) 40 Cal WN 1183.*

(2) The charge should run as follows:

I, (name and office of the Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—sold (or let to hire, or disposed of) a person under the age of eighteen years, to wit—with intent that such person should at any age be employed or used for the purpose of prostitution or for illicit intercourse with a person, to wit,—or for any unlawful and immoral purpose viz. (state the purpose) or knowing it to be likely that such minor would be employed or used for any such purpose , and thereby committed an offence punishable under section 372 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

15. Practice.—Evidence—Prove: (1) That the person in question was under eighteen years of age at the time of the offence.

(2) That the accused sold, let to hire, or otherwise disposed of such person.

(3) That he did so with intent that such person should be employed or used at any age for the purpose of prostitution, or for illicit intercourse with any person, or for any unlawful and immoral purpose; or with knowledge that it was likely that such person would be employed or used for any such purpose.

Section 373

373. Buying minor for purposes of prostitution, etc.—Whoever buys, hires or otherwise obtains possession of any [21][person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[23][*Explanation I.*—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II—"Illicit intercourse" has the same meaning as in section 372.

Cases and Materials : Synopsis

1. *Amendments.*
2. *Scope and applicability.*
3. *"Buys or hires."*
4. *"Otherwise obtains possession."*
5. *"Person under the age of eighteen years."*
6. *Intent or knowledge*
7. *"Purpose of prostitution"—Explanation I.*
8. *Illicit intercourse with any person"—Explanation II.*
9. *"Unlawful and immoral purpose."*
10. *Proof.*
11. *Procedure.*
12. *Practice.*
13. *Charge.*

1. Amendments.—(1) The word 'eighteen' was substituted for 'sixteen' by S. 2 of Penal Code (Amendment) Act 5 of 1924. Latter by S. 2 of Act 18 of 1924 the words "person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing to be likely that such person will at any age be" were substituted for the words "minor under the age of eighteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be." The effect of the second amendment is merely to enlarge the scope of the intent. *AIR 1973 Cal 250.*

2. Scope and applicability.—(1) This section deals with buyers or hirers of minor girls for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral

23. Inserted by Act XVIII of 1924, s. 4.

purposes. Where a brothel keeper allows a girl to visit the brothel for two or three hours in the night and allowed to prostitute herself to customers for money it is sufficient obtaining of possession within the meaning of the section *(29 CriLJ 993)*. The intention or knowledge requisite for an offence under this section may be presumed from the facts proved and the circumstances of the case *(24 CriLJ 100)*.

(2) The offence of selling or buying a minor for the purpose of prostitution punishable under Ss. 372 and 373 is committed even where the minor, prior to such transaction, has been leading an immoral life. *(1906) 3 CriLJ 334 (Bom)*.

(3) Words "otherwise obtains "possession" in section 373 do not refer to possession obtained from any other person—Gist of the offence lies in the exercise of effective control over the person under 18 years. Accused M by inducement and false assurance betook a minor girl to his house and along with his wife R confined the girl in their house and subsequently forced her to a life of prostitution. Both M and R were charged and convicted under section 366A P.C. and sentenced to rigorous imprisonment for three years and a fine of Rs. 200.00 each. On appeal it was contended on behalf of R that the ingredients of S. 366A P.C. were not applicable in her case and she might more appropriately be convicted under section 373 P.C. Held: On evidence it appears that R exercised effective control over the girl and forced her to lead an immoral life. Hence the offence of the appellant R comes more appropriately under section 373 of the Penal Code and therefore her conviction for one year under section 366A was converted to one under section 373 P.C. The words "otherwise obtains possession" occurring in section 373 P.C. cannot be construed as referring to possession obtained from any other person. The gist of the offence under the section lies in the exercise of effective control over a person under the age of 18 years with intent or knowledge that such person will be used for the purpose of prostitution or illicit intercourse with any person or for any unlawful or immoral purpose. *Matiar Rahman Vs. State, (1969) 21 DLR 903.*

(4) Age of the woman at time of recovery according to estimate arrived at from her statement in witness-box is found to be above eighteen years—Charge fails. *15 DLR 115 WP.*

3. "Buys or hires."—(1) The words "buys" is used in the ordinary sense and is correlative to the word 'sells' occurring in S. 372. It is not essential to the offence under this section that the buying, hiring or otherwise obtaining of the prossession of the minor should be from a third person. An agreement or understanding come to with the minor herself without the intervention of a third person would be also within this section. *(1869-1870) 5 Mad HCR 473.*

4. "Otherwise obtains possession."—(1) Minor girl running away voluntarily with accused—Latter had no possession over girl as she was free to leave him at any moment. *AIR 1937 Cal 250.*

(2) A man enjoying sexual intercourse with minor girl does not obtain her possession. *AIR 1934 Bom 200.*

(3) Where a brothel-keeper allows a girl to visit the brothel for two to three hours in the night and she is allowed to prostitute herself to customers for money, it is sufficient obtaining of possession within the meaning of S. 373. *AIR 1928 Bom 336.*

(4) It is not requisite for the purpose of this section that the possession of a minor should be obtained from a third party. It is enough if it is established that the accused in fact obtained possession of the minor with the intention of using her for prostitution. *AIR 1942 Bom 23.*

(5) The expression "otherwise obtains possession" corresponds to the expression "otherwise disposes of" because the previous words "buys" and "hires" correspond with the words "sells" and "lets to hire" in S. 372. *AIR 1937 Cal 250.*

5. "Person under the age of eighteen years."—(1) It is for the prosecution to prove beyond doubt that the person whose possession was obtained is under the age of eighteen years. Where there was no reliable evidence of age of the girl, the age of girl cannot be determined perfectly on one's impression on seeing her. *AIR 1932 Cal 417.*

6. Intent or knowledge.—(1) It is not necessary that the intention should be to use the minor girl immediately for the purpose of prostitution. *(1913) 14 CriLJ 33 (Mad).*

(2) It is for the prosecution to prove that the adoption was made by a dancing girl with the requisite intention. *(1889) ILR 12 Mad 273.*

(3) The question of intention or knowledge referred to in the section is a matter of inference from the facts and circumstances of the case. *AIR 1922 Cal 539.*

7. "Purpose of prostitution"—Explanation I.—(1) The explanation provides that if the accused is proved to have obtained possession of a minor female, whether by purchase, hire or in any other manner, and is further proved to be a prostitute or a brothel-keeper she or he is presumed to have obtained possession of the girl with the intent that she or he should use her for the purpose of prostitution. Consequently, it is for the accused person to prove that she or he obtained the possession of the minor for an innocent purpose. *AIR 1943 Bom 150.*

8. "Illicit intercourse with any person"—Explanation II.—(1) Before the words illicit intercourse" were introduced by Act 18 of 1924 the judicial view was that illicit intercourse was always immoral but not necessarily unlawful and so hiring of a minor girl for her sexual intercourse on one occasion did not fall under S. 373. *1873 Pun Re No. 16 (Cr) 19.*

9. "Unlawful and immoral purpose".—(1) Where an accused purchases a minor girl form another and cohabits with her without performing the marriage ceremony he purchases the minor intending that she should be employed for unlawful and immoral purpose. *(1900) 20 All WN 133 (139).*

10. Proof.—(1) The following circumstances were held sufficient to prove that the buying of a minor girl was with the intention to prostitute her during minority:

(i) that the accused was herself acquired during her infancy by a dancing girl, and was brought up to become, and became, a dancing girl;

(ii) that it was the practice among dancing girls to acquire children for the purposes of bringing them up as dancing girls;

(iii) that it was no instance of a girl so acquired being married;

(iv) that the accused lived the life of a dancing girl for twenty years and that she gave a large sum of money for the purchase of good looking girls of tender age;

(v) that there was no suggestion that the accused acquired the girl for the purpose of adopting her. *(1900) ILR 23 Mad 159.*

11. Procedure .—(1) Where a minor married girl was, with her husband's consent brought from Kashmir to Bombay at the expense of a brothel-keeper and was kept in brothel in Bombay, it was held that what took place in Kashmir was only a preparation for committing the offence under S. 373 which was completed in Bombay, and that the Bombay Court had jurisdiction to try the offence. *AIR 1927 Bom 666.*

(2) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

12. Practice.—Evidence—Prove: (1) That the person in question was under eighteen years of age at the time of the offence.

(2) That the accused bought , hired, or obtained possession of, such person.

(3) That he did so with intent that such person shall at any age be employed or used for the purpose of prostitution, or illicit intercourse with any person, or for any unlawful and immoral purpose; or with knowledge that it was likely that such person would be employed or used for any such purpose.

13. Charge.—The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, bought (or hired or obtained possession of) X who at the time was below eighteen years of age with intent that the said X shall be employed (or used) for purposes of prostitution or illicit intercourse or for any unlawful and immoral purpose or knowing it to be likely that the said X will be employed or used for any such purpose and thereby you have committed an offence punishable under section 373 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 374

374. Unlawful compulsory labour.—[24][(1)] Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[25][(2) Whoever compels a prisoner of war or a protected person to serve in the armed forces of [16][Bangladesh] shall be punished with imprisonment of either description for a term which may extend to one year.

Explanation.—In this section the expressions "prisoner of war" and "protected person" shall have the same meaning as have been assigned to them respectively by Article 4 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, and Article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 [26][* * *]]

Cases and Materials

1. Scope.—(1) This section makes unlawful compulsory labour an offence. Where compulsion is authorised by law such complusion will be lawful. Where jailor who is in charge of prisoners compels them to work against their will such complusion will not be unlawful as it is authorised by law. *(33 CrLJ 553*

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24. The original provision or text of S. 374 was numbered as sub-section (1) of that section by the Pakistan Penal Code (Amdt.) Act, 1958 (XXXVI of 1958). s. 2.

25. Sub-section (2) along with Explanation was added, *ibid*

26. The words "ratified by Pakistan on the second June, 1951" were omitted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), 2nd Sch. (with effect from the 16th March, 1971).

(2) Where a person insists that another who has consented to serve him shall perform his work, it cannot be said that he unlawfully compels such person to labour because it is the thing which he or she has agreed to do. *(1892) ILR 19 Cal 572.*

(3) Where there is or can be no agreement to serve between the accused person and the person compelled to labour, the compulsion will be unlawful and the accused would be guilty under this section. *(1897-1901) 1 UBR 337.*

(4) Where a single act constitutes two distinct offences, one under Sec. 374 and another under the Removal of Social Disabilities Act and the offence under S. 374 is compounded, the accused cannot be tried for the other offence, the two offences being identical. *AIR 1952 All 366.*

2. Practice.—Evidence—Prove: (1) That the accused compelled the person in question to labour.

(2) That such compulsion was unlawful.

(3) That the accused did so against the will of that person.

3. Procedure.—Not cognizable—Bailable—Not compoundable—Triable by any Magistrate.

4. 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 of—, at—, unlawfully compelled X to labour against his will, and thereby committed an offence punishable under section 374 of the Penal Code, and within my coginzance.

And I hereby direct that you be tried by this court on the said charge.

Of Rape

Section 375

375. Rape.—A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent, when she is under [27][fourteen] years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.— Sexual intercourse by a man with his own wife, the wife not being under [27][thirteen] years of age, is not rape.

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27. Substituted by section 2 of the Indian Penal Code (Amendment) Act, 1925 (Act XXIX of 1925) for "twelve" which was previously substituted for "ten" by the Indian Criminal Law Amendment Act (X of 1891).

Cases and Materials

1. For cases and materials, see under section 376 next.

Section 376

376. Punishment for rape.—Whoever commits rape shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, [28][unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

Cases and Materials (Sections 375 and 376) : Synopsis

1. Scope.—(1) The law of rape is designed to protect a woman's freedom of choice in her sexual connections. The traditional view that one cannot be held guilty of raping his wife because her consent to marriage constitutes a consent to sexual intercourse with him which in law cannot be revoked during continuance of the marriage. The offence of rape is in law a single act of sexual intercourse. It is not a continuing offence *(40 CriLJ 280)*. Except the husband all other persons are liable for punishment for having sexual intercourse with a woman without her consent. Her previous free consent is absolutely necessary. Women are seldom proved to translate their thoughts in these matters into words. They usually leave the matter of consent to tacit understanding. In such cases consent becomes a matter of inference to be made from evidence of previous or contemporaneous acts and conduct and other surrounding circumstances. Non-resistance if not otherwise accounted for should be real and unreal for there is such a thing as maiden modesty and some resistance is simulated even by women who are most anxious for the connection. In determining the question of consent these guiding principles deserve to be kept in view. It is inconceivable that a grown up girl of about sixteen years would submit to sexual intercourse without struggling. In the absence of injury in such a case, it has to be held that the girl must have been a consenting party. Resistance may lead to personal injuries on the

28. Ins. by the Indian Penal Code (Amendment) Act, 1925 (Act XXXIX of 1925), s. 3.

body of the girl, the tearing of her clothes, her shouting to attract the attention of neighbours. It is an essential part of the proof in rape that there should have been not only an assault but actual penetration. Partial penetration which does not result in any injury to the hymen is sufficient to constitute the offence of rape *(28 CrLJ 241)*. A husband has no right to enjoy person of his wife, without having regard to the question of safety to her. Where man has illicit intercourse with an adult woman with her consent, it is no rape under the law *(39 CrLJ 674)*. Only sexual intercourse without free consent of the woman amounts to rape. Submission of her body under the influence of fear or terror is no consent. Mere submission by one who does not know the nature of the act done, cannot be considered consent. Therefore, consent must be a conscious consent with the knowledge of the act involved. If there be no consent, or if it be against the will of the girl, the age of the girl is immaterial for the offence of rape. For proving the age of a girl, only conclusive piece of evidence may be her birth certificate, but unfortunately, in this country such a document is not ordinarily available. The court has to base its conclusion upon all the facts and circumstances disclosed on examining all the physical fathers of the person whose age is in question, in conjunction with such oral testimony as may be available *(PLD 1958 SC 337)*.Therefore in fixing the age of the girl, growth of her teeth, public and auxiliary hair, the growth of breast, height and weight of the girl are all relevant considerations. Ossification test might be a better or surer test of determining age. It is desirable that ossification test should be made where possible. Where there was no evidence of X-ray examination in spite of the question in the doctor's certificate, and the investigation officer, when examined in the trial Court, found it convenient not to say anything to explain this serious omission, benefit of the doubt must go to the accused. Normally in rape case, direct evidence is not available except the evidence of the person raped and it is unsafe to base a conviction on such evidence alone. If the evidence of the woman is substantially corroborated by a number of witnesses and the medical evidence also supports the prosecution cases, the accused may be held guilty of the offence of rape. In a case of rape, there was no direct reliable evidence as to the commission of the offence, no blood or semen was discovered on the body of the prosecutrix and there had been great delay in making the FIR and there was enmity between the parties. All these circumstances combined to raise doubt in favour of the accused to the benefit of which he is entitled *(AIR 1916 Lah 292)*. In a case of rape of any innocent girl of tender age the evidence of the raped girl is of great value and when she makes a statement by way of disclosure immediately after the incident it is a strong piece of corroboration. It is hardly possible that any self-respecting woman would come forward in a Court of Justice to make a humiliating statement against her honour of having been raped, unless it was absolutely ture. The evidence of the prosecutrix in a rape case is customarily received by Courts with some suspicion. In certain jurisdiction, it is the rule that the solitary evidence of the prosecutrix being a woman of full age is not accepted as sufficient, but requires corroboration by independent evidence, in order to be believed *(1974) PCrLJ 16)*. There can be no conviction for rape on mere suspicion or presumption. The commission of rape must be proved. The rules of corroboration in case of rape are as follows:

(a) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case apart from testimony of the complainant should in itself be sufficient to sustain the conviction.

(b) The independent evidence should not only make it safe to believe that the crime was committed but must in some way reasonably connect the accused with it by confirming on such material particulars the testimony of the complainant that the accused committed the crime.

(c) The corroboration must come from independent sources.

(d) The corroboration need not be direct evidence that the accused committed the crime. An indecent assault upon a woman does not to amount to an attempt to commit crime, unless the court is satisfied that there was a determination in the accused to gratify his passions at all events, and in spite of all resistance *(1962 CrLJ 715)*. The drying declaration of a deceased person is admissible in evidence in a charge of rape.

(2) In charges of rape prosecutrix's evidence should be sufficiently corroborated and should be in accord with the probabilities. *Abdul Khaleq Vs. State (1960) 12 DLR (SC) 165: 1960 PLD (SC) 325.*

(3) Rape—Possible without injuries in the private parts—Absence of semen in the vagina does not necessarily disprove that the woman was raped. The absence of injuries on the private parts of the complainant can easily be explained by the fact that the complainant had intercourse before. (Taylor, 2nd Volume, Page 80). The presence of spermatoza in the vagina is conclusive proof of sexual connection but not of rape; their absence is no proof that connection had not taken place for they may have been removed by washing or by discharge. *Saleh Muhammad Vs. State (1966) 18 DLR (WP) 67.*

(4) When circumstances lend support to the prosecutrix's deposition of rape, corroboration not absolutely necessary. *Saleh Muhammad Vs. State, (1966) 18 DLR (WP) 67.*

(5) Prosecutrix's testimony on a charge of rape requires corroboration. *Rashid Ahmed Vs. State, (1958) 10 DLR 532.*

(6) The mere fact of the story having been told to a number of relations shortly after the occurrence is insufficient corroboration. Equally, the fact of the story having been communicated by the relations to other neighbours and later to the authorities is by no means sufficient corroboration. *Abdul Khaleque Vs. State, (1960) 12 DLR (SC) 165.*

(7) Rape, charge of—When not sustainable. In a case of allegation of rape where there is no independent eye-witness and the only evidence is that of the prosecutrix herself and of those to whom it was reported, the courts are not left with any objective test for gauging the truth of the story of the prosecutrix. Expert examination of the person of the prosecutrix and of the place where the rape took place is sine qua non (= an ingredient absolutely necessary) in such cases. *Mufizuddin Mondal Vs. State (1962) 14 DLR 821.*

(8) Raped woman's physical marks on the body. In the case of rape, according to Modi's Medical Jurisprudence the body, specially the face, breasts, chest, lower part of abdomen, limbs and back should have marks of violence such as scratches and bruises, as a result of struggle, Such marks are likely to be found on the bodies of grown up woman who are able to resist. *Shah Khan Vs. State (1966) 18 DLR (WP) 91.*

(9) Charge under sections 376/511 can be altered in appeal to one under section 376. Accused charged and convicted under sections 376/511. Finding may be altered in appeal to one of conviction under section 376 P. C. and sentence be enhanced under section 439 Criminal P. Code. *Fazal Karim Vs. Crown (1955) 7 DLR (WP) 11.*

(10) Unnatural offence—Penetration into anus is not essential for an offence under the section *Muhammad Ali Vs. State (1960) 12 DLR 827: 1961 PLD (Dac) 447.*

(11) Prosecutrix's evidence in a rape case—Caution to be observed.—The evidence of a prosecutrix in a rape case is customarily received by Courts with some suspicion. In certian jurisdiction, it is the rule that the solitary evidence of the prosecutrix being a woman of full-age, is not accepted as

sufficient, but requires corroboration by independent evidence, in order to be believed. That is precisely the case, and in addition, there is a series of circumstances appearing from the facts of the case, which require that Mst. Hawa Bai's evidence implicating Mumtaz Ahmad Khan should not be accepted at its face value. These circumstances have already been dealt with above, namely, the extra slightness of the motive shown, the fact that suspicion was cast on Mumtaz Ahmad Khan by the husband, who is said by at least one reliable witness to have been named as the assailant in the first instance, the long delay before Hawa Bai's statement was officially recorded, the fact that by that day, the police had already prepared a complete case against Mumtaz Ahmad Khan and finally, the circumstances that to name the husband at the stage was a practical impossibility for a woman situated as Mst. Hawa Bai was, in particular that to do so would have meant ruin for the entire family. *Mumtaz Ahmed Khan Vs. State, ('1967) 19 DLR (SC) 259.*

(12) In a case of carnal offence the prosecution is to be believed in awarding conviction to the offender even without material corroboration, if victim's evidence is found believable and trustworthy and does not suffer from any infirmity and inherent disqualification. *Shamsul Haque (Md) Vs. State (Criminal), 52 DLR 255.*

(13) The offence committed by accused appellant finds corroboration from the medical report, namely the report of P. W. 1 who found marks of vilence on the person of the victim and opined that this is a case of rape. The evidence of the witnesses has clearly established that accused appellant committed the crime of rape on victim Kazal Rekha. The learned Judge has lightly found the accused guilty of the offence under section 376 of the Penal Code. *Tofazzal Hossain Khan Vs. The State, 17 BLD (HCD) 306.*

(14) The High Court Division on consideration of evidence of PWs rightly found that accused-petitioners Bazlu raped victim Mahinur Begum and that it was Bazlu who wanted to marry the victim girl Mahinur Begum and as such the finding of conviction and sentence of the High Court Division are based on proper appreciation of evidence on record. *Bazlu Talukder Vs. The State, 20 BLD (AD) 227.*

(15) Evidence of prosecutrix—In case of sex-offences similar importance of the evidence of the prosecutrix must be given as in the case of an injured witness. There is no bar for the court in legal custom or in evidence law to act on the sole testimony of the prosecutrix except in a rarest of rare cases whether she is found unreliable. *Jahangir Hossain Vs. The State 1 , MLR (1996) (HC) 142.*

(16) Offence of rape is not compoudable—The offence under section 376 is not compoundable. The conviction and sentence based on evidence and proof cannot be interfered with. *Shorbesh Ali & another Vs. Mrs. Jarina Begum & another—2, MLR (1997) (AD) 127.*

(17) Evidence of prosecutrix—conviction—The evidence of the victim girl aged 14 years as to how she was forcibly raped in broad day light by the accused of a neighbouring house finding her alone in her house and when she was over-whelmingly corroborated by other neighbouring witness who came to the P.O. house immediately after the occurrence on hearing cries of the victim and when the doctor found marks of violence and rape on her person such evidence go beyond doubt to establish the charge under section 376 of the Penal Code against the accused and the conviction and sentence passed thereon by the trial court are perfectly justified. *Tofazzal Hossain Khan Vs. The State,—2, MLR (1997) (HC) 329.*

(18) Victim disowning recognition—legal consequence—The FIR written by the cousin of the victim girl and during trial the girl disowned the recognition of some FIR named accused and the cousin who wrote the FIR is not examined, conviction of the accused on the basis of this type of

evidence cannot be sustained in the eye of law. *Abdul Aziz (MD) and others Vs. The State—2, MLR (1997) (HC) 369.*

(19) Offence of rape vis-a-vis the offence under section 342 of the Penal Code—jurisdiction of the Court in appeal to alter the sentence.—The offence of rape punishable under Section 376 of the Penal Code in view of its inclusion in the Schedule of the Special Powers Act, 1974 was triable by Special Tribunal. On the other hand the offence under section 342 of the Penal Code is triable by the ordinary criminal court. It is patently out of the jurisdiction of the High Court Division to alter the conviction and sentence from section 376 to 342 of the Penal Code in an appeal preferred under section 30 of the Special Powers Act, 1974. *Abdur Rahman and others Vs. the State—4, MLR (1999) (AD) 25.*

(20) Evidence of the victim even though not corroborated by eyes when can form the sole basis of conviction—In a case of rape there can hardly be any eye witness of the occurrence. When the evidence of the victim woman appears to be reliable in the absence of any proof of enmity and no inconsistency thereof transpired, such evidence of the victim alone may from the basis of conviction. When the conviction and sentence of the convict-petitioner are based on the concurrent findings of the trial court as well of the High Court Division and when such findings do not suffer from any legal infirmity, no interference is called for. *Abu Taher Mia alias Taher Mia Vs. The State 6 MLR (AD) 977.*

(21) As the PWs contradicted each other as to who accompanied the appellant Bazlu in kidnapping the girl aged 15 years who was raped by only one convict who is none other than Bazlu but the other convicts are full brother and bhaista of him and it is highly improbable that all those persons together would commit sexual intercourse on the girl when they are not professional or hardened criminals and hence other convicts are entitled to get benefit of doubt. *Bazlu Talukder and others Vs. State (Criminal) 1 BLC 261.*

(22) As the prosecutrix did not sustain any injury on her face, cheeks or breasts at the time of the commission of the alleged rape and the Medical Board also did not detect any trace of sexual violence on the two victims the offence under section 376 of the Penal Code is not proved beyond all reasonable doubt for which the appellants are entitled to get benefit of doubt. *Abdul Aziz (Md) and another Vs. State (Criminal) 2 BLC 630.*

(23) Ordinarily in carnal cases the evidence of prosecutrix is believed but in the present case the contradictions are so major that the evidence of the prosecutrix cannot be believed. *Abdul Wahed alias Chandu Mia Vs. State (Criminal) 4 BLC 320.*

(24) The appellant was the prime kidnapper and he forcibly had sexual intercourse are entitled to get the benefit of doubt as has been rightly found by the High Division as such finding is based on proper appreciation of evidence on record and hence no interference is warranted. *Bazlu Talukder Vs. State (Criminal) 5 BLC (AD) 159.*

(25) The FIR was lodged after one month and 20 days of the occurrence without offering any plausible explanation when doctor deposed in court that he did not find any sign of rape on victim Sufia Begum when there is a lot of inconsistencies and contradictions in the state of the physical conditions of victim Sufia Begum following the occurrence and interested prosecution witnesses were examined and it is inconceivable that accused Mansur Ali, however greatly he might have been swayed by passion to satisfy his carnal desire, would commit rape in presence of his major married daughter. *Mansur Ali Bepari Vs. State (Criminal), 5 BLC 374.*

(26) In sexual offence where the woman is grown up corroboration of her statement is ordinarily required but such corroboration is not insisted upon whether the victim is a minor. Where

corroborative evidence is absent, evidence of victim woman may be relied on in circumstances as where such evidence can be relied on. Evidence of the woman or the girl raped by force and against her will cannot be rejected on the ground of being an accomplice, as in such cases she is victim of outrage, Corroborative evidence need not be direct connecting the accused with the crime—circumstantial evidence serve the purpose—Caution which court and jury should observe in case of corroborated evidence in sex offences. Uncorroborated evidence of a victim girl whom accepted for conviction, reason thereof should be started. Earlier statement of victim girl used to corroborate her subsequent statement, relevant. *35 DLR 373.*

(27) Sentence of the appellant as being too severe as agreed by the appellant's counsel has been reduced to three years, RI under each of the sections but will run concurrently. This will meet the ends of justice. *4 BCR 515 AD.*

(28) Romena Khatun @ Rina aged about 16 years was a girl of exquisite beauty and she was also a meritorious student reading in Class X in Chraigharia High School. On 8-8-87 at about 8:30 AM she left her house for going to the Head Master of the School for private coaching when she had on her wearing a white paijama, a printed Kamiz and a white Orna. But she neither went to the Head Master nor returned home nor attended the School and remained missing. The informant who was her nephew and was an Assistant Teacher in the same school having found her absent in the school enquired from the Head Master if she had gone for coaching and the Head Master said that she had not. Then on return from school he enquired about Rina from her mother Sohera Khatun who also said that after Rina went out from the house in the morning for going to the Head Master for private coaching she did not return. The parents began to look for Rina in the house of relations quietly without making public that she was missing which was out of natural delicacy. Since then she could not be traced at all. On 12-8-77, that is about four days after, in the morning one Ansar Ali reported about the recovery of a dead body in the sugarcane field while he was ploughing land. On getting the news the informant the patents of Rina and others went and saw the dead body of Rina which all of them identified. The dead body was found in severe condition, the scalp and two hands were found lying scattered and the body was almost decomposed, most of the flesh being eaten up by animals. The blood stained Kamiz and the Paijama and Orna with some hairs were found lying near the dead body. Rina's father was in fainting condition and so the informant went to Gobindaganj PS and lodged FIR on the same day at 11-15AM. From the evidence it is fully proved that Rina was forcibly lifted and several persons committed rape on her by gagging and throttling her as a result of which she died. Thus Rina is found to have been murdered according to the fourth provision of section 300 of the Penal Code. Confession retracted after four months. Its credibility. From the evidence of the Magistrate PW 7 it is found that he did not complain to the Magistrate that there was any torture on him or any inducement on him to make false confession. He did not show any mark of assault to the Magistrate nor the Magistrate noticed any such mark. PW 8 Dr Ataur Rahman medically examined the accused Abdur Rashid on 5-9-77 and he found no injury on the person of the accused excepting the scar mark caused by the biting of the victim Rina. PWs 7 and 8 are independent official witnesses and had no reason to suppress the truth. It is found that for over four months after the confession the accused appeared in court several times and never complained about the confession being obtained by torture, until 11-1-78 when for the first time he retracted the confession. Delay of 22 days made by PW 6 in disclosing the fact of confession of rape committed by the appellant Abkur Rashid on the victim Rina. Reasons of delay in making the disclosure explained. Confession, judicial or extra-judicial, whether retracted or not, can validly form the basis of one's conviction (makers conviction). Judicial confession of accused Abdur

Rashid does not stand discredited merely, because the implication of the other two co-accused in the judicial confession of accused Abdur Rashid was not accepted by the court for want of supporting evidence. No premeditation nor intent for the commission of murder. Murder taken place in the course of rape. Regarding sentence it is found that the accused had not intention to commit the murder but the murder resulted form gagging and throttling on the girl in course of rape which was done with a view to stop her from raising any voice. There is thus no premeditation nor intention for the murder which only took place in course of the rape. It is also to be noted that the accused was convicted and sentenced on as long as 20-9-80. Having considered all the circumstances we are of the view that the sentence of transportation for life instead of death will meet the ends of justice. *3 BCR 144.*

(29) The offence committed by accused appellant finds corroboration from the medical report, namely, the report of PW 1 who found marks of violence on the person of the victim and opined that this is a case of rape and the evidence of the witnesses has clearly established that accused appellant committed the crime of rape on victim Kazal Rekha. The learned Judge has rightly found the accused guilty of the offence under section 376 of PC. Appeal dismissed. *17 BLD 306.*

(30) In appeal in bail matter under section 376 PC. Cruelty to woman rejected. *11 BLD 106.*

(31) Absence of sign of rape in medical certificate non-examination of the wearing cloth. *3 BLC 182.*

(32) Sometimes corroboration not necessary in case of prostitution, 376 applies. *45 DLR (AD) 66.*

(33) In the face of specific allegation of rape kidnapping against police constables, referring their case to higher police authority for departmental action is a wrong course. *32 DLR 298.*

(34) Prosecutrix carrying on profession of prostitute at relevant time—Very strong evidence required to substantiate offence of rape. Mere statement of woman that she was raped without any specific allegation that intercourse was without her consent not sufficient without corroboration. *15 DLR 115 WP.*

2. Physical incapacity of accused.—(1) The presumption that a boy under 14 is incapable of committing rape does not apply to case arising under the Code. *AIR 1915 All 134.*

(2) Even a boy of ten can be convicted of an attempt to commit rape if he has attained sufficient maturity of understanding to judge the nature and consequences of his conduct. *AIR 1935 Rang 393.*

3. "Against her will."—(1) Even where the girl ravished is below 12 years of age and as such is incapable under Sec. 90 to give her "consent" to the act of sexual intercourse, evidence is admissible to show that she was a willing party to the act. But this will not be sufficient to absolve the accused from guilty. *AIR 1933 Rang 98.*

4. "Without her consent."—(1) Where a woman is over 16 years of age sexual intercourse with her without her consent (except where the case is covered by the exception) is an offence under this section. *(1961) (1) CriLJ 689 (Orissa).*

(2) Sexual intercourse with woman's consent (except where the consent is given under the circumstances mentioned in the clauses "thirdly" and "fourthly") is not an offence under this section. *1979 CriLR (Bom) 118.*

(3) Consent to sexual intercourse on a promise of marriage is not one induced by misconception of fact and S. 80 cannot be called in aid to fasten criminal liability on the accused. *(1983) 2 CalHN 290.*

(4) Submission is not necessarily consent though a consent may necessarily involve submission. *AIR 1967 Raj 159.*

(5) It is a question depending on the circumstances of each case whether the alleged consent by the victim was mere passive submission or willing consent. The conduct and behaviour of the victim are material factors to be considered. *AIR 1979 SC 185.*

(6) Absence of injuries to either the accused or the prosecutrix, no alarm raised by prosecutrix, intercourse repeated are some of the circumstances which may give rise to the inference that prosecutrix was consenting party. *AIR 1977 SC 1307.*

5. Consent obtained under fear of death or of hurt—"Thirdly".—(1) It would depend on the facts and circumstances of each case whether the consent was obtained under fear of death or hurt. *AIR 1979 SC 185.*

(2) Where, the fear to which the woman was subject was, neither death nor hurt but of being arrested when as a matter of fact there was no warrant of arrest against her, it was held that the consent though obtained by fraud was none the less consent and the accused was not guilty under S. 376. *AIR 1955 Nag 121.*

6. Consent obtained by fraud.—(1) In England consent obtained by fraud is tantamount o consent obtained by force and violence and hence will not be a defence to a charge of rape. *(1877) 2 QBD 410.*

7. Woman incapable of exercising her will.—(1) In following cases for offence of rape, the woman could not be said to consent to the act, when the woman is:

(a) insensible. *(1859) 8 CoxCrC 131.*

(b) asleep *(1878) 14 CoxCriC 114.*

(c) in a state of unconsciousness. *(1846) 2 Cox 115.*

(d) in a state of drunkenness. *1953 RajLW 255 (DB).*

8. Presumption and proof of consent.—(1) Consent, or the absence of it, can be presumed from the attendant circumstances of each case. The first and foremost circumstance that can be looked for in cases of rape is the evidence of resistance which one would naturally expect from a woman unwilling to yield to a sexual intercourse forced upon her. Such a resistance may lead to the tearing of clothes, the inflicting of personal injuries and even injuries on her private parts. *1972 CriLJ 270.*

(2) From the mere fact that the woman did not bear the best of character, it cannot be inferred that she was a consenting party. *AIR 1953 Ajmer 12.*

(3) Mere presence of semen on the loin cloth of the woman does not mean that she was consenting party. *AIR 1925 Lah 94.*

(4) The fact that the girl was virgo intacta (=pure virgin) up to the date of the occurrence is very strong proof against consent. *AIR 1925 Lah 613.*

(5) From the mere fact that medical evidence showed that some person had sexual intercourse with the woman and that too not in the normal way, one cannot conclude that such intercourse was committed without her consent. *AIR 1955 NUC (Trav-Co) 3464 (DB).*

9. Fourth clause.—Where, the consent is given by a woman to the act of sexual intercourse in the belief that she is married to the accused, this clause is not attracted. *(1969) 1 MysLJ 304 (306).*

(2) This clause does not apply to sexual intercourse carried on under the relationship of paramour and concubine. *AIR 1969 All 489.*

10. Fifth clause.—(1) No question of consent arises in a case falling within the fifth clause. *1980 MadLW (Cri) 36.*

(2) Sexual intercourse with a woman under the age of 14 years is rape irrespective of any consent on her part. *AIR 1981 SC 261.*

(3) When consent is pleaded in defence to a charge of rape, the question would arise as to whether the girl was of age to give consent in law. *AIR 1957 Assam 39.*

(4) Age of the prosecutrix is important expecially where according to the medical evidence she was used to sexual intercourse and there was old rupture of the hymen. *AIR 1970 SC 1029.*

(5) In the ascertainment of age, the entry in Kotawari book which is genuine can certainly be taken into consideration as a strong piece of evidence. *AIR 1958 SC 143.*

(6) Unproved and unexhibited school certificate cannot be treated as evidence. *AIR 1970 SC 1029.*

(7) A doctor's evidence as to the age is no more than an opinion. *AIR 1957 Assam 39.*

8. Penetration.—(1) There need not be a completed act of intercourse to constitute an offence under this section. If there is penetration the prisoner can be convicted of rape though there is no emission from him. *1980 CriLJ 1380 (Bom).*

(2) It is impossible to lay down any express rule as to what constitutes penetration. All that can be said is that the private parts of the male must be inserted in those of the female and no rule can be laid down as to the extent of depth. *AIR 1960 Mad 308.*

(3) Courts are reluctant to believe that there could have been penetration without the hymen which is so very near the entrance having been ruptured. *AIR 1927 Lah 222.*

(4) Where in case of rape, no question was asked to the doctors as to whether if there was a small degree of penetration, spermatozoa would necessarily be present or not, the absence of spermatozoa could not negative rape. *1980 CriLJ 1380 (Bom.)*

12. Exception.—(1) The marital right of the husband to have intercourse with his wife exists by virtue of the consent given by the wife at the time of the marriage and not by virtue of a consent given at the time of each act of intercourse, as in the case of unmarried persons. *(1949) 2 AllER 448.*

(2) The Exception to the section shows that even in the case of a husband, sexual intercourse by him with his wife against her will or without her consent will be an offence of rape if the wife is below fifteen years of age. *AIR 1917 Sind 42.*

13. Burden of proof and appreciation of evidence.—(1) The burden of proof is on the prosecution to prove all the elements of the offence. *1974 CriLJ 117.*

(2) Medical examination several days after the alleged act in the case of a woman who had borne several children would have no value. *AIR 1935 Nag 69.*

(3) Mere presence of semen in the dress of the woman and/or of the accused or the absence of smegma on the private parts of the accused is not sufficient to prove that the woman was raped or that it was the accused who raped her. *AIR 1973 SC 343.*

(4) The alleged victim and the accused should be specifically examined with a view to ascertain if they are infected with venereal disease. *AIR 1954 Orissa 33.*

(5) Prosecution of accused persons under—Delay in lodging F.I.R. reasonably explained—Victim, below 16 years of age—Question of consent did not arise—Fact of absence of injury to private parts of victim and her being used to sexual intercourse is immaterial—Accused convicted. *AIR 1981 SC 361.*

(6) In a rape case the prosecutrix and her husband belonged to backward community living in a remote a rea and as such they could not be expected to know that they should rush to a doctor after the occurrence of the incident and the absence of any injuries on the person of the prosecutrix who was the helpless victim of rape might not by itself discredit the statement of the prosecutrix and in such a

situation the non-production of a medical report would not be of much consequence if the other evidence was believable. *AIR 1983 SC 911.*

(7) The mere existence of injury to the vagina does not necessarily and inevitably justify the inference that there has been rape. *AIR 1938 Rang 298.*

(8) Where hymen of victim ruptured and bruises found around it—The same was held sufficient to prove crime. *AIR 1979 SC 1194.*

(9) Where the medical examination revealed laceration of the hymen, posterior perineum and vaginal walls of the victim, the fact that there were no injuries on the person of the accused and particularly his penis, cannot be a ground for discrediting the prosecution evidence. *AIR 1969 All 216.*

(10) Absence of corroborative evidence or absence of injuries on person of victim is not fatal to prosecution in each case. *AIR 1981 SC 559.*

(11) Where, on a charge of rape against several accused, the evidence of the woman is unreliable with reference to some accused, it is unsafe to act on her evidence with respect to other accused unless it is corroborated by independent testimony. *AIR 1951 Trav-Co 167 (169) : 52 CriLJ 874.*

(12) The alleged victim's suicide cannot be a basis for adverse inference against the accused in a rape case. *AIR 1918 Low Bur 81.*

(13) Where the evidence established that the girl was playing in broad day-light, that she was carried away by the accused and brought back crying after a time, that there was a first information lodged before the police shortly thereafter, that the medical examination of the accused's genitals indicated the presence of spermatozoa—Held, that the circumstances were sufficiently corroborative of the guilt of the accused. *AIR 1976 SC 1774.*

14. Prior statement of the prosecutrix.—(1) The statement made by the prosecutrix, soon after the crime is admissible in evidence to prove her conduct. *1980 CriLJ 264 (Cal).*

15. Testimony of prosecutrix.—(1) Normally no woman would come forward to make a humiliating statement against her honour of having been raped, unless it was true. *AIR 1956 All 22.*

(2) Even though a victim of rape cannot be treated as an accomplice, the evidence of the victim in a rape case is to be treated almost like the evidence of an accomplice requiring corroboration. But if a conviction is based on the evidence of a prosecutrix without any corroboration it will not be illegal on that sole ground. *AIR 1983 SC 911.*

(3) It is highly unsafe to convict the accused on the uncorroborated testimony of the prosecutrix. *AIR 1942 Bom 121.*

(4) The law does not require corroboration and therefore, there is no bar to convict the accused on her testimony alone. *AIR 1983 SC 753.*

(5) The rule requiring corroboration is not a rule of law but a rule of prudence, and the need for corroboration, as a matter of prudence, except in cases where the circumstances make it safe to dispense with it, must be present to the mind of the judge, before a conviction without corroboration can be sustained. *AIR 1973 SC 469.*

(6) The nature and extent of the corroborative evidence that is required would necessarily vary according to the circumstances of each case. *AIR 1958 SC 143.*

(7) The previous statement is admissible as corroboration under S. 157 of the Evidence Act. *AIR 1951 Ajmer 60.*

(8) The rule as to necessity for corroboration will apply whether the witness is a child or an adult. *AIR 1946 PC 3.*

16. Attempt to commit rape.—(1) An attempt to commit rape is an act done with an intent to commit a crime in part, execution of criminal design amounting to more than mere preparation but falling short of actual consummation which if not prevented would have resulted in the full consummation of the act attempted. *1972 Raj LW 620.*

(2) Where the accused stepped across from his own roof to that of his neighbour at night and caught hold of his daughter, got on to the charpoy with her, undid the string of her pyjama and was seen struggling with her, when the neighbour's wife came up in answer to her daughter's cries and he then ran away, the accused was liable to be convicted for attempt to commit an offence under this section. *AIR 1927 Lah 580.*

(3) It must, in every case, be a question depending upon the circumstances whether a particular act done with the requisite intention towards the commission of an offence is sufficiently proximate to its commission to constitute an attempt or is so remote as merely to constitute preparation for its commission. *AIR 1927 Lah 58.*

17. Attempt to rape and Section 354.—(1) The distinction between an attempt to commit rape and an attempt to commit an indecent assault is sometimes thin. *AIR 1960 Madh Pra 155.*

(2) Forcibly making a girl naked and repeatedly trying to force the male organ into her amounts to an attempt to commit rape and not merely indecent assault. *1978 Raj CriC 14(16).*

18. Abetment of rape.—(1) Where the evidence was that A was standing with open knife while rape was being committed by B, A was held guilty of the abetment of the offence of rape committed by B. *AIR 1953 Ajmer 12.*

19. Rape and adultery.—(1) When a married woman is above 16 and has consented to the sexual intercourse by the accused, the act of the accused will amount only to the offence of adultery and not rape. *1958 Raj LW 60.*

20 Charge, trial and conviction.—(1) A joint trial of 5 accused on charges under S. 366 and this section is justified under S. 239(d), Criminal P. C. (1898) if the offences are committed in the course of the same transaction. *AIR 1941 Sind 121.*

(2) Where the details of the charge under Ss. 342, 347 and under this section enumerate several different instances of confinement and rape and extended over different periods, they cannot all be tried in one trial. *AIR 1938 Cal 769.*

(3) A conviction under this section cannot be altered in appeal to a conviction under S. 323 (simple hurt). *AIR 1934 Lah 178.*

(4) A person charged under this section cannot be convicted under S. 498 (adultery) in the absence of a complaint by the husband as required by S. 199, Criminal P. C. *AIR 1940 All 201.*

21. Rape by military man.—(1) Where the accused on active service in the army is charged with rape and is handed over to the police without being detained in military custody and the discretion under the Army Act, is not exercised by the Commanding Officer that the accused should be tried by Court martial, the offence is triable by the criminal Court. *1971 CriLJ 554.*

22. Place of trial.—(1) Where the girl is kidnapped in place X and raped in place Y, the inquiry or trial can be at either of the places, as both the offences form parts of a transaction' within the meaning of S. 220, Criminal P. C. *1980 CriLJ 1145.*

23. Sentence.—(1) A custodial sentence for rape necessary for various reasons: to mark the gravity of offence, to emphasise public disapproval, to serve as a warning to others, to punish the offender and last but not the least, to protect women. The length of the sentence would depend on all the circumstances—Features aggravating the crime enumerated. *(1982) 1 WLR 133.*

(2) The question of sentence is always in the discretion of the trial Court. *(1971) 3 SCC 934.*

(3) If it is established that even after the occurrence, the prosecutrix has been living in the house of the accused and has given birth to children from the liaison, these facts can be taken into account in fixing the quantum of punishment. *AIR 1981 SC 39.*

(4) Regarding applicability of the provisions of Reformatory Schools Act. *AIR 1968 Madh Pra 188.*

(5) If a person abducts a woman with intent to rape her and does rape her, he can be awarded separate sentences under Sec. 366 and Sec. 376. In such cases the offences should be considered as distinct offences committed in the course of the same transaction. *AIR 1967 Goa 86.*

24. Procedure.—(1) An appeal against a conviction and sentence for an offence under this section does not abate, because of the death of the appellant. *1965 All LJ 451.*

(2) Where the Court is of opinion that the child upon whom an offence under this section is committed is unable to give relevant information in the matter, by reason of tender years and consequent immaturity of judgment, it should not examine the child at all. *AIR 1930 Lah 337.*

(3) If the accused in a rape case is not able to engage counsel to defend him, Court must appoint one as 'amicus curiae' (= a friend of the court) in proper cases. *AIR 1942 Mad 285.*

(4) (a) If the sexual intercourse was by a man with his own wife being under 12 years of age—Not cognizable—Summons—Bailable—Not compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered.

(b) In any other case—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered.

(c) Triable by Tribunals under Act XIV of 1974 and Act VIII of 2000.

25. Practice.—Evidence—Prove: (1) That the accused had sexual intercourse with the woman in question.

(2) That the act was done under circumstances falling under any of the five descriptions specified in section 375.

(3) That such woman was not the wife of the accused; or if she was his wife, she was under thirteen years of age.

(4) That there was penetration.

26. 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—committed rape on X and thereby committed an offence punishable under section 376 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Of Unnatural Offences

Section 377

377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Cases and Materials

1. Scope.—(1) This section may be read with sections 10, 39 and 47 of the Penal Code. Under this section both active and passive agents are guilty of the offence, even if the act has been done with consent. To constitute this offence penetration should be strictly proved *(1935 CrLJ 718)*. Emission is not essential. The unnatural offences are: (a) Sodomy and (b) Bestiality. Sodomy consists of penetration per anus with another person. Bestiality can be committed either by a male or female human being with an animal. Where the male organ is inserted or thrusted between the thigh there is penetration to constitute an offence under section 377 of the Penal Code *(1969 CrLJ 818)*. The shape of the wound on the passive agent in sodomy is characteristic, and it cannot be produced by any hard substance. A true sodomy wound is triangular, the base external, with the sides of the triangle retreating into the fundament. Therefore when this characteristic wound is found on the victim, it goes a long way to prove the offence. Where medical evidence shows abrasion on anus due to unnatural intercourse and this corroborates the FIR the accused may be convicted under section 377. In a charge of sodomy, stains of semen constitute important evidence. Great weight must therefore be attached to the chemical examiner's report *(31 CrLJ 343)*. The evidence required to establish the offence is the same as in rape with the exception that it is not necessary to prove the offence to have been committed against the consent of the person on whom it has been perpetrated and that both the parties to the offence (if consenting) are equally guilty.

(2) Evidence regarding penetration is essential. Evidence in support of a charge under section 377, must be convincing as it is very easy a charge but extremely difficult to refute it. One of the essential ingredients to prove an offence under section 377 is, among others, that penetration must have been effected. In this sense the committal of an unnatural offence is very similar to that of rape where equally penetration is an essential ingredient which must be proved before conviction can follow. *Md. Shuaib Vs. Crown I PCR 39.*

(3) Attempt to commit an offence of sodomy—Actual penetration not necessary to constitute the offence. *Ali Md. vs. State (1970) 22 DLR (WP) 153.*

(4) Sodomy—Definition of some sort of penetration to be proved to constitute the offence under the section. *Nur Mohammad Vs. State 41 DLR 301.*

(5) Sodomy—Ingredients of the offence—One of the essential ingredients of the offence is that penetration has been effected—The degree and extent of penetration is not necessary to be proved but some sort of penetration must be strictly proved to support the charge of sodomy. *Nur Mohammad alias Bog Master Vs. The State 9 BLD (HCD) 314.*

(6) Medico Legal Evidence—Its value in an unnatural offence—Non-examination of the victim by any doctor or in the alternative if the victim was at all examined, non-submission of the medical report and the absence of the medical evidence renders the prosecution case doubtful. *Nur Mohammad alias Bog Master Vs. The State 9 BLD (HCD) 314.*

(7) Burden of proof—Act of sodomy is not done in presence of others who might be eye witnesses. But prosecution is not absolved of the burden of proving the offence. Absence of medical report about the sodomised act cast serious doubt on the prosecution case. Burden of proof heavily lies on the prosecution to prove the alleged act by reliable and convincing evidence. Shifting of burden of proof on defence—Talk of amicable settlement between the parties made the basis of corroborative proof of the alleged occurrence in total ignorance of established principle of Criminal Jurisprudence. High Court Division does not ordinarily interfere with the concurrent findings of facts arrived at by the Courts below but the present case is an exception to the rule *(Ref 9 BLD 314. 1 PCR 30). 41 DLR 301.*

(8) The accused appellant committed sodomy on a child namely, Saifullah who was found in almost unconscious condition. The accused appellant himself was under 16 years of age when he

committed the offence. He was tried under the provision of CrPC. Penetration is sufficient to constitute the carnal intercourse. The accused appellant having been under 16 years of age, his case comes under the provisions of Children Act, 1974 (XXXIX of 1974). *2 BCR 114.*

(9) The term "sodomy" means non coital carnal copulation with a member of the same or opposite sex. e.g., per anus or per os. Thus a man may indulge in sodomy even with his own wife. *AIR 1982 Kant 46.*

(10) Carnal intercourse with a bullock through its nose is an unnatural offence punishable under this section. *AIR 1934 Lah 261.*

(11) Where before the accused could thrust his organ into the anus of the passive agent, he spent himself the accused could not be found guilty of an attempt to commit sodomy. *AIR 1934 Sind 206.*

(12) A charge under this section is one very easy to bring and very difficult to refute and consequently the evidence in support of such a charge has to be very convincing. *AIR 1926 Lah 375.*

(13) Where there is no evidence of any unnatural offence having been committed, the conviction for that offence merely on certain remarks in the post-mortem report cannot be justified. *AIR 1955 NUC (MB) 4885 (DB).*

(14) It is desirable to consider medical evidence regarding the condition and appearance of the anus of the person on whom sodomy was alleged to have been committed. *AIR 1947 All 97.*

(15) Seminal stains on the dress of the accused is a relevant factor to be taken into consideration depending upon the facts of each case. *AIR 1955 NUC (Punj) 4997.*

(16) An offender under this section must be awarded a deterrent sentence. *AIR 1933 Sind 87.*

(17) Where the accused was convicted for committing an unnatural offence upon a young boy in view of the fact that no force was used, the sentence of three years imprisonment was reduced to 6 months. *AIR 1983 SC 323.*

(18) If the main accused had attempted to commit an offence under this section the abettor who was present could be found guilty only under this section read with Section 116. *AIR 1935 Sind 78.*

2. Practice.—Evidence—Prove: (1) That the accused had carnal intercourse with a man, woman or animal.

(2) That such intercourse was against the order of nature.

(3) That the accused did the act voluntarily.

(4) That there was penetration.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by District Magistrate or Additional District Magistrate specially empowered, or Chief Metropolitan Magistrate.

4. 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 of—at—had carnal intercourse against the order of nature with a certain man (or woman), to wit—(or with a certain animal), to wit (specify the kind of animal), and thereby committed an offence punishable under section 377 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

CHAPTER XVII
Of Offences Against Property

Chapter introduction.—*Our Constitution recognises the fundamental right of citizens to acquire, hold, transfer and otherwise dispose of property (article 42) and the primary responsibility as part of governance by the Government is to give protection to the property of their citizens. Offences against property are naturally enacted to conserve and preserve private rights in property against adverse attacks upon it. As such, they belong to that branch of jurisprudence which protects persons against violations of their right in property. But cases of aggravated violations of such rights have always been regarded as fit for speedy and deterrent action. This accounts for the evolution of a system which discriminates between civil and criminal remedies, for which a division between civil and criminal law becomes necessary. Such a division could not possibly be made by a sharp line, and howmuchsoever may be the care taken to define the province of the two branches of law, there must always remain cases on the frontier in which it is difficult to decide whether they legitimately appertain to the domain of civil or of criminal law. Indeed, this is really the battle-ground of the different systems upon which the laws of various countries are likely to differ. But they all agree in the central thought which prevades all systems, of which the principle is to make the protection of property a concern of the State. But how far it should go and when the State should withdraw, leaving the person aggrieved to his civil remedy, is a question upon which there is not likely to be any uniformity or consensus of opinion amongst jurists, though with the growth of international communication and diffusion of learning there is its possibility.*

This Chapter deals with:

(1) Theft (Secs. 378—382).

(2) Extortion (Secs. 383—389).

(3) Robbery and Decoity (Secs. 390—402).

(4) Criminal Misappropriation of Property (Secs. 403—404).

(5) Criminal Breach of Trust (Secs. 405—409).

(6) Receiving Stolen Property (Secs. 410—414).

(7) Cheating (Secs. 415—420).

(8) Fraudulent Deeds and Disposition of Property (Secs. 421—424).

(9) Mischief (Secs. 425—440).

(10) Criminal Trespass (Secs. 441—462).

Of Theft

Section 378

378. Theft.—Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, 'not being moveable property, is not the subject of theft but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.— A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.— A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(d) A being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the high-road not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession without Z's consent, with the intention of keeping it until he obtains money form Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z, her husband. Here it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband, Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

Cases and Materials : Synopsis

1. For cases and materials, see under section 379 next.

Section 379

379. Punishment for theft.—Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Railway Property (Unlawful Possession) Act.*
3. *Dishonest intention.*
4. *"Out of the possession of any person".*
5. *"Moves that property in order to such taking".*
6. *Explanation 1.*
7. *"Without that person's consent"—Explanation 5.*
8. *Subject of theft must be moveable property.*
9. *Theft of wood from Government forest.*
10. *Theft of telegraph wire.*
11. *Theft of aircraft.*
12. *Theft of fish in water.*
13. *Theft of salt.*
14. *Theft of water.*
15. *Theft of electricity.*
16. *Theft of gas.*
17. *Removal of cattle, horses, etc. turned loose.*
18. *Bona fide claim of right.*
19. *Cutting and removal of trees.*
20. *Removal of crops.*
21. *Joint possession.*
22. *Removal of property by wife.*
23. *Removal by owner.*
24. *Property under attachment or in respect of which Orders under Ss. 144, 145, Cr. P.C. are passed—Removal by owner.*
25. *Creditor removing property of debtor.*
26. *Temporary removal.*
27. *Master and Servant.*
28. *Hire purchase agreements.*
29. *Theft by more persons than one.*
30. *Theft and mischief.*
31. *Theft, criminal misappropriation and criminal breach of trust.*
32. *Theft and criminal trespass.*
33. *Theft and wrongful restraint.*
34. *Theft and secreting document.*
35. *Theft and receiving stolen property.*
36. *Theft and unlawful assembly.*
37. *Theft and robbery.*
38. *Attempt to commit theft.*
39. *Burden of proof and appreciation of evidence.*
40. *Possession of stolen property—Presumption.*
41. *Punishment.*
42. *Abetment of theft.*
43. *Procedure.*
44. *Charge.*
45. *Form of charge.*
46. *Civil liability for damages for removal of property by theft.*
47. *Practice.*

1. Scope.—(1) The word 'dishonestly' used in section 378 has to be read with sections 23 and 24 of this Code. The word 'dishonestly' occurring in the section involves both concepts "intention" and "dishonestly" and "dishonestly" again involves wrongful gain or wrongful loss. Intention is the key note of this section. The intention must be to take any movable property of the person 'dishonestly' and 'dishonestly' is defined in the Code as causing wrongful loss to one person and wrongful gain to another person and a wrongful gain or loss of property is achieved by unlawful means. This intention to adopt an unlawful or illegal means to achieve an illegal gain is the main ingredient of the offence of theft. It should be taken out of the possession of another person. A bonafide claim of right is a valid defence to a prosecution for theft. In order to set up in defence a plea of 'bonafide claim of right' to a charge of theft, it is necessary that the plea must be a honest one and made in good faith and is not a mere pretence. It must be a bonafide claim however weak. Complaint of theft can be filed by any person aware of the offence. (Section 378). Intention is the gist of the offence of theft. It is the intention of the taker which must determine whether the taking or moving of a thing is theft. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person or wrongful loss to another person. The real test in a case of an alleged theft of crops grown on land is as

to which of the parties had grown the crops. Where the complainant is shown to have grown the crops, the accused cutting and removing the same would be guilty of theft *(43 CrLJ 394)*. Generally speaking in the case of theft of crops, the question who grew the crops is the first matter to look to, but it is not the only thing in all cases. The question of title though secondary is relevant and so is the state of evidence as regards past possession *(36 CrLJ 83)*.The offence of theft is an offence against possession and not against title. The question in whom title to the land vests is foreign to the offence of theft. In a trial under this section, it is not the duty of criminal court to examine the complicated question of title. Removal of property on a bonafide claim of right unfounded in law and fact, does not constitute theft, but such a claim must not be a colourable one. Whether the claim is a bonafide one or not has to be determined upon the facts and circumstances of each case *(PLD 1965 Dac 315)*. An act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right. By the expression 'colour of a legal right' is meant not a false pretence but a fair pretence, not a complete absence of claim but a bonafide claim, however weak. When the accused sets up the defence that he had a claim to the property which he took away from the complainant, the prosecution must establish dishonest intention to show that this so-called claim was not made in good faith, but as only a cloak to conceal the dishonest intention and that the accused himself knew that there was no substance in the claim Theft can be established only by proof of dishonest intention and not by proof of illegality. Joint property may be the subject of theft by one of the joint owners, when all the elements of theft described in section 378 are present. Removal of fish from a public river is not theft *(17 DLR 211)*. The catching of fish in a tidal and navigable river without taking the permission of the licensee of the fishery from the Government, does not amount to theft as the fish cannot be said to be in the possession of the licensee. In a tidal and navigable river the fish can always escape and go wherever they like, they can always come from and go into the sea, they are in a state of nature. Fish in a private enclosed tank, the sluice of which remains closed so that the fish cannot escape, are in the possession of the owner of the tank and can become subject of theft *(15 CrLJ 77)*. It is not easy to detect cases of picking of pockets and where it has become extremely rampant a sentence of six months' rigorous imprisonment for the offence is not excessive. *(Section 379)*

(2) There cannot be any theft in the eye of law unless the moveable property is moved for being taken out of the possession. *Qari Habibullah Belali Vs. Capt. Anwarul Azim (1988) 40 DLR 295.*

(3) There cannot be any theft in the eye of law unless the moveable property is moved for being taken out of the possession. *Qari Habibullah Belali Vs. Capt. Anwarul Azim (1988) 40 DLR 295.*

(4) In an offence of theft there must be removal of the property out of the possession of another with intention to take dishonestly—Appellant received Taka 9000.00 in good faith from the Bank's counter instead of Tk. 1900.00 to which he was entitled and he had no knowledge that he was being overpaid—The dishonesty became full blown when the cashier requested him to return the excess amount in the evening at the school but the appellant gave a denial of having received the excess amount at all—The facts of the case do not constitute an offence of theft but they constitute another offence, dishonest misappropriation under section 402 of the Penal Code. The appellant may have received the money in good faith but the decision to appropriate the excess money to his own use makes it culpable—The conclusion is inescapable that he is inside the net. *Kawsarul Alam Vs. State 42 DLR (AD) 23.*

(5) Receipt of excess payment from Bank—Dishonest misappropriation—When the appellant detected that there had been an excess payment it was his duty to return the excess amount—Otherwise he could not escape a conviction for dishonest misappropriation. *42 DLR (AD) 23.*

(6) Excess payment—When receipt of excess payment becomes dishonest misappropriation—At the time when the cashier was putting the money into the hand of the appellant there is nothing to show that he was receiving it with the knowledge that he was being overpaid—But the next moment when the appellant detected that there had been an excess payment it was his duty to return the excess amount which did not belong to him—In consideration of the facts of the case the accused appellant could not be convicted for theft but he cannot escape a conviction for theft but he cannot escape a conviction for dishonest misappropriation. *Kawsarul Alam and others Vs. The State 10 BLD (AD) 12.*

(7) Theft—petitioners came upon the disputed land and cut and removed the hemp grown by the *bargadar* of the complainant who was in possession of the land—Magistrate gave clear finding upon discussion of evidence—question of fact—no interference. *Golbar Sarkar & others Vs. The State & another. 1 BSCD 245.*

(8) Theft—cutting and taking away of paddy—dishonest intention—*Bonafide* Claim of right—when not a valid defence in a case under this Section of the Code. *Abdul Ahad Vs. Rustom Ali & another. 3 BSCR 88.*

(9) Theft—Subjective ingredients—Mens Rea, when excluded—*bonafide* claim of right over land—reaping away of unripe paddy grown through bargadar—banafide claim of right to the land, whether can be valid basis for *bona fide* claim to the crops grown on the land. Held:—(i) The subjective element of theft—dishonest intention known as *animus furandi,* is an essential element of the offence without which such an offence is incomplete. A *bona fide* claim of right to the movable property which is sought to be taken away out of the possession of another, if reasonable, even though ill-founded, may exclude the necessary *mens rea* regarding an offence of theft. In order to show the absence of dishonest intention it is not necessary that the existence of some kind of legal right must be proved, but it will suffice if can be shown that the act was done under a claim of legal right which is *bona fide* and not a false pretence, even though there was, in fact, no legal right. (ii) *Bona fide* character of claim of right shall have to be ascertained with reference to the property which is the subject matter of the alleged offence. *Bona fide* claim of right to the land cannot be the valid basis for a *Bona fide* claim to the crop grown on such lands by the persons in possession of the same in assertion of their title thereto and the taking away of such crops by a person who has not grown them does necessarily exclude the element of dishonest intention even though such a person may have a good claim to a share of the land. *Shahjhan Mia Vs. The State & others. 4 BLR (AD) 147=27 D.L.R. (AD) 161.*

(10) Whether compounding should be allowed in appeal by leave—Criminal administration of justice in Bangladesh encourages compromise of certain disputes—Offence under this section is compoundable by the owner of the property stolen—Since the matter was pending by way of leave, composition of the offence allowed—Composition to have the effect of acquittal of the accused. *Abdus Sattar and ors. Vs. The State and anr. BCR 1985 AD 454=1986 BLD (AD) 105, 38 DLR (AD) 38.*

(11) An offence under this section has now been made compoundable, with Court's permission; u/s 345(2), Cr.P.C. by a recent amendment of law—In view of the reasons given in the joint-petition of the parties that they, in the interest of both, compromised the matter, permission may be given for compounding the offence—Accordingly, the joint application for compounding the offence—Accordingly, the joint application for compounding the offences accepted and the accused-appellants acquitted u/s. 345 of the Criminal Procedure Code. *Nasiruddin & others Vs. The State & another, BCR 1987 AD 92.*

(12) Recovery of stolen goods—Conviction for theft—Validity—If a stolen property is recovered from a person soon after the theft the court may presume that he is either a thief or a receiver of the

stolen property. In view of the direct evidence in lump considered along with the recovery of the stolen articles the court was justified in holding them (the accused) guilty under section 379. *Mouze Ali Howlader & ors. Vs. The State. 6 BSCD 35.*

(13) Commission of theft is an individual act and there must be clear evidence in respect of each individual accused and for the same reason the court is also required to consider the evidence against each of the accused separately and record its findings. *Abdul Mannan Vs. The State. 14 DLR (AD) 60=12 BLD (AD) 87.*

(14) The appellant claimed ownership over both land and the structure—House trespass, causing mis-chief and commission of theft are all interconnected and committed during the course of one transaction and acquittal from the charge of theft u/s. 379, PC of the appellant on the High Court Division's finding that the claim of both sides appears to be *bona fide,* make the conviction and sentence u/s. 448/427, PC improper and illegal as necessary criminal intention to commit the offence is absent—Criminal trespass for commission of theft was not proved and there was no criminal intention in dismalting the structure in question—Since there was no *mens rea* or criminal intention on the part of the appellant which is a necessary ingredient for offences under the sections, the conviction and sentence cannot be lawfully maintained under both the counts and consequently the appellant is acquitted of the charges. *Md. Golam Hossain Vs. The State. 8 BSCD 23.*

(15) Document filed by the defence to prove their possession, not considered—Cases of accused individually not considered, conviction set aside. There are certain points in favour of the defence which have not been considered by the Courts below. P.W. 3 deposed to the effect that one of the accused petitioners in the present case was in possession of the hut before they have been occupied by the petitioners. Ext. A, a rent receipt, supports the defence case as to their possession. These two points raise at least doubt in the truth of the prosecution case on the question of possession which is most essential point for the decision of the case. The case of the accused petitioners does not appear to have been individually considered in the light of the evidence on record. Accused have thereupon been acquitted. *Moijuddin alias Moijuddin Haji Vs. State (1966) 18 DLR 425.*

(16) Removal of fish from overflowing tank. Removal of fish from a pubic river is not theft, and further removal of fish from a tank which is overflowed and thus gets connected with the flowing streams and makes it possible for the free ingress and egress of fish from the tank, is also not theft. *Idris Ali Vs. State (1965) 17 DLR 211.*

(17) Conviction of several persons for theft demands a finding that each individual was guilty of theft—A general finding that certain things were taken away from the possession of the complainant is not enough for conviction. *Abdul Hamid Molla Vs. State (1958) 10 DLR 518.*

(18) No finding as to whether the taking away was done dishonestly—Conviction not maintainable—Section 379 begins with the word "intending to take dishonestly", it does not mean that if it is taken without consent it must mean that the intention is to take dishonestly. A charge of theft is not sustainable on the mere finding that properties were moved from another's possession without his consent. *Abdul Shah Vs. Afsaruddin Mollah (1959) 11 DLR 387 : 1960 PLD (Dac) 04.*

(19) Seizure of cattle, when amounts to theft. Accused can use force to release cattle. 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 (WPC) 179.*

(20) Seizure of cattle and taking them to the pound—When no offence. Where cattle which trespassed into a land in the joint occupation of the landlord and the tenant, the landlord's servants

were perfectly justified in impounding the cattle which were destroying the crop. *Qadir Baksh Vs. Crown (1954) 6 DLR (WPC) 179.*

(21) Seizure of cattle and taking them to the pound is no offence. It does not amount to the offence of a mischief as it is not causing such a change in the situation of the property as diminishes its utility or value; the act does not do so *per se* and the cattle when released are as useful as ever. It does not amount to an offence of theft because the essential element of taking property dishonestly, as contemplated by section 379, is lacking. *Qadir Baksh Vs. Crown (1954) 6 DLR (WPC) 179.*

(22) Conviction for theft not maintainable unless it is charged and found that the property was taken out of the possession of the complainant. No conviction is legal when the charge under section 379 stated that the accused committed theft of paddy belonging to the complainant without stating and finding that the paddy was taken out of the possession of the complainant. *Osman Ali Vs. Obaidul Hoq (1957) 9 DLR 72.*

(23) Theft charge does not lie when 144 Cr.P.C. proceedings are in force. No charge would lie under section 379 for taking paddy out of the possession of the complainant when he was debarred from entering upon the disputed land and exercising any act of possession in respect thereof by an order under section 144, Criminal Procedure Code, served on him before the date of occurrence. *Mofiz Ali Vs. Rajab Ali (1952) 4 DLR 490.*

(24) After acquittal on the charge of theft, no conviction for dacoity valid. When after a full trial a Magistrate acquits the accused of the offence of theft under section 379, he cannot be tried again for dacoity on the same facts without setting aside the acquittal in accordance with the provisions appropriate to the purpose. *Masirali Vs. Abdul Mamith (1956) 8 DLR 634.*

(25) Bonafide claim of right has reference only to the property the subject-matter of theft—But where the finding is that the accused persons purported to have purchased some interest in the land and therefore that may be regarded as having a bonafide claim of right over crop grown on the land is wholly misconceived. *Shahjahan Vs. The State (1975) 27 DLR (AD) 161.*

(26) Bonafide claim of right to the land cannot excuse for cutting and taking away paddy grown by the complainant on the land in his possession— Element of dishonesty not excluded. *Shahjahan Vs. The State (1975) 27 DLR (AD) 161.*

(27) Question of possession rather than of title is the test as to dishonest intention. It is rather the question of possession than of title which is of utmost importance for determining the dishonest intention motivating the act. To set up a claim to the crops which were grown by the complainant and were standing on the land in exclusive possession of that complainant can hardly be considered to be a fair pretence of property or right. *Shahjahan Vs. The State (1975) 27 DLR (AD) 161.*

(28) Bonafide dispute—No case u/s. 379.—To sustain a conviction under section 379 of the Penal Code it must be shown that there is no bonafide dispute of title or possession. In this particular case as has been found by the trial court that there is a bonafide dispute of title, I hold that the conviction and sentence under section 379 of the Penal Code is bad in law. *Chand Mia Vs. The State (1974) 26 DLR 232.*

(29) Complainant claims possession of the disputed vehicle through purchase from the accused—Evidence does not show that the complainant acquired right and title to the vehicle. Such possession by the complainant is not recognizable in law—Taking away the vehicle out of such possession without consent does not constitute an offence of theft. *Syed Ali Vs. State (1974) 26 DLR 392.*

(30) Charge of theft of goods when not an offence—Owner of goods when may be found guilty—Mere taking away something honestly on a bonafide belief of right today and then appropriating the same the next day even dishonestly may not amount to thieving. Further, under the provisions of the Penal Code a person can even be convicted of stealing of his own property if he takes the same dishonestly from the lawful possession of another. *Khoshlal Vs. Matleb (1982) 34 DLR 59.*

(31) Contested claim of right—Removal not a theft. When property is removed in the assertion of a contested claim of right, however unjustified that claim may be, the removal thereof does not constitute theft. *Yusuf Ali Mondal Vs. The State (1968) 20 DLR 747.*

(32) Theft—10 accused persons were found at night removing Gazari posts—'A' was also seen following them—No evidence to show that 'A' was aiding or helping other accused persons, Held—From the mere presence of 'A' it cannot be held that 'A' committed theft or actively aided or helped other accused to commit theft—Order of conviction of 'A' under circumstances, was set aside. *Haider Ali Vs. The State (1970) 22 DLR 503.*

(33) Intention, finding of—Without a finding regarding the intention of the accused persons order of conviction under sections 379 and 447 P.C. cannot be sustained. *Keramat Ali Vs. Probhat Chandra Majumder, (1972) 24 DLR 73.*

(34) Commission of theft is an individual act and there must be clear evidence in respect of each individual accused. For the same reason the court is also required to consider the evidence against all the accused separately and record its findings. *Abdul Mannan Vs. State 44 DLR (AD) 60.*

(35) The disputed hut was in the jimma of the complainant. The petitioners forcibly removed the same and took it away in spite of the complainant's protest. Such taking of property from the possession of the jimmadar constitutes offence u/s. 279 Penal Code. *Idris Vs. State 43 DLR 245.*

(36) Where the subject matter of theft belongs to the citizen of any other organisation or institution, theft *ipso facto* of such property does not become prejudicial to the economic and financial interest of the State. In the instant case as the motors in question belonged to the project for irrigation of land of different individuals there is no scope to hold that the theft of the motors was prejudicial to the financial and economic interest of the State. *Anisuzzaman Vs. State 43 DLR 35.*

(37) The contention that there was bonafide dispute with regard to the plot on which the hut was situated has no substance in this case, the consideration in the present case is whether there was any bonafide claim with regard to the hut which was the subject matter of theft. *Kazi Motiur Rahman Vs. Din Islam 43 DLR 128.*

(38) When growing of the case crops by the complainant and the cutting and taking away of the same dishonestly by the accused are proved, the accused is guilty of theft. When theft of the case crops by the accused by cutting and taking away of the same and damaging some crops in the process necessarily involves their entry into the case land and the accused are punished for theft and mischief, a separate conviction under section 447 Penal Code is unwarranted. *Motaleb Sardar (Md) and others Vs State and another 51 DLR 278.*

(39) The case property (a hut standing on a plot of land) was given in the jimma of the complainant but the accused petitioner forcibly removed it in spite of the protest of the complainant jimmadar from his possession—Such removal constitutes an offence under Section 379 of the Penal Code. *Idris and others Vs. The State 10 BLD (HCD) 352.*

(40) Bonafide claim of title in the land is now considered for ascertaining the guilt of the accused in an offence under Section 379 of the Penal Code but a bonafide claim over the subject matter of theft

is a relevant consideration. In order to convict an accused under Section 447 of the Penal Code, the Court is required to arrive at a finding, on consideration of the evidence on record, that each of the accused had the initial intention to commit the offence—In the absence of such a finding no conviction under Section 447 of the Penal Code is sustainable. *Safiuddin and others Vs. Minhajuddin Chowdhury and another 12 BLD (HCD) 301.*

(41) When growing of the case crops by the complainant and the cutting and dishonestly taking away of the same by the accused are proved, the accused is guilty of theft under section 379 of the Penal Code. In such circumstances, no plea of bonafide claim of right to the case land can save the accused from the criminal liability. *Md. Motaleb Sardar and others Vs. The State and another, 19 BLD (HCD) 407.*

(42) Theft and bonafide claim of right—It is well-settled that a co-sharer in exclusive possession of a parcel of land is entitled to maintain his possession therein to the exclusion of his co-sharers until the ejmali property is partitioned by metes and bounds but before effecting such partition the co-sharers or co-owners out of possession have no right to disturb his possession, not to speak of cutting and taking away crops grown by him. In such a case the bonafide claim of right in the land cannot extend to cutting and taking away crops grown by a co-sharer in possession. Bonafide or contested claim of right is no defence against a charge under section 379 of the Penal Code for cutting and taking away crops grown by the co-sharer in possession. *Nasiruddin Shah and others Vs. Nazrul Islam and others, 18 BLD (HCD) 634.*

(43) Bonafide claim of right to property—When not available—A cosharer in exclusive possession of a portion of land is legally entitled to maintain his possession therein to the exclusion of other cosharers until the joint property is partitioned by metes and bounds. Bonafide claim of right to the property is no defence in the case under section 379 of the Penal Code and such defence cannot be allowed to extend to the cutting and taking away the crops grown by the cosharer in possession of the land. *Nasiruddin Shaha and others Vs. Nazrul Islam and others—3, MLR (1998) (HC) 240.*

(44) Bonafide or contested claim of right is no defence against a charge under section 379 of the Penal Code for cutting and taking away crops grown by the co-sharer in possession. *Nasiruddin Shaha and others Vs Nazrul Islam & ors. (Criminal) 3 BLC 524.*

(45) Neither of the Courts below has endeavoured to discuss any evidence against each accused person and gave no such finding against them individually and hence the order of conviction and sentence under section 379 of the Penal Code is not sustainable in law. *Asiruddin (Md.) alias Asiruddin Sarker and others Vs. State and another (Criminal) 5 BLC 641.*

(46) Both the courts below ought to have found that there was a bonafide dispute over title and possession of the case land which existed between the parties and hence the trial Court illegally passed the order of conviction and sentence which was wrongly upheld by the appellate Court without applying its judicial mind and as such the conviction and sentence under sections 379 and 447 of the Penal Code are not sustainable in law. *Asiruddin (Md.) alias Asiruddin Sarker and others Vs. State and another (Criminal) 5 BLC 641.*

(47) It is the settled principle of law that a criminal case under section 379 of the Penal Code would not lie where there is a contested claim of title or bonafide dispute as to right, title and possession over any property. Learned Sessions Judge committed no illegality in acquitting the opposite party Nos. 1-3 after reversing the judgment and order of conviction and sentence passed by the learned Magistrate. *Mannan Mondal Vs. Moshfiqur Rahman Alias Azad and 3 others (Crininal) 6 BLC 434.*

(48) In an offence of theft there must be removal of the property out of the possession of another with intention to take dishonestly—Appellant received Taka 9000.00 in good faith from the Bank's counter instead of Taka 1900.00 in which he was entitled and he had no knowledge that he was being overpaid—The dishonesty became full-blown when the cashier requested him to return the excess amount in the evening at the school but the appellant gave a denial of having received the excess amount at all—The facts of the case do not constitute an offence of theft but they constitute another offence, dishonest misappropriation under section 403 of the Penal Code. The appellant may have received the money in good faith but the decision to appropriate the excess money to his own use makes it culpable—The conclusion is inescapable that he is inside the net. English law—Larceny—Facts disclosed would make the appellant guilty of larceny—Animus furandi and payment under a mistake of fact distinguished—Under English law innocent taking followed by conversion due to subsequent change of intention is a civil wrong but not an offence—Our law is different *(Ref 10 BLD 12 AD, 10 BCR 59 AD). 42 DLR (AD) 23.*

(49) There cannot be any theft in the eye of law unless the moveable property is moved for being taken out of the possession. *40 DLR 245.*

(50) No specific finding as to initial intention of the accused—Conviction under section 447 based on discrepant and contradictory statements of prosecution witnesses cannot be sustained—Conviction under section 379 is, however, maintained in the facts and circumstances of the case. Court to look into the quality of evidence but not to the number of witnesses. *10 BCR 53.*

(51) Offence under section 379 having been made compoundable by a recent amendment with court's permission under sub-section (2) of section 345 of the Code of Criminal Procedure, joint application for compounding the offences under section 345 CrPC is accepted and the accused appellants are acquitted. *7 BCR 92 AD.*

(52) Conviction under section 379 Penal Code—Appeal on special leave pending before the Appellate Division against conviction when a petition was moved for permission to compromise the dispute between the complainant and the accused (the parties being inter-related)—Compromise petition allowed as law encourages compromise. We have no hesitation in allowing the composition and as a result this composition shall have the effect of acquittal of the accused *(Ref 5 BCR 454 AD). 38 DLR (AD) 38.*

(53) After acquittal under section 379, charge under section 148 must fail. The appellants having been acquitted of the charge under section 379 of the Penal Code on the ground of contested right of possession of the case land between two parties, there could be no conviction of the appellants under section 148 of the Penal Code. The charge under section 148 of the Penal Code against the appellants having not mentioned any of the objects as common object of the alleged unlawful assembly as enumerated in section 141 of the Penal Code, the charge is bad and therefore it has vitiated the entire trial. Original Medical Certificate not filed but a duplicate of it suspicious. *38 DLR 300.*

(54) The appellant's revisional application against the Magistrate's order of acquittal was referred to the Single Judge of the High Court who, holding that he had jurisdiction in the matter, decided the application. Leave was granted to consider whether in view of the provisions in the High Court appellate side Rules, the Single Judge was right in exercising jurisdiction in respect of an offence punishable by a sentence of imprisonment exceeding one year. Held: The offence under section 379 of the Penal Code quite expressly and beyond any doubt is punishable with a sentence of imprisonment for three years. Obviously, Rule VII could have immediate application to this offence clearly barring the jurisdiction of a Single Judge to hear the revisional application against the order of acquittal passed in the case, involving this offence. *4 BSCR 366.*

(55) Village Court's jurisdiction to try cases for theft where the property involved is valued at Taka 5000.00. Magistrate trying a case of theft the value of the property involved being less than Taka

5000.00 Magistrate has no jurisdiction. The order of conviction by the Magistrate being illegal provision of section 529 CrPC cannot be called in and in support of Magistrates order. *35 DLR 100.*

(56) Written complaint to SDM after six years of commission of alleged offences—Complaint petition and statement on oath made by the complainant do not implicate accused appellant—Enquiry officer's report states that a prima facie case is made out against accused appellant and others—Cognizance taken by SDM—High Court Division refused to quash proceedings on ground that Enquiry Officer's report discloses a prima facie case—High Court Division's view held incorrect—Continuance of such proceedings amounted to abuse of process of law. *1 BCR 68 SC.*

(57) Under section 379 PC the Magistrate is firstly to decide if the complainant was in possession of the disputed land and if he grew the disputed crops on the said land and then to decide if the accused persons dishonestly cut and took away the crops without the consent of the complainant. This can be done only on appreciation of evidence produced in support of the allegations. *29 DLR 309.*

(58) Conviction of several accused on a general finding of theft without consideration of each individual case cannot be upheld. In a criminal case the court is only concerned with the actual physical possession of the parties. Mere relationship is no ground to disbelieve a witness if it is otherwise found trustworthy. *29 DLR 3.*

(59) Where with reference to the first report at thana and other circumstances the case against an accused person is very doubtful, benefit of the doubt should be given to accused and in such cases even the concurrent findings of fact of the lower courts are liable to be set aside on revision. *25 DLR 258.*

(60) In the absence of an express finding regarding dishonest intention, conviction of an accused under section 379 cannot be maintained *(Ref: 11 DLR 387). 24 DLR 101.*

(61) The judgment of the lower appellate court is itself of a summary nature and does not discuss any evidence. It is correct that Exhibits A and B have not at all been considered by that court. There are documents of vital importance and non-consideration of such documents cannot but be held to have seriously prejudiced the defence. *20 DLR 303.*

(62) Co-sharers are in exclusive possession of specific portion of joint property by amicable arrangement, though no legal partition by metes and bounds did take place. Any taking away of trees from the portion of one co-sharer by encroachment upon it is punishable as an offence of theft and criminal trespass under sections 379 and 447 of the Penal Code. *17 DLR 479.*

(63) Complainant restrained by an order under section 144 CrPC from entering on the disputed land. Accused taking away paddy from the land while the order was in force—Not offence under section 379 (Ref 4 DLR 490). *10 DLR 366.*

(64) Where the initial complaint and charge against the accused disclosed an offence under section 379 Penal Code, his conviction under section 427 cannot be sustained *(Ref 6 DLR 30). 6 DLR 32.*

(65) Word "possession" must be interpreted in its broadest sense, and apart from physical possession must also mean ownership of and control over, moveable property concerned. *2 PCrLJ 155.*

(66) Section 378 defines 'theft' and S. 379 prescribes the punishment therefor. A person commits 'theft' as defined in S. 378 if—

(a) he removes movable property,

(b) from out of the possession of another,

(c) without that person's consent,

(d) in order to take it dishonestly. *AIR 1965 SC 585.*

(67) Where victim does not offer any resistance against dispossession of moveable property even if hurt is caused voluntarily, the offence committed by accused would be only theft and not one under Section 384. *(1982) CriLJ 714.*

2. Railway Property (Unlawful Possession) Act.—(1) The Act being a special Act overrules the provisions of S. 379 of the Code which is a general Act. A conviction for theft of railway property under the Act, instead of under S. 379 of the Code, is not illegal. *1972 AllWR (HC) 683.*

(2) Accused charged of stealing railway property under Sections 379, 461 and 411., P.C.—Not found in possession—Allegation and proof that they had been in possession—Charge under Section 3 of Act of 1966 is justified. *AIR 1979 SC 1825.*

3 Dishonest intention.—(1) It is essential for the offence of theft that the removal of the property must have been with the intention to take it dishonestly. *1980 CriLR (Mah) 85.*

(2) Taking the definition of "dishonestly" in S. 24 and "wrongful gain" and "wrongful loss" in S. 23 together, a person can be said to have dishonest intention if in taking the property it is his intention to cause gain by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by unlawful means, of property to which the person so losing is legally entitled. *AIR 1965 SC 585.*

(3) The gain or loss need not be a total acquisition or a total deprivation; it is enough if it is a temporary retention of property by the person wrongfully gaining or temporary 'keeping out' of property, of the person legally entitled. *AIR 1963 SC 1094.*

(4) The intention to cause wrongful gain to oneself or wrongful loss to another is known as animus furandi. *AIR 1965 SC 585.*

(5) The burden is on the prosecution to show that the accused was acting dishonestly. *AIR 1955 NUC (Orissa) 3230.*

(6) The question whether the accused had the dishonest intention is one of fact. A guilty intention may be inferred from the facts proved. *AIR 1960 AndhPra 569.*

(7) A person has no right to steal the property of another in order to bring pressure on him to restore his property which had been stolen by that other. The act will amount to theft even in such a case. *AIR 1935 Lah 769.*

(8) Where the accused broke into a temple and removed idols for celebrating a festival it was held that the taking could not be said to be dishonest. *AIR 1941 Mad 71.*

(9) Accused, an illiterate cultivator, applied for Letters of Administration with the copy of the will annexed to the estate of his deceased uncle, who had made a will in favour of the accused. Before Letters of Administration were granted but at a time when the accused had no suspicion that a caveat was likely to be entered by the uncle's widow, the accused removed certain property which was in the possession of the widow, but which formed part of the property bequeathed to the accused under the will. It was held that the conduct of the accused did not disclose presence of dishonest intention. *AIR 1926 Cal 241.*

(10) Where the accused in order to punish a boy, tied him to a tree and then took away his cloth in order to put him to shame it was held that it was not a case of theft. *AIR 1924 Mad 587.*

(11) Even an intention to cause wrongful gain or wrongful loss temporarily is "dishonest". *AIR 1959 SC 1390.*

(12) In order to prove dishonest intention the question of title to the property in question is relevant. *AIR 1962 Tripura 25.*

4. "Out of the possession of any person".—(1) The offence of theft is an offence against possession and not against title. *1977 AllCriC 243.*

(2) In order to prove dishonest intention which is one of the essential constituents of the offence of theft the question of title to the property will enter into the picture. *AIR 1962 Tripura 25.*

(3) Removal of idols from the possession of Pujaris maintaining the idols as agents of the Hindu community amounts to theft. *AIR 1967 Raj 190.*

(4) Where a carter removes from the godown of a railway company a bag filled with pilferings from a number of bags consigned to others, the bag being in the possession of the railway as bailees, the act amounts to theft. *AIR 1918 Pat 314.*

(5) A person leaving his cycle temporarily outside a market or in a park with the idea of taking it back after returning does not abandon its possession and hence, one who dishonestly removes it is guilty of theft. *AIR 1954 Sau 33.*

(6) X, a Mahomedan agreed with some Hindus that a she-calf belonging to him should be tied in the courtyard of his neighbour who was Hindu so that the calf will not be sacrificed by X. After the calf was so tied, the calf was removed elsewhere by the order of the accused. It was held that though at the time of the removal the calf was in the court-yard of the neighbour, it was still in the possession of X and the accused was guilty of theft. *AIR 1929 Pat 429.*

(7) The auction-purchaser at a rent execution sale of a holding took delivery of possession. Subsequently the persons who were previously in possession cut and removed some bamboo clumps standing on the land. It was held that when the auction-purchaser acquired the land he acquired the bamboos also and hence the persons were guilty of theft. *AIR 1932 Pat 344.*

(8) A Wada was owned by one M. The landlord of the village thinking that the original tenant had left the village and the Wada had reverted to him, entered the Wada and removed the things belonging to another person lying there. It was held that he could not enter the Wada in the possession of M and remove the things that were there and was guilty of theft. *AIR 1951 Kutch 49.*

(9) Where the possession of a thing has been abandoned by the owner, the person taking the thing will not be guilty of theft. Thus, removal of bricks which had been left lying for eight years (i.e., abandoned) will not be theft. *AIR 1925 Rang 113.*

(10) A thing does not become res nullius merely on the owner determining to destroy or abandon it. It continues to be his property until completion of the process of abandonment or destruction. Abstraction of a currency note which has been held up by the currency officer for destruction is theft though at the time of abstraction the process of destruction had partly been done. *AIR 1925 Sind 21.*

5. "Moves that property in order to such taking".—(1) To support a conviction under S. 379 it must be shown that the property was moved out of the possession of the complainant. Mere proof that the property in accused's possession belonged to the complainant is not sufficient. *(1949) 53 CalWN (1 DR) 48 (DB).*

(2) Since the definition of theft requires that the moving of the property is to be 'in order to such taking" the word 'such' meaning 'intending to take dishonestly' the very moving must be with dishonest intention. *AIR 1958 Mad 476.*

(3) Till the property is moved, no offence of theft can be committed even if the alleged offender had intended to take dishonestly the property out of possession of any other person without his consent. *AIR 1965 SC 926.*

(4) A mere seizure of cattle found trespassing on a certain land does not amount to moving the cattle; the act of moving the cattle could only be subsequent to the act of seizing them. Hence, the mere seizure of cattle, though illegal, cannot amount to the offence of theft. *AIR 1965 SC 926.*

(5) Where the accused cut the string with which a hass (a neck ornament) was fastened round the complainant's neck and forced the ends of the hass slightly apart intending to remove the same from the neck but on account of the struggle that ensued between him and the complainant the hass fell from the latter's neck and was found on the bed, it was held that this constituted sufficient moving of the hass so as to bring the act under S. 378. *AIR 1918 Lah 397.*

(6) The offence of theft is completed if there is a dishonest moving of a thing even when the thing or the property is detached from that to which it was originally secured. If the thief moves the thing even an inch from the place where it lay, the offence would be complete though he may then leave it alone. *AIR 1958 Mad 476.*

6. Explanation 1.—(1) Earth, that is soil and all component parts of the soil and minerals when severed from the earth or land to which they are attached becomes movable property capable of being the subject of theft. *(1904) 1 CriLJ 429.*

(2) Where the accused persons were convicted of theft and mischief for clearing a piece of Government land and cutting and appropriating the trees thereon, it was held that the conviction was not illegal, as the mischief preceded the theft which, under Explanation 1 could not have been committed until the trees had been detached from the ground. *(1864-1866) 2 BomHCR (Cr) 392.*

7. "Without that person's consent"—Explanation 5.—(1) An essential ingredient of theft is the taking of the property out of the owner's possession without his consent. *(1964) 2 Mad LJ 271.*

(2) Where the accused removed the box belonging to himself from the possession of the Station Master of the Railway Administration after paying for certain excess charges payable by him, it was held that the accused must be taken to have removed the box with the implied consent of the Station Master and committed no offence of theft. *AIR 1916 All 89.*

(3) A consent given on a misrepresentation of facts is one given under a misconception of facts within the meaning of S. 90 and the taking of the property in such a case must be held to be without consent and will amount to theft. *AIR 1963 Bom 74.*

(4) Where a licensee cuts down trees in Government forest which are not covered by his licence and the person authorised to give consent to remove them out of the possession of the Government gives it by issuing removal pass and the bill of title to timber under the misconception that the timber to be removed was timber covered by the licence, the consent is one given under a misconception of fact and is no consent for purposes of S. 378 and the removal of timber in such circumstances amounts to theft. *AIR 1930 Rang 114.*

(5) Where a Municipal Commissioner got from the Municipal clerk some letters written by him to the Chairman for perusal and did not return them it was held that even if the consent of the municipal clerk for parting with the documents might have been obtained by deceit or coercion the Municipal Commissioner could not be made liable for theft, though he might be liable for some other offence. *AIR 1960 Pat 546.*

8. Subject of theft must be movable property.—(1) 'Property' is a generic term for all that a man has dominion over. It has been defined to be "the unrestricted and exclusive right to dispose of

the substance of a thing in every legal way and exclude every one else from interference with it". *AIR 1957 Pat 515.*

(2) Res nullius (thing which has no owner) or ferae naturae (birds and beasts in their wild state such as deer, hares, peasants, partridges, etc.), as distinguished from domitae naturae, (tame animals and birds) are not property at all and cannot be subject-matter of theft or larceny. *AIR 1955 Mad 299.*

(3) "Moveable property" has been defined in S. 22 ante as including corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth. Immovable property cannot, be a subject of theft. *(1908) 7 CriLJ 49 (Nas).*

(4) The following will be movable property which may be a subject matter of theft:—

(a) Valuable security is movable property. *1979 CriLJ NOC 95 (Goa).*

(b) Flimsies (decoded cablegrams) meant to be destroyed, so long as they are not destroyed. *AIR 1921 Sind 57.*

(c) Soil minerals when severed from earth to which it is attached. *(1891) ILR 15 Bom 701.*

(d) A Hindu idol. *AIR 1967 Raj 190.*

9. Theft of wood from Government forest.—(1) A theft of wood from Government forest would be governed by S. 378, Penal Code in the absence of anything in the Forest Act to exclude the operation of the Penal Code. *1885 PunRe 10 P. 20.*

10. Theft of telegraph wire.—(1) The ingredients of an offence under S. 5, Telegraph Wire (Unlawful Possession) Act are different from those of one under the present section. Hence where an accused is charged under the former and acquitted he cannot be convicted under this section by applying S. 238, Criminal P. C. *1973 CriLJ 6 (All).*

11. Theft of aircraft.—(1) The taking out of an aircraft by a military cadet for an unauthorised flight gives him the temporary use of the aircraft for his own purpose and deprives the owner of the aircraft, viz., the Government of its legitimate use for its purposes i.e., the use of the aircraft for the Air Forces squadron. Such use being against all regulations of the aircraft flying is a gain or loss by unlawful means. There is also the absence of consent on the part of the owner. The cadet, in such a case, is therefore guilty of theft of the aircraft. *AIR 1957 SC 369.*

12. Theft of fish in water.—(1) Fish in an acquarium or in a tank of 20 or 30 square yards may be possessed, but fish in a large sheet of water of several acres in extent cannot be the subject of possession or theft. *1970 CriLJ 638 (Orissa).*

(2) Fish in a public river or flowing stream are not stored or bred there they are not confined within an enclosed space and are therefore free to go wherever they like. They are ferae naturae i.e., in a state of nature and hence nobody can be said to be in possession of them and therefore no theft can be committed in respect of such fish. *AIR 1955 NUC (Patna) 3243.*

(3) The fish in a private enclosed tank, the sluice of which remains closed so that the fish cannot escape, are in the possession of the owner of the tank and can be subject of theft. *AIR 1965 SC 585.*

(4) Where the fish are able to go in or out of a private fishery or tank the act of fishing followed by removal of the fish does not amount to theft. *AIR 1939 Oudh 14*

(5) Fish confined in a pond from where they cannot escape but can be caught by bailing out the water, can be subject of theft. *AIR 1943 Mad 34.*

(6) Where the accused claimed to have caught fish in a tank under a bona fide claim of right, it was held that they could not be convicted for the offence of theft. *AIR 1965 SC 585.*

13. Theft of salt.—(1) The accused took away salt naturally formed in a creek which was under the supervision of a man belonging to the Customs Department stationed there to prevent persons taking away salt naturally formed from sea water. It was held that salt having, in this case, been legally appropriated, its dishonest removal constituted theft. *(1882) ILR 4 Mad 228.*

14 Theft of water.—(1) Running water not reduced to possession cannot be the subject of theft. *(1908) 7 CriLJ 367 (Cal).*

(2) Water when conveyed in pipes and thus reduced to possession can be the subject of theft. *AIR 1924 All 131.*

15. Theft of electricity.—(1) Section 378 of the Penal Code read by itself, even after the enactment of S. 39, Electricity Act (1910), would not include theft of electricity, for electricity is not 'corporeal property' within the definition in S. 22 and cannot be considered to be movable property; the only way in which it could be said that S. 39 of the Electricity Act extended S. 378 of the Penal Code is by stating that it made something which was not a theft under Section 378, Penal Code, a theft within the meaning of that section. *AIR 1965 SC 666.*

(2) Actual extraction of electricity by artificial means proved—Accused No. 1 owner of meter connection. Accused No. 2 running some business therein—Licence stands in name of Accused No. 1—Prosecution discharging initial onus of proof—Accused persons will have to show that tempering of electricity was done without their knowledge. *1983 MadLJ Cri 315.*

16. Theft of gas.—(1) Abstraction of gas belonging to a Corporation or a Company from the gas pipe without its passing through the matter in order to avoid payment for consumption of gas amounts to larceny under the English law. *(1869) 38 LJ MC 54.*

17. Removal of cattle, horses, etc. turned loose.—(1) When a person seizes cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gives out that he is taking them to the pound, he commits on offence of theft, however mistaken he may be about his right to that land and crop. *AIR 1965 SC 926.*

(2) Mere seizure of cattle, though illegal, cannot amount to theft. *(AIR 1965 SC 926.*

(3) Where the cattle are seized at a very great distance from the field damaged and when the cattle had already come within their owner's possession, the act of the accused in seizing and removing the cattle is not only not covered by S. 10 of the Cattle Trespass Act, but also amounts technically to an offence of theft. *AIR 1947 Lah 380.*

(4) Where cattle trespass on the land of another but cause no damage, they are not liable to be taken to the pound, but the owner of the field removing them to the pound under a bona fide belief of his right to do so is not guilty of theft. *AIR 1949 All 180.*

(5) Cattle sent out to graze in the pasture, jungle or common land are still in the possession of the owner and can be subject of theft. *AIR 1954 Nag 55.*

18. Bona fide claim of right.—(1) A bona fide claim of right to property is a good defence to a prosecution for theft. In such a case no dishonest intention can be attributed to the taker. To constitute theft there must be not only no legal right but also no appearance or colour of a legal right. *AIR 1965 SC 585.*

(2) It will not be a theft if a person acting under a mistaken notion of law or fact and believing that a certain property belongs to him, removes that property from the possession of another. *AIR 1965 SC 926.*

(3) The claim of right must not be a mere colourable pretence to obtain or to keep possession. *AIR 1969 Orissa 70.*

(4) By the expression 'colour of a legal right' is meant not a false pretence but a fair claim, not a complete absence of a claim but a bona fide claim, however weak. *AIR 1965 SC 585.*

(5) The assertion of a claim of right must be sufficient to create a reasonable doubt that the property may not belong to or be in the possession of the complainant. *AIR 1958 Mad 476.*

(6) Whether a claim is bona fide is mainly a question of fact. *AIR 1965 SC 585.*

(7) Where the High Court held that a certain survey number belonged to the complainant and not to the accused, the action of the accused, about two weeks after the decision of the High Court, in cutting the standing crops on the survey number was held not to be under a bona fide claim of title. *AIR 1951 Hyd 78.*

(8) Where two persons are asserting their exclusive right to take sand from a particular spot of the river as lessees from two different persons whose title to lease is in dispute, it may well be that both of them are claiming a bona fide right to take sand. In such a case a prosecution under Sec. 379, if instituted against any of them, is bound to fail. *AIR 1951 Cal 207.*

(9) Where the heir of the deceased and his servant removed the cattle belonging to the deceased a few days after his death from the possession of the concubine of the deceased, it was held that they were not guilty of theft. *AIR 1941 Mad 674.*

19. Cutting and removal of trees.—(1) A tree so long as it is attached to earth, is not movable property and cannot be the subject of theft; but as soon as it is severed from the ground with the dishonest intention of taking it, the offence of theft is committed. *(1869-70) 5 Mad HCR (App Side) xxxvi.*

(2) If a lessor cuts and removes trees from land in the lessee's possession it would constitute theft. *1966 CriApp R (SC) 392.*

(3) A mortgagee who is in possession of trees under the terms of the mortgage deed without having any right to cut and appropriate them, cuts and appropriates them does not commit the offence of theft as he is given possession of the trees. *AIR 1940 Pat 701 (701) : 41 CriLJ 795.*

(4) Where a raiyat of an estate who had paid his jungle dues took some firewood for domestic purposes from the jungle outside the boundaries of his village without a pass or permit from the estate, it was held that the raiyat acted in pursuance of a bona fide claim of right and was not guilty of theft. *AIR 1931 Pat 99.*

(5) Accused removing two beams of timber from custody of lambardar to whom they had been made over by forest department as having been unlawfully cut by the accused from his own land—No offence. *1962 RajLW 605.*

(6) Where the complainant having purchased a tree, felled it and cut it into suitable logs but the accused claiming that the tree belonged to the proprietors of the village removed the timber, it was held that the act of the accused was not covered by bona fide claim of right. *AIR 1933 Lah 481.*

(7) Forest produce must be proved to belong to Government. *AIR 1939 Lah 469.*

20. Removal of crops.—(1) Standing crop so long as it is attached to the earth is not movable property but the moment it is severed from the earth it can become subject of theft. In fact, the very fact of severance may constitute theft. *1965 MLJ (Cr) 119.*

(2) If the taking of the crop is dishonest a conviction may be had for theft. *AIR 1934 Oudh 182.*

(3) The question of title, though secondary, is relevant and so is the question of past possession. *(1966) 32 CutLT 859 (864); AIR 1944 Pat 274.*

(4) The questions of title become relevant for the purpose of appreciating the evidence of the present possession of the land. *AIR 1952 Sau 22.*

(5) Where the charge is that the accused removed crop from the field in the possession of the complainant, it is essential to prove such possession. *AIR 1971 Pat 124.*

(6) Where the question of possession of land and crop on the date of the incident were not beyond controversy, a conviction under S. 379 was set aside by the Supreme Court. *AIR 1972 SC 949.*

(7) Where the Court had declared that a certain survey number belonged to the complainant and not to the accused, it was held that the cutting of the crops on the survey number by the accused about two weeks after the decision of the High Court amounted to theft as it could not be said to be under a bona fide claim of right. *AIR 1951 Hyd 78.*

(8) Where pending an appeal by the tenant against a decree in favour of the landlord in a suit for possession, the landlord obtained delivery of possession but the tenant removed the crops after the delivery was given, it was held that under the circumstances the tenant could not be said to have any idea of causing wrongful gain to him or wrongful loss to decree-holder landlord. *AIR 1927 Pat 130.*

(9) Zamindar entitled to share in crops—Removal by raiyat without payment to Zamindar—Dishonest intention—Raiyat is guilty. *(1902) 26 Mad 461.*

21. Joint possession.—(1) Joint property will be deemed to be in the possession of all the co-sharers or co-proprietors and hence S. 378 will not include, under the offence of theft, a case where one joint proprietor takes into his sole possession property belonging to himself and his coproprietors which had been previously in their joint custody. *1979 SrinagarLJ 206. (J&K).*

(2) Theft will not include a case where a jointly owned property is actually in possession of one co-owner and is taken away by the other co-owner. *AIR 1927 Lah 650.*

(3) A co-sharer in possession of a joint property has the undoubted right to remove movable property in his possession and also in the possession of other co-sharers from one spot of the joint land to another spot of the same land. *AIR 1936 Cal 261.*

(4) An existing partnership between the complainant and the accused will not rule out the commission of an offence under S. 379 by the accused with respect to the partnership property. *AIR 1969 Cal 232.*

22. Removal of property by wife.—(1) If a wife removes her husband's property left in her custody from his house with dishonest intention, she is guilty of theft. *(1894) ILR 17 Mad 401 (402).*

(2) A Hindu wife cannot be convicted of theft for taking away her palla or Stridhan out of the custody of her husband. *(1871) 8 BomHCR Cri 11.*

23. Removal by owner.—(1) Under certain circumstances an owner of property may be guilty of stealing his own property if he takes it out of the possession of another dishonestly. *1930 MadWN 90.*

(2) A woman contracted to deliver a barge to a person on payment of a certain amount. The vendee made a part payment but failed to pay the balance and the woman, after notice to the vendee, took away the barge from the place where it was brought for delivery to the vendee. It was held that under

the circumstances there was no dishonest intention on the part of the woman in seizing the barge. *AIR 1930 Bom 488.*

(3) The owner of a buffalo which was impounded rescued it after opening the door by slipping the chain over the lock. It was held that the owner was guilty of theft, as the rescuing was with dishonest intention and from the possession of the authorities of the pound in whose possession the buffalo must be deemed to be after it was impounded. *AIR 1927 Mad 343.*

24. Property under attachment or in respect of which orders u/ss. 144, 145, Cr.P.C., are passed—Removal by owner.—(1) Where the property of the judgment debtor is attached and placed in the custody of the sapurdar and subsequently the judgment-debtor knowing that the property had been attached takes it and appropriates it to his own use, he is guilty of theft. *ILR (1978) 1 Cut 381.*

(2) Where land is attached under S. 83, Criminal P. C., and actual possession is taken by the posting of a constable on the spot, a person removing the standing crop from such land is guilty under S. 379. *AIR 1940 Cal 163.*

(3) Where in execution of a decree against a person, property belonging to another person is being wrongfully taken away by the bailiff, the owner taking back his property is not guilty of theft. *AIR 1959 Raj 289 (290).*

(4) The land of the accused was sold in execution of a decree against him and the delivery of the land was ordered. Crop was raised on the land by the lessee of the accused after the Court sale and delivery of the crops was not ordered by the Court. The accused removed the crop. It was held that the removal could not be said to be dishonest. *AIR 1941 Mad 41.*

(5) The landlord sued A and B for possession of the holding transferred by A to B. The suit was decreed and an appeal filed by A was pending. In the meantime the landlord obtained delivery of possession but A cut and removed the crops after the delivery was given. It was held that the accused could not be said to have any idea of causing wrongful gain to him or wrongful loss to the decree-holder and was not guilty of theft. *AIR 1927 Pat 130.*

(6) S obtained a rent decree against R. S. purchased R's holding in execution and obtained possession. R filed a suit before such purchase, to set aside the rent decree as obtained by fraud. Pending such suit R removed the crops from the holding. The rent decree was subsequently set aside by the Court. It was held that R could not be said to have dishonest intention in removing the crops. *AIR 1941 Pat 369.*

25. Creditor removing property of debtor.—(1) A creditor who takes away movable property of his debtor from the latter's possession without his consent with the intention of coercing him to pay his debt commits the offence of theft as defined in Section 378. *(1895) ILR 22 Cal 1017.*

26. Temporary removal.—(1) The gain or loss contemplated by the expression "dishonest taking" need not be a total or permanent acquisition or a total or permanent deprivation; it is enough if it is a temporary retention of property by the person wrongfully gaining or temporary keeping out of property from the person legally entitled to it. 'Theft' under the Penal Code differs from 'larceny' in English law, which contemplates permanent gain or loss. *AIR 1963 SC 1094.*

27. Master and servant.—(1) A servant would be guilty of theft if he runs away with property entrusted to him by the master. *AIR 1927 All 470.*

(2) Where a mercantile agent was entrusted with certain shares of a company with full authority of disposal and he sold them to various persons, it was held that the case was not covered by illustration (d) to S. 378 and he was not guilty of theft. *AIR 1965 Cal 355.*

(3) A creditor through his servant seized the radio of his debtor openly claiming it as security for the debt. It was held that the servant having acted under the directions of his master his conviction for theft could not be sustained. *AIR 1965 Mad 483.*

(4) Where the accused knows that his master was removing goods of the complainant without even a pretence of right and yet he assists him in doing so the accused acts dishonestly and is guilty of theft. *AIR 1926 Pat 36.*

(5) Where the servants of the daristimrardar cut trees without the permission of the istimrardar in spite of the fact that the latter had pointed out that they could not do so without his permission, it was held, under the circumstances, that, to follow the orders of the daristimrardar, was to take the risk of being visited with the consequences of the act and that the servants in cutting the trees must be held to have guilty knowledge. *AIR 1934 Pat 491.*

28. Hire purchase agreements.—(1) When the condition of the hire purchase agreements grants leave and licence to the owner to take possession of the articles on default of installments due under the agreement it amounts to the purchase giving his consent to the removal of the article. Such taking cannot, in law, amount to taking without consent. hence, the removal does not amount to theft. *1965 AllLJ 214.*

29. Theft by more persons than one.—(1) To secure conviction of more persons than one on the ground that all such persons were in joint possession of stolen property, it must be proved that the stolen property was either in the physical possession of each one of the accused persons or else it was in possession, physical or constructive, of one or more of them, on behalf of and to the knowledge of the other accused persons and that each of them intended to possess it for their joint use and to the exclusive of persons other than themselves. *AIR 1929 Sind 9.*

(2) If two persons go steal a particular article and one who is actually committing the theft is not able to find that particular article but steals something else instead and both of them run away together, both must be held guilty of theft inasmuch as the other who did not actually steal the article must be taken to have acted in furtherance of a common intention to commit theft. *AIR 1942 Pesh 50.*

(3) Where a gang of persons goes to the land of another with the intention of removing paddy by force and some of them commit the theft, all are responsible for the theft. *AIR 1936 Rang 70.*

(4) Where a group of persons detain a person carrying some articles and engage themselves in some negotiations with him and another group suddenly appear on the scene and remove the articles, while the first group remain silent spectators, the natural inference is that the group which detained the person and the group which removed the articles were members of a gang acting in furtherance of a common intention. *AIR 1969 Ker 29.*

30. Theft and mischief.—(1) The ingredients of the offence of mischief differ in many respects from those of the offence of theft. Mischief may be committed in respect of any property movable or immovable, while theft can only be of movable property. Destruction or injury to property or its diminution in value is a necessary ingredient in mischief, while theft requires no such ingredient. *(1922) 23 CriLJ 504 (Fat).*

(A) Illustrations.—(1) A cuts a tree on B's land with a view merely to annoy B , but does not remove the tree. A commits mischief but not theft. *AIR 1916 Mad 1071.*

(2) A commits theft of B's bullock and then kills it. A commits theft as well as mischief. Here the mischief succeeds the theft. It was held that B having already suffered loss by theft of his bullock,

there could be no further 'wrongful loss' by the subsequently killing of the bullock and that therefore, the accused can be convicted only for theft. *AIR 1925 Pat 34.*

31. Theft, criminal misappropriation and criminal breach of trust.—(1) In a theft the original taking is dishonest and without the consent of the owner. In criminal breach of trust, the original taking may be both honest and with the consent of the owner. In criminal misappropriation the original taking is not dishonest but may be without the consent of the owner. *AIR 1928 Nag 113.*

(2) In criminal breach of trust the property is lawfully acquired or acquired with the consent of the owner but dishonestly misappropriated by the person to whom it is entrusted. In criminal misappropriation the property is innocently acquired often casually and by chance, but a subsequent chance of intention the retaining becomes wrongful. *AIR 1951 Punj 103.*

(3) In the case of theft mere removal from the possession of person with dishonest intention is enough while in other cases there must further be misappropriation or conversion. *AIR 1953 Pat 100.*

(4) Cattle turned out to graze are still in the possession of the owner unless the contrary is shown and the taking of such cattle constitutes theft and not criminal misappropriation. *AIR 1954 Nag 55.*

(5) Property in possession of accused as public servant—Removal of the accused himself or by some other with consent of accused—Offence does not amount to theft but is one under S. 409. *AIR 1950 Lah 199.*

32. Theft and criminal trespass.—(1) The accused was caught at night in the vicinity of some cattle which had been tethered on the complainant's square and near which the complainant and his brother were sleeping. It was held that the accused could not be held guilty of an attempt to commit theft but that he committed the offence of criminal trespass. *AIR 1924 Lah 223.*

(2) The mere surrounding of an open space by a wall of fence would not convert it into a building and a person entering it to commit theft, cannot be convicted under S. 457 but he is guilty of an offence under S. 379 read with S. 511. *AIR 1914 Lah 584.*

33. Theft and wrongful restraint.—(1) The accused prevented the complainants from proceeding in a certain direction with their carts and extracted from them a sum of money on a false plea. It was held that the accused were guilty of wrongful restraint and not of theft. *(1868) 10 SuthWR 35.*

34. Theft and secreting of document.—(1) A party to an arbitration aggrieved by the decision of the arbitrator on a point against him, seized the document lying besides the arbitrator, ran away and refused to produce it. He held guilty under S. 204 and not under theft. *(1881) ILR 3 Mad 261.*

35. Theft and receiving stolen property.—(1) The purse of A was removed by X; X and Y were near A when the theft was committed and both ran away together; X handed over the purse to Y immediately after the theft; the purse was recovered from Y. It was held that Y was guilty under S. 379 read with S. 34 and not under S. 411. *AIR 1957 All 678.*

(2) Facts showing that accused not only knew where incriminating articles were but also taking part in theft—Contentions that accused could be convicted only under Section 411 and not under Secs. 380 and 457 not upheld. *AIR 1957 Assam 168.*

36. Theft and unlawful assembly.—(1) Where the common object of the offence under S. 147 is theft, there should be no separate sentence for each of the offences. *AIR 1955 NUC (Assam) 2850.*

(2) Where the charges under S. 379 did not refer to the common object of the unlawful assembly but were intended to refer to the acts of individual accused, apart from their acts as members of the

unlawful assembly and there was no finding that any of the accused individually took away the articles, it was held that the conviction of the accused under S. 379 could not be sustained. *AIR 1941 Pat 492.*

37. Theft and robbery.—(1) If hurt is caused while carrying away the stolen property, the offence would be robbery; but if after the theft is committed the offender merely makes good his escape the offence would be theft and not robbery. *1977 WLN (UC) 445 (Raj).*

(2) Where the inception of the struggle was only a quarrel and it was at the end that the accused found a chance of taking the articles of the complainant in order to ensure the payment of money due to him, the offence is one under S. 378 and not under S. 392. *AIR 1935 Pesh 49.*

(3) The accused beat the complainant and his concubine, resulting in injuries to them and immediately entered the complainant's house and removed boxes containing cash, ornaments and utensils. It was held that the beating was primarily for the purpose of the theft which took place immediately after the assault. The offence committed was robbery under S. 394 and theft. *AIR 1955 Cal 527.*

38. Attempt to commit theft.—(1) The accused was caught in the vicinity of some cattle which had been tethered on the complainant's square and near which the complainant and his brother were sleeping. It was held that the evidence was not sufficient to hold the accused guilty of an attempt to commit theft though he could be held guilty of the offence of criminal trespass. *AIR 1924 Lah 223.*

(2) The accused entered an open thorned enclosure in which goats and sheep were kept but on the owner being disturbed, he fled away. It was held, he could be held guilty of an attempt to commit theft. *AIR 1926 Lah 147.*

(3) The accused was caught while attempting to steal the purse of P from his pocket; P, however, seized the purse from outside his pocket and also the hand of the accused. It was held that the offence fell under S. 511 and not under S. 379. *AIR 1942 Mad 521.*

39. Burden of proof and appreciation of evidence.—(1) In the absence of sufficient evidence of removal of or attempt to remove the property, merely being found at night time in the vicinity of the property is not sufficient to sustain a conviction for theft or attempt to commit theft, though the accused may be held guilty of criminal trespass, etc. *1948 AllWR (HC) 151.*

(2) Accused found to be present in taxi at the time of arrest—Failure on part of prosecution to establish relationship amongst the three accused—No conspiracy had been either alleged or established—No part played by accused in commission of offence was established—Held, accused not guilty of offence under Section 379 Penal Code—Presence in a taxi does not mean that occupier of taxi is aware of fact that taxi was stolen property and no offence could be brought at home. *1984 CriLR (Mah) 18.*

(3) Where the case of victim had not been corroborated by any other evidence conviction under S. 379 on the basis of evidence of victim alone could not be sustained. *1982 CriLJ NOC 136 (Orissa).*

(4) Charges of criminal trespass, theft etc.—Complainant not producing evidence as to ownership of property relating to which commission of offence alleged—No independent witnesses examined—Held, accused were entitled to benefit of doubt. *1983 CriLJ 59 (Gauhati).*

(5) Offence of theft—Reappreciation of evidence by Supreme Court in interest of justice—Delay in filing first information report—Presence of accused, a Government Servant at place of occurrence not proved by evidence—Accused entitled to acquittal. *AIR 1984 SC 454.*

(6) Prosecution for offence under S. 378—Purchase of stolen article not examined by prosecution though his name and address was available—Also no efforts were made to recover that article from purchase—Held, conviction under S. 379 could be not sustained. *1982 WLN (UC) 345 (349) (Raj).*

40. Possession of stolen property—Presumption.—(1) The Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. *(1978) 45 CutLT 124.*

(2) Where a long time has elapsed between the date of theft and the date when the accused was found to be in possession the said presumption does not arise. *AIR 1946 Sind 153.*

(3) The presumption refers to above is a rebutable. The words "may presume" in the illustration shows that it is not always necessary that the presumption should be raised. All the circumstances of the case have to be considered before drawing such an inference. *AIR 1954 SC 279.*

(4) The mere pointing out by a person of the place where stolen property is concealed, which place is not in his possession, is not by itself sufficient to maintain a conviction for theft. *AIR 1969 Guj 100.*

(5) In a previous case the accused was convicted under S. 379 for harvesting and removing paddy from the possession of the complainant. Subsequently he was tried for the same offences in respect of the same land. It was held that the previous judgment was relevant and admissible to prove the dishonest intention of the accused. *AIR 1961 Manipur 43.*

41. Punishment.—(1) Where the offence of theft was committed by a landlord in a high-handed manner a sentence of mere fine would be inadequate. *AIR 1951 Kutch 58.*

(2) It is not easy to detect cases of picking of pockets. A sentence of six month's rigorous imprisonment is not excessive for such offences. *AIR 1957 All 678.*

(3) A sentence of one year's rigorous imprisonment was held to be excessive for picking of pockets. *AIR 1953 All 345.*

(4) Where a young man of 23 years, coming from a good family, committed theft of cash, due to starvation and at the first approach of the police made a clean breast of everything and made over all the money a lenient punishment was held sufficient. *AIR 1980 SC 636.*

(A) Other illustrative cases.—(1) Accused not previous convicts—Did not enjoy usufruct of stolen property—Held, conviction maintained but sentence altered to period already undergone. *1982 UP (Cri) C 25 (26) (All)*

(2) Where a person with no previous conviction stole a coconut tree, it was held that having regard to the circumstances of the offence and character of the offender, he should be released after admonition and should not be sentenced to imprisonment. *AIR 1967 Goa 95.*

(3) Where the accused had stolen 3 sugarcane-strikes, it was held that the motive of the accused was not to cause wrongful gain or wrongful loss, but only to satiate his craving and the case was considered fit for giving him the benefit of S. 360, Criminal P. C. *AIR 1955 NUC (MB) 4327.*

(4) Where an act is an offence under two enactments which are not in conflict with each other prosecution can be restored to under either of the enactments. *AIR 1951 Mys. 25.*

(5) Conviction under both Sections 147 and 379—Sentence under this section reduced from 3 years' R. I. to 2 years' R. I. to run concurrently with the sentence of 2 years' R. I. under Section 147. *1979 UJ (SC) 582.*

42. Abetment of theft.—(1) When a person is convicted of theft only it is not competent for the appellate Court to modify the conviction into one for abetment of theft. *(1913) 13 CriLJ 203.*

(2) Where the property is attached by the Amin in execution of a decree at the instance of A. The fact that the claim petition of B to the property is allowed does not warrant the conviction of A under S. 379 read with S. 114. *AIR 1941 Mad 799.*

(3) The evidence against the accused was that he was standing by the thief. There was no evidence at all to lead one to the conclusion that he was engaged in any conspiracy with the principal offender for the doing of the act of theft. It was held that he was not guilty of abetting the theft. *AIR 1923 Pat 121.*

43. Procedure.—(1) Offence u/s. 379 read with Section 75—For purpose of compounding only offence is one under section 379 does not give different colour to it. *AIR 1970 Ker 251.*

(2) Where several accused were separately engaged in fishing and stealing fish and there was no common object or intention, it was held that they could not be tried jointly. The joint trial is not a mere irregularity. *AIR 1927 Mad 177.*

(3) Theft—Discharge of accused—Wrong application of provision of law—Discharge amounting to acquittal—Second complainant for commission of same offence—Barred by Section 300 of Criminal Procedure Code. *1982 CriLJ 2144.*

(4) An offence of theft punishable under S. 379 is to be tried as warrant case under Cr. P. C. 1898. *1981 AllLJ NOC 89.*

(5) Where investigation revealed offence that had been committed under sections 379 and 447 of Penal Code and a prima facie case was already made out at this stage, discretion of High Court should not be exercised under Section 482 of Criminal Procedure Code for purpose of obstructing clear flow of investigation by competent investigation machinery. *1982 MadLW (Cri) 149.*

(6) Complaint of theft of truck—Court should consider whether crime as per definition of theft has been committed—It should avoid going into question of ownership. *1982 CriLJ (NOC) 161 (Gauhati).*

(7) Cognizable—Warrant—Not bailable—Compoundable—Triable by any Magistrate, Village Court.

44. Charge.—(1) Where the charge does not mention the name of the person from whom the property is removed, the conviction is not bad in the absence of prejudice. *AIR 1967 Raj 190.*

(2) A person charged with theft and demanding illegal gratification can be charged alternatively. *AIR 1941 Rang 295.*

(3) Theft of different things on different dates separated by considerable periods cannot be treated as one theft. Each theft should be charged separately. *AIR 1944 Cal 224.*

45. Form of charge.—(1) A charge under this section must be specific about the place where from the property is alleged to have removed. *(1973) 1 CutWR 201.*

(2) 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 of—at—committed theft of (specify the things) by taking it out of the possession of X and thereby committed an offence punishable under section 379 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

46. Civil liability for damages for removal of property by theft.—(1) The pendency of prosecution proceedings for an offence is not bar to a suit for damages for the removal of the property which is the basis of the prosecution. *AIR 1971 Orissa 8 (8).*

47. Practice—Evidence—Prove: (1) That the property in question is movable property.

(2) That such property was in possession of a person.

(3) That the accused removed the said property from that person's possession.

(4) That he did so without the consent of that person.

(5) That he did so in order to take the same out of the possession of that person.

(6) That he did so dishonestly with a view to cause wrongful gain to himself or wrongful loss to that person.

Section 380

380. Theft in dwelling house, etc.—Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *Theft from building.*
3. *Vessel.*
4. *"In any building."*
5. *Charge and conviction.*
6. *Evidence and proof.*
7. *Sentence.*
8. *Procedure.*
9. *Practice.*
10. *Charge.*

1. Scope.—(1) The object of the section is to give greater security only to property deposited in a house so as to be under the protection of the house and not to property about the person of the party from whom it is stolen. The expression 'building' must be regarded as indicating some structure intended for affording some sort of protection to the person dwelling inside it or for the property placed there for custody. Similarly, theft within the compound wall and outside the building will not fall under this section. Theft of cloth spread on the top on a building for drying will not fall under this section, Theft from a person—in a dwelling house is therefore simple theft.

(2) Theft committed in a verandah—Verandah is a part of the building—The limitations which appear to have been imposed by the Legislature on buildings referred to in sections 380 and 442 are not as to the nature of their structures or the materials of which they are made but to the use to which such structures are intended to be put. Whether any part of it was intended as a human dwelling or as a place of worship or for custody of property must necessarily depend on the facts of each case. The verandah as deposed in this case may be used for any of these purposes and as such is a part of the building. *Waziuddin Vs. State (1966) 18 DLR 227.*

(3) Charge must state the property in respect of which the theft was committed—The charge under section 380, was farmed as follows: "That you, on or about the same date and place, committed theft in the dwelling-hut of Hazera." Held: The charge is defective in that it does not state what articles were taken out of the possession of Hazera. *Safiuddin Vs. Crown (1953) 5 DLR 519.*

(4) Conviction not made on account of non-production of stolen clothes and seizure list, when other reliable evidence proves the prosecution case.—On consideration of the evidence of the prosecution witnesses the courts below considered the question of the absence of the seizure list and the alamat before them and they held the view that in the facts and circumstances of the case the absence of the seizure list and the alamat before the Court could not falsify the prosecution case. *Abdul Jabbar Vs. State (1983) 35 DLR 408.*

(5) Conviction under both the sections in respect of the same offence not legal. A person cannot be convicted both under sections 380 and 411, and sentenced separately under both the sections. If the accused is convicted under section 380, he cannot be convicted under section 411 as well. *Muslim Mondal Vs. State (1962) 14 DLR 595.*

(6) Provisions of the two sections explained in relation to each other. Principal ingredients of the offence u/s. 457 may broadly be divided , inter alia, into two heads: (1) the accused committed lurking house trespass by night, and (2) the same was committed with intent to commit theft. There is no dispute that the first part in this case on the basis of positive evidence has been fulfilled in the present case. The nest question is the appellant having been acquitted of the charge of theft u/s. 380 P. C. whether the second part of the ingredient of the offence under section 457 P. C. has failed. The clause "If the offence intended to be committed is theft" in section 457 of the Penal Code refers to a state of mind of the accused at the time of his entry. What is required is the presence of a state of mind at the time of entry, the intention being, inter alia, to commit theft. Actual commission of theft is not pre-requisite for the commission of the offence under this section. He may or may not commit actual theft. He may fail in his attempt. He may in fact commit theft. The subsequent facts, though may be relevant to ascertain the intention of the accused at the time of entry, are not necessary to constitute the offence under section 457 P. C. *Sirajuddin Vs. The State (1976) 28 DLR (AD) 162.*

(7) Same person charged with the commission of offence under sections 457 and 380. These offences cannot be treated as part of the other, being separate and distinct offences. *Sirajuddin Vs. The State (1976) 28 DLR (AD) 162.*

(8) The finding of the Civil Court as to possession passed in a Civil Suit shall prevail over the finding of the criminal Court as to possession. If the appellant was in possession in 1978 as found by the Civil Court, then for the purpose of the criminal case it was enough to hold that the prosecution evidence as to possession could not be accepted beyond reasonable doubt. The appellant could not be legally convicted for the alleged offence of criminal trespass. *8 BCR 25 AD.*

(9) Leave to appeal was granted upon the assertion of the appellant that they preferred an appeal against the order of conviction and sentence passed against them but the High Court Division committed an error on the face of the record in holding that no appeal was preferred by them and discharging the Rule on the ground. Be that as it may, we are satisfied that the High Court Division wrongly presumed that no appeal was preferred by the present appellants. Evidence then the Rule could not be discharged upon the mistaken view. The appellants were deprived of the benefit of the decision of the High Court Division because of an erroneous assumption made by it to which we have already referred. The evidence being the same upon which the order of conviction is based and the trial also being one and the same, we think, it has been rightly urged that there could not be two different results and appellants also should get the benefit of the finding of the High Court Division that the prosecution failed to prove its case. *6 BCR 113 AD.*

(10) Opinion of footprint expert to identify accused—Value of such opinion. The science of identification of footprints is at an elementary stage and much reliance cannot be placed on the result of examination of footprints. The track evidence by itself would not be enough before a court to connect an accused with the crime. Even if resemblance is shown between two footprints, there has to be other incriminating facts and circumstances to prove the guilt of the accused. *4 BLD 17.*

2. Theft form building.—(1) The offence under this section is an aggravated form of the offence of theft. The aggravation lies in the fact that the theft of property is committed in a building tent or vessel. It is immaterial that the building is in the joint possession of the parties. *1979 CriLJ 446.*

(2) It is immaterial whether the owner of the building is present or not at the time of the theft. *1971 Rat Un Cr C 56 (DB).*

(3) Accused going to Barshi police station to lodge some complaint—Finding constables were sleeping and not listening to his complaint—Accused taking away one handcuff from police station to show it to Police Superintendent at Solapur in support of his grievance that constables at Barshi were not doing their duties and were sleeping—Held, accused had no intention to cause wrongful loss to police. *1982 CriLJ 1873 (Bom).*

(4) Ingredients of offence under—Husband and wife living jointly in the same house and having joint possession of property therein—Wife cannot be charged with theft u/s. 380. *1980 Raj Cri C 327.*

3. Vessel.—'Vessel' is defined in S. 48 of the Code as denoting anything made for the conveyance by water of human beings or of property. *(1872) 1 Weir 436.*

4. "In any building."—(1) The word "building" must be construed in its ordinary sense as referring to an area which is covered over by a roof. *(1892) 1 QB 264.*

(2) The limitations imposed by the Legislature are not as to the nature of the structures or materials, but as to the use to which such structures are intended to be put. *AIR 1929 Sind 17.*

(3) Theft of chilies from the roof of a house has been held to be a theft in a building. *1974 CriLJ 76 (Pat)*

(4) An entrance hall surrounded by a wall in which there were two door-ways but without doors, was held to be a building. *1979 Pun Re No. 10 page 29.*

5. Charge and conviction.—(1) A person charged under S. 406 can be convicted for an offence under this section in view of S. 221 Criminal P. C. *AIR 1955 NUC (Sau) 5053 (DB).*

(2) The joinder of charges for an offence under this section and of cheating under Section 420 of the Code is permissible, if no prejudice would be caused to the accused thereby. *AIR 1932 All 244.*

(3) As the thief himself cannot be convicted under S. 215 there cannot be separate convictions for the offence under S. 215 and this section. *(1908) 7 CriLJ 464.*

6. Evidence and proof.—(1) According to Illustration (a) to S. 114 of the Evidence Act, the court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. Two things are necessary before the Court may presume the above position: firstly, the goods must be proved to be stolen goods and secondly, the possession of the stolen goods by the accused must be soon after theft. *1956 MadhBLJ 305.*

(2) On the mere evidence of recovery of stolen articles from possession of the accused, the accused can be convicted for theft but not for murder. *1984 CriLR 142.*

(3) Whether the accused would be presumed to be the thief or receiver of stolen goods depends on the facts and circumstances of each case. *AIR 1972 SC 2501.*

(4) Where the two accused persons could not afford any reasonable explanation for their recent and exclusive possession of the stolen she-goats, they were held guilty under S. 380 P.C. *1983 WLN (UC) 80 (Raj).*

(5) Section 27 of the Evidence Act is often pressed into use in tracing possession to the accused. *AIR 1967 Ker 197.*

(6) It was alleged that the accused had made an extra-judicial confession before his arrest and the constable who arrested him also knew it, but such an entry regarding confession was not made in the

'roznamcha'. Held, the accused could not be convicted for offences under Ss. 302 and 380 on the basis of the extra-judicial confession. *(1983) 2 Crimes 954 (2) (959) (DB) (Raj).*

(7) Merely because some clothes were lying outside at a time when the petitioner was caught inside the house, it could not be assumed that he was the author of the crimes of theft of clothes from the dwelling house. *1984 CriLJ 828: (1984) 1 Crimes 727 (Orissa).*

(8) Merely because the accused the accused had a criminal background and he was present in the village of the deceased on the date of occurrence, the accused could not be held guilty in the absence of legal proof of the offences alleged to have been committed by him. *1983 CriLJ 130.*

(9) As to appreciation of evidence in cases under the section: *1981 CriLJ (NOC) 32 (Gauhti); AIR 1974 SC 514; 1984 CriLR 243 (DB) (Raj); (1982) 2 ChadLR (Cri) 640 (P &H); 1979 CriLJ (Mah) 362; AIR 1961 Ker 28; AIR 1958 AndhPra 255; AIR 1955 NUC (Bom) 5296.*

7. Sentence.—(1) For an offence under this section, a sentence of fine alone illegal. *ILR (1966) Cut 363.*

(2) Failure to pass a sentence of imprisonment is illegal. *(1949) 2 SauLR 91 (92).*

(3) Accused, presenting as a detective Police Officer entered to the premises of the complainant, examined the scales and weighs and during the temporary absence of the complainant committed theft of a ring. The High Court held that the two offences under Section 170 and this section are distinct and that separate sentences are not illegal. *(1919) 24 Mys CCR No. 331 p. 435 (435).*

(4) L & R were convicted for offence under S. 380 P.C. L was caught on the spot while R ran away with the stolen bicycle which was never recovered. Sentence of imprisonment awarded to L reduced to the period already undergone. As for R was concerned it was held that there were no extenuating circumstance for reducing the sentence of one year's R. I. imposed by lower court. *1981 UP CriC 39.*

(5) Offence under Ss. 457 & 380—Accused aged about 22 years having no previous conviction—Sentence of one year's R. I. reduced to six months only. *1982 UP (Cri) C 103 (All).*

8. Procedure.—(1) A charge of theft under this section was lodged against three persons. Two were placed on trial and were acquitted. Subsequently, some stolen articles were found in the house of the third accused. He was tried and convicted under S. 411 of the Code. On the above facts, it was held that the previous trial of the two persons was no bar to the trial of the third accused, as some additional evidence, subsequently ascertained was before the Court to support a charge under S. 411 of the Code. *(1906) 4 CriLJ 173 (Cal).*

(2) A document was reduced in Court by a party in a civil suit. The opposite party removed the said document before it was exhibited in evidence and substituted forged document in its place. It was held that the document was property within the meaning of S. 22 of the Code and the complaint of Court is necessary for prosecution of the offender for offences under Ss. 467 and 471 of the Code; but not for an offence under this section. *1963 (2) CriLJ 558 (Guj).*

(3) The fact that a Magistrate entertains a complaint for offence under Sections 464 & 380, when the complaint is that more than five persons emitted a house and stole property does not amount to a dismissal of the complaint under S. 395 of the Code. Therefore, an order of the revisional Court directing the Magistrate to treat the case a preliminary register case for an offence under S .395 without hearing the accused is bad in law. *AIR 1948 Mad 95.*

(4) An offence under this section is not so intimately connected with an offence under S. 436 of the Code as to warrant a committal of the case to a Court of Session. *AIR 1926 Cal 1090.*

(5) Where an accused's plea of guilty to a charge under this section is based on an erroneous conception of one's right in property, S. 375, Criminal P. C., is not applicable to the case and cannot shut one's right of appeal. *AIR 1931 All 265.*

(6) Charge of theft—Property recovered from possession of accused—Accused acquitted—Property should be restored to accused—Order of court for return of ornaments after decision of civil court regarding title is illegal. *1982 AllLJ 504.*

(7) When the accused from whom property was recovered has been acquitted by the charge under S. 380. The court is not competent to deliver some of the recovered ornaments which are identified by the complainants to him on the ground that he claimed ownership of the ornaments seized. If the complainant claims ownership of the property, his proper forum is to seek remedy from civil court. *1982 AllLJ 340.*

(8) Where the accused confessed during investigation before the police authorities that monies had been realised by him from the sale of stolen commodities which undoubtedly belong to the complaints, the properties in question should be returned to the complainant. *1979 Raj CriC 293.*

(9) Cognizable—Warrant—Not bailable—Compoundable when permission is given by the Court before which the prosecution was pending—Triable by any Magistrate, Village Court.

9. Practice.—Evidence—Prove: (1) That the subject matter is the movable property.

(2) That it was in possession of a person.

(3) That the accused moved it.

(4) That he did so without obtaining consent of the person in whose possession the said moveable property remained.

(5) That he did so intending to dishonestly take it out of his possession.

(6) That the property stolen was in the building, tent or vessel.

(7) That the said building, tent or vessel as then used as dwelling house or for the custody of property.

10. 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—committed in a building (or tent or vessel) used as a human dwelling (or for the custody of property) the theft of (specify the thing), belonging to X and thereby committed an offence punishable under section 380 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 381

381. Theft by clerk or servant of property in possession of master.—Whoever being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer , shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope and applicability.*
2. *Clerk or servant.*
3. *Theft.*
4. *Property of illegal societies.*
5. *In the possession of master or employer.*
6. *Duty of Court*
7. *Sentence.*
8. *Jurisdiction—Misjoinder of chargers.*
9. *Appeal.*
10. *Procedure.*
11. *Practice.*
12. *Charge.*

1. Scope and applicability.—(1) This section provides for a severe punishment when a clerk or a servant has committed theft because he has greater opportunities of committing this offence owing to confidence reposed in him. When the possession is with the master this section applies; when it is with the servant, section 408 comes into operation. An unpaid apprentice is a clerk or servant within the terms of this section *(3 CrLJ 70).* A Clerk or servant is a person bound by an express contract of service.

(2) In view of the provisions of section 237 of the Code of Criminal Procedure the conviction of the petitioner under section 381 is maintainable although he was charged under section 408 but not under section 381 of Penal Code. In view of the provision of section 237 Cr. PC and being in respectful agreement with the pronouncements of the learned Judges, I am of the view that although in this case the petitioners was charged under section 408 of the Penal Code and not under section 381 of the Penal Code still his conviction under section 381 of the Penal Code is quite maintainable and the petitioner was fully aware of the nature of accusation against him and had the opportunity to meet the element of offence punishable under section 381 of the Penal Code and he was not also prejudiced by conviction under section 381 of the Penal Code. *Mahbubul Alam Vs. State, 41 DLR 7.*

(3) Charge was framed under Section 408 of the Penal Code and the accused was convicted under Section 381 of the said Code—Whether conviction legally sustainable—Although the accused petitioners was charged under section 408 of the Penal Code and not under Section 381 of the Penal Code still his conviction under Section 381 of the Penal Code is maintainable in law as the accused was fully aware of the nature of the accusation against him and he had sufficient opportunity to met the elements of the offence punishable under Section 381 of the Penal Code. *Mahbubul Alam Vs. The State 9 BLD (HCD) 419.*

(4) This section also deals with an aggravated form of the offence of theft. The aggravation consists in the abuse of trust and confidence which exists in the relationship of master and clerk and master and servant and the punishment is accordingly more severe than that for ordinary theft. *1887 All WN 54.*

2. Clerk or servant.—(1) The test whether a person is a clerk or a servant within the meaning of this section is whether the person is under the control of and bound to obey the orders of his employer; he may be so without being bound to devote the whole of his time to his employer's service. *(1873) 12 CoxCriC 492.*

(2) Whether the person is a "clerk or servant" within the meaning of the section depends upon the terms of employment. Thus, if a person A says to another carrying on an independent trade. "if you get any order for me I will pay you a commission." "and that person receives money and applies it to his own use; he is not guilty under this section for he is not a clerk or servant; but if A says to B; "I employ you and will pay not by salary but by commission," then B is a servant. The reason for such distinction is that A has no control over the person employed in the first case whereas in the second case A employs B who is bound to obey A's orders in regard to all matters relating to his employment. *(1870) 11 Cox 551.*

(3) An unpaid apprentice is a "clerk or servant." *(1906) 3 CriLJ 70.*

(4) Prisoner was also employed by the company to canvass for orders for advertising, superintend the bill posting, collect money due to the company, and pay it to the cashier—Held that his being a director of the company did not prevent him from being a servant of the company. *(1894) QB 310.*

(5) Person who is not under the orders or control of employer in the discharge of his duty. *(1890-1895) 17 Cox CriC 656 (659).*

(6) The prisoner was employed as traveler to solicit orders for and to collect money due on the execution of such orders by the firm and to pay over the moneys so collected in the evening. The prisoner had no authority to retain in his hands moneys belonging to the firm. He was to be exclusively in the employment of the firm. He had no salary but was paid a commission on all orders. It was held in a case of embezzlement against him that the prisoner was a clerk and servant within the meaning of Statute. *(1871) 12 Cox CrC 56.*

3. Theft.—(1) Removal of property in the assertion a bona fide claim of right though unfounded in law does not constitute theft; but a mere colourable pretence to obtain or keep possession of property does not avail as a defence. *AIR 1924 Lah 453.*

(2) The taking of official papers by a clerk of the office out of the officer's custody for showing them to a party's vakil is theft by a clerk or servant. *AIR 1926 Bom 122.*

(3) Where the accused was legally in charge of the articles and in that capacity, moves the articles from one place to another then he cannot be held guilty of theft under this section. *AIR 1955 NUC (Bom) 5310.*

4. Property of illegal societies.—(1) Where the secretary of a society was charged for embezzlement of funds of the society and it was contended that the object of the society was illegal and hence the combezzlement of the property of the society was not an offence, it was held that though the rules may be void as being in restraint of trade, it cannot be contended that such societies are illegal so as to deprive the protection of the law in respect of their property and that the accused was guilty of theft. *(1870) 11 CoxCriC 483.*

5. In the possession of master or employer.—(1) This section deals with theft in respect of property in the possession of the master or the employer. The prosecution must therefrom produce evidence sufficient to establish that the property was stolen form the possession of the master or the employer. *(1974) 1 CriLT 126.*

(2) In the absence of evidence that property was stolen from the possession of the master the conviction under this section cannot stand. *AIR 1916 Mad 1103.*

6. Duty of Court.—(1) A Magistrate dealing with a criminal case cannot allow himself to influence in his decision by vague and general consideration based on extraneous experience of his own and supported by no proof. *1887 All WN 54.*

7. Sentence.—(1) Where a domestic servant in whom his master resposes confidence and trust, betrays the confidence and commits theft, in his absence, of precious articles such as gold and diamond ornaments, he must be dealt with very severely, if the guilt is proved. *1959 JabLJ 738.*

(2) The Magistrate has the power to impose a sentence of fine also under this section but it is a matter of discretion. *AIR 1957 Punj 55.*

8. jurisdiction—Misjoinder of charges.—(1) Where the accused was charged with having stolen the property outside the country but was arrested within the country and prosecuted under S. 381, it

was held that a Court has no jurisdiction to try him for an offence under this section but can try him for an offence Section 411. *(1886) ILR 10 Bom 186.*

(2) Where an accused person is charged with having committed an offence under S. 379 he should not be convicted of an offence under this section read with S. 109 when he is not charged with having committed that offence. *AIR 1923 Pat 121.*

9. Appeal.—(1) An accused, a young man convicted under this section was released under Cr. P. C. without being awarded sentence. It was held that it cannot be said that the conviction is incomplete without a sentence for the purpose of exercising the right of appeal given by the Criminal P. C. against a conviction under this section and the appeal against the conviction was maintainable. *AIR 1948 Mad 16.*

10. Procedure.—(1) The trial of an offence under this section by a third class Magistrate is illegal. *(1897-1901) 1 UBR 75.*

(2) Offences under Ss. 458, 467, 471 & 381, P. C.—Anticipatory bail should be granted where the complaint is made after unreasonable delay. *1981 BomCR 57.*

(3) Cognizable—Warrant—Not bailable—Compoundable When permission is given by Court—Triable by Metropolitan Magistrate, Magistrate of the first class or Village Court.

11. Practice.—Evidence—Prove (1) That the property in question is moveable property.

(2) That such property was in the possession of a person.

(3) That the accused moved such property whilst in the possession of that person.

(4) That he did so without the consent of that person.

(5) That he did so in order to take the same out of the possession of that person.

(6) That he did so with intent to cause wrongful gain to himself or wrongful loss to that person.

(7) That the accused was at that time a clerk or servant, and was employed in such capacity by the person in whose possession the stolen property was.

12. 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 of— at—being a servant (or clerk or employed in the capacity of a clerk or servant) of X committed theft by stealing property, to wit—in the possession of the said X, and thereby committed an offence punishable under section 381 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 382

382. Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft.—Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) A commits theft on property in Z's possession; and while committing this theft, he has a loaded pistol under his garment having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(b) A picks Z's pocket , having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

Cases and Materials

1. Scope.—(1) The possession by a thief, at the time of his committing a theft, of a knife or other weapon, which, if used on a human being might cause death or hurt, would not of itself justify a conviction under section 382 of the Penal Code. There must be something to show or from which it may properly be inferred that the offender made preparation for causing one or more of the results mentioned in the section *(1 CrLJ 378)*. The only difference between the offence under this section and that in the case of robbery is that some injury is actually inflicted while under this section all preparations made were also for effecting his escape after committing such theft or to retain the property stolen.

(2) The essence of the section is the commission of theft, accompanied by preparation for causing death, hurt, restraint or fear in order to committing theft or to effecting escape after committing theft.. *Mofizul Islam Vs. State (Criminal) 54 DLR 221.*

(3) An offence under section 382 of the Penal Code is triable by Court of Sessions as per Column Eight of the Schedule. The Assistant Sessions Judge acted beyond jurisdiction in making the impugned order under section 250 CrPC as the offence under section 382 PC is triable by Court of Sessions and not by a Magistrate *(Ref: 8 BCR 166). Karim Dad Vs. Abul Hossain, 40 DLR 44.*

(4) FIR-case not disclosed, offence-case quashed. *44 DLR 391.*

(5) The essence of the offence contained in section 382 is the commission of theft accompanied by preparation for causing death or hurt or restraint or fear of death or of hurt or of restraint to any person in order to the committing of such theft or to effecting of escape after committing such theft. Since in the instant case the commission of theft has not at all been proved, section 382 of the Penal Code has no manner of application in the case. *Mofizul Islam Vs. The State 22 BLD (HCD) 145.*

(6) Carrying a weapon at the time of committing a theft shows "preparation" to use it if necessary and it is not essential that the accused should actually cause hurt or attempt to do so. *1980 CriLJ 760 (MadhPra).*

(7) Proof of actual theft is necessary before conviction under this section. *AIR 1923 Lah 512.*

(8) Where the accused caused hurt to person in order to effect escape after committing theft, he should be convicted under this section. *(1908) 7 CriLJ 446.*

(9) Where all the accused came together to a spot and went together with the stolen property and two of them carried away the property while the others waited at a distance and all of them were armed, it was held that it could be presumed that all of them came with intent to commit theft and that all of them were liable for theft. *AIR 1950 Kutch 29.*

(10) Where the theft is by armed persons and is practically a highway robbery, a sentence of two years' rigorous imprisonment is not excessive. *AIR 1950 Kutch 29.*

2. Practice.—Evidence—Prove: (1) That the subject matter of theft is moveable property.

(2) That it was in the possession of any person.

(3) That the accused moved it.

(4) That he did so without obtaining consent of the person in whose possession such moveable property was.

(5) That he did so intending to dishonestly taking it out of his possession.

(6) That the accused committed theft having made preparations for causing death, hurt or restraint or fear of death, hurt or restraint.

(7) That he did so—(a) in order to commit such theft, or (b) to effect his escape or (c) to retain the property stolen.

3. Procedure.—(1) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Sessions.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, or on about the—day of—, at—, committed theft of (specify the property) from the possession of X after your having made preparations for causing death or hurt or restraint to any person in order to the committing of such theft or in order to the effecting of his escape after committing such theft or in order of retaining of such property stolen and thereby committed an offence punishable under section 382 of the Penal Code and within my cognizance.

And I hereby direct that you tried by this Court on the said Charge.

Of Extortion

Section 383

383. Extortion.—Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in [1][fear to give donation or subscription of any kind or to deliver] to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion".

Illustrations

(a) A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b) A threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory note binding Z to pay certain money to A. Z signs and delivers the note. A has committed extortion.

(c) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain product to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

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1. Substituted by Act XV of 1991, for "fear to deliver" (w.e.f. 24-12-90).

(d) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

Cases

1. Scope.—To constitute the offence of extortion there must be inducement which should proceed from the person charged and it should result in creating such fear in the mind of the victim as to make him give property or valuable security etc. as the case may be. It follows that there can be no offence of extortion when possession was obtained peacefully. The essence of the offence of extortion is in the actual delivery of possession of the property by the person put in fear and the offence is not complete before such delivery. In extortion property is delivered by causing fear.

2. For cases relevant to this section, see under section 384 next.

Section 384

384. Punishment for extortion.—Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials : Synopsis

1. ***Scope and applicability.***
2. ***Puts any person in fear of any injury.***
3. ***Dishonest inducement.***
4. ***Delivery.***
5. ***Property or valuable security.***
6. ***"To any person".***
7. ***Distinction between S. 384 and S. 161 of the Code.***
8. ***Distinction between extortion and cheating.***
9. ***Abetment of extortion.***
10. ***Extortion and robbery.***
11. ***Extortion and criminal intimidation.***
12. ***Extortion and criminal breach of trust.***
13. ***Sentence.***
14. ***Procedure.***
15. ***Charge.***
16. ***Practice.***

1. Scope and applicability.—(1) The element of dishonesty is the essence of this section. Delivery by the person put in fear is essential. Where a person through fear offers no resistance to the carrying off of his property but does not deliver any of the property to those who carry it off, the offence committed is robbery and not extortion. The offence is carried out by overpowering the will of the owner. The forcible taking of the victim's thump-impression on blank pieces of paper which can be converted into a valuable security does not necessarily involve including the victim to deliver papers with the thumb-impressions. Hence, where the victim is assaulted by the accused and his thumb-impression forcibly taken upon a blank piece of paper, the offence of extortion cannot be said to have been established. The offence is no more than the use of criminal force or an assault punishable under section 352 Penal Code nor does the offence amount to robbery in the absence of proof that the papers were taken from the victim's possession *(AIR 1941 Pat 129, 42 CrLJ 361).*

(2) Wrongful confinement unattended by intention to commit extortion—No offence. Necessary ingredients to be established—"Attempt" in section 511, P. Code is the direct movement towards the commission after preparation has been made, but mere wrongful confinement unattended by any overt act signifying an intention to commit extortion cannot come up higher than the stage of preparation. *Enayetullah Vs. Crown (1955) 7 DLR 87.*

(3) Where the initial complaint does not indicate that by putting the complainant in fear of any injury the accused dishonestly attempted to induce the complainant to sign or affix his seal to blank

paper and deliver the paper to the accused nor does it even show that he held out a paper and pen to the complainant and coerced him to sign it. Held: It cannot be said that the initial complaint disclosed an offence punishable under sections 384/511. *Enayetullah Vs. Crown (1955) 7 DLR 87.*

(4) The chief element in the offence of extortion is intentionally putting a person in fear of injury to that person or to any other and thereby dishonestly inducing the person to put in fear to deliver to any person any property or valuable security etc. *ILR (1979) Bom 1747.*

(5) It is not sufficient that there should be wrongful loss caused to any individual but the person putting that individual in fear of injury must have the intention that wrongful loss should be caused. *AIR 1950 Nag 214.*

(6) Where a person accepts remuneration for using his good offices, it will not amount to extortion. *AIR 1949 Kutch 7.*

(7) The person delivering the property must be put in fear; otherwise, if the person who so delivers is not afraid of the threat, then, an offence under this section is not committed. *AIR 1955 Sau 42.*

2. Puts any person in fear of any injury.—(1) The injury that a person may be put in fear of is not necessarily physical injury. The injury to character may be also an injury, as is shown by illustration (a) to the section. *(1968) 1 MalayanLJ 32.*

(2) The word "injury" in S. 383 is not confined to physical injury. Even a terror of a criminal charge, whether true or false, amounts to a fear of injury. *AIR 1952 Pat 379.*

(3) Where the complainant was put in fear of loss of his employment if he did not pay money to the accused, it was held that the accused was guilty under this section. *AIR 1936 Sind 29.*

(4) The injury contemplated must be one which the accused can himself inflict or cause to be inflicted. *AIR 1944 Sind 203.*

(5) Unlawful detention of a cart at a toll gate due to illegal demand for levy amounts to injury. *1 Weir 441(1) (441); 1 Weir 20.*

(6) Levy of fine under threat of picketing is extortion. *AIR 1922 All 529.*

3. Dishonest inducement.—(1) The element of dishonesty is necessary for a conviction under this section. If the accused did not act dishonestly but believed bona fide that he was entitled to act in that manner, he could not be convicted for extortion. There must be intention to cause wrongful loss to the person who is extorted. *(1883) 6 MysLR No. 348. p. 177.*

(2) Taking brides or extorting money cannot be reconciled with the duties of a police officer and such act cannot be regarded as committed under colour of authority. *AIR 1932 Sind 28.*

(3) Demanding money for doing what one is not bound to do is not an offence under this section. *AIR 1924 Lah 162.*

4. Delivery.—(1) The essence of the offence of extortion is in the actual delivery of possession of property by the person put in fear and the offence is not complete before such delivery. *1970 CriLJ 647.*

(2) Where possession was obtained peacefully, it cannot be said that the goods were obtained by extortion. *AIR 1949 All 599.*

(3) Where the accused loots the property, i.e., himself removes the property instead of causing the victim by threat of injury etc. to part with it, the offence will be "theft" and its variants (like robbery, dacoity, etc.) (Section 377, etc.) and not extortion. *AIR 1979 SC 1943.*

5. Property or valuable security.—(1) Property under this section means both movable and immovable property. *AIR 1951 Hyd 91.*

(2) Where a promissory note was taken forcibly from a minor, the document is a valuable security within the meaning of this section and it is immaterial that it might subsequently be held to be of no effect against the executant. *AIR 1933 Pat 601.*

(3) Where the petitioner armed with revolver, stengun abducted and wrongfully confined a person and threatened to kill him and forced to write letters to his parents containing demand for payment of ransom of large amount which was made, the letters written constituted property or valuable security within the meaning of S. 383 and an offence of extortion was committed. *AIR 1982 NOC 151.*

6. "To any person."—(1) It is not necessary that the threat should be used and property received by one and the same individual. Several persons may arrange that the threat should be used by some persons and the property be received by others. All would be guilty of extortion. It is not necessary that the receivers should be charged as abettors thought that might be done. *(1886) 2 BomHCR 394.*

7. Distinction between Section 384 and Section 161 of the Code.—(1) The essential element in the offence under S. 161 is the fact of receipt of illegal gratification in whatever way it was demanded and obtained. But where payment was obtained under fear of authority, an offence u/s. 384 and not S. 161 is committed. For an offence u/s. 384, proof of fear of injury is essential. *AIR 1956 Cal 116.*

(2) Where an accused was first tried for an offence under S. 384 and acquitted it does not bar his trial for an offence under the Prevention of Corruption Act, either under S. 408 or any principle of natural justice. *AIR 1955 Pat 453.*

8. Distinction between extortion and cheating.—(1) Money obtained either under a fraudulent inducement or dishonestly amounts to cheating (S. 417). But if it was obtained by putting the complainant in fear of injury and thereby inducing him to deliver any property it amounts to extortion. *(1865) 3 SuthWR 32.*

(2) Although there is a common feature between extortion and cheating, yet, they cannot be regarded as two aspects of one offence and it is indicated by the manner in which punishment is provided for each of them. *AIR 1928 Bom 346.*

9. Abetment of extortion.—(1) For an abetment it is necessary that the accused intentionally aids by any act or illegal omission the doing of the thing which constitutes the offence. An omission to disapprove of the extortion committed is not an abetment of the extortion. *AIR 1948 Cal 47.*

10. Extortion and robbery.—(1) Extortion accompanied by threat of immediate injury falls under S. 392. *1950 All LJ 711.*

11. Extortion and criminal intimidation.—(1) A was charged with committing criminal intimidation to X by threatening X and his daughter Y with injury to their reputation by publication of the nude photographs of Y with intent to cause alarm to them. No reference to blackmail or extortion was made in the charge. In the evidence, however, it appeared that the object of A was to make X pay 'hush money' to A, A was convicted under S. 506 of the Code. *AIR 1960 SC 154.*

12. Extortion and criminal breach of trust.—(1) A charge of criminal breach of trust and also of extortion in respect of the same moneys are incompatible with each other. Consequently, a conviction both for criminal breach of trust and extortion is not proper when they are in respect of the same moneys. *AIR 1936 Sind 29.*

13. Sentence.—(1) Where an accused, who is a public servant, such as a member of the Police Force, whose duty it is to help people and protect them from oppression, but who, instead of doing that adopts the role of an oppressor by committing offences under Ss. 161 and 384, a deterrent sentence should be given so as to serve as an example to others. *AIR 1942 Oudh 163.*

(2) The offence under this section undoubtedly reflects, to some extent, anti-social depravity of mind. However, the sentence of imprisonment for one year was reduced to the period of one month already undergone in view of the long proceedings lasting for eight years and the fact that the attempt did not succeed. *AIR 1973 SC 2200.*

14. Procedure.—(1) Where there is no specific charge of extortion, but only a charge of theft then the accused cannot be convicted for the grave offence of extortion. *(1912) 13 CriLJ 597 (DB) (Cal).*

(2) The offence under S. 384 is not compoundable. A charge of extortion is not a private dispute. *AIR 1936 Sind 146.*

(3) Not cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate, Magistrate of the first or second class.

15. Charge.—(1) In a charge of extortion the approximate amounts extorted and the nature of extortion should be stated. If the accused comes to know only at the close of evidence, the offence with which he is charged, it is an irregularity fatal to the trial. *AIR 1916 All 60.*

(2) 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 of—, at—, committed extortion by putting X in fear of a certain injury, to wit—, and thereby dishonestly induced that said X to deliver to you a certain property to wit—, and that you thereby committed an offence punishable under section 384 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

16. Practice.—Evidence—Prove: (1) That the accused put the complainant in fear of some injury.

(2) That such injury was either to the complainant or to some other person.

(3) That the accused did so intentionally.

(4) That he thereby induced the person so put in fear to deliver to some person some property or valuable security, or something signed or sealed, which was convertible into a valuable security.

(5) That the accused acted dishonestly in doing as alone.

Section 385

385. Putting person in fear of injury in order to commit extortion.—Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to [2][fourteen years and shall not be less than five years], or with fine, or with both.

Cases and Materials

1. Scope.—(1) This section provides for punishment of an extortion which remained at the stage of threat, the offence not being committed. This section having provided for attempt to commit extortion, section 511 may not apply. In order to attract the provision of this section it is necessary that the accused should have put some person in fear of injury as defined in the Code in order to extort some property from him. *(19 Cr.LJ 445).*

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2. Substituted ibid, for "two years".

(2) The essential ingredients of the offence under this section are: that the accused put or attempted to put any person in fear of any injury; and that such act of the accused was in order to commit extortion. *1980 WLN (UC) 222 (Raj).*

(3) The offence under S. 384 includes the offence under this section which is a less serious offence than the offence under Section 384. *AIR 1941 Sind 36.*

(4) The injury contemplated by the section must be one which the accused can himself inflict or cause to be inflicted. A threat that God will punish a man for some act or omission of his is not such an injury as the section refers to. *AIR 1944 Sind 203.*

(5) The word 'illegal' as defined in S. 43 of the Code means "unlawful". *AIR 1930 Pat 593.*

(6) A threat by a Mukhtiar (who appeared on behalf of accused in theft case against accused) to put scandalous questions to the complainant in the witness box, unless he paid him (the Mukhtiar) some money, is a threat to cause injury within the meaning of this section. *AIR 1930 Pat 593.*

(7) A threat of a criminal complaint amounts to putting the threatened person in fear of injury, whether the complaint is true or false, the guilt or innocence of the party threatened being immaterial. *AIR 1952 Kutch 54.*

2. Practice.—Evidence—Prove: (1) That the accused put the complainant in fear or attempted to put him in fear.

(2) That the fear was regarding some injury.

(3) That the accused did as above to commit extortion.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoudable—Triable by Special Tribunal as provided under Special Power Act.

4. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the day of—, at—put X (or attempted to put X) in fear of injury namely—in order to commit extortion and you thereby committed an offence punishable under section 385 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 386

386. Extortion by putting a person in fear of death or grievous hurt.—Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope—(1) If the fear caused is that of death or of grievous hurt it naturally causes great alarm. When a boy is kidnapped and the ransom letters disclosed to put the father of the boy into fear of the boy being murdered in case the ransom money is not paid the extortioner will be guilty of sections 364 and 386. *48 DLR 269.*

(2) The distinguishing element between extortion and robbery or dacoity is not the presence of the offender but the presence of imminent fear and also the delivery of possession of goods to the offender, the actual delivery or possession of property by the person put in fear is the essence of the offence of extortion. Where a person through fear passively allows his property to be taken away the offence

committed will be robbery or dacoity and not extortion. The Special Tribunal had no jurisdiction to try this case as the offence alleged against does not come either under section 386 or section 387 of the Penal Code, but it is more in the nature of a robbery or a dacoity. *Dulal Howlader and others Vs. State 48 DLR 269.*

(3) The offence under Ss. 386 and 387 are aggravated forms of the offence defined under S. 383 and must be read with that section. *AIR 1944 Sind 203.*

(4) Where the accused persons kidnapped a boy and demanded ransom from the father of the boy, putting him in fright of the boy being murdered, it was held that the accused were guilty of aggravated forms of kidnapping and extortion u/ss. 364 and 386 of the Code, and that where the offences were committed in pursuance of a conspiracy or a common intention, one accused would be equally guilty with the others of the two substantive offences and would be liable to the same sentence. *AIR 1957 SC 381.*

(5) Where the accused abducted a girl but there was no evidence on record to show that the girl was even threatened or was put in danger of being murdered the accused could not be convicted under S. 386. *1980 Chand CriC 50 (P&H)* .

2. Practice.—Evidence—Prove: (1) That the extortioner put the complainant or any other person in fear of death or of grievous hurt to him.

(2) That the extortioner did so intentionally.

(3) That the extortioner induced the person so put in fear to deliver to him or some other, some property or valuable security or some thing signed or sealed which was convertible to valuable security.

(4) That the accused did so intentionally.

3. Procedure.—Not cognizable—warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.— The charge should run as follows:

I (name and office of the Judge, etc.) hereby charge you (name of the accused) as follows:

That you, on or a about the—, day of—, at—, put Z in fear of death or of grievous hurt to the person or to any other person in order to commit extortion, and thereby committed an offence punishable under section 386 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 387

387. Putting person in fear of death or of grievous hurt, in order to commit extortion.—Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment [3][for life and shall not be less than seven years], and shall also be liable to fine.

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3. Substituted by Act XV of 1991, s. 4, for "of either description for a term which may extend to seven years", (w.e.f. 24-12-90).

Cases and Materials

1. Scope.—(1) This section may be read with section 46 and 320 of the Penal Code. This section provides for punishment of an extortion which remained incomplete and resulted only in the stage of an attempt.

(2) The very act of putting a person in fear of death or grievous hurt is by itself an offence under this section where it is done in order to commit extortion. *(1913) 14 CriLJ 167.*

(3) The offence under this section is an aggravated form of the offence defined under S. 383 and must be read in conjunction with it. *AIR 1944 Sind 203.*

(4) Where several accused were charged with entering a house, and one of them put the owner in fear of death in order to extort the keys of the safe kept in the house, and no common intention was proved, it was held that all the accused could not be convicted for the offence under this section. *1931 MadWN 129.*

(5) The words "in order to" import intention. A drunken man cannot be said to be incapable of committing the offence under this section unless it is shown that his mind was so affected by drink that he was incappable of forming the intention necessary to constitute the offence. *(1912) 13 CriLJ 864.*

(6) The standard of proof required is that the Court must be satisfied that the prosecution must (and not may) be true. *AIR 1960 MadhPra 11.*

(7) Accused took active part in abducting and torturing a victim with a view to extort ransom. No ground for reducing sentence of three years' R. I. *AIR 1979 SC 1493.*

2. Practice.—Evidence—Prove: (1) That the extortioner put or attempted to put some person in fear of death or grievous hurt.

(2) That he did so to commit extortion.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Special Tribunal as provided under Special Powers Act.

4. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or a about the—day of—, at—, put X (or attempted to put X) in fear of death or grievous hurt in order to the committing of extortion and that you thereby committed an offence punishable under section 387 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 388

388. Extortion by threat of accusation of an offence punishable with death or [4][imprisonment for life], etc.—Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with [4][imprisonment for life], or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be one punishable under section 377 of this Code, may be punished with [4][imprisonment for life].

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4. Substituted by Ord. No. XLI of 1985 for "transportation for life".

Cases and Materials

1. Scope.—(1) The aggravating circumstance under this section is the threat of an accusation of an offence punishable with death or imprisonment for life or with imprisonment for ten years. If the accusation is of unnatural offence then the penalty provided is severer.

(2) It is not material whether the charge of the crime levelled against the prosecutor by the accused is true or not. But it is material in considering the question whether in the circumstances of the case, the intention of the accused was to extort money or merely to compound the offence. *(1868) 11 Cox CriC 43.*

(3) The term "to accuse" means to charge a person before any third person. The threat to accuse need not be a threat to accuse before a judicial tribunal; a threat to charge him before any third person is sufficient. *(1849) 3 Cox CriC 547.*

(4) The deposition of a prisoner before a Magistrate against the complainant of endeavouring to excite one of them to commit an unnatural offence is admissible in evidence against them. *(1850) 4 Cox Cri C 404.*

2. Practice.— Evidence—Prove: (1) That the accused put the complainant in fear of an accusation of (a) an offence punishable with death or imprisonment for life or with imprisonment for ten years or (b) an attempt to commit the above offence or (c) an abetment of the same.

(2) That such injury was either to the complainant or to some other person.

(3) That such injury was intentional.

(4) That the accused thereby induced the person threatened to deliver to some person property or valuable security or something signed which was convertible into a valuable security.

(5) That the accused acted dishonestly.

(6) That the accused did the above to commit an offence under section 377 Penal Code.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of scissions, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate specially empowered by the Government in that behalf (first paragraph), District Magistrate, Additional District Magistrate specially empowered (second paragraph).

4. Charge.— The Charge should run as follows:

I (name and office of the Judge, etc.) hereby charge you (name of the accused) as follows:

That you, on or a about the—day of—, at—, committed extortion by putting—(name of the person) in fear of an accusation against him (or any other person) of having committed (or attempted to commit) the offence of—punishable with death (or with imprisonment for life or with imprisonment for a term which may extend to ten years (or under section 377: and thereby dishonestly induced the said—to deliver to you a certain property to wit—) and you thereby committed an offence punishable under section 388 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 389

389. Putting person in fear of accusation of offence, in order to commit extortion.—Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, an offence punishable with death or with [4][imprisonment for life], or with imprisonment for a term which may extend to ten

years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the offence be punishable under section 377 of this Code, may be punished with [4][imprisonment for life].

Cases and Materials

1. Scope.—(1) This section may be read with section 40, 384, 385 and 488 of the Penal Code.

(2) Where the accused was acquitted of the charge of an offence under Section 389 of the Code but was convicted of an offence under the Police Act, it was held that the conviction was liable to be set aside since the actual charge framed under S. 46 against the accused was the same as the charge framed for the offence of extortion, of which he was acquitted. *1 Weir 844.*

(2) Prosecution of accused persons (one head constable and two constables) under the Prevention of Corruption Act and Ss. 347 and 389, P.C.—Contradictions in statements of prosecution witnesses—Prosecution version unnatural—Acceptance of money in presence of crowd in broad day light, unbelievable—Held, accused were not liable to be convicted. *1982 UP (Cri) C 142 (All).*

2. Practice.—Evidence—Prove: (1) That the accused put or attempted to put a person in fear.

(2) That the fear was of an accusation of having committed or attempted to commit an offence.

(3) That such offence was punishable with death, imprisonment for life or imprisonment for at least ten years.

(4) That he did so in order to commit extortion.

For the last provision also prove:

(5) That the accusation was of an unnatural offence.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by the Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate specially empowered (first paragraph); District Magistrate, Additional District Magistrate specially empowered, Chief Metropolitan Magistrate (second paragraph).

Of Robbery and Dacoity

Section 390

390. Robbery.—In all robbery there is either theft or extortion.

When theft is robbery.—Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.—Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt , or of instant wrongful restraint to that person, or to some other person, and by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations

(a) A holds Z down, and fraudulently takes Z's money and Jewels from Z's clothes, without Z's consent. Here A has committed theft, and in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(b) A meets Z on the high-road, shows a pistol, and demands Z's purse, Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(c) A meets Z and Z's child on the high-road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(d) A obtains property from Z by saying—"Your child is in the hands of my gang, and will be put to death unless you send us ten thousand [5][taka]. This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

Cases and Materials

1. Scope.—(1) This section may be read with sections 39, 46, 319, 339 Penal Code. Robbery is an aggravated form either of theft or of extortion. Robbery may be distinguished from theft and extortion by the presence of force and imminent fear of violence and may, therefore, be defined as felonious taking from the person of another or in his presence against his will, by violence or putting him in fear of injury *(AIR 1928 Cal 498)*. If theft is already committed and violence is used to help an offender to escape, theft is not robbery. In a charge of robbery, it must be shown that there was not only violence or hurt or wrongful restraint but also that it was caused for the purpose of enabling theft to be carried out. In all robbery, there is either theft or extortion. An accidental injury by a theft will not convert his offence into robbery. 'Restraint' implies abridgment of the liberty of a person against his will. Removal of ornaments from the body of a person after causing his death does not amount to robbery. Dishonest intention is a sine qua non of the offence of robbery.

2. For more cases relevant to this section, see under section 392 infra.

Section 391

391. Dacoity.—When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointy committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding is said to commit "dacoity".

Cases and Materials

1. Scope.—(1) To constitute the offence of dacoity, it is necessary that death or hurt or wrongful restraint or fear of such instant evils should be caused by the offenders not only in order to the

5. Substituted by Act VIII of 1973, s. 3 and 2nd Sch. w.e.f. 26-3-1971 for "rupees".

committing of theft or in committing theft, or in carrying away property obtained by theft but also "for that end" and that five or more persons should be acting conjointly *(18 CrLJ 346)*. The word "conjointly" is the most important word bearing on the liability of persons accused of an offence of dacoity. While it may be true to say that common intention is no part of the offence of dacoity, the word "conjointly" used in section 391, manifestly refers to united or concerted action of the persons participating in the transaction. Even an attempted robbery by five or more persons amounts to an offence of dacoity and the fact that dacoit failed to remove any booty is irrelevant *(AIR 1951 All 834)*. To constitute an offence under section 391, there should be at least five persons involved in the commission of the offence.

2. For more cases relevant to this section, see under section 395 infra.

Section 392

392. Punishment for robbery.—Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Cases and Materials : Synopsis

1. *Scope of sections 390 and 392.*
2. *Causes or attempts to cause death or hurt or wrongful restraint or fear thereof to any person.*
3. *"For that end".*
4. *"Wrongful restraint". See also S. 339.*
5. *"The offender".*
6. *"In order to the committing of the theft", etc.*
7. *"In committing the theft".*
8. *In carrying away stolen property.*
9. *Benefit of doubt.*
10. *"Voluntarily".*
11. *Robbery by extortion.*
12. *Murder, robbery and section 404.*
13. *Charge and conviction.*
14. *Evidence and proof.*
15. *Sentence.*
16. *Procedure.*
17. *Practice.*
18. *Charge.*

1. Scope of sections 390 and 392.—(1) High way robbery is a very heinous offence for which deterrent sentence should be passed. In such a case the value of the stolen property should not be a criterion whereby the amount of punishment is to be determined. Robbery is an aggravated form of extortion. The element of fear exists in both and there is delivery of property by the victim. Whenever theft is accompanied by violence or fear of instant violence or extortion is accompanied by violence or fear of instant violence, the presence of the offender and the delivery of the thing extorted there is robbery. Where the names of accused appear in FIR and stolen property is recovered from their possession, mere obliging statements of some witnesses would not cast doubt on the prosecution evidence and the conviction may be upheld. The mere pointing out by the accused of the place where some of the stolen properties were concealed is not sufficient to support a conviction under section 411, nor would it amount to taking part in dacoity or robbery *(13 CrLJ 127)*. The accused may be convicted where they were correctly identified at identification test parade and stolen articles were identified and recovered from their possession. However, in dacoity cases evidence adduced as to identification of dacoits ought not to be accepted too readily but should be looked at with great caution. Where a policeman on patrol duty committed robbery, it was held that the accused not merely committed a penal offence, he brought slur on the force to which he belonged and also debased the uniform he was wearing at the relevant time as insignia of his authority. A substantive sentence of one

year, in the above circumstances for an offence which is punishable with RI which may extend to 14 years is so grossly inadequate as to amount to miscarriage of justice.

(2) Punishment for voluntarily causing hurt in committing robbery—In view of the fact that the two appellants and some other unidentified persons illegally confined the informant shop-keeper and others in the shop and by curtailing their liberty forcibly looted away valuable goods from their possession but without causing hurt to any body, the appellants committed the offence punishable under section 392 of the Penal Code not under section 394. *Gohar Ali and another Vs. The State 16 BLD (HCD) 398.*

(3) Robbery is an aggravated form of theft or extortion. *(1784) 168 ER 263.*

(4) Dacoity (S. 391) is robbery committed or attempted to be committed where the number of persons taking part in it, whether as principals and abettors, is more than five. *1977 KerLT 714.*

(5) The opening words of the section show that where there is no theft or extortion, there cannot be any robbery. *1978 WLN (UC) 275.*

(6) Where the element of removal of movable property from the possession of another is wanting there will be no theft and hence, there will be no robbery. *AIR 1941 Pat 129.*

(7) Section 392 applies also to highway robbery. The sentence passed under the section may extend to 14 years if the highway robbery is committed between sunset and sunrise. Under S. 397, robbery is punishable with a minimum punishment of seven years. The offence covered is robbery involving use of a deadly weapon, etc. In such a case, the more appropriate section to apply will be S. 397 which prescribes a minimum sentence of seven years and not S. 392, under which, though the maximum sentence may be one for 14 years yet there is no minimum sentence and the court may award, in its discretion, sentence of imprisonment for a period of less than seven years even where the offence has involved the use of a deadly weapon. *1978 CriLJ 797.*

(8) Though an offence under S. 392 is exclusively triable by a Court of Session; where the complainant himself had submitted to the jurisdiction of Magistrate, while securing conviction of accused under S. 392 in the first complaint and neither claimed that the matter be dealt with as an offence exclusively triable by a Court of Session, nor such plea was raised in the revision filed by him against the order of discharge of accused, the complainant having failed in first attempt to secure conviction of accused, it is not open to him to have a second round in the Sessions Court on the ground that the Magistrate had no jurisdiction. *1981 UP CriC 116 (All).*

(9) Owner of account books illegally seized by an officer—Owner forcibly recovering it from officer—there is no theft and therefore no robbery. *AIR 1965 All 543.*

(10) Knife injuries caused by accused on person of victim—Injuries enabling accused to remove ear-rings and keys from person of victim—Case is covered by S. 392 and not by S. 394. *1984 CriLJ (NOC) 103 (Delthi).*

2. Causes or attempts to cause death or hurt or wrongful restraint or fear thereof to any person.—(1) It is essential in order to constitute a theft a robbery, that the offender should have caused to any person death, hurt or wrongful restraint or the fear of instant death or instant hurt or instant wrongful restraint. Where such elements exist the theft would be robbery, not otherwise. *AIR 1955 NUC (Him Pra) 4302.*

3. "For the end".—(1) The death, hurt, wrongful restraint or the fear thereof must have been caused for the purpose of achieving the end or object of theft, or of carrying away the stolen property. *1979 CriLJ 1158.*

(2) An assault not made for purpose of achieving the object of theft or carrying away the stolen property would not make the theft, a robbery. *1970 CriLJ 647.*

(3) Where a fight did not start with any object of theft but over money due by the complainant to the accused and at the end of the quarrel the accused found a chance to take the complainant's property for ensuring the payment of his money, it was held that the accused was not guilty of robbery. *AIR 1935 Pesh 49.*

(4) The words "for that end" do not mean that the assault or hurt must be caused "in the same circumstances" or "in the same transaction" as the theft. *AIR 1941 Oudh 476.*

(5) Murder on provocation—About seven hours thereafter accused committing theft—Theft had no connection with murder and offence fell not u/s. 392 but u/s. 380. *AIR 1953 HimPra 105.*

4. "Wrongful restraint".—(1) "Restraint" implies abridgment of the liberty of a person against his will. A person deprived of his will power by sleep or otherwise cannot, while in that condition, be subject to any restraint. *AIR 1928 Lah 445.*

5. "The offender".—(1) The word "offender" in the section denotes the person who commits the theft or extortion and does not include persons who have not committed the theft but who carry away the stolen property. *1966 AllWR (HC) 549.*

6. "In order to the committing of the theft" etc.—(1) The use of violence will not ipso facto convert a case of theft into robbery unless such violence is committed for one of the ends specified in S. 390. There must be a specific averment or allegation to that effect. *1979 CriLJ 1158 (Cal).*

(2) Where both the thief and the person who helps him to escape are concerned in the act of theft and one of them lifts the property and the other uses violence against the victim in order to help the fellow-thief to escape, such helper also will be guilty under S. 390. *AIR 1976 SC 1430.*

7. "In committing the theft".—(1) The words "in committing the theft" import the idea that the death or injury caused is part of the act of theft. Where the accused snatched away the murkis from the ears of the complainant causing hurt to him, it was held that the offender was guilty of robbery. *AIR 1955 Raj 147.*

8. In carrying away stolen property.—(1) The carrying away of the stolen property may be and ordinarily is one of the ends or purposes or objects of the thief and if for that end he causes death etc., he will be guilty of robbery. *1958 BLJR 238.*

(2) Accused armed with deadly weapons threatening complainant's party not to interfere with their taking away fish from tank and removing the fish are guilty of dacoity. *AIR 1980 SC 2127.*

(3) Accused while carrying away stolen property exploded crackers to frighten away his pursuers. Conviction under Section 395 held was proper. *AIR 1980 SC 788.*

9. Benefit of doubt.—(1) Where two views can be taken of the object for which violence has been used by the accused, it would be safer to take the view which would be more favourable to him. *AIR 1966 Pat 453.*

(2) If the facts and circumstances of the case are such that they point to grave improbabilities in the story for prosecution, acquittal of accused cannot be set aside. *1981 CriLR (SC) 218.*

10. "Voluntarily".—(1) In order that theft may amount to robbery, the accused must cause death or hurt or wrongful restraint voluntarily for one of the ends mentioned in the section. *AIR 1933 Lah 407.*

11. Robbery by extortion.—(1) In order to constitute robbery by means of extortion, there must be immediate delivery of the property by the victim and the will to do so must be endangered by fear which should have been caused by the exfortioner antecedent to the delivery. *1950 All LJ 711.*

(2) A barber extracting his annual remuneration from the complainant before it became due at the end of the year by putting him in fear of instant hurt is guilty of robbery. *AIR 1950 Nag 214.*

12. Murder, robbery and section 404.—(1) When death is caused for the purpose of stealing the jewels of the deceased, it is robbery, defined in this section and made punishable under Section 392. *AIR 1927 Mad 243.*

(2) The word 'person' will not include a dead body and hence the act of the accused in stealing property from the dead body will amount only to an offence under S. 404 (Dishonest misappropriation of property possessed by deceased person at the time of his death). *AIR 1958 MadhPra 192.*

(3) The word 'person' cannot be so narrowly construed as to exclude the dead body of a human being who was killed in the course of the same transaction in which theft was committed. *AIR 1963 MadhPra 106.*

13. Charge and conviction.—(1) Charges under this section and S. 397 cannot be joined unless they form part of the same transaction within the meaning of S. 220. Cr.P.C. *AIR 1933 Lah 512.*

(2) A person charged with the offence of dacoity (S. 395) can be convicted of an offence under S. 457 or this section where on the evidence before the Court, the accused's act may fall under S. 457, S. 395 or S. 392, and it is not necessary to frame a fresh charge. *AIR 1927 Oudh 196.*

(3) An accused charged with the offence of dacoity can be convicted of the lesser offence of robbery without there being a specific charge therefor. *AIR 1956 SC 441.*

(4) The offence under S. 369 is not a minor offence included in the offence under this section and hence, a person charged under this section cannot be convicted under S. 369. *AIR 1930 Lah 544.*

(5) A person convicted for robbery cannot also be convicted for an offence under S. 411 (dishonestly receiving stolen property). *AIR 1950 East Punj 66.*

(6) A man causing death, while carrying away stolen property, can be convicted both of murder and robbery. *AIR 1955 NUC (All) 3573.*

14. Evidence and proof.—(1) The unexplained possession of stolen property soon after a suspected robbery and murder is not only presumptive evidence of robbery against the accused but also of murder. *AIR 1956 SC 400.*

(2) It is not open to a Court to base a conviction under this section on insufficient evidence on the mere fact that the accused in his statement admitted having taken property from the complainant for some other purpose, which was not believed by the Court. *AIR 1929 Sind 255.*

(3) The mere presence of the accused among the raiders who visited the village at night is not sufficient to hold that they committed robbery or dacoity. It must be shown that the accused conjointly committed robbery or aided its commission. *AIR 1962 Manipur 7.*

(4) As to the appreciation of circumstantial evidence and the value of identification evidence. *AIR 1983 SC 367.*

15. Sentence.—(1) A sentence of imprisonment is essential for an offence under this section. *AIR 1922 All 245.*

(2) A sentence of 7 years' R. I. is not too severe in the case of a previous convict charged with an offence under this section. *AIR 1934 Oudh 122.*

(3) In dealing with cases of highway robbery, the value of the stolen property is immaterial in deciding the quantum of sentence. *AIR 1942 Oudh 221.*

(4) Separate sentences for murder and robbery are legal. *AIR 1936 Nag 200.*

(5) As to further illustrations on point of sentence. *1984 CriLJ (NOC) 103 (Delhi); (1983) 1 Crimes 547; 1982 UP (Cri) 63 (All); 1980 LuckLJ 25 (All).*

16. Procedure.—(1) An offence under this section cannot be summarily tried under S. 260, Criminal P. C. *(1907) 5 CriLJ 21.*

(2) Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate specially empowered (first paragraph), Court of Session (second paragraph).

17. Practice.—Evidence—Prove: (1) That the accused committed theft.

(2) That he caused or attempted to cause to some person (a) death, hurt, or wrongful restraint: or (b) fear of instant death, or of instant hurt, or of instant wrongful restraint.

(3) That he did as above (a) in committing such theft or (b) in order to commit such theft or (c) in carrying away or attempting to carry away, the property obtained by such theft.

(4) That he acted voluntarily.

Or—Prove (1) That the accused committed extortion.

(2) That he was, at the time of committing it, in the presence of the person so put in fear.

(3) That he committed it by putting that person or some other person in fear of instant death or of instant hurt, or of instant wrongful restraint.

(4) That he thereby induced the person so put in fear to deliver up then and there the thing extorted.

18. Charge.—The charge should run as follows:

I (name and office of the Magistrate/Session Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, robbed (state the name), and thereby committed an offence punishable under section 392 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 393

393. Attempt to commit robbery.—Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This is a specific section for punishing attempt to commit robbery. Where no overt act is done towards the commission of robbery, merely standing in a crowd is not evidence of committing or attempting to commit robbery or even aiding in commission of robbery *(47 CrLJ 249).*

(2) Theft or extortion is an essential ingredient of the offence of robbery and each requires dishonest intention on the part of the accused as an essential factor to constitute the offence. Therefore, an intention to rob is an essential ingredient of the offence of attempt to commit robbery made punishable under this section. *(1912) 13 CriLJ 864.*

(3) A person charged under S. 398 could be convicted under this section. *(1911) 12 CriLJ 468.*

(4) The accused who was unarmed accompanied other armed person, but was at a distance from the place where the latter committed robbery. It was held that the accused could be convicted of an offence under this section read with S. 114. *AIR 1926 Rang 207.*

(5) Accused attempted to commit a robbery in a running train and jumped out from the train getting injured, held were rightly convicted and sentenced to 3 years' R. I. *1979 All CriR 284.*

2. Distinction between extortion, theft, robbery and dacoity.—Extortion occupies a middle place between theft and robbery or dacoity. Dacoity is robbery by five or more persons conjointly

committed or attempted to be committed. Robbery, on the other hand, is a special and aggravated form of either theft or extortion. Theft is robbery if in the course of it the offender voluntarily causes or attempted to cause to any person death, hurt, or wrongful restraint, or fear of instant death, hurt or wrongful restraint. Thus, if hurt is actually caused when the offence is committed the offence is punishable as robbery. Extortion is robbery if the former is accompanied by violence. Extortion differs from theft inasmuch as in the former there is the wrongful obtaining of consent by putting the person in possession of property in fear of injury to him or to any other. The offence of extortion is carried out by over-powering the will of the owner. In theft there is never the intention of the offender to obtain the consent of the owner of the property. Moreover in theft the property involved is moveable property, but in case of extortion it may be any property.

3. Practice.—Evidence—Prove: (1) That the accused attempted to commit robbery.

(2) That in such attempt he did some act towards the commission of that offence.

(3) That he attempted to commit theft or extortion for obtaining property or put some person in fear to deliver up the thing extorted.

4. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

5. 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 of—, at—, did an act, to wit—, and which amounted to an attempt to rob X, and thereby committed an offence punishable under section 393 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court or the said charge.

Section 394

394. Voluntarily causing hurt in committing robbery.—If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with [6][imprisonment] for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of section.*
2. *Charge and conviction.*
3. *Evidence and proof.*
4. *Sentence.*
5. *Procedure.*
6. *Practice.*
7. *Charge.*

1. Scope of section.—(1) This section indicates that violence or hurt must be caused by a person while he is committing or attempting to commit a robbery. The other persons who join him in committing or attempting to commit such robbery are also held guilty of offence. Where hurt is caused independently of theft and not with object of committing theft, but subsequently theft is committed because the accused finds a good opportunity to do so, the offences will be two different offences—of causing hurt and of committing theft the accused will not be liable for robbery under section 394. Similarly where the accused abandoned the intention of committing robbery and took to their heels on

6. Substituted by Ord. No. XLI of 1985, for "transportation".

alarm being raised. Subsequently there was firing by the accused to prevent pursuit which resulted injuries to prosecution witnesses. It was held that violence was not caused for one of the ends contemplated by section 390. Conviction for the offence under section 394, could not be sustained. It was altered to one under section 326 *(1970 PCrLJ 155)*. As an offence punishable under this section 392, an accused person who is convicted under both these sections can be legally punished only under this section and in such a case it would be sufficient to convict him under this section alone. Separate convictions are according to the illustration (m) to section 235 of the Code of Criminal Procedure is justifiable. Where hurt is caused in the commission of a theft, the causing of hurt changes the theft into robbery and the charge should be held under this section for causing hurt in the commission of robbery. This section and not section 397 Penal Code will apply to the case of a robber who does not himself cause grievous hurt or use any deadly weapon.

(2) Prosecution of the accused-appellants initiated by the P.W. 1.—Complainant by a complaint before a Magistrate—Complaint petition filed after delay of over three days—P. Ws. 2, 3 and 4 corroborated the complainant's evidence claiming to have appeared on the scene and to have recognised the accused-person—P.W. 2 was the complaint's full brother and P.W. 4 is his cousin both residing in the complainant's house—None of them is found to be natural witness—All these witnesses accepted the defence suggestion about the place of occurrence—About 15 to 20 persons who were disinterested and independent appeared on the scene but only 3 witnesses, two of them being relations were produced by the complainant—Defence examined four witnesses to substantiate their case that the complainant falsely instituted the case out of enmity with the accused persons—Trial Court on consideration of four witnesses for the prosecution and four witnesses for the defence held the appellants guilty of robbery and convicted and sentenced—The charge of robbery, shall have to be established by the evidence of prosecution witnesses—In view of the nature of evidence, particular when all the three witnesses found to be chance witnesses in respect of a matter where independent and disinterested witnesses could have been examined and considering the inordinate delay in filing the complaint, it could not be held that the charge was established beyond reasonable doubt—The appellants found entitled to benefit of doubt—They were given benefit of doubt and are found not guilty by the Appellate Division—The impugned order of conviction and sentence was set aside and the Appellants were acquitted by the Appellate Division. *Azizur Rahman and anr. Vs. The State. 5 BSCD 45.*

(3) The prosecution has failed to prove the main ingredient of section 394 of the Penal Code regarding hurt sustained by the victim during occurrence at the hands of the accused persons as neither any doctor has examined nor any paper showing admission into hospital was filed before the Court and the non-production of recovered snatched-away money has made the entire prosecution case unworthy to believe and that the prosecution has also tried to embellish its case and the appellants are found not guilty of the offence charged and acquitted therefrom. *Noor Islam and another Vs State (Criminal) 6 BLC 178.*

(4) Non-examination of investigating officer does not always prejudice the accused—Admittedly the appellants remained in absconderice during the whole trial and in such a situation the non-examination of the investigating officer cannot be said to have caused any prejudice to the appellants. *Gohar Ali and another Vs. The State 16 BLD (HCD) 398.*

(5) Nature of evidence. Chance witnesses. Independent and disinterested witnesses not examined. Inordinate delay in filling the complaint. Charge does not seem to have been established beyond doubt. Benefit of doubt given. *Azizur Rahman Vs. The State 4 BCR 370 AD.*

(6) Accused brought out robbed goods from a place known only to him is a strong circumstance to establish that he was himself involved in the commission of the offence. *Salauddin Vs The State 32 DLR 227.*

(7) Mistaken identification of a wrong person as accused in the TI parade held after 5 (five) months. Delay in holding TI parade after 5 months reduced the value of identification—In view of the mistake admitted by PW 3 the solitary witness, in identifying a wrong person in the TI parade, it would be unsafe to convict the appellants, namely Kazi Enayet Hossain and Abul Kashem on such shaky foundation. Conviction of other appellant Shahadat Hossain upheld. *Shahadat Hossain Vs. The State 5 BCR 141.*

(8) The Supreme Court on a consideration of the entire evidence found that the "whole prosecution case was streaked with falsehood" and that the case against the appellant was a mere fabrication and on that view acquitted the appellant. *Mohammad Hanif Vs. The State. 19 DLR 453 SC.*

(9) The definition of robbery in S. 390 shows that in order that theft may amount to "robbery" the offender need not actually cause hurt for the purpose of committing the theft or carrying away the property got by the theft; it is sufficient if the offender attempts to cause hurt. *(1900-1902) 1 Low Bur Rul 232.*

(10) Where after beating the complainant and his concubine which resulted in causing injuries to them, the accused entered the complainant's house and removed boxes containing cash, ornaments, etc., it was held that the beating was primarily for the purpose of theft and hence the accused was guilty under this section. *AIR 1955 Cal 527.*

(11) Where the accused snatched ornaments from the complainant's neck and while doing so caused injuries to her, it was held that his act amounted to an offence punishable under this section. *AIR 1955 NUC (Ajmer) 4757.*

(12) Where the accused, a police constable, slapped a boatman and made him hand over certain articles found on the drowned body of a person, and kept the articles himself and denied falsely that he had recovered them from the boatman, it was held that the police constable's guilt under this section was established. *AIR 1978 SC 448.*

2. Charge and conviction.—(1) When there are a number of accused persons, the charge must clearly state the individual acts against each accused and it must also be made clear whether they are charged for an offence under this section read with S. 34. *1956 MadhBLJ 651.*

(2) The offence under this section is not necessarily an ingredient of the offence of dacoity as there can be a dacoity without anybody being actually hurt. Hence, an offence under this section cannot be said to be a minor offence so far as dacoity is concerned. *AIR 1928 Mad 207.*

(3) Where during trial under S. 396 twelve persons out of sixteen accused were acquitted and there was no finding that the remaining four committed dacoity with others numbering more than sixteen, conviction of the four accused under S. 396 was converted to one under S. 394. *(1969) 3 SCC 727.*

3. Evidence and proof.—(1) It is not sufficient for the prosecution merely to prove that there was a theft and a causing of hurt to the victim. It must also establish that the accused was the offender in committing robbery. *(1892-1896) 1 UppBur Rul 245.*

(2) The mere circumstance of the recovery of stolen property at the instance of the accused is not sufficient to establish his guilt under this section. *AIR 1959 Cal 280.*

(3) Recevery of ornaments of deceased at the instance of accused—Deceased last seen wearing those ornaments—Absence of any evidence to connect him with murder of deceased or having robbed her of her ornaments—Accused, held liable to be convicted under Section 411 and not under Section 302 or Section 394. *AIR 1980 SC 1753.*

(4) Where the nature of the stolen articles, the manner of its acquisition by the owner, the nature of the evidence of its identification, the manner in which it was dealt with by the accused, the place and

circumstances of its recovery, inability of the accused to explain its possession are circumstances that help raising a presumption the article was involved in an offence under S. 394 and also of murder that took place in the transaction. *AIR 1978 SC 522.*

(5) Where the case against accused rested not only on oral evidence of eye-witnesses but also on the fact that soon after the crime he was found in possession of a revolver from which was fired the bullet which was found in the body of the deceased, the Supreme Court refused to interfere with the concurrent findings of the lower courts. *1970 UJ (SC) 714.*

(6) Where the accused who were alleged to have committed offence under S. 394 P.C. belonged to the neighbouring village at a distance of less than a mile from police quarter, the scene of occurrence, and the witnesses (police officials) who came to identify the accused, had seen the accused from behind while escaping and the officials and the officer (victim) though knew the accused but did not name them in the F.I.R. and identification of two of the accused took place after a gap of four days after their arrest without any explanation for the delay, the accused could not be convicted for offence under S. 394 P.C. *AIR 1983 SC 289.*

4. Sentence.—(1) The sentence for an offence under this section should not be out of proportion to the gravity of the offence. *AIR 1955 Cal 527.*

(2) For a daring robbery in day time in the female compartment of a running train it was observed that the minimum (seven years) provided under S. 397 may be passed if the conviction were to be under this section. *AIR 1928 Lah 169.*

(3) An accused under this section is not entitled to the benefit of the Probation of Offenders Act, as an offence under this section is punishable with imprisonment for life. *AIR 1955 Orissa 106.*

(4) Section 360, Criminal P.C., is also not applicable. *AIR 1955 NUC (Ajmer) 4757.*

(5) Consecutive sentences in respect of convictions under S. 397 and this section are illegal, if they are based on the same set of facts. *AIR 1926 Lah 47.*

5. Procedure.—(1) A Magistrate trying the accused for an offence under this section can pass an order for compensation under S. 250 of the Criminal P.C. *1970 BLJR 1160.*

(2) An offence under S. 397 is a scheduled offence under the West Bengal Tribunals of Criminal Jurisdiction Act (Act 14 of 1952). A person accused of an offence under S. 397 can at the same trial, by reason of S. 221. Criminal P.C., be tried for an offence under this section. *AIR 1955 Cal 177.*

(3) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

6. Practice.—Evidence—Prove: (1) That the accused or someone jointly concerned with him, committed or attempted to commit robbery.

(2) That the accused, or such other person, voluntarily caused hurt in doing so.

7. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you on or about the—day of, at—, committed (or attempted to commit) (or were jointly with X concerned in committing) (or attempting to commit) robbery of the property of A, and that as such you (X) voluntarily caused hurt to A (or), and that you thereby committed an offence punishable under section 394 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 395

395. Punishment for dacoity.—Whoever commits dacoity shall be punished with [6][imprisonment] for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. Scope of sections 391 and 395.—(1) Dacoity is a most serious crime which it is difficult to detect in the sense of bringing home the offence to the culprits and it is an offence which gives rise to a great deal of misery. There is no distinction between a dacoity and an attempt to commit one and both are treated alike. The definition of dacoity includes attempt commit dacoity. Where there was evidence that five or more persons were connected with the commission of dacoity; all such persons would be guilty of the offence under this section. In ordinary circumstances a sentence of rigorous imprisonment for a period of five years is the least sentence which should be passed. The crime of robbery in all cases must be considered as a serious crime and although this section does not provide for a graver punishment in the case of dacoity committed on the highway between sunset and sunrise, as in the case of robbery, nonetheless a dacoity committed on the highway between sunset and sunrise in an aggravation of the offence and a sentence of seven years is not excessive *(43 CrLJ 615)*. Where the dacoity is a very serious one the maximum sentence under this section, or something approaching the maximum sentence, should be passed upon the persons concerned *(43 CrLJ 97)*. A sentence of fine only is illegal *(47 CrLJ 780)*. Where no stolen property was found in possession of the accused charged under section 395 and their names were not entered in FIR and no identification proceedings were conducted by any Magistrate it was held that their conviction solely based upon the testimony of the complainant was not sustainable *(29 CrLJ 989)*. FIR was lodged after two days and delay remain unexplained it was held that conviction would not be safe in the fact of absence of any incriminating circumstances. Conversion of robbery into dacoity is illegal where there is no proof that five or more persons have taken part in committing or attempting to commit the crime *(11 CrLJ 248)*. A person not taking part in dacoity but bringing food for the gang prior to dacoity is guilty of abetment *(35 CrLJ 863)*. Where it is established that the common object of the rioters was both to cause hurt to members of another community whom they might happen to find and to rob the shops and house of that community, any person who is proved to have taken part in the disturbance must be found of dacoity *(28 CrLJ 1110)*. There is no statutory prohibition against conviction under both sections 395 and 412 Penal Code. But on principle, if a criminal act is only a single act coming within the definition of two distinct offences, there should not be a conviction for both the offences. Thus where the accused is

convicted under section 395 for committing a dacoity in which the property found in his possession came to him, he cannot be held guilty both under sections 395 and 412 *(AIR 1956 All 336)*. Although an approver is a competent witness, being an infamous witnesses, his evidence has to be corroborated on material particulars before acceptance *(1958 CrLJ 343)*. Identification parades are held to find out whether the suspect is the real offender or not. Identification proceedings should be held as early as possible. Identification at night during a dcoity, when the people are terrorised, is generally of very little value *(28 CrLJ 874)*. Changes of error in identification become greatly increased when the identification is based upon a momentary glimpse in the confusion and excitment of the moment at night, though it was a moonlight night *(33 CrLJ 381)*. It is an important fact whether all the persons identified were previously known to the witnesses, or were perfect strangers to them, the time of the occurrence, the state of light and the opportunities which the witnesses has of identifying are martial circumstances to be deposed to in each and every case *(31 CrLJ 206)*. Statements made at such parades are not substantive evidence but they may be used to contradict or corroborate statements made on oath in courts if a witness is able to pick up the accused in an identification parade his evidence will have added weight but if he fails, his evidence is weakened and that is the purpose of identification parade. Identification parades are of weak type of proof and it depends entirely upon the capacity of a witness to register a true impression in his mind and then to keep it in his memory. If due and adequate precautions are taken to ensure a fair and impartial identification it may be sufficient. Where the suspects are known to the eye witnesses, the holding of an identification parade is a farce *(AIR 1961 All 153)*. If an accused has to be put up for identification he should not be allowed to be seen by the identifying witnesses before identification. If there is evidence that the accused had been seen before identification or that the police was creating opportunities for witnesses to observe the accused or that the accused were taken in and out of jail and proper precautions were not taken, the object of identification will be defeated. Similarly showing photographs of the accused by the investigating staff to the witnesses where identification is a material issue delay may seriously prejudice *(AIR 1954 SC 4)*. Where the accused where convicted on the sole evidence of their being found in possession of stolen goods which were later identified to belong to traders whose goods had been looted in a dacoity, it was held that the presumption that they were rightly drawn. In many dacoity cases identification or recovery of articles is the only and at all events the most important material. But if the article identified is not distinctive in appearance, being of a class of common and unidentifiable articles, it would be very unsafe to convict on such identification. For a conviction under this section pointing out a place where stolen property was found, is not sufficient *(15 CrLJ 404)*. In most cases of dacoity the dacoits are not arrested on the spot. The evidence on the basis of which their conviction is sought consists only of identification and recovery of stolen property. The mere fact that a person accused of decoits made incriminating statements about himself before, several prosecution witnesses and even produced some of the stolen articles is not convincing or conclusive evidence of his guilt *(14 CrLJ 601)*. Where a confession is not corroborated by any other evidence and it is subsequently retracted, it would be unsafe to convict the accused on the basis of the confession *(AIR 1945 Bombay 484)*. But if the retracted confession is corroborated by the details given in it and by the production of stolen property by the accused, it may be sufficient for conviction of the accused under the section.

(2) Dacoity is perhaps the only offence which the Legislature has made punishable at four stages:

(i) Assembling for the purpose of committing dacoity. Each of the persons who so assembles is guilty under S. 402.

(ii) Making preparation for committing dacoity. Any one who makes preparation is punishable under S. 399.

(iii) Attempt by five or more persons (including persons who aid such attempt) to commit dacoity.

(iv) Actual commission of robbery by five or more persons (including those who aid such commission). *AIR 1960 Pat 582.*

(3) The essential elelments of the offence of dacoity as defined in this section are:

(i) Five or more perosns must act conjointly.

(ii) Such act must be robbery or attempt to commit robbery.

(iii) The five persons must consist of those who themselves commit or attempt to commit robbery or of persons who commit or attempt to commit the robbery and those who are present and aid them in such commission or attempt. *AIR 1957 SC 320.*

(4) The section contemplates actual participation by every one of the five or more persons in the commission of the robbery whether as aiders or as major actors. *AIR 1973 SC 760.*

(5) Where the victim was abducted and wrongfully confined by five persons who were armed with deadly weapons and they threatended to kill him unless he wrote letters to his father for payment of ransom the accused would be guilty of extortion amounting to dacoity as the letters written by victim constitutes property. *AIR 1982 NOC 151.*

(6) A dispute purely of a civil nature is beyond the purview of this section and it would be abuse of the process of the court of criminal proceedings being started in regard to disputes of a purely civil nature. *AIR 1979 SC 850.*

(7) Dacoity case—Defence plea that the accused Q contested GRAM SARKER Election and the implication in dacoity was the consequence of village political rivalry was not at all put to the prosecution witness in cross-examination—P. Ws. recognized the accused Q with a gun in his hand and he did not cover his face—Trial court believed the prosecution case—High Court Division considered that there was no SUGGESTION that the witnesses were tortured—Conviction and sentence rightly recovered—No interference by the Appellate Division. *Abdul Quddus and anr. Vs. The State, BCR 1987 AD 142.*

(8) Reduction of sentence by the High Court Division—Reduction of the sentence from 7 years to 5 years u/s. 397 read with sec. 395 of the Penal Code—This sentence is illegal in that the minimum sentence u/s. 397 is 7 years' imprisonment—Sec. 397 does not punish the offence of dacoity but it simply provides a minimum punishment of 7 years for dacoity if the offender has committed it with a deadly weapon or has inflicted injuries to any person while committing this offence—Since dacoity is punishable u/s. 395 High Court Division altered the conviction from Sec. 397 to S. 395. *Emran Ali and Firoj Ali Vs. The State, 5 BSCD 45.*

(9) Offence of Dacoity—No evidence other than the FIR and the confessional statement which were not properly recorded—FIR proved in the case did not establish *per se* that there was an occurrence of decoity as alleged—When there was no other evidence of decoity, there was no use to refer to the alleged confession of the accused to prove their participation in the occurrence which was not proved at all—..... confession itself there was a reference to the occurrence of decoity—It may be

said quite ingeniously that the confession itself proves the occurrence provided it is accepted. *Babul @ Abdul Majed Khan & anr. Vs. The State, 42 DLR (AD) 186.*

(10) Forming of a charge u/s. 395 against less than 5 persons without in addition saying that five or more were participants in the crime is legally a valid charge if statements and evidence on record disclose that the number of participants was five or more—Even in case of a defective charge trial not vitiated unless there was failure of justice. Mere physical presence of several others in the company of accused, where circumstances favouring their innocence exist. *Hachi Meah Vs. State (1965) 17 DLR 692.*

(11) Dacoity—Charge of, not tenable without a minimum of five persons. As an offence under section 395 requires a minimum of five persons there, obviously a charge which merely recites that three persons took part in the occurrence, cannot in law be a valid charge under section 395. *Akkel Ali Vs. Crown (1949) 1 DLR 175.*

(12) After acquittal on the charge of theft no conviction for dacoity valid. When after a full trial, a Magistrate acquits the accused of the offence of theft under section 379, he cannot be tried again for dacoity on the facts without setting aside the acquittal in accordance with the provisions appropriate to the purpose. *Masir Ali Vs. Abdul Mamith (1956) 8 DLR 634.*

(13) Conviction under Sec. 395 P.C.—Bail by the High Court on appeal cannot be granted as of right but is discretionary with it—Where bail not granted, Supreme Court refuses to interfere. *Md. Ismail Vs. the State, (1969) 21 DLR (SC) 161.*

(14) The expression "the offender uses any deadly weapon" interpreted. The meaning of the word "use" must receive a comprehensive interpretation and would include the carrying of any deadly weapon in the course of a dacoity with a view to overawe persons intending to resist the commission of the dacoity. *Hoshir Ali Vs. The State, (1969) 21 DLR 575.*

(15) Petitioners convicted and sentenced under sections 342 and 395 P.C. separately by the trial Court. Sentence imposed u/s. 342 being found illegal on appeal, that is no ground to hold that sentence imposed u/s. 395 will be affected. *Md. Ismail Vs. The State, (1969) 21 DLR (SC) 161.*

(16) In a charge under section 395 punishment for dacoity and of beating can be imposed. Where the facts and circumstances disclose two intentions, namely, "giving the complainant party a good beating" and "looting or dishonest removal of property", there is no reason why section 395 of the Penal Code will not be attracted in a proper case. The point in each case shall have to be decided by the facts of the individual case if the "intention of dishonest taking by force" is found consistently running with the "intention of giving a good beating to the complainant party" in a case, the accused can equally be convicted for any of the offences of theft, robbery and dacoity whichever is attracted, if the facts so justify. *Azimuddin Khan Vs. Sabu Ali, (1968) 20 DLR 1217.*

(17) Conviction under section 395 of the Code cannot be sustainable for following reasons:

(a) No clear evidence that there were 5 or more persons.

(b) Delay in lodging FIR.

(c) Evidence of the house owner patently suffers form serious infirmities.

(d) P. Ws. could not identify the accused though they claimed to have recognised them.

(e) Unchallenged defence that accused persons were men of good character. *Imam Ali Vs. State, (1973) 25 DLR 407.*

(18) Non-examination of the investigation officer who apprehended the dacoits with ornaments casts serious doubt on the prosecution story in view of the evidence on record and attending circumstances. *Abdul Gafur alias Batta Miah Vs. The State, (1988) 40 DLR 474.*

(19) The accused were charged and convicted under section 395 as well as under section 397, P.C. and awarded a sentence of imprisonment under section 397, P.C. alone; no separate sentence was, however, passed under section 395 P.C. Held: section 397 P.C. being complementary to section 395 P.C. a charge under section 395 read with section 397, P.C. instead of two distinct charges should have been framed. *Hoshiar Ali Vs. The State, (1969) 21 DLR 575.*

(20) Lumping together of several distinct charges in one trial is not permissible. Joint trial of separate and distinct offences not in course of same transaction is not permissible. *Lal Mia Vs. State (1988) 40 DLR 377.*

(21) Joint trial of separate and distinct offences not in course of same transaction is not permissible. *Lal Mia Vs. State, (1988) 40 DLR 377.*

(22) An offence under section 448 is not a minor offence in relation to offences under sections 395 and 412. An offence under section 448 of P.C. is not a minor offence in relation to the offence of dacoity under section 395 or receiving looted property in a dacoity under section 412 of the Penal Code and the conviction for former offence without the accused being charged with it is illegal and void. Entering into another's house is not necessary element of the offence of dacoity under sections 395 and 412 of the Penal Code, and the elements of those offences do not include the elements of an offence under section 448 of the Penal Code. *Sultan Ahmed Vs. State (1960) 12 DLR (SC) 53.*

(23) For the purpose of conviction under section 395 there is sufficient evidence against the appellants as they were variously identified as more than 1 PW. *Ratan Khan Vs. State, 40 DLR 186,*

(24) Non-examination of the investigation officer who apprehended the dacoits with ornaments casts serious doubt on the prosecution story in view of the evidence on record and attending circumstances. *Abdul Gafur alias Batta Miah Vs. State, 40 DLR 474.*

(25) Charge under section 395 PC but conviction under section 397 PC. The accused appellant having been not placed on trial under section 397 PC his conviction under section 397 not sustainable in law. *Abu Taleb Vs. State 41 DLR 239.*

(26) Accused Ali Howlader's conviction under section 395/397 Penal Code cannot be sustained in law as the officer who conducted TI Parade was not examined. *Amir Hossain Vs. State 41 DLR 32.*

(27) So far as accused Ali Howlader is concerned the learned Sessions Judge has relied upon the evidence of the identifying witnesses to convict him; and since for non examination of the offence who conducted the TI parade the evidence of the identifying witnesses in the Test Identification parade cannot be relied upon his conviction under sections 395/397 of the Penal Code cannot also be sustained in law. *Amir Hossain Vs. State 41 DLR 32.*

(28) The Special Tribunal constituted under the provisions of the Special Powers Act (XIV of 1974) has no jurisdiction to take cognizance of the non-scheduled offences under sections 395 and 397 Penal Code as they were omitted from the schedule of the SP Act, 1974 by amending Ordinance X of 1977. *Khalilur Rahman Vs. State 41 DLR 385.*

(29) Conviction of the appellants on the basis of the confessional statement of a co-accused without any corroborative evidence is not maintainable in law. *Hakim Ali and others Vs. The State 11 BLD (HCD) 371.*

(30) Dacoity is usually committed at dead hours of the night and in that view of the matter the means of recognition is of vital importance. The Court is to scrutinise the evidence of witnesses with great care and caution in respect of recognition of the accused persons. Where the informant's

testimony remains uncorroborated and the identity of the accused is not established beyond reasonable doubts, it is unsafe to convict the accused persons. *Kuti alias Belal and others, Vs. The State, 15 BLD (HCD) 9.*

(31) In a case of dacoity committed in the darkness of night the question of recognition is of vital importance. When the only eye witnesses to the occurrence does not state in his evidence about the means of recognition of the alleged dacoits, the order of conviction cannot be sustained. *15 BLD (HCD) 121.*

(32) Charge of dacoity—Absconsion of accused—no ground for conviction. When the prosecution case has departure from the FIR story on material points and the evidences are full of contradictions regarding recognition of the daciots and the manner of occurrence, the disinterested C.S. witnesses are not examined and there is enmity between the parties, the prosecution case becomes doubtful in which the conviction and sentence of the accused cannot be sustainable in the eye of law. Moreover absconsion of the accused by itself without supporting evidence cannot be the basis of conviction. *Pear Ali Khan alias Pear Ali and another Vs. The State—4., MLR (1999) (HC) 258.*

(33) Identification of suspects in T.I. Parade—Belated T.I. Parade—Evidentiary value of Preconditions of holding T.I.P.—As human memory fades with the lapse of time, unordinary delay in holding T.I. parade reduces its evidentiary value. When the identifying witness had the chance of seeing the suspects in the court lock-up before the T.I. parade, the identification made in such T.I.P. cannot alone form the basis of conviction T.I. parade in order to be reliable must be held immediately after occurrence or the arrest of the suspects. *Abdul Hakim (Mirza) and others Vs. The State—5, MLR (2000) (AD) 27.*

(34) Conviction to be based on legal evidence—When prosecution fails to bring home the charge under sections 395 and 397 of the Penal Code by any cogent evidence as to the identity and participation of the accused in the commission of the offence, no conviction can be passed on basis of surmise or any other hypothesis. *Bellal alias Bellal and 2 others Vs. The State 7 MLR (HC) 27.*

(35) Offence of dacoity—When enmity between the parties from before the occurrence exists, corroboration of partisan witness by independent witness is necessary—Although there is no rule of law requiring corroboration by independent witness, the rule of prudence demands corroboration of partisan witness by independent witness particularly when enmity between the parties exists from before the occurrence. *Mahmudul Huq and others Vs. The Sate 7 MLR (HC) 105.*

(36) The appellant was charged under section 412 of the Penal Code but he was convicted under sections 395/397 of the Penal Code under misconception of law which cannot be sustained in law. *Abul Hashem Molla and 5 ors. Vs. State (Criminal) 1 BLC 211.*

(37) All the T.I. parades were held after about one year from the date of occurrence and there was a chance for PW. 1 to see the accused persons in court lockup before the identification in the TI parade for which no reliance can be placed on such TI parade and hence the conviction and sentence under section 395 of the Penal Code is not sustainable. *Mirza Abdul Hakim and others Vs. State (Criminal) 5 BLC (AD) 21.*

(38) The defence that accused Quddus contested the Gram Sarkar election and the implication in dacoity is the consequence of village political rivalry was not at all put to the prosecution witness in cross-examination. The trial considered the evidence and correctly recorded the conviction. Appeal dismissed. *7 BCR 142.*

-151

(39) Statements of some accused persons to have committed dacoity at any one of places or any where else mentioned by the witnesses do not amount to confession. The learned Additional Session Judge has no knowledge about confession. Establishment of large number of Courts overnight named by Young and immature officer, Advocates and staff without sufficient knowledge and experience has resulted in glaring miscarriage of justice as in this case causing untold miseries, harassment and sufferings. *7 BCR 347.*

(40) Judicial confession though subsequently retracted are found voluntary and true confession in this case guilty under section 395 of the Penal Code. Merely on the basis of confession of two accused appellants the other accused appellants cannot be convicted. *36 DLR 275.*

(41) The respondents filed petition of complaint against the appellants to the SDO who took cognizance of the matter and issued warrant of arrest against the appellants on charges of dacoity, criminal trespass and rioting. Thus the litigant parties have succeeded in crediting rivalry between two sets of judicial authorities when the learned Munsif, Sherpur issued notices upon the SDO. The order of a court, whether superior or subordinate, must elicit obedience of every person, be he an individual citizen or any authority set up by the Government, Criminal case is quashed. *5 BCR 231 AD.*

(42) Retrial cannot be ordered when the prosecution case depends on a retracted confession. *33 DLR 5.*

(43) Recognition of accused persons being improbable, speculative and of an uncertain character, no reliance can be placed on such recognition for convicting accused persons. Omission to state recognition to the Investigation Officer amounts to material contradiction. *1 BCR 70.*

(44) The High Court Division acquitted the accused respondents who were convicted under sections 395 and 397 of the Penal Code and under the provisions of SP Act, 1974 and sentenced them to suffer RI for four years by the Special Tribunal and whose conviction and sentence were confirmed in appeal by the Appellate Tribunal. The High Court Division on appraisal of evidence came to the conclusion that of the six neighboring witnesses five of them categorically stated that the names of the dacoits allegedly recognised were not disclosed to them when to aforesaid witnesses came immediately after the occurrence. The statement of the witnesses under section 162 CrPC were not given to the accused persons. The High Court Division on consideration of this and other circumstances held that no useful purpose would be served by directing a retrial and acquitted the accused respondents. *1 BCR 117.*

(45) A conviction under section 395 is not sustainable when it is based on test identification parade. A "TI parade to be dependable must satisfy certain conditions. In the first place, the accused should be unknown to the identifying witness by name. Secondly, he must not have had any opportunity to see the accused after the occurrence in connection with which he is put up for identification. Thirdly, the identifying witnesses makes no mistake, expert of a most negligible character in the matter of identification. If the accused was known to the witness by name from before the occurrence he would disclose the name of the accused immediately after the incident and at any rate to the investigating officer and in that case the question of his figuring as a witness in a TI parade will not arise. His identification of the known accused in a test identification parade will thus be worse than useless. This is a major reason for not depending on a TI Parade held long after the incident *(7 DLR 564 followed). 19 DLR 662.*

2. "Five or more persons.—(1) One of the essential ingredients of the offence under this section is that five or more persons must conjointly act, whether directly or indirectly as aides. *AIR 1958 Cal 25.*

(2) Where five persons were charged under this section and it was not the prosecution case that there were any more persons who took part in the robbery and one of the accused was acquitted the remaining four cannot be convicted under this section. *AIR 1958 AndhPra 510.*

(3) Where, out of six persons charged for dacoity three were acquitted, Court held that the other three accused could not be convicted for dacoity in the absence of proof that there were other unknown persons who, along with the accused, were five or more in number. *AIR 1956 SC 441.*

(4) Provided the requisite number so act, the actual commission of the robbery and the attempt to commit the robbery stand on the same footing and amount to a completed dacoity. *AIR 1957 SC 320.*

3. "Conjointly commit or attempt to commit".—(1) To constitute the offence of dacoity, five or more persons should be acting conjointly in committing robbery as principals or aides. *1974 KerLT 328.*

(2) The word 'conjointly' used in the section manifestly refers to united or concerted action of the persons participating in the transaction. *AIR 1951 Assam 143 (2) (144): 32 CriLJ 1380 (DB).*

(3) D with his wife and daughter was sleeping outside their house at night. The five accused came, beat D and his wife and daughter when they resisted their actions. Accused 1 then broke open the door. Three of the accused went inside and the other two kept guard outside. All the accused then removed the boxes and the two accused who had kept guard actually carried away the boxes. It was held that the beating and the robbery were part of the same transaction and that all the accused acted conjointly and were guilty under this section. *AIR 1948 Mad 96.*

4. "Present and aiding."—(1) A person present and aiding the commission or attempt to commit robbery stands on the same footing for purposes of this section, as the persons actually committing or attempting to commit the robbery. 'Aid' does not necessarily import intention as can be gathered from the words "intentionally aids" used in S. 107, thirdly, ante. This section does not say that the 'aid' should be intentional. It has, however, been held that under this section the aid should be intentional. *AIR 1956 VindhPra 18.*

(2) It is necessary that the aider must be present at the commission of or the attempt to commit dacoity. *AIR 1926 Cal 374.*

5. There must be robbery or attempt to commit robbery.—(1) If there is no robbery or attempt to commit robbery, there can be no dacoity. *AIR 1968 Raj 11.*

(2) The word 'dacoity' applies according to the definition not only where a robbery is committed but also where robbery is attempted. In this view it is clear that a dacoity may be committed even if the dacoits were unsuccessful in carrying away or removing any booty. *AIR 1951 All 834.*

6. Dishonest intention necessary.—(1) Inasmuch as robbery is an essential element of dacoity and dishonesty is an essential element in both theft and extortion which are essential elements in robbery, it is clear that if there is no dishonest intention on the part of the offenders, an offence of dacoity under this section cannot be made out. *AIR 1941 Mad 763.*

7. Motive.—(1) No motive is necessary to be proved for the offence of dacoity. It is not necessary that the accused should have known their victims previously or have any grievance against them. The prospect of loot is itself a sufficient motive. *AIR 1942 Pat 199.*

8. Abetment of dacoity.—(1) The fact that a person has knowledge of a design by certain persons to commit dacoity and voluntarily conceals the existence of such design knowing that such concealment would facilitate the commission of the dacoity does not amount to an abetment of the dacoity. *(1865) 4 Suth WR (Cri) 2.*

9. Unlawful assembly and dacoity.—(1) Where the common object of an unlawful assembly was not dacoity, but was something else, the members who did not take part or join in the dacoity committed by some of the members cannot be made liable under this section. The fact that the unlawful assembly, rioting and dacoity formed part of the same transaction would not be enough to make the persons who were not the actual participants in the dacoity, liable under this section. *AIR 1953 Orissa 1.*

(2) Where the common object of an unlawful assembly is to commit dacoity, the persons of the assembly who do not actually participate in the dacoity can be made liable for dacoity by virtue of Section 149. *AIR 1951 Hyd. 97.*

10. Charge and conviction.—*(A) Several dacoities committed by the same persons.*—(1) Where there was commission of dacoity in three houses on the same night, the charge must be separately laid in respect of each incident. *AIR 1962 Manipur 7.*

(B) Charge of dacoity—Conviction for another offence.—(1) A person charged with dacoity cannot be convicted of mischief as the latter offence has no connection whatever with the dacoity charge. *AIR 1950 All 471.*

(2) If the accused who is charged in general terms of having committed dacoity is convicted under S. 458 and there is no prejudice to the accused the irregularity would be cured by the provisions of S. 464 of the Criminal P. C. *AIR 1959 MadhPra 6.*

(3) An accused charged with conspiracy to commit dacoity with murder can be convicted of the charge of conspiracy to commit dacoity only. *AIR 1965 Cal 593.*

(4) A person charged for an offence under Section 396 could be convicted of an offence under this section as it is a minor offence in relation to an offence under S. 396. *AIR 1948 Mad 96.*

(5) In a charge under Ss. 395 and 400, when the evidence of the prosecution witness was disbelieved for the purpose of sustaining a conviction under S. 395, a conviction in the charge under S. 400 on the same evidence cannot be supported. *AIR 1966 AndhPra 344.*

(C) Charge for dacoity founded on common object.—(1) A conviction for dacoity, founded on a common object not charged, or on evidence which does not prove the necessary ingredients of the offence is not sustainable. *AIR 1924 Mad 584.*

(D) Alternative charges.—(1) Under S. 220, Criminal P. C. charges under S. 412 and this section can be framed in the alternative and a conviction under this section can be altered to one under Section 412 in appeal, when there is no surprise or prejudice to the accused. *AIR 1952 Vind Pra 42.*

(E) Offence under this section disclosed in evidence.—(1) Where the evidence recorded by the committing Magistrate disclosed an offence under this section, the Sessions Judge is justified in framing a charge under this section. *AIR 1933 Oudh 375.*

(F) Charge for dacoity—Conviction for abetment.—(1) Where the accused was tried on a charge of dacoity simpliciter, but is found to be liable as an abettor, the omission to mention the charge under S. 109 of the Code is curable under S. 465, Criminal P. C. unless it has occasioned a failure of justice. *1946 RangLR 313.*

(G) Miscellaneous.—(1) An accused charged for an offence under this section cannot be found guilty of an offence under S. 342 of the Code, when no specific questions were put to the accused regarding the ingredients of the offence under Section 342. *AIR 1955 (All) 2694.*

(2) Where no articles or movables were stolen but accused persons only extorted money from the victims the case was not under S. 395 but one under Section 384/149 P. C. *AIR 1979 SC 1943.*

11. Evidence and proof.—(1) It is for the prosecution to prove all the ingredients of the offence against the accused. Whether such ingredients have been proved depends upon the facts and circumstances of the particular case. *AIR 1950 All 471.*

(2) The mere presence of the accused among dacoits is not enough to prove that he committed dacoity. *AIR 1977 SC 783.*

(A) First information report.—(1) It is not necessary that F. I. R. should specify every little detail and describe the specific part played by each one of the accused, when number of them have entered the house and committed robbery. *AIR 1951 Orissa 71.*

(2) If the informant mentions the part played by any particular accused the omission about details regarding the others may have some significance. *AIR 1954 All 684.*

(B) Retracted confession.—(1) A retracted confession, when there are circumstances to show that the making of the confession itself was neither voluntary nor true, is not sufficient to find the accused guilty of an offence under this section. *AIR 1945 Bom 484.*

(C) Police report.—(1) A report made by a Sub-Inspector of Police to his superior that certain suspects were going to commit dacoity cannot be used as a sort of first information report, if the Sub-Inspector of Police had not, in his report, disclosed the source of his information; and the mere fact that he says that somebody told him that certain persons were going to commit a dacoity is not evidence at all against those persons. *AIR 1941 Bom 146.*

(D) Injury on accused.—(1) The mere fact that the accused had been recently wounded and that he has failed to give a satisfactory explanation as to how he was wounded, combined with the fact that he was carried away from his house to a place of hiding shortly after the dacoity is of some corroborative value, but is not conclusive of his guilt. *AIR 1934 Pesh 53.*

(E) Injuries on complainant.—(1) Where, in a charge of dacoity, the Court disbelieves the entire evidence for the prosecution as regards the dacoity, the case must fail and Court cannot convict the accused under S. 323 or 324 merely on the ground that the complainants had received certain injuries which could not be self-inflicted and may have been caused by some of the accused. *AIR 1945 All 87.*

(F) Confession.—(1) Where the only incriminating statement the approver made was that, after the dacoity, he was offered Rs. 100/- which he took, it was held by the High Court, that such statement was not a confession that he committed dacoity and that it cannot be taken into consideration as against the other accused. *AIR 1926 Cal 374.*

(G) Evidence of identification.—(1) Evidence as to identification of the dacoits is a weak type of proof. *1979 All CriR 390.*

(2) As a matter of law a conviction can be based upon the evidence of identification of the accused. *AIR 1956 Pat 39.*

(3) In a case of robbery in a passenger bus travelling with 20 passengers, it was held by the Supreme Court that the presence of an identifying witness at the scene of occurrence was not open to doubt merely because his name did not appear in the F.I.R. when as many as 20 passengers including the witness were alleged to have been looted but the names of only a few were mentioned in the F. I. R. *AIR 1972 SC 2478.*

(H) Identification parade.—(1) The validity of an identification parade cannot be challenged on the ground of irregularity in the manner of holding it or on the ground of delay in holding it when the

Magistrate and Police Officer who conducted it were not cross-examined in that behalf. *AIR 1972 SC 2478.*

(2) Delay in holding an identification parade make a case doubtful and a conviction under S. 395 based on such evidence would be improper. *(1982) 3 SCC 368 (I).*

(3) Soon after a dacoity, properly proved as have been stolen in the dacoity was found with the accused—Held on facts that even with the presumption under S. 114, Evidence Act accused could not be convicted under S. 395. *AIR 1982 SC 129.*

(4) If there is other evidence to connect an accused with the crime itself, however small, the finding of the stolen property with him is a piece of evidence which connects him further with the crime. There is then no question of presumption. The evidence strengthens the other evidence already against him. It is only when the accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn. *AIR 1971 SC 196.*

(5) Evidence regarding identification of properties, subject-matter of dacoity untrustworthy—No corroborative evidence as to ownership—Conviction held should be quashed *(1970) 1 SCWR 635.*

(6) As to further illustrative cases on point of recovery of stolen articles. *1984 CurLJ (Civ & Cri) 241 (P&H); 1980 Chand Cri C 197 (Punj); 1980 Chand CriC 8.*

(I) Approver's evidence.—(1) Before the evidence of an accomplice as to his participation in the dacoity can be accepted, the jury should be warned that they need corroboration of that fact as much as of anything else. *AIR 1932 Cal 295.*

(2) When reasonable proof exists that a sum of money deposited by the accused with a bank was borrowed by him from a certain person for the purpose of redeeming a mortgage which existed on his land, the story as told unless proved to be untrue cannot be said to be material corroboration of the statement of an approver that the accused had got the money as his share of the booty in the dacoity. *AIR 1918 Lah 358.*

(J) Miscellaneous.—Armed gang robbery—The prosecution must prove that the accused may reasonably be presumed to know that the person who used arms were in possession and in control of those arms. *(1976) 2 MalayanLJ 2.*

(2) Where the prosecution witness are not quite consistent about the parts that were played by various dacoits, the discrepancies of this kind would point rather to the truth than to the falsity of the prosecution case. Mistakes in observation are likely to be made by witnesses to a crime of this nature. *AIR 1945 All 100.*

(3) Accused were people of sufficient means to participate in a dacoity and were next door neighbours of the complainant. Evidence showed possibility of false implication and raised doubts about complicity of the accused in dacoity. Supreme Court set aside the conviction under S. 395. *AIR 1981 SC 1388.*

12. Duty of Court.—(1) Courts should remember that penal laws are made for the protection of all classes alike and that they do not recognise any exception in the case of any particular denomination of persons. A theft or dacoity would not be any the less a theft or dacoity if committed by members of one denomination upon the members of another denomination. *(1893) ILR 15 All 299.*

13. Sentence.—(1) Dacoity is a most serious crime and a deterrent sentence is called for. *AIR 1956 Orissa 177.*

(2) In awarding punishment for an offence under this section, two things are to be considered:

(i) What punishment does the individual deserve having regard to the gravity of his offence.

(ii) Is an unusually heavy sentence necessary in the particular case to protect the interests of the public at large by acting as a deterrent to others. *AIR 1980 SC 788.*

(3) Accused, while carrying away stolen property firing crackers to frighten away pursuers are guilty of dacoity—But as they had not attempted to injure the inmates of the house where the dacoity was committed and by the time their appeal came up before the Supreme court for hearing they had already undergone R. I. for 2.5 years and were young in age, the Supreme Court reduced the sentence to the term already undergone. *AIR 1980 SC 788.*

(4) As to further illustrative cases on point of sentence. *AIR 1984 SC 207; AIR 1980 SC 2127; 1984 1 Crimes 406; AIR 1955 NUC (All) 4158; AIR 1955 NUC (All) 1504.*

(5) The meaning of the expression "shall also be liable to fine" occurring in this section as well as in other sections of the Code like 302, 325, 409, etc. is that there is a liability to fine and not that a sentence of fine is obligatory. *AIR 1968 Pat 287.*

14. Procedure.—(1) Where there is a probability of the accused absconding, it is not proper to grant bail to the accused. *AIR 1969 Tripura 42 (43, 44): 1969 CriLJ 1534.*

(2) The fact that the name of particular accused is not stated in F. I. R. is not ground for granting bail to him *AIR 1959 Manipur 28.*

(3) Where the accused is acquitted of an offence under S. 379 of the Code, an order of further enquiry into an offence under this section is without jurisdiction. *AIR 1955 Cal 496.*

(4) Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Sessions.

15. Form of charge.—(1) Framing of charge under Ss. 149/395—Offence under Section 395 comes into existence only when act of dacoity is committed by five or more persons jointly—Question of applying Section 149 is therefore a mere surplusage. *AIR 1976 SC 2566.*

(2) The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the day—of—at—committed dacoity, an offence punishable under 395 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

16. Practice.—Evidence—Prove: (1) That the robbery was committed or attempted.

(2) That five or more persons committed or attempted to commit robbery, or that whole number of persons committing or attempting to commit robbery was five or more.

(3) That such persons were acting conjointly.

Section 396

396. Dacoity with murder.—If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or [6][imprisonment] for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *"Five or more persons."*
3. *"In committing dacoity."*
4. *Charge and conviction.*
5. *Evidence and proof*
6. *Sentence.*
7. *Procedure.*
8. *Practice.*
9. *Charge.*

1. Scope.—(1) This section is enacted to declare the liability of other persons as co-extensive with that of the actual murderer, and for this purpose, all that is required to be proved is that they should have "conjointly committed" the dacoity and death caused by a dacoit in the course of the dacoity would be murderer and attributed to all of them. The death need not be proved against any of the daoits in particular, so long as death is the result of cumulative effect of the violence used by gang. The first essence of an offence under this section is that the dacoity is the joint act of the persons concerned and the second essence of the offence is that the murder is committed in the course of the commission of the dacoity in question *(6 CWN 72)*. If, when a dacoity is planned, murder is contemplated from the first and is committed in the dacoity any person, who joins in the conspiracy, is liable under section 302 read with section 109 to imprisonment for life, even if he does not eventually join in the commission of the dacoity with the other conspirators. Dacoity starts from the entry of the dacoits into the premises and ends with their departure *(AIR 1951 All 834)*. Murder committed by one of the dacoits while making good their escape is murder committed in committing the dacoity *(25 CrLJ 319)*.A dacoity being as soon as there is an attempt to commit robbery. Conviction under this section may be based on circumstantial evidence, the evidence must be such as is sufficient to prove his guilt positively. An extra-judicial confession allegedly made before witness was retracted and not corroborated in material particulars by other deviance. The conviction of the accused was set aside as it was not supported by any evidence *(PLD 1969 Dhaka 504)*. Where the names of identification witnesses were not mentioned in FIR and the witness had not told the Investigation Officer they could recognise the culprits, identification of the accused by such witness could not be relied upon as evidence of their guilt. Where the case against an accused person resists on recovery of subject of dacoity from him or at his instance it is necessary to show that the articles recovered were the same as were identified in court as exhibits. If that is not done, benefit of the doubt must go to the accused. Generally where the accused is found in possession of stolen property a presumption under section 114, Evidence Act will not alone justify fixing him with anything more than the knowledge that the goods were obtained by dacoity *(22 CrLJ 60)*. Therefore a person who was not arrested at the time of dacoity and about whom there is no proper evidence of identification cannot be convicted only because he was found in possession of stolen property. He can be convicted under section 412 Penal Code *(52 CrLJ 1514 DB). (48 DLR 287, 49 DLR 245.)*

(2) Joint trial under sections 396, 395 and 412/414—Effect.—S was charged and convicted under sections 412/414, P.C., at a joint trial with remaining accused who were charged and convicted under sections 395 and 396, P.C. On objection being taken that the joint trial was illegal inasmuch as the offence alleged against the other appellants was not of dacoity alone but also one of murder committed during the commission of the dacoity punishable by section 396. Held: The mere fact that the appellants other than S. were in addition to being persons accused of an offence of dacoity (which offence includes theft) persons accused also of another offence, would not make the joint trial of S. with them illegal, if those appellant's case be jointly tried for the two offences. *Ali Vs. Crown (1954) 6 DLR (WP) 52.*

(3) Dacoity with murder—When a murder is not committed in the course of committing dacoity there can be no conviction under section 396 of the Penal Code. Since the prosecution has failed to prove the commission of dacoity and murder of victim Tajul by the condemned-prisoner and his associates by any cogent and reliable evidence the order of conviction is not sustainable in law. *State Vs. Mesbahuddin 49 DLR 245.*

(4) Although the charge under section 396 against other co-accused has failed he can be safety convicted under section 302 of the Penal Code as he had full notice of the charge under section 302 which is inherent in the charge under section 396 of the Penal Code. *State Vs. Rafiqul Islam (Criminal) 55 DLR 61.*

(5) In absence of any evidence of dacoity by any of the witness and in absence of any recovery of any article taken away during the dacoity from the possession of any of the accused person it can be safely said that the prosecution has hopelessly failed to prove the case of dacoity and therefore the charge under section 396 P.C. must fail on the ground of absence of evidence to prove any of the ingredients of section 391 of the Penal Code. *Md. Abdul Ali and others Vs. State, 20 BLD (HCD) 327.*

(6) Conviction based on consistent evidence cannot be interfered with merely on ground of non-examination of Magistrate who held T.I. Parade—conviction and sentence was awarded on proof of charge under section 396 of the Penal Code with consistent and reliable evidence on record. That the confessional statement was not relied upon and that the Magistrate who held T.I. Parade of the accused was not examined, does not constitute ground for acquittal of the convict-appellants. *Abdul Hashem @ Bachchu Fakir (Md) & others Vs. The State, 5 MLR (2000) (AD) 87.*

(7) No murder was committed by the dacoits at the time of committing dacoity but some of the prosecution witnesses have proved that Khushi sustained stab injury by the dacoits when they were running away and some of the witnesses proved that it was father of Khusi and hence there was a major contradiction regarding the person as to who received the injury. The victim died 4 days after the occurrence in the hospital during treatment but the prosecution has failed to prove as to who was murdered by the dacoits and hence the conviction under section 396 of the Penal Code is bad in law as no murder was committed by any of the dacoits during commission of dacoity. *Abdul Khaleque Vs. State (Criminal) 6 BLC 654.*

(8) In the absence of any evidence of dacoity by any of the witnesses and in the absence of any recovery of any article taken away during the dacoity from the possession of any of the accused persons it is a case of no evidence and the prosecution has hopelessly failed to prove the charge under section 396 of the Penal Code against any of the accused persons beyond reasonable doubt and hence the impugned judgment and order of conviction and sentence is not sustainable. *State Vs. Md. Abdul Ali and others (Criminal) 6 BLC 152.*

(9) Four out of fifteen persons charged with the offence were convicted. Evidence suggests the presence of more than five persons. Conviction under the section is valid. *8 DLR 50.*

(10) Eleven persons were charged under section 396 and alternatively under section 302 and 120B of the Penal Code. Held the trial was vitiated by misjoinder of charges. Neither section 239(d) nor section 236 of the CrPC justified such a joinder. Section 239(d) permitted joinder of persons accused of different offences committed in course of the same transaction, but a charge under section 396 Penal Code deals with persons accused of the same offence and joinder of different offences under section 396

and 302/120 is not permissible under section 236 CrPC. Prosecution led evidence as to an incident which took place six years back to show that the accused made then an attempt to poison the murdered man. Held—The Session Judge should have refused to record evidence on this matter and should have ruled it out of consideration. If a point arose in the evidence against the accused which the court considered vital it was the duty of the Judge to call the attention of the accused to the point and to ask for an explanation thereof *(Ref 3 DLR 518), 5 DLR 52.*

(11) Sections 396 read with 34 and 201 read with 34—sentence—Pre-planned dacoity with cold blooded and cruel murder of four persons committed by accused. Bodies buried with a view to cause evidence of crime to disappear sentence of life imprisonment and of six years' RI (to run concurrently) imposed by trial court and confirmed by High Court in appeal—in the circumstances plea for reduction of the sentences to the period already undergone rejected by Supreme Court. Criminal Trial—Appreciation of evidence—Minor discrepancies in testimony of a witness, if not affecting its credibility, would not make the testimony unreliable. *1986 SCC (Cri) 174.*

(12) This section like Ss. 34, 149 and S. 460 fixes the vicarious liability of persons conjointly committing a dacoity for the act of murder if committed by one or more of them. *AIR 1955 Hyd 147.*

(13) It is equally necessary that the cusing of the death of the victim should amount to murder and that the murder should have been committed in committing dacoity. *AIR 1935 Cal 580.*

(14) It is not necessary to prove that murder should have been within the contemplation of all or some of them when the dacoity was planned or that they should have actually taken part in or abetted its commission. *AIR 1965 Cal 598.*

(15) It is not necessary to prove that the others expected that murder would be committed. *AIR 1953 Assam 45.*

2. "Five or more persons".—(1) Where it is proved that five or more persons conjointly committed a dacoity and murder is committed by one of them in committing the dacoity, the fact that some of the said five or more persons are not identified does not affect the guilt of the persons who were some of such five or more persons. *AIR 1930 Lah 263.*

3. "In committing dacoity".—(1) The murder must have been committed "in committing a dacoity", that is, the murder should have taken place in the commission of the dacoity. It is only then that the accused will be liable under this section though actually the murder was committed not by him but by some other person participating in the commission of dacoity. *AIR 1955 Hyd 147.*

(2) Murder committed in attempting to escape without carrying away the stolen property is not murder committed in committing dacoity. *AIR 1957 SC 320.*

(3) If the murder is committed while carrying away the stolen property the murder must be held to have been committed in the commission of the dacoity. *AIR 1932 Cal 818.*

(4) The question whether murder was committed in committing dacoity is a pure question of fact, not to be determined by any general rule but by the special circumstances of each case. *AIR 1967 Raj 134.*

(5) The presumption of a common intention to add murder to robbery is not easily avoided where all or some, to the knowledge of the rest of those engaged in the enterprise, are proved to have carried firearms and firearms have been used with fatal effect. *AIR 1935 Rang 89.*

4. Charge and conviction.—(1) When murder is committed in the commission of the dacoity, it is proper to frame the charge under this section rather than under Ss. 302 and 395. *AIR 1925 Lah 337.*

(2) The charge under S. 302 is not a minor charge in relation to the charge under this section. *AIR 1933 Cal 294.*

(3) A conspiracy to commit dacoity is a minor offence in relation to the offence of conspiracy to commit dacoity with murder. *AIR 1965 Cal 598.*

5. Evidence and proof.—(1) The burden of proof is on the prosecution to prove against the accused all the elements of the offence. Where the evidence against the accused consists only of the recovery of stolen property, it is not safe to convict him under this section. *AIR 1970 SC 535.*

(2) Witnesses identifying accused, the dacoits ought not to be disbelieved on the sole ground that they were not produced and examined before the committing Magistrate. *AIR 1963 All 161.*

(3) Improper admission of approver's evidence owing to misinterpretation of provisions of Criminal P. C. and Evidence Act, held did not necessarily amount to substantial and grave injustice to entitle petitioner (accused) to special leave to appeal to Privy Council. *AIR 1925 PC 52.*

(4) Recovery of goods stolen in dacoity from accused three days after occurrence—Only presumption deducible from being that accused knew articles as stolen but not as stolen in dacoity—his conviction is proper under S. 411 and not under S. 396. *AIR 1970 SC 535.*

(5) Long enmity between accused and victim party—Offence committed during midnight—Sufficient moonlight and lantern light enabling eye-witnesses to identify all accused—No falsity of evidence proving commission of offence by accused—Conviction held proper. *AIR 1983 SC 431.*

(6) Prompt recovery of stolen articles form house of accused charged with dacoity—Strong presumption of complicity of accused arise. *AIR 1964 Tripura 54.*

(7) Dacoity—Evidence disclosing commission of offence by accused—No other view of evidence possible—Held, High Court was justified in reversing the trial Court's order of acquittal. *AIR 1981 SC 612.*

(8) None of witnesses gave any description of dacoits in their statements or in oral evidence nor gave any identification marks, such as stature of accused or whether they were fat or thin or of fair colour or black colour—Only one witness identified dacoits after certain days from T. I. parade—Conviction cannot be based only on identification by single witness. *AIR 1981 SC 1392.*

6. Sentence.—(1) A sentence of 14 years rigorous imprisonment for an offence under this section is illegal. *AIR 1956 All 163.*

(2) In the case of persons who are vicariously liable under this section, the Court has a discretion to award a lesser sentence. The normal sentence would however be death in the absence of mitigating or extenuating circumstances. *ILR (1963) 42 Pat 454; AIR 1960 All 190.*

(3) Where two of the dacoits committed murder in order to facilitate the dacoity, and the Sessions Judge has sentenced them to imprisonment for life without giving any reasons for not imposing the sentence of death, it was held that a sentence of death, should have been passed. *AIR 1968 SC 1464.*

(4) Whether extenuating circumstances exist in any particular case will, of course, depend upon the facts of the particular case. *AIR 1932 Cal 818.*

7. Procedure.—(1) Offence under Ss. 395 and 397 of the Code are minor offences under S. 238, Criminal P. C., when considered in relation to an offence under this section. An accused person who already had the benefit of an acquittal for an offence under this section cannot, in view of S.

300, Criminal P. C., be tried again and convicted of an offence under S. 395 on the same set of facts. *AIR 1949 Mad 195.*

(2) Cognizable—Warrant—Not baliable—Not compoundable—Triable by the Court of Session.

8. Practice.—Evidence—Prove: (1) That there was the commission of dacoity.

(2) That one of the accused committed murder.

(3) That the murder was committed during the commission of dacoity.

9. Charge.—The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about—the day of—at—committed dacoity, and that in the commission of such dacoity, murder was committed by one of your members, and that you thereby committed an offence punishable under section 396 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 397

397. Robbery or dacoity, with attempt to cause death or grievous hurt.—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Cases and Materials : Synopsis

1. *Scope.*
2. *Robbery or dacoity must have been committed.*
3. *"Uses any deadly weapon".*
4. *"Or causes grievous hurt to any person".*
5. *Such offender.*
6. *"Deadly weapon".*
7. *Charge and conviction.*
8. *Evidence and proof.*
9. *Sentence.*
10. *Procedure.*
11. *Practice.*
12. *Charge.*

1. Scope.—(1) This section may be read with sections 11, 319 and 448 of the Penal Code and this section is merely a rider to section 394. It does not create any substantive offence. It is complementary to sections 392, 395 and 396 which create the substantive offences. It merely regulates the punishment already provided for dacoity, by fixing a minimum term of imprisonment when its commission has been attended with certain aggravating circumstances, viz, (a) use of a deadly weapon, or (b) causing of grievous hurt, or (c) attempting to cause death or grievous hurt. The provisions of this section are obligatory as "the imprisonment with which such offender shall be punished shall not be less than seven years" *(25 CrLJ 259).* A conviction merely under section 397 has no meaning. The conviction in a case of a dacoity should be under section 395 read with section 397 of the Penal Code *(26 CrLJ 570).* Section 397 is intended to cover the case of a person who displays a deadly weapon to frighten his victims or their neighbours or who makes use of any deadly weapon for other similar purpose. Its operation is not confined to cases where the weapon is used actually for causing injury or for attempting to cause an injury, to another *(39 CrLJ 323).* Section 397 can apply only to the actual user of the weapon and not to others constructively *(25 CrLJ 1024).* It is not necessary that deadly weapon should be used actually *(32 CrLJ 567).* It is sufficient that the robber or dacoit carries in his

hand a deadly weapon open to the view of the victims or brandishes the same to frighten or terrorise them. The principle of constructive liability does not apply to cases under this section. This section includes a case where a dacoit armed with deadly weapon uses it in any manner for the purpose of facilitating the commission of dacoity or for his own protection *(21 DLR 448)*. But where the dacoits abandoned the intention of committing robbery and took to their heels on alarm being raised and subsequently the accused fired shots to prevent pursuit and injured a prosecution witness. The violence was not caused for one of the ends contemplated by section 390, a conviction for an offence under section 394 cannot be sustained. His conviction may be altered to one under section 326 *(1970 CrLJ 155)*. The mere fact that stolen property is recovered from the accused or that he is identified as one of the culprits is not sufficient for conviction under this section. Where the offence committed is punished under section 394/397 Penal Code the minimum sentence which a court can impose is the sentence of rigorous imprisonment for 7 years.

(2) "Use any deadly weapon" in section 397—Connotation of—The point for determination is whether the mere carrying of dangerous weapons like guns for the commission of dacoity would attract the provisions of this section or not. Held: The word 'uses' occurring in section 397, should be construed broadly as including the case of carrying of a deadly weapon during the dacoity or robbery although the gun was not actually used in the course of committing the offence. *Ahmed Vs. State (1964) 16 DLR (SC) 30.*

(3) "Uses any deadly weapon"—The words must receive a comprehensive interpretation: "Use any deadly weapon". The meaning of the word "use" must receive a comprehensive interpretation and would include the carrying of any deadly weapon in the course of a dacoity with a view to overawe persons intending to resist the commission of the dacoity. *1950 PLD (Lah) 269.*

(4) Fixes a minimum punishment—Does not create an offence but fixes minimum punishment in certain cases of robbery or dacoity. *1956 PLD (Lah) 157.*

(5) Dacoit armed with deadly weapon—Use of such weapon for commission of the dacoity or for protection comes within the purview of section 397 P.C. On a comparison of the provisions of sections 397 and 398 P.C. it will be found that even in the case of attempted robbery or dacoity when the offender is armed with deadly weapon, he is liable to be punished with a minimum sentence of seven years' imprisonment. Section 397 P.C. should be given a liberal interpretation so as to include a case where the dacoit armed with deadly weapon uses it in any manner for the purpose of facilitating the commission of the dacoity or his protection. *Idris Ali Majhi Vs. The State, (1969) 21 DLR 448.*

(6) Dacoity with attempt to cause grievous hurt—the absence of any grievous hurt to any person or use of any deadly weapon, conviction for such an offence cannot be sustained. *Kashem Molla Vs. State 42 DLR 453.*

(7) In a decoity case the prosecution is required to prove by evidence that in fact decoity was committed as alleged in the FIR or complaint. Without bringing on record that evidence it will be pointless to bring on record or consider other evidence showing participation of accused into offence. *Babul @ Abdul Majed Khan & Vs. anr. The State. 42 DLR (AD) 186.*

(8) Accused Ali Howladar's conviction under section 395/397 PC cannot be sustained in law as the officer who conducted TI Parade was not examined. *41 DLR 32.*

(9) Lumping together of several distinct charges in one trial is not permissible. Charge under section 395 and 397 of the Penal Code relates to distinct offence for commission of dacoity. As soon as the accused appellants and others retreated from the said house, the commission of offence is

complete. Thereafter on the following date when Nasiruddin, Fakrul Ahmed were assaulted in the police station, charge under section 325/34 of the Penal Code was drawn for the said alleged offence. Offence under sections 302/34 of the Penal Code alleged to have been committed by accused appellants and others on the next morning when they committed under Gous by assaulting and charge under section 302/34 was also drawn against them. Piecing these distinct charges together against the accused appellants and others in one trial is not permissible, under the provisions of the Cr.P.C. *40 DLR 377.*

(10) Section 397 PC—Conviction of accused is not sustainable. As far as the charge against the appellants under section 397 of the Penal Code is concerned, we find that the prosecution has signally failed to substantiate as to what weapon, if any, was carried by any of the accused appellants. There is no evidence that any grievous hurt was accused to any person or any attempt was made to cause death or grievous hurt to any person. As such we are of the opinion that the conviction of the appellants under section 397 of the Penal Code cannot be sustained *(Ref. 41 DLR 239). 8 BCR 3.*

(11) A bonafide claim over the land is no consideration for the purpose to find guilt in an offence under section 397 Penal Code. No particular number of witnesses is to be examined by the prosecution to prove its case. The Court can base its finding on the testimony of a sole witness if it believes him *(Ref. 21 DLR 575). 8 BCR 13.*

(12) Statement of some accused persons to have committed dacoity at any one of places or any where else mentioned by the witnesses do not amount to confession. The learned Additional Session Judge has no knowledge about confession. Establishment of large number of Courts overnight manned by young and immature officers, advocates and staff without sufficient knowledge and experience has resulted in glaring miscarriage of justice as in this case causing untold miseries, harassment and sufferings. *7 BCR 347.*

(13) Carrying of a deadly weapon in the course of dacioty involves an offence falling under section 397 Penal Code irrespective of the fact whether the arms were used in the dacoity or not. Obeying unlawful order of a superior does not exonerate a person who commits an offence as a consequence 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 WP.*

(14) This section and the next do not create substantive offences, but merely prescribe a minimum sentence for the offence of robbery and dacoity under the aggravating circumstances mentioned in these sections. *1980 All LJ 635.*

(15) The essential ingredients of the offence under this section are:—

(i) An offence of dacoity or robbery must have been committed;

(ii) The offender should have taken part in the offence; and

(iii) The offender should have used a deadly weapon or caused grievous hurt to any person or attempted to cause death or grievous hurt to any person at the time of committing the offence. *(1904) 1 Cri LJ 901.*

2. Robbery or dacoity must have been committed.—(1) Before this section is attracted, there must either be a dacoity or robbery. *1961 KerLJ 548.*

3. "Uses any deadly weapon".—(1) This section employs the words "uses any deadly weapon", while S. 398 uses the words "is armed with any deadly weapon". *AIR 1975 SC 905.*

(2) If the deadly weapon is actually used by the offender in the commission of the robbery such as in causing grievous hurt death or the like then it is clearly used. *AIR 1975 SC 905.*

(3) Accused carrying knife open to the view of victims—Section 397 is attracted—Any other overt act is not necessary. *AIR 1975 SC 905.*

(4) If the knife was "used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with his property, that would amount to 'using' the weapon within the meaning of S. 397". *AIR 1975 SC 905.*

(5) The words "uses" in S. 397 and "is armed" in S. 398 have to be given identical meaning. *AIR 1975 SC 905.*

(6) When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. *AIR 1975 SC 905.*

4. "Or causes grievous hurt to any person".—(1) Provided that the accused causes grievous hurt at the time of committing the robbery or dacoity, it is not necessary that he should have intended to cause such hurt. *1901 Pun Re No. 6 p. 20.*

5. Such offender.—(1) The words 'such offender' occurring in the latter part of this section have been construed in two different ways. It has been construed to mean only that offender who uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt and not others who are jointly concerned with him in committing the dacoity or robbery. *1978 Raj Cri C 18.*

(2) S. 34 (or S. 149) has no application to a case of an offence under this section. If, this section does not create any substantive offence but merely provides a minimum punishment for robbery or dacoity if certain circumstances are proved, Ss. 34 & 149 can have no materiality in construing Ss. 397 and 398. *AIR 1971 Manipur 43.*

6. "Deadly weapon".—(1) Ordinary plain sticks or lathis are not designed to cause death and are not "deadly weapons" though they may be used as weapons for causing death. *AIR 1957 Tripura 48.*

(2) A knife is a deadly weapon. *AIR 1975 SC 905.*

7. Charge and conviction.—(1) As this section does not create a substantive offence, a conviction under this section alone is not correct. The conviction ought to be under this section read with Section 395 or 392 as the case may be. *AIR 1957 Tripura 48(49) = 1957 CriLJ 1457.*

(2) This section has reference not only to the offence of dacoity but also to the offence of robbery. Where it is proposed to use this section, either S. 395 or 392 should be definitely referred to in the charge, so that accused persons may know exactly what they have to meet. *(1974) 40 CutLT 825 (Pr 9); AIR 1947 Pat 157.*

(3) An offence under S. 325 is an offence affecting human body and dacoity is an offence against property. Therefore it is not open to a Court to convict the accused under S. 325 when he is charged for an offence under this section read with S. 392. *AIR 1928 Oudh 373.*

(4) Accused convicted and sentenced under Ss. 397, 34 of Penal Code and under S. 37 of Arms Act—Facts and circumstances of case showing that offence fell under S. 392 of Penal Code—Conviction altered accordingly and sentence reduced. *AIR 1981 SC 2008.*

8. Evidence and proof.—(1) Whether the accused took part in the dacoity for which they were charged depends upon the evidence adduced in the case; it is for the prosecution to establish that the accused used any deadly weapon or caused grievous hurt or attempted to cause death or grievous hurt.

When there is no satisfactory evidence that the accused did any of these acts, he cannot be found guilty under this section. *1978 CriLJ (NOC) 143 (Punj).*

(2) Failure of prosecution witnesses to identify appellant at Test Identification Parade—Articles which were subject matter of dacoity recovered at the instance of appellant—Conviction under S. 397 P.C. altered to that under Section 412 P.C. *AIR 1978 SC 1390.*

(3) Conviction of accused under Ss. 395 and 397 based on fact that he was found in possession of the two articles not proved satisfactorily as forming part of corpus delicti—Victim failing to identify accused in two identification parades—Accused not liable to be convicted under Ss. 395 and 397. *AIR 1982 SC 948.*

(4) Recent and unexplained possession of stolen property will be presumptive evidence against an accused on a charge of robbery as well as murder. *AIR 1967 Goa 21.*

(5) Mere denial of recoveries on the part of accused is not sufficient to rebut presumption of guilt arising from their recent and unexplained exclusive possession of looted articles. *1974 WLN (UC) 250 (254) (Raj).*

(6) When a person is found in possession of property taken in dacoity soon after the commission of the dacoity, the proper inference to be drawn is that he was one of the dacoits and not that he was a receiver. *AIR 1955 NUC 3235 (Pat).*

(7) When accused were arrested more than a week after the date of dacoity with injuries upon their persons, which were testified by medical evidence to be gunshot wounds, the fact at best may lead to an inference that they were concerned in some transaction in which they received gunshot injuries; but that does not lead to the inference that they were concerned in the dacoity. *AIR 1956 Bom 186.*

(8) The evidence that after the occurrence of dacoity, the Police Patil went round the village and ascertained whether the accused was in his house can at best be regarded as hearsay and has little evidentiary value. *AIR 1957 Bom 186.*

(9) Offence of murder and robbery—Appreciation of evidence—High Court held, committed serious errors in reading the evidence on the record and basing findings on mere conjectures—Proof of accused person's possession of incriminating articles—Circumstantial evidence against him, held, sufficient to justify the trial court's finding that he was guilty of offence under S. 302 and under Section 392 read with Section 397, P.C. *AIR 1978 SC 1183.*

(10) Fishes in the tank belonging to complainant taken away by accused who were armed with deadly weapon—Claim of accused that they reasonably believed tank to be belonging to Government—No documents supporting their claim produced by accused—No iota of evidence to support stand of accused—Held, accused were rightly convicted under S. 397. *AIR 1980 SC 2127.*

9. Sentence.—(1) A person if convicted under this section, is liable to be punished with not less than 7 years' imprisonment. *1934 MadWN 1286.*

(2) Consecutive sentences in respect of convictions under S. 394 and this section are illegal, if they are based on the same set of facts. *AIR 1926 Lah 47.*

(3) The use of a deadly weapon by one offender at the time of committing robbery cannot attract S. 397 for imposition of minimum sentence on another offender who had not used any deadly weapon. *AIR 1975 SC 905.*

(4) Conviction under Ss. 452 and 397—Accused 20 years of age belonging to middle class respectable family but due to undesirable company committing offence—Benefit of Probation of Offenders Act given to accused and his sentence suspended. *AIR 1983 SC 654.*

(5) Robbery with help of sword—Accused a primary school teacher without bad antecedents—Amount robbed being trivial amount—No physical hurt caused to anybody—Accused not resisting his arrest—Held mitigating circumstances warrant recommendation for exercise of power of remitting or reducing sentence under S. 432, Cr.P.C. *AIR 1981 SC 644.*

10. Procedure.—(1) A Magistrate who finds that an offence under this section is disclosed in the evidence, must commit the case for trial to the Sessions Court. He cannot treat the grievous hurt as simple hurt and try the case himself. *Rat Un Cr C 476.*

(2) When a person is acquitted of an offence u/s. 396, a subsequent trial on the same set of facts on a charge u/s. 395 read with S. 397 is barred in view of S. 300 Cr.P.C. *AIR 1949 Mad 195.*

(3) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

11. Practice.—Evidence—Prove: (1) That there was the commission of robbery or dacoity.

(2) That the accused used a deadly weapon or caused grievous hurt; or attempted to cause death or grievous hurt.

(3) That the above acts were done during the commission of robbery or dacoity.

12. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of, at—, committed robbery/dacoity offences punishable under section 392 or 395 of the Penal Code (give details as per the above sections) and that at the time of committing the said robbery or dacoity you used a deadly weapon namely—of accused grievous hurt to A or attempted to cause death or grievous hurt to A, and thereby committed an offence punishable under section 392 or 395 read with section 397 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 398

398. Attempt to commit robbery or dacoity when armed with deadly weapon.—If, at the time of attempting to commit robbery or dacoity the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Cases and Materials : Synopsis

1. *Scope.*
2. *"Is armed with a deadly weapon".*
3. *Dishonest intention necessary.*
4. *Abetment of offence under this section.*
5. *"Such offender".*
6. *Charge and conviction.*
7. *Evidence and proof.*
8. *Sentence.*
9. *Practice.*
10. *Procedure.*
11. *Charge.*

1. Scope.—(1) This section does not relate to a substantive offence. It is applicable only to the case of an attempt to commit robbery and has no application to a case in which robbery has actually been committed *(38 CrLJ 926).* This section only regulates the measure of punishment. To attract section 398 it is not necessary that the accused must show the use of weapon. It is enough if the accused was armed with deadly weapon. The word "offender" occurring in this section refers to the

person who is proved to be armed with a deadly weapon and not to others so comprising the gang attempting to commit robbery *(29 CrLJ 383)*. This section punishes only the person who is armed. A man cannot be convicted of abetting an offence under section 398 *(27 CrLJ 1285)*. The words "offender" and "such offender" refer only to the persons who are proved to have actually been "armed with" deadly weapon and not to the others who in combination with such persons have committed robbery or dacoity. Section 34 has no application in the construction of this section, though it may be read with section 392 and 395 to determine the substantive offence which is created *(33 CrLJ 460)*.

(2) On a comparison of the provisions of section 397 and 398 Penal Code it will be found that even in the case of attempted robbery or dacoity when the offender is armed with deadly weapon, he is liable to be punished with a minimum sentence of seven years' imprisonment. *21 DLR 448.*

(3) While the previous section covers the case of completed dacoity or robbery, this section applies only to cases of attempts at committing robbery or dacoity and has no application to a case in which robbery or dacoity has been completed. *AIR 1952 Vindh Pra 42.*

(4) Like the previous section, this section does not create a substantive offence. It merely prescribes a minimum punishment that must be awarded in cases falling under it. *AIR 1959 MadhPra 6.*

2. "Is armed with a deadly weapon".—(1) A person may be said to be "armed with a weapon" when he has the weapon with him and carries it with the intention of using it if the occasion requires it. *AIR 1934 Lah 522.*

(2) It is not necessary that the victim of the intended robbery or dacoity should be aware of the possession of the weapon by the attacker. All that is necessary under this section is that the accused should be armed at the time of the attempt to commit the robbery or dacoity. *(1948) 1 SauLR 100.*

3. Dishonest intention necessary.—(1) Theft or extortion is an essential ingredient of the offence of robbery and dishonest intention is an ingredient of the offence of theft or extortion: consequently, dishonest intention is necessary to be proved before the accused can be convicted under this section. *(1912) 13 CriLJ 864.*

4. Abetment of offence under this section.—(1) As this section applies only to that offender who is armed with the deadly weapon, there cannot be a conviction for abetment of an offence under this section. *AIR 1923 Rang 207.*

5. "Such offender".—(1) It is only the robbers who are actually armed with deadly weapons who can be charged and convicted under S. 398. *AIR 1941 Mad 489.*

6. Charge and conviction.— (1) In a charge for an offence under this section the substantive S. 393 (attempt at robbery) or dacoity (S. 395) should be mentioned. *(1911) 12 CriLJ 468.*

(2) In a case of charge for dacoity only, the actual offender or offenders who were armed with deadly weapons can be convicted under this section. *AIR 1932 Lah 367.*

(3) An accused charged under this section read with S. 395 could be convicted under S. 458 of the Code when the evidence showed that he committed that offence and there was no confusion in the mind of the accused and he in fact tried to meet all the ingredients of the offence under that section. *AIR 1959 MadhPra 6.*

7. Evidence and proof.—(1) An accused cannot be convicted under this section when the only evidence against him is that of an approver, corroborated by his identification which had taken place nearly six months after his arrest. *(1949) 2 SauLR 152.*

8. Sentence.—(1) The minimum sentence of 7 years is compulsory in the case of an accused found guilty under this section. A sentence of five years is illegal. *AIR 1924 Oudh 314.*

9. Practice.—Evidence—Prove: (1) That there was the attempt to commit robbery or dacoity.

(2) That the accused was armed with a deadly weapon.

(3) That he was so armed when the robbery or dacoity was committed.

10. Procedure.—Cognizable—Warrant—Not bailable—Not Compoudable—Triable by the Court of Session.

11. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, attempted to commit robbery/dacoity punishable under section 392/395 Penal Code (give details as per the above sections) and that at the time of attempting to commit the said robbery or dacoity you were armed with any deadly weapon namely— and thereby committed an offence punishable under section 392/395 read with section 398 Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 399

399. Making preparation to commit dacoity.—Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Intention, preparation and attempt.*
3. *"Whoever".*
4. *Five or more persons assembling for dacoity.*
5. *Charge and conviction.*
6. *Evidence and proof.*
7. *Sentence.*
8. *Acquittal under this section—Effect.*
9. *Accused having Explosive substance at time of preparation—Sanction for prosecution.*
10. *Practice.*
11. *Procedure.*
12. *Charge.*

1. Scope of the section.—(1) This section punishes mere preparation to commit dacoity. Dacoity is the only offence where punishment is provided even at the stage of preparation. No hard and fast rule can be laid down that any particular act or any particular kind of steps towards the commission of an offence are necessary to constitute "preparation". The essential things is that the prosecution must show that there were persons who had conceived the design of committing dacoity. Once the existence of such a conspiracy has been established then any step taken with the intention and for the purpose of forwarding that design may justify the court in holding that there has been preparation within the meaning of this section. "The making of preparation" should be shown to the satisfaction of the court by some act, such as the collection of men, arms, provisions, etc., which, coupled with other circumstances, plainly manifest the intention to commit dacoity. In order to establish an offence under this section, it is not necessary that the persons shown to be making the preparation should be five or more in number. But it is necessary to prove that the raid for which they were making preparation was to be committed by five or more persons. The proof of an offence under this section is mainly a

question of inference from facts. Where a band of armed men, some of them with unlicensed fire arms, were moving about many miles from their village and attempted to conceal their presence, threatened those who enquired who they were, resisted pursuit and fired at those who pursued them the only reasonable inference that can be drawn is that the men were dacoits and had made preparations to commit dacoity *(45 CrLJ 130).*

(2) "Assembly for the purpose of committing dacoity is an element of section 402. Such an element plus something more together constitute an element of section 399 Penal Code that is, "a preparation to commit dacoity". Thus when there is preparation for committing dacoity section 399 Penal Code is attracted and in such case conviction of the accused both under sections 402 and 399 Penal Code would be improper and illegal. *22 DLR 723.*

(3) Ordinarily preparation for an offence is not per se indictable. The present section is one of the few exceptions to the general rule. *(1980) 49 CutLT 222.*

(4) Dacoity has been regarded as an offence so intrinsically dangerous that the Legislature has thought it necessary in dealing with it to override the distinction ordinarily drawn between "attempt" and "preparation". Thus not only is assembling for the purpose of committing dacoity made punishable by Section 402, Penal Code, but in S. 399 a provision has been drafted in the broadest possible terms rendering liable to serve punishment, "whoever makes any preparation for committing dacoity. *(1910) 11 CriLJ 551.*

2. Intention, preparation and attempt.—(1) There are three stages in doing an act. The first stage is the intention to do it. The second stage is preparation for doing the act and third stage is the direct movement towards the commission of the act. *AIR 1958 Cal 25.*

(2) It is not necessary for the prosecution to prove that the intention of the accused was to commit dacoity in the house of a particular person of a particular village. *AIR 1960 Pat 582.*

(3) It s not necessary for any injury to be caused to any particular person in order to attract the provisions of this section. *AIR 1960 Punj 482.*

(4) No overt act by the accused is necessary. It is sufficient if some act to get ready for dacoity is done. *AIR 1959 All 727.*

(5) It is not necessary to prove what exact part was played by each member in such preparation. *AIR 1916 Lah 334.*

(6) Although the charge framed under section 399 of the Code is patently defective, there are sufficient materials on record to justify the conviction of accused under section 399, he being a member of the assembly consisting of 8/9 persons. *Karam Ali Vs State (Criminal) 54 DLR 378.*

(7) Grave Offence—Dacoity—Bail—Article 2(4) of P.O. No. 50 of 1972 relates to offences of robbery or dacoity already committed and not to offence that is yet to be committed for which there was only a preparation and assembly—offences alleged do not fall within the mischief of Art. 2(4) (g) of P.O. No. 50 of 1972—Article 10 of the P.O. which prohibits bail can have no application. *The State Vs. Md. Khurshed Alam. 1 BSCD 245.*

(8) Conviction and sentence u/s. 399, PC—Prosecution proved confessional statements of the petitioners—The confessional statements were recorded by a competent Magistrate of the first Class who recorded the statements after observing all formalities and proved the same—The High Court found the confessional statements true and voluntary—The High Court Division upheld the conviction on the basis of the judicial confessions which though retracted were found true and voluntary—It is

well settled that as against the maker himself, his confession judicial or extra-judicial whether retracted or not, can validly form the sole basis of his conviction, if the Court is satisfied and believes that it is true and voluntary. *Mijanur Rahiman and ors. Vs. The State. 5 BSCD 46.*

(9) Offence of preparation to commit dacoity—Though there is express provision for offence of preparation to commit dacoity, there is no provision in the Penal Code as to offence of preparation by persons below 5 in number to commit robbery. The Penal Code has been suggested to be amended to this direction. *Karam Ali Vs. the State 7 MLR (HC) 79.*

3. "Whoever".—(1) A dacoity can be committed only by five or more persons acting conjointly. But a preparation for dacoity can be made by any one of them. It is not necessary that the intention of the person who makes the preparation should be shared by the others. *AIR 1958 Cal 25.*

(2) It is not necessary that they should all make preparation for dacoity. *AIR 1952 Punj 249.*

4. Five or more persons assembling for dacoity.—(1) The assembling of five or more persons for the purpose of committing dacoity is not "preparation" for committing dacoity as envisaged by the section, inasmuch as such assembling is separately punishable under Section 402. Otherwise there will be redundancy. *AIR 1955 NUC (All) 1989.*

(2) The offence under S. 402 and the one under S. 399 would probably involve similar ingredients, but the difference between the two is that while under S. 402 a mere assembling without other preparation is enough, S. 399 is attracted when some additional step is taken in the course of the preparation. *AIR 1960 Punj 482.*

(3) After assembling for the purpose of committing a dacoity and proceeding to a certain distance on their way to the destination it is possible that the idea is abandoned or the process is interrupted. When once the destination is reached, or almost reached, preparation becomes complete and till then there would be mere "assembling". *AIR 1954 Kutch 1.*

5. Charge and conviction.—(1) A person charged under this section and S. 402 can be convicted under Secs. 147 and 148. *AIR 1962 All 13.*

6. Evidence and proof.—(1) On a charge for an offence under this section, the prosecution must show that there were persons who had conceived the design of committing dacoity. Once the existence of such a conspiracy has been established, any step taken with the intention and for the purpose of forwarding that design may justify the Court in holding that there has been "preparation" within the meaning of the section. *AIR 1949 East Punj 340.*

(2) Where there is no evidence of intention to commit dacoity, a conviction under this section cannot be sustained. *AIR 1956 All 464.*

(3) The facts that the accused persons were found concealed, or were found attempting to conceal their identity, with the additional factor that they were armed with weapons and torches which they used on their pursuers or captors, were held sufficient to find the accused guilty of an offence under this section. *AIR 1935 Oudh 471.*

(4) The facts that the accused persons assembled from different villages in a lonely place at an odd hour, armed with weapons of attack and defence, without any explanation for so assembling, are circumstances which have been held to be sufficient to convict the accused of an offence under this section. *AIR 1955 NUC (Pat) 4903.*

(5) The accused who came from different places and had no apparent connection between them, were caught by the police travelling together in a tonga hired for taking them to village H close to

village P and the tonga had to await their return at H. They were found in possession of electric torches and illicit firearms and resisted their capture by the Police. Earlier two of them were found loitering about a house in village P and when questioned slunk away without giving any reply. There was no explanation from any one of them regarding their travelling together in a tonga with firearms. On the above facts, it was held that the accused were rightly convicted under S. 402 and this section. *AIR 1959 All 727.*

(6) Where the evidence of a person shows that he is an accomplice, then it must be corroborated in material particulars against each accused before it can be accepted. *AIR 1928 Lah 193.*

(7) Some of persons proceeding to commit dacoity during night arrested—Identification evidence unsatisfactory—Absence of other evidence—Conviction cannot be sustained. *AIR 1953 AllLJ 453.*

7. Sentence.—(1) Making preparations for committing dacoity and assembling for the purpose of committing dacoity when done at different times and different occasions are distinct offences and though separate sentences can be awarded, the practice is to award concurrent sentences. *AIR 1925 Lah 119.*

(2) Accused being an old man of 70 years sentence was reduced to period already served. *AIR 1980 SC 1631.*

(3) Accused convicted under Section 399/402 P.C. were young men and students—They were not previous convicts—Offence under S. 399 not punishable with death or imprisonment for life—Supreme Court released the accused on probation. *AIR 1979 SC 1690.*

(4) Where the accused persons convicted under Ss. 399 and 402 had no previous conviction and were quite young by age—Held there was scope for reduction of their sentences to three years' rigorous imprisonment for each under Sections 399 and 402. *AIR 1959 All 559.*

8. Acquittal under this section—Effect.—(1) An acquittal for an offence under this section is no bar to a subsequent trial on the same facts for the collecting of men to wage war against the Government (Section 122) when authority under S. 196 Criminal P. C., for the prosecution under Chap. IV, Penal Code had not been accorded at the time of the first trial. *(1900-1902) 1 LowBur Rul 340.*

9. Accused having explosive substance at time of preparation—Sanction for prosecution.—(1) Where on a complaint under this section, the facts disclosed that the accused was having bombs in his possession at the time of preparation for dacoity, it was held that sanction under S. 4 (b) of the Explosive Substances Act was necessary for the prosecution. *(1912) 13 CriLJ 433 (Cal).*

10. Practice.—Evidence—Prove: (1) That the act of the accused amounted to preparation.

(2) That it was preparation to commit dacoity.

11. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Sessions.

12. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, made preparation to commit—, for committing dacoity, and thereby committed an offence punishable under section 399 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 400

400. Punishment for belonging to gang of dacoits.—Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with [6][imprisonment] for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. Scope of the section.—(1) The offence is of a very special character. The word "belong" implies something more than the idea of casual association: it involves the notion of continuity and indicates a more or less intimation with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected had identified himself with a band, the common purpose of which is the habitual commission of dacoity *(22 CrLJ 663, 29 CrLJ 705)*. The sense of the word 'gang' in this section is that the persons should act in concert and therefore two or more persons can constitute a gang. Their purpose of habitually committing dacoity may be proved by their declaration or by their conduct. The word 'belong' in this section implies something more than the idea of casual association. This word involves the notion of continuity rather than of permanency and suggests that the connection should be of such a long duration as to reasonably warrant an inference that the accused persons had identified themselves as members of a gang. It is not sufficient to make a person member of a gang if he is shown only to have participated in one or two isolated dacoities. Prosecution must prove that the accused belonged to a gang which was consciously associated for the purpose of habitually committing dacoities *(9 CrLJ 597)*. For proving a charge under this section it must be established: (a) that there was a gang associated for the purpose of habitually committing dacoities and (b) that the accused belonged to the gang, that is to say, the association of the accused with the gang was not casual but was intended to be habitual. One of the chief points to be established in case of gang dacoity is association in the crime and if it can be proved that the accused and other persons had joined together to commit dacoits, the former fact would be strong evidence of criminal association and would be relevant to show that they were members of the gang. Persons merely assisting and sheltering the dacoits and associated with them for friendship sake, who join them in drinking, or meeting them at fairs, though they run the risk of being punished, could not be said to belong to a gang. The association and purpose may be proved by direct evidence or from fact established *(9 CrLJ 567)*. It is not necessary for participation of any member even in a single dacoity. *(AIR 1956 Orissa 177)*.

(2) Ingredients of an offence to be established under section 400. In order to establish the guilt of an accused under section 400 for belonging to a gang of persons, it is not incumbent upon the prosecution to show that a particular accused who belongs to such a gang did actually take part in any one or more of the dacoities concerned. The participation of an accused in dacoity is evidence showing

his connection with the gang and establishing his object for such connection. *Nur Ali Gazi Vs. State (1961) 13 DLR 740.*

(3) Conviction not safe, when participation in dacoity not proved—Association for commission of the offence must spread over a long time. *Nur Ali Gazi Vs. State (1961) 13 DLR 740.*

(4) Gist of the offence under the section—Quantum of evidence for proving the offence. Section 400 Penal Code creates an offence of a very special character. The gist of the offence appears to be association for the habitual commission of dacoity. The offence thus lies in the agreement habitually to commit dacoity. It is not necessary that the evidence should be of the same quality as would be required to establish the commission of the dacoity itself. Even if the evidence on the record is such as would have justified a trial upon a specific charge of dacoity the mere fact that there was no such charge or trial would not make that evidence inadmissible or unreliable in a case under section 400 of the P. Code. *Ramzan Ali Vs. The State, (1968) 20 DLR (SC) 49.*

(5) Proof of association and the purpose of association, by direct evidence or by establishing the circumstance. *Ramzan Ali Vs. The State, (1968) 20 DLR (SC) 49.*

(6) The association and the purpose of the association may be proved either by direct evidence to the effect that the accused, or the accused and others, met and resolved to join together for the purpose of habitually committing dacoity or, in the absence of such direct evidence it may even be established by proof of facts from which the association may reasonably be inferred. The evidence of the first kind, namely, direct evidence can come from a participant or an associate alone. Therefore, the general practice in such cases is to get this direct evidence through the mouths of accomplices who are made approvers by the tender of pardon, though the practice of the Courts in this Sub-Continent has been so consistent as to harden into a rule of law that the evidence of an accomplice, unless corroborated in material particulars by independent evidence, is not relied upon. *Ramzan Ali Vs. The State, (1968) 20 DLR (SC) 49.*

(7) Corroboration of the evidence of association in respect of offence under section 400 P.C.—Nature of association to be established. In order to provide corroboration to the approver's evidence the practice has grown up, in such cases, to lead evidence of, what has been called, association, general and specific et seqq. Such evidence of association cannot, by its very nature, be of a very precise or definite character and it is, therefore, essential to bear in mind that it may not always be safe to rely upon the *ipse dixit* of a witness of this kind unless he is of such a reliable character that neither his veracity nor his memory can be doubted or that his identification of the person or persons so seen by him is of such a nature that it can be implicitly relied upon. the circumstances which may normally be regarded as sufficient for furnishing such confirmation might well be—

(i) That the witness had contemporaneously reported this fact to somebody else;

(ii) That other witnesses also support the testimony;

(iii) That in the information, if any, lodged with regard to dacoity the person or persons named by the witness have been shown as accused persons;

(iv) That the person so named was, in fact, arrested or challenged in that dacoity; and

(v) That some article looted in that dacoity was actually recovered from the person named or at his instance.

Evidence of such a nature must be scrutinized with care and caution in order to eliminate all chances of false implication or even an honest mistake. *Ramzan Ali Vs. The State, (1968) 20 DLR (SC) 49.*

(8) The word 'belong' in the expression 'belong to gang'—What it connotes. The word 'belong' involves the notion of continuity rather than of permanency, et seq. The word "habitual" also imports a sense of continuity. It should be proved that the accused had been concerned in a large number of dacoities in a comparatively short space of time et seq. *Ramzan Ali Vs. The State, (1968) 20 DLR (SC) 49.*

(9) General evidence of bad character can be led in cases of this kind for establishing an offence under the section. Normally in such a case general evidence of bad character in the shape of commission of other crimes, such as thefts, burglaries, etc., although inadmissible as evidence of character, may be admissible to prove habit or association. In this case even previous acquittal in case of dacoity or for being in possession of goods stolen in a dacoity may be relevant for establishing the association of the accused with the gang. The evidence of association by itself, even if believed, may well be insufficient, if it does not tend to show that the approver's statement that certain dacoities were committed by the accused persons was true. *Ramzan Ali Vs. The State, (1968) 20 DLR (SC) 49.*

(10) Incident took place long ago—Without a F.I.R. being lodged it is not safe to be taken into account. As regards incidents about which no reports were lodged with the police we cannot agree with the Courts below that they can be taken into account. If a person never lodged an F.I.R. about a dacoity in his house how his veracity can be accepted after 8/10 years when he comes forward to assert that such a dacoity did in fact take place in his house. The evidence of such incidents must be treated with great caution and unless confirmed through extremely reliable independent evidence should not be acted upon. *Ramzan Ali Vs. The State, (1968) 20 DLR (SC) 49.*

(11) For a conviction under section 400 of the Penal Code, it is not necessary that the person convicted must have taken part in any one of the dacoities. On the other hand evidence showing the actual participation by an accused in any given dacoity is evidence both of his association with the gang and of his object in such association. Such evidence which though not believed for the purpose of a conviction under section 395 of the Penal Code may yet be relied upon for the purpose of a conviction under section 400 of the Code. A conviction under section 400 of the Code cannot be considered bad in law merely because the evidence on the record would also have justified a conviction for a specific offence under section 397 of the Code or conviction for dacoity. *Omar Ali and others Vs. The State, PLD 1967 Dhaka 310.*

(12) Belonging to a gang of dacoits was by itself made an offence for the first time by the Penal Code. The offence is entirely a statutory one. *AIR 1963 AndhPra 314.*

(13) The essential ingredients of the offence under this section are:

(i) There must be a gang of persons.

(ii) The gang must be associated for the purpose of habitually committing dacoity.

(iii) The accused must belong to the gang. *(1972) 1 CutLR (Cri) 149.*

(14) The section appears to postulate the existence of a definite gang operating for a definite period and the object of the section would seem to be to provide for the punishment of those proved to be members of such a gang and against whom evidence is not forthcoming to convict them of specific offences of dacoity. *AIR 1963 AndhPra 314.*

2. "Associated".—(1) Association is gist of offence under this section. *(1912) 13 CriLJ 39 (Cal).*

(2) The expression, 'associate' taken along with the words "habitually committing dacoity" imports the idea that the combination is not merely for a single act of dacoity but extends to a period of time during which several acts of dacoity may be committed. *AIR 1963 AndhPra 314.*

3. "Gang of persons".—(1) The expression in this section means a band of persons acting or going about together for a criminal purpose. In this section the purpose is habitually committing dacoity. *AIR 1927 Lah 527.*

(2) The marginal note should not be considered in interpreting the section and even 2 persons may constitute a gang. *AIR 1963 Andh Pra 314.*

(3) Having regard to the ordinary meaning of the word and to the rule of interpretation of Statutes that where there is ambiguity in the language used in the body of the section, the marginal notes may be taken into consideration. *AIR 1959 SC 586 (589).*

4. "Habitually".—(1) The habit could be proved by an aggregate of acts. *(1910) 11 CriLJ 364.*

(2) An accused though he may be guilty of an offence under S. 216A, yet, may not be guilty of an offence under this section, unless it is established that his association with the rest was for the purpose of habitually committing dacoity. *AIR 1956 Orisssa 177.*

(3) The evidence that the accused habitually commits theft (as distinguished from dacoity) is not sufficient. *AIR 1923 Bom 71.*

5. "Belong".—(1) The word 'belong' in this section involves the notion of continuity and indicates more or less intimate connection with a body of persons extending over a period sufficiently long to warrant the inference that the person affected has identified himself with the band, the common purpose of which is the habitual commission of dacoity. *AIR 1963 AndhPra 314.*

(2) A mere receiver of stolen property or a mere harbourer of a gang of dacoits cannot be said to belong to such a gang. But a habitual harbourer of a gang of dacoits, knowing them to be habitually committing dacoity may in some circumstances be held to belong to that gang. That question will depend upon all the proved facts and circumstances of the case. *AIR 1956 Orissa 177.*

6. Charge and conviction.—(1) Where a single charge under this section only is framed against all the accused alleged to be concerned in several dacoities, the fact that the prosecution case of conspiracy between them has failed, does not affect the legality of the joint trial for different dacoities when no prejudice has been caused to the accused persons, as the case may fall under S. 221, Criminal P. C. *AIR 1963 AndhPra 314.*

7. Evidence and proof.—(1) The association and purpose of association may be proved by direct evidence or by proof of facts from which they can reasonably be inferred. Evidence that accused persons or groups of them had been concerned in a large number of dacoities within a comparatively short space of time, may be sufficient evidence of such association. *1974 CutLR (Cri) 19.*

(2) If on the evidence, it is established that a number of persons had participated in dacoities within a short period, it could be inferred that they formed themselves into an association for habitually committing dacoities. *AIR 1966 AndhPra 344.*

(3) It is also necessary to establish the identity of the gang concerned in the dacoities, when admittedly there had been other gangs operating in the area. *AIR 1963 Andh Pra 314.*

(4) When people of bad antecedents are proved to have been kept in jail for several months and when subsequent to their release they are proved to have participated jointly in several dacoities, it will be reasonable to infer that they operated as a gang engaged in habitually committing dacoities. *AIR 1956 Orissa 177.*

(5) Where the only material evidence in respect of the accused charged under this section is a judgment whereunder they have been convicted under S. 411 of the Code, in respect of the occurrence,

the judgment is inadmissible as evidence to prove their connection with the crime, when none of the witnesses to the material facts are called again at the trial. *AIR 1963 AndhPra 314.*

(6) Membership of the gang in regard to an individual accused person will depend upon the facts and circumstances of a case and not upon any arithmetical calculation with regard to a number of dacoities in which an accused may be found to have taken part along with other members of the gang. *AIR 1961 Pat 260.*

(7) Evidence which though not believed for the purpose of conviction under S. 395 of the Code, may yet be relied upon for the purpose of conviction under this section. *AIR 1930 Oudh 455.*

(8) When persons are charged under this section the only direct evidence that can be tendered is that of accomplices. Other witnesses can testify to association on certain isolated occasion but the man who gives the evidence of habitual association must inevitably be an accomplice. *AIR 1924 Lah 235.*

8. Sentence.—(1) An offence under this section is more heinous than a case of simple dacoity made punishable under S. 395. Therefore an accused found guilty under this section must be awarded a more severe sentence than that is normally inflicted in a case of ordinary dacoity. *AIR 1961 Pat 260.*

(2) The various factors to be taken into consideration in awarding the sentence are:

(i) How long has the accused belonged to the gang;

(ii) What dacoities have been committed by the gang since the accused joined it;

(iii) In how many of these dacoities did the accused actually take part;

(iv) What was the character of the dacoities in which the accused actually took part. *1953 MadWN 933.*

9. Procedure.—(1) The acquittal of an accused on a charge under this section cannot operate under S. 300, Criminal P.C., as a bar to his being prosecuted again on a charge under S. 395 of the Code for committing one of the dacoities in respect of which evidence was given in a previous trial under this section. *(1899) 1 BomRL 15.*

(2) Though the headquarters of the gang be District X, if some of the dacoities are committed in District Y, the trial in the Sessions Division of District Y is competent. *AIR 1961 Pat 260.*

(3) When allegations are made against an accused person which would bring his acts within the ambit of this section, it is not proper to proceed against him under the preventive sections of Criminal P. C. (like S. 110, Criminal P. C.) instead of trying him for an offence under this section. *AIR 1925 All 250.*

(4) Congnizable—Warrant—Not bailable—Not compoundable—Triable by the Court of sessions.

10. **Practice.**—Evidence—Prove: (1) That the accused belonged to the gang in question.

(2) That such gang was associated for the purpose of habitually committing dacoity.

11. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, belonged to a gang of persons associated for the purpose of habitually committing dacoity, and thereby committing an offence punishable under section 400 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 401

401. Punishment for belonging to gang of thieves.—Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons

associated for the purpose of habitually committing theft or robbery, and not being a gang of *thugs* or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *"Associated."*
3. *"Gang."*
4. *Belong to a gang.*
5. *Purpose of association.*
6. *"Habitually."*
7. *Evidence.*
8. *Onus of proof.*
9. *Procedure.*
10. *Sentence.*
11. *Practice.*
12. *Charge.*

1. Scope of the section.—(1) This section provides punishment for a person belonging to a gang of thieves. The word 'belong' connotes something more than casual association, It involves a notion of continuity over a period of time sufficiently long to absorb the tenets of the gang whose purpose is the habitual commission of dacoity. For conviction under this section it is necessary to prove that: (a) A gang of person existed; (b) The persons joined together to commit theft or robbery; (c) Robbery or theft was to be habitually committed; (d) The accused belongs to such a gang. When a gang is once established all persons joining the gang in some theft, generally become members of the gang, but this rule is not without exception. A prosecution under this section is of a peculiar nature deferring from an ordinary case in the number of accused involved and the extent of time covered by their operations. Aggregate of acts will prove the habit. It is not necessary to prove that each individual member of the gang has habitually committed theft or has committed any particular theft in company with other members. Evidence of the commission of several thefts, of meeting together at different places, before and after the commission of thefts and burglaries in bazars, boats and houses, of being seen on various occasions carrying away stolen articles or found in company under circumstances suggesting complicity in theft and burglaries, and evidence of systematic thefts of cattle by individual accused are sufficient to support a conviction under this section *(27 CrLJ 807)*. Gang of thugs or dacoits are excluded from this section as they are already covered by section 311 and 400, while this section covers gangs of thieves and robbers. No unfavourable presumption should be drawn against persons associating with the members of a gang at fairs, weedings and liquor shops *(17 CrLJ 443)*.

(2) The essential ingredients of the offence under this section are:

(i) That there should be in existence a gang of persons;

(ii) That such gang should be associated for the purpose of habitually committing theft or robbery.

(iii) That the accused should belong to that gang. *(1972) 38 Cut LT 683.*

(3) Where once such a gang as fulfils the ingredients is proved to exist, all persons 'joining' it in one or more cases of theft or robbery will come within this section. *AIR 1914 Lah 539.*

(4) This section no doubt has excellent objects and uses but it ought not to be resorted to where the persons sought to be brought within its four corners might have been made responsible for distinct and individual offences; nor is it intended to affect them, unless an association for the habitual commission of theft or robbery is clearly made out. *1886 AllWN 16.*

2. "Associated".—(1) For a conviction there must be proof that there was association and that such association was for the purpose of habitual theft or robbery. *(1912) 13 CriLJ 799.*

(2) The fact that many persons out of a wandering tribe were dishonest and committed thefts is not sufficient to show that they combined for habitually committing thefts. Wives and children staying with the adult members of the gang cannot be said to be associated with them within the meaning of this section. *(1911) 12 CriLJ 204 (All).*

3. "Gang".—(1) The term 'gang' is well known and where a person is said to belong to X's gang it means that the gang was organised by X, he (X) being also a member of that gang. *AIR 1953 Pepsu 145.*

(2) Where a gang is once established, persons joining the gang knowing its purpose will become members of the gang. There may, however, be exceptions. Thus a person taking part in a theft with some members of the gang is not necessarily its member. *AIR 1916 Lah 447.*

4. "Belong to a gang".—(1) A mere receiver of property stolen by the members of a gang cannot be said to 'belong' to that gang. *AIR 1932 Lah 486.*

(2) The word 'belong' implies something more than casual association. It would not be sufficient for the prosecution merely to rely upon the fact that the accused person had associated himself with the gang in the commission of only one offence. *AIR 1960 Guj 5.*

(3) It is necessary to show that the accused knew the existence of the gang and joined it for the purpose of committing theft or robbery. *AIR 1916 Lah 447.*

5. Purpose of association.—(1) The purpose of the association must be that of habitually committing theft or robbery. Such purpose is usually not a matter of direct proof by direct evidence but is generally a matter of inference from the facts and circumstances proved and the acts done by the accused. *AIR 1960 Guj 5.*

(2) An association with a gang for the purpose of committing offences other than theft or robbery is not covered by this section. *AIR 1920 Cal 87.*

(3) Where there is no proof that the association of the accused with the gang was for the purposes mentioned in this section the accused cannot be found guilty under this section. *AIR 1916 Lah 447.*

6. "Habitually".—(1) Habit is a fact in issue to be proved for the purpose of establishment of the ingredients of the offence referred to in Note 1(2). Habit is equivalent to character and therefore it may be reasonably said that the character of the accused is itself a fact in issue for proving a charge under this section. *(1972) 38 CutLT 683.*

(2) Habit should be proved by the aggregate of acts. *AIR 1920 Cal 87.*

(3) It is not necessary to prove that each individual member of the gang has habitually committed theft. *AIR 1923 Lah 666.*

7. Evidence.—(1) Evidence that each individual of a party is a convicted theft is relevant for determining if the party constitutes a gang of persons associated for the purpose of habitual theft. It can be tendered before or after the association has been established by the prosecution. *(1912) 13 CriLJ 539.*

(2) To prove an association, evidence that certain persons of the gang were seen near the scene of house-breaking before or after the event, is a relevant fact. *AIR 1937 Nag 17.*

(3) Actual participation by the accused in any theft or robbery is evidence both of his association with the gang and of his object in such association. *AIR 1929 Oudh 321.*

(4) An old conviction of the accused for dacoity is admissible not for proving his habit of committing theft but only for proving his criminal tendency to commit theft. *AIR 1925 Bom 195.*

(5) As association for the purpose of habitually committing theft or robbery,is a particular trait of bad character in issue, in a case under this section, evidence of this trait is admissible and not of the general bad character of the accused. *AIR 1960 Guj 5.*

(6) Evidence of association before the period of charge is admissible to corroborate the evidence of association during the period. *AIR 1938 Mad 858.*

(7) Previous conviction for theft and previous proceedings under S. 110, Criminal P. C., are admissible for proving habit and not of general bad character under S. 14, Evidence Act and so they are not excluded by S. 54 of that Act. *AIR 1930 Sind 211.*

(8) Previous convictions and previous proceedings under S. 110, Cr. P. C. may be adduced and considered against the accused, both prior and subsequent to the year when the gang was first formed. *AIR 1914 Lah 545.*

8. Onus of proof.—(1) The evidence that a panchayat enquired into a theft and called a person before it as a suspect, or that a person accepted money and agreed to make a search for stolen property and to restore it to the owner does not as against that person prove any of the ingredients of the offence punishable under Section 401. *AIR 1926 Lah 439.*

9. Procedure.—(1) The difference between this section and S. 110, Criminal P. C., is that the former is punitive, while the latter is preventive. *AIR 1947 Oudh 86.*

(2) The prosecution can proceed against certain persons either under this section or under S. 110, Criminal P. C., and in the latter case it cannot be objected that a substantive charge should have been laid against them. *AIR 1933 Oudh 251.*

(3) Joint trial of different sets of persons under this S. and S. 413, is illegal. *AIR 1932 Lah 486.*

(4) The offence of belonging to a gang of thieves and that of receiving stolen property from the gang are separate transactions and as an offence under this section cannot be said to include theft, these charges being of distinct offences, separate trials must be held. *AIR 1925 Lah 537.*

(5) Where two sessions cases are started against persons of a gang, they can be combined when all the accused constitute one gang. *AIR 1938 Mad 858.*

(6) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

(7) Conviction under this section cannot be bad in law merely because evidence on record would also have justified a conviction for a specific offence u/s. 379 or 392 of the Code. *AIR 1929 Oudh 321.*

10. Sentence.—(1) It is not equitable to give separate sentences under this section and S. 457 of the Code where the main evidence for establishing membership consists of the fact that the accused took part or received some of the proceeds of the burglaries of his gang. *AIR 1932 Lah 298.*

(2) Sentences for offences under this section, Ss. 411 and 457 of the Code on the same day, but in different trials can be ordered to run concurrently. *AIR 1926 Nag 426.*

(3) While assessing sentence under this section, the Magistrate can take into consideration previous convictions and orders under S. 110. Criminal P. C., even when S. 75 of the Code does not apply. *AIR 1930 Sind 211.*

11. Practice.—Evidence—Prove: (1) That there existed a gang of person.

(2) That those persons were associated for the purpose of committing theft or robbery.

(3) That theft or robbery was to be committed habitually.

(4) That the accused was member of such gang.

12. 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—of at—belonged to a gang of persons associated for the purpose of habitually committing theft (or robbery), and that you thereby committing an offence punishable under section 401 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 402

402. Assembling for purpose of committing dacoity—Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope and applicability.*
2. *This section and section 399.*
3. *Proof of intention or purpose of the assembly.*
4. *Identification of the accused.*
5. *Procedure and punishment.*
6. *Practice.*
7. *Charge.*

1. Scope and applicability.—(1) This section contemplates stage when whole project still lies in the realm of design and intention without any attempt having yet been made to give it a concrete shape. In certain circumstances assembly itself may amount to a preparation, for example when five or more persons, after having planned a dacoity and after having collected the necessary arms and implements agree to assemble at a forsaken temple in a jungle in order to proceed therefrom to the place of raid and in pursuance of that agreement do in fact assemble there. Assembly in such a case would not be an assembly as contemplated by section 402, but would be an act of preparation. The offence under this section is complete as soon as five or more persons assemble together for the purpose of committing a dacoity. Though an offence under section 399 and 402 would involve similar ingredients, the difference between the two is that while under section 402 mere assembly without other preparation is enough, section 399 is attracted when some additional step is taken in the course of preparation. Preparation consists in devising or arranging means necessary for the commission of an offence. An attempt is direct movement towards the commission after preparation is made. The intention or agreement to commit dacoity must be proved before members of an assembly can be punished under section 402. The only evidence that may be available for the offence under this section is the evidence of conduct and circumstances from which the court may justifiably infer the existence of an intention to commit dacoity. On receiving information that some persons were going to assemble for the purpose of committing a dacoity, a police party went to grove. When darkness set in, number of persons came to the grove armed with guns. Four of them were caught and articles recovered from them were a gun, some gunshots and gun powder, a dagger, electric torch and sticks. It was held that having regard to the circumstances which led the police party to come to the grove and in view of the articles recovered from the possession of the accused there was hardly any room for doubt that the purpose of the assembly was to commit dacoity. *(AIR 1950 All 93).*

(2) "Assembly" for the purpose of committing dacoity is an element of section 402. Such an element plus something more together constitute an element of section 399 Penal Code, that is, "a

preparation to commit dacoity". Thus when there is preparation for committing dacoity section 399 Penal Code is attracted and in such case conviction of the accused both under section 402 and 399 Penal Code would be improper and illegal. *22 DLR 723.*

(3) Under the English law the agreement or combination to do an unlawful thing or to do a lawful thing by unlawful means amounts in itself to an offence. The Code follows the English law in this section. *(1901) ILR 24 Mad 523.*

(4) This section applies to the mere assembly of persons to commit dacoity without any further proof of any preparation or attempt. What it contemplates is a stage when the project still lies in the realm of design and intention without any attempt having yet been made to give it a concrete shape. *AIR 1958 Cal 25.*

(5) The essential ingredients of the offence under this section are:

(a) an assembly of five or more persons;

(b) their purpose being the committing of dacoity; and

(c) the accused was one of the five or more persons so assembled. *AIR 1979 SC 1412.*

2. This section and Section 399.—(1) Though the offence falling under the two Ss. 399 and 402 would probably involve similar ingredients, the only difference between the two is that while under this section mere assembly without preparation is enough, S. 399 is attracted only when some additional step is taken by way of preparation. *(1962) 26 CutLT 571.*

(2) The mere act of assembling is not to be deemed to be a preparation for commission of dacoity made punishable under S. 399. *AIR 1956 All 464.*

3. Proof of intention or purpose of the assembly.—(1) It is often difficult to get direct evidence of the purpose of the assembly. The purpose can be gathered only from the circumstances of the case and the nature of the articles recovered from the possession of the accused. *(1975) 41 CutLT 768.*

(2) Presumption arising from the circumstances is a rebuttable one and it is open to such persons to show that they had assembled there for a lawful purpose. But in the absence of any such evidence a conviction under this section would be quite proper. *AIR 1959 All 727.*

(3) The proper test would be whether the circumstances sought to be relied upon are consistent with the one and only purpose or intention set out in the charge. If the facts and circumstances are susceptible of two interpretations, one in favour of the prosecution and the other in support of the defence version, then the benefit of doubt will have to go to the accused. *AIR 1962 All 13.*

(4) The prosecution need only prove that the accused are members of the assembly and not what exact part was played by each one of them. *AIR 1916 Lah 334.*

(5) The mere fact that the accused were found at 1 A.M. does not by itself prove that they had come there for the purpose of committing dacoity or for making preparation for the same. They could be there for the purpose of committing murder or any other offence. *AIR 1979 SC 1412.*

(6) Accused persons alleged to have been arrested by police party while preparing for committing dacoity—Firing from both sides alleged but no one receiving injuries—Investigating officer not finding signs of any encounter on the spot—General Diary entries not exhibited to afford corroboration to statements of police officers—Public witness produced not an independent witness—Discrepancies in the statement of witnesses—Conviction of accused u/s. 402 cannot be sustained. *(1983) 1 Crimes 821 (All).*

(7) Accused persons assembling in Nala in the night and planning to commit dacoity—Police party surrounding and arresting them—countrymade pistols, pharsas, recovered from accused persons—

Word 'dacoity' in the conversation of the accused alleged to have been heard by witnesses i.e. station officer and other police officers but there was no mention in F.I.R.—All circumstances lead to conclusion that accused had assembled there for committing dacoity and did make preparations for committing dacoity. *1984 AllCriRul 31.*

(8) Conviction under Ss. 399, 402—Telegram sent by wife of accused complaining about his arrest showing arrest of accused prior to the time of occurrence—Accused alleged to have arrested before witness but no witness produced—Prosecution case against accused cannot be true—Accused given benefit of doubt and acquitted. *1983 UP (Cri) Rul 259 (All).*

4. Identification of the accused.—(1) The absence of identification proceedings is fatal to the prosecution case. *1965 AllWR (HC) 519.*

(2) Proof of identification held not satisfactory as the identification witness had seen accused only in dim light. *1979 AllCriR 390.*

5. Procedure and punishment.—(1) Where the accused are charged under this section but are convicted under Ss. 147 and 148 such a conviction cannot be said to have prejudiced them since a charge under this section fully covers the ingredients of Ss. 147 and 148. *AIR 1962 All 13.*

(2) Sections 399 and 402 envisage separate offences and provide for different punishments for these offences. Consequently, the offence under S. 399 never completely merges in the offence under this section and separate sentences can be passed for each of the offences proved. But where nothing more than mere assembling is proved, a simultaneous conviction and sentence under the two sections cannot be maintained. *AIR 1955 NUC (All) 1989.*

(3) When five or more persons assemble for the purpose of committing dacoity, each of them is punishable under this section merely on the ground of joining the assembly. *AIR 1960 Pat 582.*

(4) Where the offence was not attended with violence a lenient sentence should be passed. *1968 CriLJ 982 (All).*

(5) Where the accused were quite young and there was no previous conviction against them, it was held that a lenient sentence was justifiable. *AIR 1959 All 559.*

(6) Where the accused was an old man of 70 years, the sentence was reduced to period already served. *AIR 1980 SC 1631.*

(7) Conviction u/ss. 402/399—Accused young student not previously convicted—Offence being not punishable with death or life imprisonment accused was released on probation. *AIR 1979 SC 1690.*

(8) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

6. Practice.—Evidence—Prove: (1) That five or more persons were assembled.

(2) That they were assembled for the purpose of committing dacoity.

(3) That the accused was one of such persons.

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 of—at—were one of five (or more) persons assembled for the purpose of committing dacoity, and that you thereby committed an offence punishable under section 402 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Of Criminal Misappropriation of Property

Section 403

403. Dishonest misappropriation of property.—Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft ; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B, being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse, and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonesly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property [for] a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it, it is sufficient if, at the time of

appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations

(a) A finds a [5][taka]. on the high-road, not knowing to whom the [5][taka] belongs. A picks up the [5][taka]. Here A has not committed the offence defined in this section.

(b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person on whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

Cases and Materials : Synopsis

1. Scope of the section.—(1) The essence of the offence or criminal misappropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use by the accused. No entrustment is required for his offence to be constituted. The mere possession of the property is not sufficient for producing the charge without something to indicate the appropriation or conversion though long possession without any attempt to find the owner may amount to evidence of intention to do so. All that is necessary for an

offence under section 403 is that there should be misappropriation or conversion with the intention of causing wrongful gain or wrongful loss. All that is required is that there should be an intention of causing such gain or loss which would amount to dishonesty *(35 CrLJ 982 FB)*. In the absence of any overt act on the part of the accused on dishonest motive can be imputed to him. In order to constitute an offence of criminal misappropriation, property must have come into the possession of the accused innocently in the first instance (38 CrLJ 48). There must be something to prove dishonesty. Intention has got to be proved. The illustrations (a), (b) and (c) show that the original innocent taking amounts to criminal misappropriation by subsequent acts. Explanation (2) of this section makes the necessity of some positive proof of this sort quite clear. Illustration (a) shows that the picking up of a Taka whose owner is not known, is not an offence. Similarly illustration (c) shows that the finding of a purse with Taka belonging to an unknown owner is not an offence, but the appropriations of it to the finder's own use is necessary to complete it *(8 CrLJ 250)*. The illustrations to section 403 relate to cases where a person appropriates the articles to his own use. Morever, the word 'misappropriated' is in the explanation and illustration appended to the section replaced by the expression 'appropriate' to his own use but the illustrations cannot be taken to limit or narrow the scope of section 403 itself. Misappropriation is the wrongful setting apart of assinging of a sum of money to a purpose or use to which it should not be lawfully assigned or set apart *(41 CrLJ 824)*. The word "converts" means appropriation and dealing with the property of another without right as if it is his own property. A partner has undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purpose he may be accountable civilly to the other partners. But he does not thereby commit any misappropriation *(AIR 1965 SC 1433)*. When a person retains or appropriates the property in assertion of a bonafide claim of right, though unfounded in law and fact, he is not guilty of criminal misappropriation because there is no dishonest intention. Retention of money or a sufficiently long period by a person who is bound under law to return it to another legally entitled to it raises an inference of a temporary misappropriation within the meaning of this section. A false denial of a loan is not in itself a misappropriation at all, and may amount to not more than an attempt to evade civil liability for the money lent. Attempt to evade civil liability does not necessarily imply that the property lent has been misappropriated. The false denial of a loan is compatible with he absence of criminal misappropriation, and no more constitutes that offence than possession of stolen property constitutes theft or dishonest receipt. There cannot be any criminal misappropriation with regard to immovable property. On a charge of criminal misappropriation it is sufficient for the prosecution to establish that some of the money mentioned in the charge has been misappropriated by the accused even though it may be uncertain what is the exact amount so misappropriated. Charge can be made for gross sum provided that motive included between the first and last of such dates shall not exceed one year.

(2) *Criminal Misappropriation, theft, cheating and criminal breach of trust: Difference*—An easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property by cheating, the taking is without honesty but with the consent of the owner and in criminal misappropriation it is honest trust without the consent of the owner *(AIR 1928 Nag 113)*.

(3) Temporary embezzlement of money is an offence under the section. The accused while entering two subsequent collections dated 24.3.60 and 2.4.60 in the collection register did not enter in the

collection register the amount of 456/8/11 collected on an earlier date, that is, 20-3-60. He, however, entered the amount in register when the same was detected by his superior authority and he also deposited the amount. The defence plea was that due to forgetfulness the amount was not entered in the collection register. Held: The amount of Rs. 456/8/11 was accounted for more than 6 months after the collections which tends to prove temporary misappropriation. *Abdul Khaled Mia Vs. State 16 DLR (Dac) 342.*

(4) When both criminal case and civil suit maintainable—There is no illegality in the order of revival of a case passed by the Additional District Magistrate in exercise of the powers of District Magistrate. Civil suit for recovery of money misappropriated is competent side by side with a criminal case started for the offence of criminal breach of trust and criminal misconduct. *Md. Nazrul Islam Vs. The State and another—1, MLR (1996) (AD) 409.*

(5) Excess payment—When receipt of excess payment from bank becomes dishonest misappropriation—At the time when the cashier was putting the money into the hands of the appellant there is nothing to show that he was receiving it with the knowledge that he was being overpaid. But the next moment when the appellant detected that there had been in excess payment it was his duty to return the excess amount which did not belong to him—In consideration of the facts of the case the accused appellant could not be convicted for theft but he could not escape a conviction for dishonest misappropriation. *10 DLR 12.*

(6) Charge of misappropriation of several items covering one year must be tried in one trial. *22 DLR 539.*

(7) This section makes it an offence to dishonestly misappropriate or convert to one's own use movable property. *AIR 1958 SC 56.*

(8) The law expects a Govt. servant to be honest in the discharge of his duties. Therefore as compared to S. 403, S. 409 provides severe punishment to public servants. *1981 UPLT (NOC) 53.*

2. "Dishonestly".—(1) All that is necessary for an offence under this section is that there should be misappropriation or conversion with the intention of causing wrongful gain or wrongful loss. It is not necessary that loss or gain should have actually accrued before the offence is completed. *AIR 1934 All 499.*

(2) Dishonesty may be proved by positive evidence or may be presumed from the circumstances but in no case can it be assumed as a matter of course. *AIR 1956 Mys 40.*

(3) The mixture of the funds of another with one's own may be natural and proper or it may be convenient, but irregular or again it may be both irregular and criminal. The Court cannot conclude that the offence of criminal misappropriation has been committed unless it be a just result of the evidence that the accused had a guilty intention. *(1914) 15 CriLJ 305 (309) (PC).*

(4) Certain bales of cloth which were in the custody of the railway were found to be unloaded near the godown of the accused and were latter on recovered from that godown. It was held that these facts were not sufficient to prove dishonest intention on the part of the accused. *AIR 1961 Assam 132.*

(5) The accused, a booking clerk, received various sums from motor drivers for deposit with the cashier but failed to deposit the same. It was only several days after he was placed under suspension that he handed over the sums to the cashier. It was held that conduct of the accused in retaining the money for long, his failure to hand over the sums to the cashier when required to do so by the

Regional Manager, his abrupt departure without permission and without handing over charge of the records and sums were clear indications of dishonesty. *AIR 1959 HimPra 14.*

3. "Misappropriates or converts to his own use".—(1) The word "misappropriates" and the expression "converts to his own use" do not mean the same thing, though they both connote that the person who misappropriates or converts to his own use property is already lawfully or innocently in possession of it. *1889 Pun Re (Cr) No. 36, page 136.*

(2) The word "appropriate" means "to set apart or assign" the property to oneself or to another to the exclusion of the owner. *AIR 1956 Mys 40.*

(3) The words "converts to his own use" necessarily connote the user of or dealing with the property in derogation of the rights of the owner. *AIR 1956 Mys 40.*

(4) The property should belong to another person. There can be no misappropriation of one's own property. *AIR 1914 Low Bur 1.*

(5) Where A mortgaged his property to B and the mortgaged property was acquired by the Government and compensation paid to A, and A refused to pay the amount to the mortgagee, it was held that A was not guilty of misappropriation of the amount. *AIR 1954 Cal 547.*

(6) The President of a Co-operative Society was charged with having misappropriated the amount belonging to the society and it was argued that mere retention did not amount to misappropriation; it was, however, found that he was asked several times to pay the amount but that he had failed to do so; he was held guilty of misappropriation. *AIR 1958 Mys 82.*

(7) Certain buffaloes belonging to the complainant strayed. They were found in the possession of the accused. When the complainant appeared on the scene and demanded them he did not deliver the buffaloes to him and put him off on the pretext that he would make enquiries from the vendor from whom he purchased them. He, however, made no attempt to prove that he received these buffaloes from any one else. He was using them for the period that they were in his possession. It was held that the facts disclosed an offence of criminal misappropriation. *AIR 1957 Assam 35.*

(8) Merely taking the complainant's cattle towards the cattle pound does not amount to conversion or misappropriation by the accused. Conversion to his own use, viz., taking them for sale, detaining them, in his own house or some such thing needs to be proved. *AIR 1955 NUC (All) 3530.*

(9) Certain bales of cloth which were in the custody of the railway were found to be unloaded near the godown of the accused and were later recovered from that godown. It was held that there being no proof of misappropriation or conversion of the property or any evidence of dishonest intention on the part of the accused there could be no conviction under S. 403. *AIR 1961 Assam 132.*

(10) Accused serving in the Force was handed over a kit at the time of enrolment. He left his post without leave and without handing over the kit but not with the intention never to return. It was held that the retention of the kit by the accused did not amount to misappropriation or conversion unless it could be shown that the accused dishonestly used the property in violation of any direction of law prescribing the mode in which the trust was to be discharged or of any legal contract, express or implied. *AIR 1957 Raj 26.*

(11) Person obtaining possession of property by cheating, later on converting same to his own use is guilty of criminal misappropriation. *AIR 1959 Bom 408.*

(12) Complainant alleging payment of money to accused for purchase of sewing machine—Accused neither purchasing machine nor returning money—Accused denying that he got money—Payment of money proved—Case held one of criminal misappropriation. *AIR 1950 All 266.*

4. "Any movable property".—(1) The property referred to in S. 403 is movable property. There can be no misappropriation if the subject-matter of the offence is immovable property. *1932 Mad WN 1353.*

(2) The word "property" is used in the Penal Code in a much wider sense than the expression "movable property". *AIR 1962 SC 1821.*

5. Explanation 1.—(1) Explanation 1 to S. 403 states that dishonest misappropriation for a time only is a misappropriation within the meaning of the section. *AIR 1923 Nag 146.*

(2) Merely because an instalment of an agricultural loan is not paid into the treasury the very next day by the village munsif, the inference cannot be drawn that he has misappropriated the amount so omitted to be paid. *AIR 1930 Mad 507.*

(3) Where a patwari, neither credited to the Government the amount received by him in excess on account of land revenue, nor made it over to the Patel, it was held that the presumption u/s. 114, Evidence Act, would be that he kept the amount with him for his own use with intent to make wrongful gain for himself and to cause wrongful loss to the rightful owner. *AIR 1938 Nag 445.*

(4) The accused was an income-tax clerk whose duty was to receive money and credit it into the treasury. He admitted to have received two sums and retained the same for several months with him but fearing detection by officers paid them into the treasury subsequently, making false entries in his account books to avoid suspicion. He was held guilty under S. 403. *(1889) ILR 12 Mad 49 (DB).*

(5) The accused in his capacity as booking clerk of a Transport company received certain sums from drivers of various transport vehicles for deposit with the adda cashier. He, however, failed to deposit the same and it was only several days after he was placed under suspension that he handed over the missing sum to the adda cashier. It was held that he was guilty of dishonest misappropriation although temporary. *AIR 1959 Him Pra 14.*

(6) When person entrusted with funds for disbursement for a particular purpose misappropriated them, by preparing false documents, but disbursed the amount for the intended purpose after the matter was reported to the authorities—Held that accused was guilty under this section. *AIR 1972 SC 958.*

6. Explanation 2.—(1) A person who takes possession of property, not in the possession of any other person, does not, by that act alone, commit any offence under this section. He commits it only when he misappropriates or converts it to his own use. *1889 Pun Re (Cri) No. 15, page 60.*

(2) A finder of property, of which from the nature of it, there must be an owner, must take some steps in order to ascertain its true owner. If, after he has taken some steps in order to ascertain the true owner, the true owner is not discovered, then, under certain circumstances, he may retain the property and would not be held guilty of criminal misappropriation; but if he acts in such a way, that the true owner may never discover that the article had been picked up by him, then he is attempting to create a situation where conversion of the goods to his own use would be easy. In such a case the conduct of the finder is criminal and he would come within the ambit of this section. *AIR 1952 All 481.*

(3) The finder must wait for a reasonable time to allow the owner to claim the property before appropriating it. *AIR 1938 Mad 172.*

(4) Where a person who took cattle scattered on account of Cheeta care, subsequently retained it intending to treat it as his own, he would be guilty of criminal misappropriation. *AIR 1944 Mad 26.*

(5) The accused tried to sell a spanner which he found lying on a public road. It was held that it was not a case where the accused had reasonable means of discovering and giving notice to the owner of the spanner, of having found it. The spanner was not of any appreciable value and the case fell under illustration (a) to Section 403; the accused could not be held guilty. *AIR 1930 Bom 176.*

(6) A stocked large quantities of timber on railway land taken on lease. B also took lease of the adjoining land in order to keep heavy equipment to construct a dam. B gave notice to A for removal of timber within 15 days and thereafter enclosed the land by barbed wire and later on cleared the land with cranes. It was held that, apart from the legal position that principles of criminal law are not applicable to determine civil liability, there was sufficient notice within the meaning of Explanation 2 and after expiry of the time fixed in the notice B had no liability to A. *AIR 1959 Orissa 103.*

7. Joint property.—(1) An owner of property cannot be guilty of misappropriation of his own property. This principle will apply even in the case of joint owners. *AIR 1965 SC 1433.*

8. Partner.—(1) A partner has undefined ownership along with other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit any misappropriation. *AIR 1965 SC 1433.*

9. Principal and agent.—(1) The principal cannot be held guilty of misappropriation if his agent commits the offence of misappropriation. *(1967) 8 Guj LR 552.*

10. Misappropriation by wife—Liability of husband.—(1) A husband cannot be made liable for acts of misappropriation of his wife during the course of her service simply because he had allowed her to take up service. *AIR 1915 All 128.*

11. Liability of corporate bodies.—(1) A corporate body or a company is not indictable for offences which can be committed only by a human individual or for offences which must be punished with imprisonment. Barring these exceptions a corporate body is liable for acts and omissions of its directors, authorised agents or servants whether they involve mens rea or not, provided they have acted or have purported to act under authority of the corporate body. *AIR 1964 Bom 195.*

12. Misappropriation, criminal breach of trust, theft, cheating—Distinction.—(1) In a criminal misappropriation the property comes into the possession of the accused innocently in some natural manner but by subsequent change of intention the retention becomes unlawful, whereas in a criminal breach of trust the property comes into the possession of the accused either by an expressed entrustment or by some process placing the accused in a position of trust and there is dishonest use or disposal of the property in violation of the trust. *1967 Mad LJ (Cri) 20.*

(2) In a theft the original taking is dishonest and without the consent of the owner but in a criminal breach of trust it is both honest and with the consent of the owner. In a criminal misappropriation the original taking is honest but without consent of the owner. *AIR 1928 Nag 113.*

13. Misappropriation and other offences.—(1) A person who is proved to have dishonestly misappropriated property cannot be convicted of dishonestly retaining it under S. 411. *(1907) 5 CriLJ 413 (Low Bur).*

(2) A packet containing a loose diamond and a diamond ring was lost at a Post Office and was found with the accused two years later. It was held that only one offence under S. 411 was committed and not two offences under S. 403, one in respect of the diamond and the other in respect of the ring. *AIR 1924 Rang 256.*

14. Attempt and preparation.—(1) Accused who was in charge of a grain godown removed certain bags and secreted them in another room. The registers were, however, not manipulated. It was held that the act did not amount to conversion nor an attempt to commit conversion but that it was merely preparation. *AIR 1949 Pat 326.*

(2) One D who wanted to send by registered insurance post a letter containing currency notes asked the accused to write the address on the envelope but the accused tried to substitute another envelope in place of the original and wrote the address on it. D's suspicion having been aroused he demanded the original envelope. An altercation ensued and the original envelope containing the currency notes and D's coat were torn. It was held that the offence of robbery with which the accused was charged was more or less technical and the accused should really have been charged with attempt to criminally misappropriate the notes. *AIR 1933 Sind 139.*

15. Evidence and proof.—(1) In order to establish an offence under Section 403 the prosecution has to prove:

(a) that the property was the property of the complainant;

(b) that the accused misappropriated that property or converted it to his own use; and

(c) that he did so dishonestly.

No prosecution can be founded on the mere suspicion of the complainant that the accused has misappropriated the property. *AIR 1939 All 602.*

(2) It is not necessary in every case to prove in what precise manner the accused misappropriated the money. *AIR 1959 SC 1390.*

(3) It is sufficient if the prosecution "establishes that some of the money mentioned in the charge has been misappropriated by the accused, even though it may be uncertain what was the exact amount so misappropriated. *AIR 1928 Bom 148.*

(4) When a man is found in possession of property about 7 months after it has been lost and there is no other evidence, he ought not to be called upon to account for it, particularly when he gives a reasonable explanation of getting it. If the accused gives reasonable account of how he came in possession of the property, it is the duty of the prosecution to show that the explanation is false; but if he gives an unreasonable explanation it would be for him to establish the truth. *AIR 1916 Lah 288.*

16. Procedure.—(1) Where J filed a complaint for misappropriation, examined two witnesses but subsequently absented himself and M filed a separate application that J did not wish to continue prosecution which M may be permitted to continue, it was held that permission to continue the prosecution may be granted where M has something to do with the institution of the proceedings. *1972 AllCriR 113.*

(2) A charge under this section and one under Section 417 can be joined and tried together where the two offences form part of the same transaction. *AIR 1915 All 380.*

(3) Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by any Magistrate and by Village Court. But if the offence is committed by public servant, it becomes: Cognizable—Warrant—Not bailable—Not compoundable—Triable by special Judge under Act XL of 1958 & Act II of 1947.

17. Alteration of conviction.—(1) A conviction under S. 409 can be altered into one under Section 403 under Section 221 of the Criminal P. C. *1966 AllWR (SC) 695.*

18. Same facts constituting offence both under the Code and under a special Act.—(1) For contravention of Insurance Act read with Insurance (General) Regulation, though it is punishable under them proceedings under Ss. 406/403, Penal Code are maintainable. *AIR 1971 Cal 93.*

19. Civil liability.—(1) If goods are delivered to a purchaser in pursuance of a contract for purchase, the mere fact that the person denies receipt of goods delivered, does not render him guilty under S. 403 or S. 406, the matter being purely in the nature of a civil dispute. *AIR 1924 Mad 516.*

(2) If a cheque is wrongly dishonoured by a Bank that does not amount to misappropriation. The remedy lies in civil Court. *AIR 1950 Cal 57.*

(3) The plaintiff had stocked large quantities of timber on railway land taken on lease. The defendant also took lease of the adjoining land in order to keep heavy equipment to construct a dam. The defendant gave notice to the plaintiff for removal of timber within 15 days and thereafter enclosed the land by barbed-wire and later cleared the land with cranes. In a suit by the plaintiff for damages it was held that apart from the legal position that the principles of criminal law are not applicable to determine civil liability, there was sufficient notice within the meaning of Expln. 2 of S. 403 and after its expiry, the defendant was under no liability to the plaintiff. *AIR 1959 Orissa 103.*

(4) The mixture of the funds of another with one's own may be in many cases natural and proper, or it may be convenient but irregular or again it may be both irregular and criminal. The distinction between these cases should be handled with the greatest judicial care so as (while preserving the amplest civil responsibility) to prevent the third or criminal category from being extended to mistaken though convenient acts. *(1914) 15 CriLJ 305.*

(5) A who had mortgaged certain lands to B had entered into an agreement with B under which the compensation money which A was to get in respect of the mortgage lands acquired under the Land Acquisition Act was to be applied first towards the satisfaction of the mortgage loan. On receipt of the money, however, A refused to pay it to B. It was held that the compensation money could not in law, become the money of B. The refusal to pay every civil debt did not justify the finding of dishonesty. The case was one of breach of contract. *AIR 1954 Cal 547.*

20. Punishment.—(1) Accused who was 25 years of age, criminally misappropriated cattle. It was held that the offence was not a minor one and that a sentence of one year's rigorous imprisonment was justified. *AIR 1952 All 481.*

21. Practice.—Evidence—Prove: (1) That the property in question is movable property.

(2) That the accused misappropriated or converted it to his own use.

(3) That he did so dishonestly.

22. Charge.—The charge should run as follows:

I (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about—the day of—at—dishonestly misappropriated or converted to your own use certain property to wit—, belonging to XY, and thereby committed an offence punishable under section 403 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 404

404. Dishonest misappropriation of property possessed by deceased person at the time of his death.—Whoever dishonestly misappropriates or coverts to his

own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession dishonestly, misappropriates it. A has committed the offence defined in this section.

Cases and Materials : Synopsis

1. ***Scope of the section.***
2. ***"Dishonestly".***
3. ***"Misappropriates or converts to his own use".***
4. ***"Property".***
5. ***Partnership property.***
6. ***Knowledge regarding possession of deceased and of person legally entitled after his death.***
7. ***"Legally entitled to such possession".***
8. ***Evidence and proof.***
9. ***Procedure.***
10. ***Charge.***
11. ***Section 404 and other offences.***
12. ***Punishment.***
13. ***Practice.***

1. Scope of the section.—(1) This section is intended only to punish servants and strangers who could have no right to or interest in, the effect of a dead man and who misappropriate such offence but not to punish near relations who take possession under a claim of independent ownership or a calim to succeed as heir of the deceased *(AIR 1913 Mad 506)*. Removal of ornaments from the body of a person after causing his death cannot amount to robbery because robbery is theft by force and theft is taking movable property out of a person. A dead body is not a person. Therefore the act of the accused would amount to dishonest misappropriation of property possessed by the deceased and is an offence under section 404 *(1958 CrLJ 902)*. The object of this section is to offer protection to property which by reason of its being peculiarly placed needs protection to property where the person who could look after it is dead and the person entitled to it has not yet appeared.

(2) This section relates to an aggravated form of the offence of dishonest misappropriation under S. 403. Hence all the elements necessary to constitute the offence under S. 403 are also necessary to constitute an offence under this section. *(1869) 12 Suth WR (Cr) 39.*

(3) It is necessary that the property should have been in the possession of a deceased person at the time of his death and should not have since come into the possession of any person legally entitled to such possession. It is also necessary that the accused should have been aware of these facts. *AIR 1949 Cal 171.*

(4) The object of this section is to afford protection of property which by reason of its being peculiarly placed needs protection where the person who could look after it is dead and the person who is expected and entitled to look after it after the death of such person has not appeared on the scene. *AIR 1956 MadhB 49.*

2. "Dishonestly".—(1) It is an essential ingredient of the offence under S. 404, that the accused must have done the act of misappropriation or conversion "dishonestly". The section can have no application where persons such as near relatives of the deceased take possession of the property under a bona fide claim of right. *AIR 1956 MadhB 49.*

3. "Misappropriates or converts to his own use".—(1) The words of the section are in the alternative: "misappropriates or converts to his own use". It is not necessary for a conviction under the section, therefore, that the accused should misappropriate the property to his own use. Where it is found, for example, that the accused misappropriated the property to the use of the zamindar in the exercise of his function as the zaminder's gomastah, the accused would be guilty under this section. *(1869) 12 SuthWR (Cr) 39.*

4. "Property".—(1) Criminal misappropriation and conversion is possible of immovable property such as a building where materials have been severed from building and removed. *AIR 1925 All 673.*

(2) In the case of immovable property there cannot be misappropriation or conversion (except where the immovable property is first demolished and then the material is removed thereafter). *AIR 1956 MadhB 49.*

5. Partnership property.—(1) Property of a partnership concern is never in the possession of any individual partner. It is partnership property and every partner is an agent of the other. A necessary incident of every dissolution of partnership is settling of accounts and unless that is done none can say which assets belonged to the deceased partner. The possibility of inheriting deceased partner's property can arise only after accounts are settled. *1976 Chand LR (Cri) 67 (Delhi).*

6. Knowledge regarding possession of deceased and of person legally entitled after his death.—(1) The mere fact that some ornaments which belonged to the deceased and were on his person before his death, were recovered from the accused is not sufficient to prove such knowledge on the part of the accused. *1961 MPLJ (Notes) 130.*

7. "Legally entitled to such possession".—(1) In order to find a person guilty under this section, the prosecution has to prove that the property was in the possession of a deceased person at the time of his decease and that it has not since been in the possession of any person legally entitled to such possession. *AIR 1949 Cal 171.*

(2) If the accused took possession of the property from a person who was entitled to be in possession and who was in possession of it at the time of the death of the deceased the section will not apply. *AIR 1956 Madh B 49.*

8. Evidence and proof.—(1) Where the accused claimed the ornaments in question to be his own, it was held that it was necessary for the prosecution to have tendered unimpeachable evidence of the identification of the ornaments, and that the mere fact that the ornaments were kept buried is not sufficient to give rise to an inference that they did not belong to the accused. *1963 MPLJ (Notes) 258.*

(2) One D had taken certain articles from a dead body. The accused, a police constable slapped D, and got the articles from him and kept the articles with himself and for his own purpose. It was held by the Supreme Court that offences under S. 394 and this section were made out against the accused. *1973 SC 448.*

9. Procedure.—(1) Offence under S. 404 P. C. is not an offence of dacoity and cannot be considered as one falling within the definition of expression 'scheduled offences' given in the special

statute and the special Judge was held not competent to take cognizance of the case under that statute. *1982 UP Cri R 222 (All).*

(2) Not cognizable—Warrant—Bailable—Not compoundable—Triable by the Metropolitan Magistrate or Magistrate of the first class. But if the offence is committed by public servant it becomes: Cognizable—Warrant—Not bailable—Not compoundable—Triable by special Judge under Act XL of 1958 and Act II/47.

10. Charge.—(1) Where the evidence establishes that it is the accused who murdered his step-mother and removed the jewels from her immediately after the murder, the conviction of the accused on charge of murder and under Section 404 was held to be proper. *1956 Mad WN 805.*

(2) It is not desirable to charge an accused in a murder case with an offence u/s. 404 for misappropriating the articles of the deceased in absence of evidence of misappropriation. *AIR 1941 Mad 306.*

(3) The charge should run as follows:

I (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about—the day of—at—dishonestly misappropriated or converted to your own use certain property to wit, belonging to XY, a deceased person at the time of the death and had not since been in the possession of any person legally entitled and (that you were at the time of the death of the said person a clerk or servant or the deceased) and that you have thereby committed an offence punishable under section 404 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

11. Section 404 and other offences.—(1) Removal of ornaments from body of one after causing his death is not robbery but an offence under this section. *AIR 1958 MadhPra 192.*

(2) Where murder and robbery are committed in course of the same transaction by the same person, the offence would fall under S. 392 and not under S. 404. The matter would be different if a thing is stolen from a dead body apart from the transaction in which death occurred. *AIR 1963 MadhPra 106.*

12. Punishment.—(1) Where the person who could look after the property is dead and the person entitled to look after it after the death of the former has not come forward, there is a chance available to strangers to dishonestly misappropriate or convert the same to their use and the property needs special protection. It is for this reason that a provision is made in S. 404 by which the dishonest misappropriation or conversion in the circumstances is made punishable with a higher sentence. *AIR 1956 Madh B 49.*

13. Practice.—Evidence—Prove: (1) That the property in question was movable property.

(2) That such property was in the possession of a deceased person at the time of his death.

(3) That it was not thereafter in the possession of any person legally entitled to such possession.

(4) That the accused misappropriated it or converted to his own use.

(5) That he did so dishonestly.

(6) That he knew the facts mentioned in (2) and (3).

(7) That the accused was, at the time of the owner's death, employed by him as a clerk or servant.

Of Criminal Breach of Trust

Section 405

405. Criminal breach of trust.—Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Illustrations

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods; A has committed criminal breach of trust.

(c) A, residing in [7][Dacca(Sic)], is agent for Z, residing at [8][Chittagong]. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of [5][taka] to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue officer, is entrusted with public money and is either directed by law or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

Cases

1. Scope.—(1) The terms of section 405 are very wide and entrustment may be brought about in any manner *(37 CrLJ 637 FB)*. It is not necessary that entrustment should be express. An implied

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7. Subs, by the Federal Law Revision and Declaration Act 1951 (Act XXVI of 1951), s. 4 and Sch. III , for "Calcutta".

Sic. *Spel* "Dhaka" instead of "Dacca".

8. The word "Chittagong" was substituted for the word "Lahore" by Act VIII of 1973 ,Second Sch., (w.e.f. 26-3-71).

entrustment will suffice. The word "entrusted" is not necessarily a term of law. The expression "entrusted" in section 405 is used in its legal and not in its popular sense. A person is entrusted with property when he receives it from another otherwise than for or on account of himself. He may be entrusted with it either for or on account of the person from whom he receives or a third party or parties (*AIR 1963 All 691 DB*).To constitute an offence under this section "there must be an entrustment of property and dishonest misappropriation of it. The person entrusted may misappropriate himself or he may willfully suffer another person to do so (*AIR 1961 SC 751*) A person coming to have a dominion, though not actually entrusted with the property, can be guilty of misappropriation *(1974 CrL J 418)*. A lapse in the discharge of official duty which may be either due to inadvertence, negligence or overwork stands on a different footing and must be distinguished from criminal liability. Where there is no entrustment of property there can be no conviction for breach of trust. For an offence of criminal breach of trust besides showing that the property was entrusted to the accused it is further necessary to show that he had dishonestly misappropriated or converted it to his own use. Mens rea is the essence of the offence of criminal breach of trust. Criminal intention in a charge for criminal breach of trust is a matter of inference from proved facts. When the essential ingredients for criminal misappropriation are taking and there is no mens rea, a case of criminal misappropriation may not lie while a Civil action may be sustained. Even breach of trust gives rise to a suit for damages but it is only when there is evidence of a mental act of fraudulent misappropriation the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust. Great caution ought to be used in drawing an inference of dishonesty from a breach of duty imposed by civil law. An owner of property, in whichever way he uses his property and with whatever intention, will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. A partner has undefined ownership along with the other partners over all the assets of the partnership *(3 DLR 449)*. Section 405 does not cover the case of a loan or an advance of money when borrower of the depositee intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest, or compensation for the use thereof (*AIR 1948 Cal 1)*. A criminal breach of trust cannot be said to have been committed in cases for example, false denial of loan advanced, failing to act up to the directions of the persons depositing the money, which money was not utilized for his own purposes. (*AIR 1940 Mad 329*).

(2) Misappropriation—Denial of the charge, when receives reasonable support from the prosecution evidence and circumstances. Held: When all the facts and circumstances of the case against the present accused are taken into account, in particular his conduct, there is a reasonable possibility that the explanation which he put forward is true and in consequence of which he is entitled to be acquitted. *Mir Ahmad Vs. State (1962) 14 DLR (SC) 258.*

(3) Entrustment is an essential ingredient of offence of criminal breach of trust and a man cannot be guilty of this offence unless he is entrusted with the amount. *A. Salam Chowdhury Vs. Crowm (1952) 4 DRL 80.*

(4) If several persons are charged for an offence of criminal breach of trust and sec. 34, P.C., is sought to be applied to punish all of them for criminal breach of trust it is necessary to establish that all of them were entrusted with the amount. *A Salam Chowdhury Vs. Crown (1952) 4 DLR 80.*

(5) Criminal breach of trust—Ingredients necessary to be proved by the prosecution. Where the charge against an accused person is that of criminal breach of trust, the prosecution must prove not only entrustment of or dominion over property but also that the accused either dishonestly

misappropriated, converted, used or wilfully suffered some other person to do so. *Shakir Hossain Vs. State(1957) 9 DLR (SC) 14.*

(6) Mere failure to return—Articles haired—Mere failure to return without evidence of *mens rea*—Whether amounts to criminal breach of trust.*1951 PLD (Lah) 342.*

(7) Breach of trust—Dishonest misappropriation, conversion to one's own use or disposal in violation of direction of law or legal contract—Nature of proof—Whether there can be any presumption as to misappropriation. There may be circumstances establishing that when an accused person has received money, if he fails to account for it, it can only be that he misappropriated or converted it to his own use and the absence of direct evidence of misappropriation or conversion which in many cases not be easy to obtain may, in such a case, be made good by the presumption out of the circumstances. But, in a case where no evidence of misappropriation or conversion is available and the accused person was under obligation to deal with it in a particular way, the Court cannot reach any conclusion to the effect that the accused did not fulfill this obligation upon mere presumption. It would be the duty of the prosecution to establish, that in fact the accused was guilty of contravening his duty in respect of the particularism in question. *Abdul Latif Vs. Crown(1953) 5 DLR (WPC) 40 (12-13)*

(8) Undertaker on his undertaking to produce the deposited tractor in court when called upon, failing to make good his promises. Guilty of criminal breach of trust. Held: the appellant was entrusted with the tractor and he was under obligation to produce it before the court, but instead of producing the tractor he disposed of it ``in violation of any legal contract express or implied which, he has made touching the discharge of such trust. All the ingredients of 'criminal breach of trust' are prima facie present in the action of the appellant and, as such, he came well within the mischief of the section, That his bond is liable to forfeiture and he incurs a civil liability in terms of his bond is not a ground for exoneration from the criminal liability when his willful act or omission brings him within the mischief of section 405. By his failure to produce that tractor to the Court he has incurred both civil and criminal liabilities which may coexist and are not mutually exclusive. *Shahidullah Patwary Vs. State (1983)35 DLR (AD) 281.*

(9) Violation of contract will hold good for and offence of criminal breach of trust if the conditions as to 'entrustment' within the meaning of section 405 is satisfied. *Shamsul Alam & ors. Vs. A.F.R. Hasan & ors (1988) 40 DLR 46.*

(10) Interpretation of entrustment u/s 405 P.C:— It connotes that the accused holds the property in a fiduciary capacity, the property remaining in the possession of control of the accused as a bailee. *Shamsul Alam & ors. Vs. A.F.R. Hasan & ors.(1988) 40 DLR 46.*

(11) Under the concept of entrustment the person who transfers possession of the property to second party still remains the legal owner of the property and the person so put in possession, only obtains a special interest by way of a claim for money advanced for the safe keeping of the thing. *Shamsul Alam & ors Vs. A.F.R. Hasan & ors (1988) 40 DLR 46.*

(12) Illustration is a key to understand and interpret the section. The illustrations given under the section do not include a transaction of loan and violation of the condition of loan agreement. No authority was cited that an alleged violation of a loan agreement constitutes an offence of criminal breach of trust. *Shamsul Alam & ors. Vs. A.F.R. Hasan & ors (1988) 40 DLR 46*

(13) The word "trust" and "entrustment" interpreted—In a transaction of loan the loan giver does not retain any control over the loan amount and it becomes the personal money of the loanee and as such he cannot be conceived of committing any breach of trust. If there is any violation of the terms of

agreement under the contract, that will be decided in the civil court and no criminal action would lie. *Shamsul Alam & ors. Vs. A.F.R. Hasan & ors. (1988) 40 DLR 46.*

(14) Facts alleged constitute an offence of criminal breach of trust or any offence triable in criminal court. *Shamsul Alam & ors. Vs. A.F.R. Hasan & ors. (1988) 40 DLR 46.*

(15) The only relevant question for consideration is whether the facts alleged disclose an offence of criminal breach of trust. *Shamsul Alam & ors. Vs. A.F.R. Hasan & ors. (1988) 40 DLR 46.*

(16) Meaning of entrustment—Entrustment connotes that the accused held the property in fiduciary capacity—C.I. Sheets of Tahsil office which were blown off by storm were collected and kept in the Tahsil office—Whether the Tahsildar in charge was entrusted with C.I. sheets. *Akmal Hossain Vs. State (1988) 40 DLR 483.*

(17-20) Charge under section 405— What the prosecution must prove to establish the said charge—Mere entrustment of or dominion over the property will not prove the charge but the prosecution must also prove its misappropriation by accused or its conversion to the use of the accused. *Mohammad Musa Vs. Kabir Ahmed 41 DLR 4.*

(21) A Transaction of loan of money under an agreement does not operate as an entrustment occurring in section 405 Penal Code. *Shamsul Alam Vs. A.F.R. Hasan 40 DLR 46*

(22) Violation of contract will hold good for an offence of criminal breach of trust if the condition as to entrustment within the meaning of section 405 is satisfied. *Shamsul Alam Vs. A.F.R. Hasan 40 DLR 46*

(23) Interpretation of entrustment under section 405 PC—It connotes that accused holds the property in a fiduciary capacity, the property remaining in the possession or control of the accused as a bailee. *Shamsul Alam Vs. A.F.R. Hasan 40 DLR 46.*

(24) Under the concept of entrustment the person who transfers possession of the property to second party still remains the legal owner of the property and the person so put in possession only obtains a special interest by way of a claim for money advanced for the safe keeping of the thing. *Shamsul Alam Vs. A.F.R. Hasan 40 DLR 46.*

(25-27) When wilful act or omission of a person brings him within the mischief of the section—he is not exonerated from criminal liability on the ground that his bond is forfeited and he incurs a civil liability. *Shahidullah Patwary Vs. The State 13 DLR (AD) 56 = 1984 DLR (AD) 25.*

(28) Non-submission of completion report to the authority by the person entrusted with money for doing repair works where constituted criminal breach of trust—Non-submission or delay in submission of the completion report along with the accounts cannot by itself be sufficient to find the accused guilty. *Dr. Babar Ali Vs. The State BCR 1985 AD 231=1985 BLD (AD) 169.*

(29) Dishonest misappropriation, meaning of—Failure to execute the work according to the terms of the agreement which stipulates refund of money with interest, whether merely civil liability or would also constitute criminal breach of trust—Failure to execute the work is violation of the contract—Where the accused was entrusted with money would not only constitute criminal liability but would also constitute civil liability—The accused would be guilty of criminal breach of trust. *Dr. Babar Ali Vs. The State.1985 BLD (AD) 169.*

(30) Criminal breach of trust—Entrustment—Money loaned or advanced to a borrower of depositee who intend to use of utilise that money does not constitute entrustment. If the expression 'entrusted' is applied to a thing which is not money, it would undoubtedly indicate that such thing

continues to remain the property of the prosecutor during the period in which the accused is permitted to retain its possession or is permitted to have domain over it—Similarly, the word 'entrustment' when used in respect of money, it means the money that has been transferred to the accused under circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecutor and the money remains in the possession or control of the accused as a bailee, and in trust for the prosecutor as the bailor, to be restored to him or applied in accordance with his instruction—In other words, the person who parts with his money remains the beneficial owner thereof even through the person to whom it is given retains its actual possession section—405 does not cover the case of a loan or an open advanced money when the borrower or depositee intends to use or utilise that money for the time being, till he is in possession of it, although he may have to return and equivalent amount later on to the person making the advance with or without interest or compensation for the use thereof. *Md. Safiruddin alias Shafiruddin Vs. The State 1 BLD (HCD) 150.*

(31) Criminal breach or trust—Essential elements of—The essential element of the offence of criminal breach of trust is dishonesty—Without the existence of dishonesty or a dishonest mind acting from behind in the disposal, conversion or use of the property held under trust there may occur a breach of trust but not a criminal breach of trust. The term 'dishonestly' as defined in the penal Code implies an intention or an aim to cause wrongful gain to the accused himself or to his chosen beneficiary and a wrongful loss to the victim by unlawful means—this mens rea is followed by a comnissive act such as dishonest misappropriation and disposal of a property either actual or inferred—Anything short of these essentials will not warrant a conviction under Section 409 of the Penal Code. *The State Vs. Abdur Rahim and others 2 BLD (HCD) 121.*

(32) Criminal liability of a surety in respect of a bond for failure to produce the property in question before the Court—by the failure of the surety to produce the tractor before the Court he has incurred both civil and criminal liabilities, which may co-exist and are not mutually exclusive. *Shahidullah Patwary Vs. The State 4 BLD (AD) 25.*

(33) Criminal breach of trust—Non-completion of work within the specified time and non-submission or delay in submission of the completion report along with the accounts cannot by themselves be sufficient incriminating circumstances to prove the guilt of the accused—Of course the civil liability arising out of non-fulfilment of a contract, in part or in full, may be additional to and independent of the criminal liability which may have been incurred by the accused when he used or disposed of the money he was entrusted with in violation of the contract which he made touching the discharge of his trust. *Dr. Babor Ali Vs.The State 5 BLD (AD) 169.*

(34) Criminal breach of trust—When a contract creates a trust in respect of a property which is alleged to have been misappropriated, it will amount to an offence of criminal breach of trust—In the case of purchase of goods a person entrusted to discharge the obligation by purchasing and delivering the goods will be trustee for the unspent money in his hand and if there is any misappropriation of that money it will amount to an offence of criminal breach of trust. Whether the legal representative of the trustee can be held criminally liable for the breach of trust—A trust is an obligation attached to the ownership of the property and it can be traced in the hands of the legal representative—A mere retention of the unspent money will not amount to criminal misappropriation but if the retention is followed by an intention to wrongfully deprive the owner of its use and secure it for his own benefit, it will amount to criminal breach to trust. *Samarendra Nath Halder Vs. the State 7 BLD (HCD) 348*

(35) Entrustment—Meaning of—C.I sheets of the Tahasil office were blown off by storm and those were missing—whether the Tahsilder-in-chatge of the Tahsil office was entrusted with those C.I.

Sheets—Entrustment connotes that accused holds the property in fiduciary capacity and contemplates creation of relationships whereby the owner of the property makes it over to another person to retain it by him until certain contingency arises or to be disposed of him on the happening of certain event—the act of collection of blownoff C.I. sheets and keeping the same in the Tahasil office cannot be held to be entrustment. *Akmal Hossain and another Vs. The State 8 BLD (HCD)195.*

(36) Mere inability to pay back a sum of money entrusted the sale proceeds of a property entrusted, whether will establish the fact of criminal misappropriation. The expression 'property' occurring in section 405 of the Criminal Procedure Code should not be given a narrow construction. Blank forms of tickets are also property when the same are converted into tickets after sale. Mere delay in payment of money entrusted to a person, when there was no particular obligation to pay at a certain date, does not amount to misappropriation. Mere inability to pay back a sum of money entrusted, the sale proceeds of a property entrusted will not establish the fact of criminal misappropriation, if mens rea is not established. The prosecution must also establish, apart from entrustment that the accused had dishonestly misappropriated the property entrusted. *A.H.M. Siddique Vs. The State 13 BLD (HCD) 85*

(37) Partner cannot be held liable under section 405, Penal Code. Once it is held that it was a partnership business and the complainant and the accused persons were partners such prosecution cannot be maintained. If the prosecution for criminal misappropriation cannot be maintained, the prosecution for cheating under section 420 cannot also be maintained. *36 DLR 14 AD*

(38) The liability to give account and the duty to deliver goods having arisen at Narayanganj the Court of Magistrare at Narayanganj has jurisdiction to try the offence of criminal breach of trust within the meaning of section 405 Penal Code, if there was only a liability to account at Narayanganj and no duty to deliver any goods there the position might have been otherwise. Where it is alleged that the accused has failed to account for the property then the second part of section 405 Penal Code will apply and jurisdiction exists at the place where the property should have been delivered by the accused. Where, however, there is only a liability to account at a certain place and no duty to deliver any property at that place, the Criminal Court at place where the accounting is to be done has no jurisdiction to try offence. *12 DLR 456.*

2. For more cases relevant to this section, see under section 406, infra.

Section 406

406. Punishment for criminal breach of trust.—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials: Synopsis

1. *Scope of the section.*
2. *Accused must have been "entrusted" with property (or dominion over property).*
3. *"In any manner".*
4. *Criminal breach of trust and theft—Distinction.*
5. *Criminal breach of trust and cheating.*
6. *Trust and loan.*
7. *"Dominion over property."*
8. *"Property."*
9. *Carrier.*
10. *Pledge.*
11. *Stake-holder.*
12. *Deposit of money.*
13. *Collection of money by delegated authority.*
14. *Broker and customer.*

15. Vendor and purchaser.
16. Hire-purchase transaction.
17. Partner.
18. Joint owner.
19 Pleader and client.
20. Guardian and ward.
21. Banker and customer.
22. Craftsman and customer.
23. Entrusting property for repair.
24. Contract to do certain work.
25. Directors of company.
26. Miscellaneous.
27. "Dishonestly".
28. Misappropriates.
29. "Converts to his own use".
30. "In violation of any direction of law".
31. "In violation of any legal contract".
32. Express trust.
33. "Wilfully suffers any person so to do".
34. Onus of proof and appreciation of evidence.
35. Failure to account or delay in accounting or in payment or omission to pay.
36. Failure to certify payment into Court under O. 21. R. 2, Civil P. C.
37. Negligence.
38. Abetment.
39. These sections and S. 105 of the Insurance Act.
40. Agreement to give time to repay amount.
41. Place of trial.
42. Procedure and jurisdiction.
43. Offences falling under this section and under a special Act.
44. Existence of civil remedy.
45. Charge.
46. Sanction or leave of Court.
47. Acquittal.
48. Sentence.
49. Alteration of conviction.
50. Interference by High Court.
51. Practice.

1. Scope of the section.—(1) Dishonest intention is the gist of an offence punishable under this section. Every breach of trust is not criminal. It may be intentional without being dishonest or it may appear to be dishonest without being really so. In such cases the Court should be slow to move and this caution is all the more necessary because there is a tendency to secure speedy results by having recourse to criminal law. To constitute the offence of criminal breach of trust, there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged. There must be an entrustment: there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract and the misappropriation or conversion or disposal must be with a dishonest intention. Every breach of trust gives rise to a suit for damages, but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust. Courts should be slow to presume dishonesty. Dishonesty cannot always be implied from the occasional failure of a servant immediately to credit into the treasury amounts recovered by him in the discharge of his official duty *(39 CrLJ 349)*. The entrustment may be in any manner. Another alternative is that the accused may get dominion over the property in any manner. In both cases the law contemplates that the accused person should receive the money and holds it on behalf of the other, so that he should be trustee of the property. The expression "in any manner" does not enlarge term "entrustment". The section is couched in broad terms and covers any person who is in any manner entrusted with any property. An easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is

without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner *(AIR 1951 Punj 103)*. In cheating, property is wrongfully acquired by means of deception i.e. misappropriation including belief by an act or omission. In criminal breach of trust the property is acquired lawfully or by free consent. If a sum of money is advanced by way of loan no criminal breach of trust is committed even if the borrower uses it for a purpose other than that for which the advance was made *(13 CrLJ 269)*. Upon a charge for criminal breach of trust the accused pleaded that the amount claimed by the complainants was due to them or a debt, but having sustained losses in business they were unable to pay it. It was held that in such cases the crucial test is, was the sum due to complainants owned by the accused as a debt, or was it held by them as trust money for complainants over which they had no right of disosition of any kind *(28 CWN 831)*.

'Property' referred to in this section must be movable property. Criminal breach of trust cannot be committed in respect of immovable property. The property regarding which the offence is alleged to have been committed must have been 'entrusted' to the accused or he must have 'dominion over' it. No criminal prosecution is sustainable against a partner for misappropriation of partnership money. A person, who fails to produce a meter installed by an electric company is responsible for its price but is not guilty of criminal breach of trust *(33 CrLJ 866)*. When the accused retains dominion over the property and has some claim to it, even if it turns out not to be sustainable in law, there is no offence unless the claim is merely a pretence and not bonafide *(AIR 1924 Cal. 908)*. A criminal Court should not entertain a complaint where liability is purely of a civil nature. Where a transaction is no more than a loan which has not been repaid, there can be no criminal prosecution under this section *(1977 CrLJ 195)*. If an offence is made out under section 406, the mere fact that a civil remedy is also open to the complainant would not oust the jurisdiction of the criminal Court *(1975 PCrLJ 545)*. Criminal breach of trust is committed at the place where the money is received and misappropriated.

(2) Compromise over a non-compoundable offence does not render it innocuous. The accused took the ornaments from the complainant on promise that he would return them after a month. He failed to return the ornaments as he had promised but, on the other hand, pawned them elsewhere. A compromise was effected between the parties and the accused undertook in writing that he would return them within one month from the date of writing. Having failed to do that he was prosecuted under section 406 for criminal breach of trust and it was contended on his behalf that the matter had been compromised and there remained only a civil liability. Held: The offence, however, had been committed in this case before the document was executed, that is, when the appellant pawned the ornaments. When the appellant pawned the ornaments he dishonestly misappropriated or converted to his own use the ornaments or dishonestly used them. A compromise subsequent to the commission of the offence would be of no effect, for the offence under section 406 is not compoundable. *Amir Sharif Vs. Sayeda Khatoon and State (1962) 14 DLR (SC) 76 : 1962 PLD (SC) 97.*

(3) Direct evidence to establish misappropriation not essential when circumstances clearly lead to an inference of guilt. Entrustment of the property having been proved and the accused having failed to account or render an explanation for his failure to account an inference of misappropriation with dishonest intention may readily be made in the light of the circumstances of the case. The prosecution is not always obliged to prove the precise mode of conversion or misappropriation by the accused of the property entrusted to him. *Khalil Vs. State (1963) 15 DLR 97.*

(4) Charge of criminal misappropriation does not lie against a co-partner. A partnership cannot proceed against another partner of a partnership firm on charges of criminal misappropriation except in a case where there has been a special fiduciary relationship between the partners. *State Vs. Syed Imtiazuddin Hossain (1965) 17 DLR 382.*

(5) Retention without dishonest motive—Mere retention of money without evidence of dishonest misappropriation—No offence. *Khaliq Hossain Vs. Crown (1956) 8 DLR (WP) 64.*

(6) Complainant kept, with the permission of the accused but in his absence, several maunds of gur in the accused's house who did not know how much gur was stocked nor was he present when the complainant later removed a certain quantity of gur out of the stored stock. Held: In these circumstances there was no entrustment of gur with the accused such as is contemplated under section 406. *Jogendra Kishore Vs. Crown (1951) 3 DLR 315.*

(7) Charge for criminal breach of trust in respect of money obtained by dealing with the entrusted property—Conviction illegal. When a person is charged with criminal breach of trust of certain property entrusted to him, he cannot be convicted of embezzling of the property but the amount obtained by dealing with it. *Debandra Nath Vs. Crown (1950) 2 DLR 366.*

(8) Money paid—Compensation for compounding a criminal case—If paid in trust. Where a sum of money was paid by the complainant to the accused as compensation for compromise of a criminal case against the complainant which, however, was not compromised as the Court refused permission, the compensation money so paid to the accused could not be said to have been paid in trust so as to bring the offence whithin the mischief of section 406. *53 CWN (DR 1) 79.*

(9) Criminal breach of trust—Entrustment is the main ingredient of the offence—Accused must have domain over the property or it must be entrusted to him—If money or property not so entrusted, accused commits no criminal breach of trust. The accused, a contractor, was entrusted with the work of sinking three tube-wells each 152 ft. deep with two filters for Rs. 800.00 each. No money or materials were given to him. After completion of the work, the accused submitted bills and drew Rs. 2400.00 for three tube-wells. It was later found that the tube-wells were 108 feet deep with one filter each the accused was charged and found guilty of the offence of criminal breach of trust. On appeal it was—Held: Entrustment is the main ingredient of this offence. Law requires that the property regarding which the offence is alleged to have been committed was entrusted to the accused or he must have domain over it. In the instant case no money or property was entrusted to the accused. He cannot, therefore, be convicted for the offence, under s. 406 P.C. A case of cheating under section 420 P.C. has been established against him and the offence under section 406 P.C. was altered to one under section 420 P.C and the accused convicted thereunder. *Lutfar Rahman Vs. The State, (1969) 21 DLR 933.*

(10) Criminal breach of trust is not an offence referred to in section 136 and therefore, sanction under section 137(3) not necessary. Magistrate took cognizance of offence (criminal breach of trust) on the complaint of an inspector of Co-operative Societies without previous sanction of the Register as require under section 137(3) of the Co-operative Societies Act, 1940. Held: The offence of criminal breach of trust not being an offence under the Co-operative Societies Act, previous sanction of the register was not necessary. *The State Vs. Abdur Rashid Miah, (1970) 22 DLR 373.*

(11) Money paid on the basis of agreement for purchase of certain goods—Money on receipt by the recipient becomes his money, not the money of the payor—It is not a case in which the recipient held the money in trust for the payer—Not had he any control over the money after it is paid—For breach of contract (a civil liability), a suit in civil court will lie—The proceeding under section 406 is made out. *Abdul Rahim Vs. Begum A. Murshed (1982) 34 DLR 320.*

(12) Entrustment of dominion over the property is an essential ingredient of the offence under section 406 together with the element of misappropriation. *Md. Shahjahan Vs. Haji Yeaqub Ali Chowdhury (1979) 31 DLR 63.*

(13) Breach of terms of contract when circumstances do not show that there was any criminal breach of trust or cheating—Failure to fulfil such a contract does not amount to any criminal offence. Under a contract bearing date 9.2.77, A (Opposite party 2) purchased 2000 mounds of sacking twine from B (accused-petitioner) and in pursuance thereof A took delivery of the 1500 mounds of sacking twine against payment. Regarding the remaining 500 mounds, B by letter dated 9.2.77 asked A to take delivery of the same within 22.9.77 on payment of the price thereof. " It is alleged that A went to take delivery of the goods on 23.9.77 with a pay order, but B did not deliver the goods" and it is "further stated that B on 23.10.77 finally refused to give delivery of the goods". In these circumstances A lodged a complaint before S.D.M Narayanganj for prosecution of B u/s. 406 of the Penal Code. B appeared before Court and was released on bail. On the case being transferred to another Magistrate B moved an application for his discharge under section 253(2) Cr. P.C. which being rejected by the learned Magistrate B moved the High Court Division u/s 439 and 561A Cr. P.C. against the order of the Magistrate. The contract being genuine and the parties being bound by the terms of the contract, the dispute over alleged breach of contract would be one of civil nature. Since no case has been made out against B for any offence which might fall under section 406 or 420 of the Penal Code the proceeding against B pending in the court of the Magistrate must be quashed u/s 561A Cr. P.C. *Sayeed Ahmed & Md. Ayub Vs. State (1980) 32 DLR 247.*

(14) Business, in partnership—As against a partner a charge of criminal breach of trust will not lie u/s. 406—Unless there is an agreement between the partners that a particular property shall be the separate property of a partner there cannot be a case of entrustment. Unless there is an agreement between the partners that a particular property would be the separate property of a partner there cannot be an entrustment of it to the other partner or partners. In the absence of such agreement, each partner is interested in the whole of the partnership assets and there cannot be an entrustment of "a partner's property" as such by one partner to another because there is no "property" which can be entrusted. *Mostafa Chowdhury Vs. State (1983) 35 DLR 68.*

(15) Accused induced the complainant to pay to him 20 lakh taka on his (accused's) assurance to procure 20 N.O.Cs. and visas but failed to keep his promise and finally denied to have received any money from the complainant—This is a case which falls within the mischief of section 406, Penal Code. No scope to argue creation of a partnership business. *Musa Bin Shamsher Vs. Ansarul Huq (1987) 39 DLR 24*

(16) —Several persons sought to be convicted for criminal breach of trust—Ingredients to prove—Entrustment essential. If section 34 of the Penal Code is to be applied to punish several 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 entrustment a person cannot be charged and punished as a principal offender by the application of section 34, for this section cannot create entrustment where there is none. *Abdus Salam Vs. Crown (1952) 4 DLR 80.*

(17) Intention essential for abetment—In order to constitute an abetment of an offence under section 406 P.C. intention is essential. A person having no knowledge of the fraud cannot have intended to aid the commission of any offence by any other person. *Crown Vs. Motilal Sen (1953) 5 DLR 66.*

(18) Partnership—Breach of trust—A partner failing to account may not be accused for fraudulent breach of trust unless there is a clear agreement whereby the purpose which the accused fails to carry out and misappropriated it. *Musa Bin Shamsher Vs. Ansarul Huq (1987) 39 DLR 24.*

(19) Circumstances of the case show that a case for criminal breach of trust and cheating is made out. Complainant parted with a large sum of money and paid it to the accused on the latter assuring that he will procure N.O.C. and visa permits for 20 persons but he failed to procure them and ultimately refused to have received any money from the complainant. *Musa Bin Shamsher Vs. Ansarul Huq (1987) 39 DLR 24.*

(20) Money lent by the complainant to the accused-petitioner induced by representation to repay and there is absence of any entrustment. Allegations constitute no offence of criminal breach of trust and the charge thereof is quashed. *Shafiuddin Khan Vs. State 45 DLR 102.*

(21) Paddy purchased by PW 1 was handed over to the appellant—Appellant refused to deliver the sale proceeds and denied the entire transaction—The case is one of entrustment fully proved by the prosecution—No interference. *Mohammad Musa Vs. Kabir Ahmed 41 DLR (AD) 151.*

(22) A criminal court while awarding punishment under section 406 of the Penal Code has got no authority to pass an order directing the accused to pay the sale proceeds of a property over which he had dominion to the complainant. *Mohammad Musa Vs. Kabir Ahmed 41 DLR 4.*

(23) Court below in passing the order of making repayment of sale proceeds acted *ex mero motu* and transgressed their jurisdiction. *Mohammad Musa Vs. Kabir Ahmed 41 DLR 4.*

(24) Quashing of proceedings for alleged breach of trust and cheating: Money claims not the outcome of a particular transaction but arose after year-end accounting following regular business between the parties. If on settlement of accounts at the end of a period some money falls due to one party from the other party and the other party fails to pay the dues, such liability cannot be termed criminal liability. Allegation that dues were allowed to accrue dishonestly, neither attract an offence under section 420 not under section 406 or under any other section. The whole allegation in complaint petition, even if true, cannot form basis of any criminal proceeding. The proceedings are quashed. *Sayed Ali Mir Vs. Syed Omar Ali 42 DLR (AD) 204.*

(25) Question of offence of breach of trust and cheating—Business transaction were going on between the complainant and the accused for a long time relating to supply of fish and the latter made payments in parts. A balance amount claimed by the complainant was not agreed on and the accused refused to pay it. This refusal to pay the balance does not constitute any criminal offence under sections 406/420 Penal Code. *Islam Ali Mia Vs. Amal Chandra Mondol 45 DLR (AD) 27.*

(26) Nothing was stated in the FIR that the accused denied that he would not pay the balance amount. No allegation of initial deception has also been alleged. The High Court Division rightly quashed the proceeding. *Rafique (MD) Vs. Syed Morshed Hossain and another 50 DLR (AD) 163.*

(27) A request is not a " false representation" or an inducement. If there is any false representation of inducement on the part of the party and of the property is delivered on such false representation or inducement, in that case the action is 'cheating' within meaning of section 415 of the Penal Code. *Habib (Md) and another Vs. State represented by the Deputy Commissioner (Criminal) 52 DLR 105.*

(28) Wheat was supplied by the complainant on credit on the request of the petitioner who is close relation of the complainant. Under such circumstances a request cannot be considered as 'false representation' or 'inducement'. The criminal proceeding is therefore quashed. *Motaleb Hossain (Md) Vs. State and another (Criminal) 53 DLR 198.*

(29) As some payments were made by the accused persons, it cannot be said that there was any initial deception on the part of the accused persons. Under such circumstances, we are of the view that

there are no elements of the offences under sections 406 and 420 of the Penal Code and as such continuation of the proceedings will be an abuse of the process of the court. *Abdul Rouf (Md) alias Nayan vs State (Criminal)53 DLR 283.*

(30) When allegations show that the acused had initial intention to deceive, criminal case should not be quashed on the plea of pendency of civil suit for realisation of the money in question. *Abdul Bari and others vs State and others (Criminal) 53 DLR 410.*

(31) The High Court Division found that the complaint petition discloses an offence of inducement by the accused to part with money. By such inducement the complainant paid money to the accused on the undertaking by the latter to repay the same as and when complainant demanded it. But the accused misappropriated the money by issuing cheques which were dishonoured. This establishes prima facie case of deception. *Delwar Hossain vs Rajiur Rahman Chowdhury and another (Criminal)55 DLR (AD) 58.*

(32) Since there is a claim and counter-claim between the parties this criminal case should not be allowed to proceed and they be given an opportunity to sort out claims in the Civil Court. *Delwar Hossain Sowdagar vs State, represented by the Deputy Commissioner (Criminal) 55 DLR 5.*

(33) Non-compliance of the conditions of the (আপোষ নামা) regarding setting of the dispute arising out of an agreement to purchase a building does not attract the ingredients of the provision of sections 406/420 Penal Code. The allegation made in the first information report discloses a civil liability for which the criminal proceeding cannot but be quashed. *Ashraf Miah (Md) Vs. State(Criminal) 55 DLR 509.*

(34) Criminal breach of trust in respect of a partnership property—A parterner holds property belonging to the partnership business as one of its owners—Until the dissolution of the partnership on accounts it cannot be said that he holds the property in a fiduciary capacity—Unless there is an agreement that a particular property would be the separate property of a partner, there cannot be any entrustment of it to the other partner—In the absence of such an agreement each partner is interested in the whole of the partnership assets—There can be no entrustment of such property by one partner to another as there is no property which can be entrusted with. *Mostafa Chowdhury and another Vs. The State and amother 3 BLD (HCD) 190.*

(35) Criminal breach of trust—In respect of a loan taken from the bank by a way of over-draft—Security was furnished by the loanee more than a year after the disbursement but there was no security when the payment was made—Criminal breach of trust is constituted for disposal of the property held in trust in violation of any direction of law. *Nakuleswar Saha Vs. The State 4 BLD (AD) 10.*

(36) Criminal breach of trust—Defencse plea of partnership—In determining whether a person is or is not a partner regard shall be had to the real relation between the parties as shown by all relevant facts taken together—With regard to the transaction that gave rise to the case the complainant used the term 'howla' in his complaint and the word 'jimma' in his deposition which clearly connote entrustment—It is a case of neither party that the profits of the sale in question would be distributed between the parties—The prosecution case of entrustment is made out. *Mohammad Musa Vs. Kabir Ahmed and another 9 BLD 118.*

(37) Criminal breach of trust in respect of business transaction—Civil liability and no bssis for criminal proceedings—Civil claims are not to be brought in criminal courts as a contrivance to put pressure upon the accused for repayment of dues—Civil claims are to be settled and sorted out in Civil Court—To hold it otherwise will be to ignore the realities of business transactions and to encourage

civil claims to be brought into criminal courts. *Sayed Ali Mir and another Vs. Sayed Omar Ali and another 10 BLD (AD) 168.*

(38) The question of offence of cheating whether arises when there is nothing to show that any entrustment of property was made to the accused. The question of offence cheating does not arise (in the instant case) as there is nothing to show that the accused has dishonestly induce the complaint to sell the fish to him on credit. There is nothing to show that any entrustment of the fish was made to the accused for sale of fish on credit according to the direction of the person making the entrustment. *Md. Islam Ali Mia alias Md. Islam Vs. Amal Chandra Mondol and another, 13 BLD (AD) 28.*

(39).There is no specific promise for payment by any specific date and as such the High Court Division did not find any existence of initial intention for deception on the part of the accused petitioner. What happened between them was in due course of normal and regular business transaction for which no criminal action lies. At best the informant may go for civil action against the accused petitioner. *Mohiuddin Md. Abdul Kader Vs The State and another, 20 BLD(HCD)499.*

(40) The allegations made in the petition of complaint: it clearly shows that the petitioner had initial intention to deceive the complainant and thereby misappropriated the money. So, it cannot be said that it is a case of civil nature. The petition of complaint undoubtedly discloses criminal offence against the accused petitioner. The Appellate Division held that the High Court Division rightly refused the prayer for quashing the proceeding. *Abu Baker Siddique Vs. The State & anr, 18 BLD (AD) 289.*

(41) Dishonouring of the cheque itself does not constitute the offence of cheating. As regards the argument that the accused petitioner issued a cheque knowing fully well that he had no money in the account and that conduct amongst to cheating we are not of the view that dishonouring of the cheque itself does not constitute the offence of cheating. *Md Motaleb Hossain Vs. State and another, 20 BLD (HCD) 573.*

(42) The alleged transaction in between the complainant and the appellant is clearly and admittedly a business transaction. The appellant had already paid a part of the money under the contract to the complainant. The failure on the part of the appellant to pay the complainant the balance amount under the bill does not warrant any criminal proceeding as the obligation under the contract is of civil nature. The High Court Division were not justified in refusing to quash the proceeding in question although the transaction in question between the parties is clearly of a civil nature. *Dewan Obaidur Rahman Vs. The State and anr, 19 BLD (AD) 128.*

(43) Cheating and dishonestly inducing delivery of property—Conviction whether sustainable where the facts of the case do not give rise to an inference of mens rea viz fraudulent dishonestly conduct The Appellant, was a contactor and undertook to sink several tubewells on the basis of specification and stipulation contained in the terms of contract. He was tried by a Special Judge for an offence u/s 406 P.C. and was convicted and sentenced thereunder. He preferred appeal to the High Court. The High Court in the facts and circumstances of the case could not sustain the conviction of the appellant U/S 406 but held that he had committed an offence U/S 420 P.C. and accordingly altered the conviction u/s 406 to one U/S 420, PC. Held: (i) The Appellant's failure to execute the work in accordance with the terms of contract does not, *ipso facto* give rise to an inference of mens rea, *viz.* fraudulent or dishonest conduct, which is an essential ingredient of an offence of cheating. (ii) As no money or property was entrusted with the accused and as he had purchased the materials with his own money he could not be convicted u/s 406. The question of Criminal liability, therefore, does not arise

merely for the non-execution of work in terms of the contract The conviction of the appellant U/S 420 based upon the finding that he made false representation and fraudulently induced the Chairman to make payment, cannot, accordingly, be sustained. *Lutfor Rahman Vs. The State. 2 BLR (AD) 10=25 DLR (AD) 101.*

(44) Criminal breach of trust—breach of trust in respect of loan taken from the bank by way of overdraft—security was furnished by the loanee more than a year after disbursement of loan—there was no security when the payment was made—criminal breach of trust is constituted, by disposal of a property held in trust in violation of any direction of law. *Nakuleswar Saha Vs. The State 1984 BLD (AD) 10=13 BLR (AD) 1=35 DLR (AD) 284.*

(45) A partner cannot be charged by his co-partner for breach of trust and cheating—once it is held that it was partnership business and the complainant and the accused were partners then such prosecution cannot be maintained—if the prosecution for criminal misappropriation cannot be maintained the prosecution for cheating cannot also be maintained—initial intention to deceive was not alleged even by the complainant because the complainant himself said that in order to help the accused he lent the money though he did enter into partnership till then. *Nasiruddin Mahmud & others Vs. Momtazuddin Ahmed & another 13 BLR (AD) 193=36 DLR (AD) 14=1984 BLD (AD) 97.*

(46) Read with Criminal Procedure Code, Sec. 561A:—Appellant's contract with the District Controller of Food for milling Government's paddy under certain terms and conditions that if the miller failed to deliver husked rice within 30 days from the date of receipt of allotment of paddy with further extension of delivery period for another 15 days—Due to a number of causes and other circumstances the miller failed to deliver husked paddy within the stipulated period—Inspector of Food concerned made an inspection of the stocks during the temporary absence of the Appellant—Appellant contended, inter alia, that even if the prosecution case was believed, it would be a case of civil liability against the appellant—Contention accepted, proceeding quashed. *Jahanara Begum Vs. The State BCR 1985 AD 281.*

(47) Offence of Criminal Breach of Trust–Defence plea of partnership—It is not the case of the prosecution or of the defence that the profits of the sale in question would be distributed between them—The prosecution case of entrustment was fully proved—"Howala"–"Jimma" clearly connote entrustment—In determining whether a person is or is not a partner regard shall be had to the real relationship between the parties shown by all relevant parts. *Mohammad Musa Vs. Kabir Ahmed & ors. (1989) BLD (AD) 118=41 DLR (AD) 151.*

(48) Complaint Petition U/Ss. 420 and 406 PC—The complainant was induced by the accused to part with Taka six lacs on the false assurance of the accused that he would give shares of his shipping business to the complainant—The complainant parted with the money and the same was misappropriated by the accused on giving a false promise to her by deception—Accused issued two cheques for the amount of Taka six lacs on two different dates and on complainant's communication with bank she came to know that the accused instructed the bank not to pay the amount of those cheques—Whether the evidence is adequate for supporting the conviction can only be determined at the trial and not at the stage of enquiry—There is intrinsic quality in that Complainant's statement on oath and in the petition of complaint to take cognizance in the present Case—A *prima facie* case has been made out—It is not fit and proper to quash the proceeding at this stage. *S.A. Sultan Vs. The State & ors. 44 DLR (AD) 139.*

(49) Joint trial—Not permissible—Joint trial of offences under section 406 and 420 of the Penal Code and of section 23 of Immigration Ordinance 1982 by the Special Court is not permissible as the

offence under section 23 of the Immigration Ordinance, 1982 is exclusively triable by Special Court while the offence under section 406 and 420 of the Penal Code are triable by the Magistrate. Where ingredients of the offences under section 406 and 420 of the Penal Code and under section 23 of the Immigration Ordinance, are contained in the allegation, prosecution in both the courts for the respective offences are competent. *Mosammat Noor Jahan Begum @ Anchuri & anotehr Vs. The State—2, MLR (1997) (AD) 34.*

(50) Quashment of proceedings under section 406 of the Penal Code—Interest of loan—A truck purchased with loan money taken from Bank against agreement and subsequently it was sold in violation of agreement and by errasing registration number and Chesis number. These allegations prima facie constitute offence under section 406 of the Penal Code and as such the proceedings cannot be quashed. *Ruhul Amin Vs. Md. Nazrul Islam and another—5, MLR (2000) (AD) 320.*

(51) Money taken on hand note is a loan—When money is taken as loan against hand-note it becomes the property of the loanee and the nonpayment thereof does not constitute offence punishable under section 406. *Md. Reazuddin Ahmed Vs. The State and another—2, MLR (1997) (AD) 37.*

(52) Loan taken does not constitute offence—The exemption of loan granted by Board does not constitute offence under section 406/409 of Penal Code read with section 5(2) of Act II of 1947 against the Managing Director. The proceedings being illegal are quashed under section 561A Cr.P.C. *Sekander Ali Vs. the State—1, MLR (1996) (HC) 29.*

(53) Loan money does not constitute offence—Quashment of proceedings to prevent the abuse of the process of court—Unless there is inducement and entrustment loan taken for business purpose and failure or refusal to repay the same is a civil liability and does not constitute offence punishable under section 406 and 420 of the Penal Code. Therefore the proceedings being abuse of the process of Court are quashed. *Abdul Mannan Sarker (Md.) Vs. The State 6 MLR (HC) 279.*

(54) A legal Adviser cannot be made liable for the offence of forgery and criminal breach of trust for giving his legal opinion—Taking into consideration the opening given by the Legal Adviser for releasing the property from the list of vested property it was recommended by the Additional Deputy Commissioner (Rev) to the Ministry concerned who enquired into the matter and became satisfied that the property in question was not vested or abandoned property and thereby released the same. In such circumstances the Legal Adviser committed no offence of forgery and criminal breach of trust in giving his opinion for releasing the property and the proceeding was quashed. *Abdus Samad (Md.) Vs. State (Criminal) 1 BLC 63.*

(55) From a plain reading of the petition of complaint it is clear that the initial intention of cheating and the elements of criminal breach of trust have, very well, been alleged therein and, as such, on the face of these allegations it is difficult to say that no prima facie case has been alleged to have been committed by the petitioners under sections 406/420 of the Penal Code. The impugned judgment and order of the High Court Division do not suffer from any illegality. Seeking leave to appeal without appearing in the High Court Division is disapproved. *Habibur Rahman (Md.) and another Vs. State, through the Deputy Commissioner, Narayanganj and another (Criminal) 1 BLC (AD) 146.*

(56) As the petition of complaint discloses an initial intention to deceive the complainant, who was persuaded to advance a large amount of money to the accused persons and as such there is no ground for quashing the proceeding. *Kamrul Islam (Md.) Vs. Atikuzzaman (Criminal) 2 BLC 227.*

(57) Considering the facts and circumstances of the case it appears that neither there is any mens rea on the part of the petitioner nor is there any ingredient of sections 406/420 of the Penal Code resulting thereby that the proceeding against the petitioner is quashed. *Nurul Huq Ruzbu Vs. State and another (Criminal) 3 BLC 374.*

(58) The facts as alleged in the petition of complaint constitute a prima facie criminal intention of cheating and deception in the mind of the petitioner which is still continuing because of the non-payment of any part of the amount alleged in the complaint-petition and all these are the matters for decision at the time of trial after taking evidences and that after exhausting the remedy under section 439A the jurisdiction under section 561A, CrPC cannot be invoked. *Kamal Hossain Vs. Zahid Hasan & another (Criminal) 3 BLC 378.*

(59) Unless the auditor under section 53 of the Wakf Ordinance held that a Mutwalli was guilty of breach of trust it would not make out a case of breach of trust on the vague allegations as to his failure to disburse the dues due to the beneficiaries. *Nazrul Islam Mollick Vs. Khowaj Ali Biswas and another (Criminal) 4 BLC (AD) 239.*

(60) If there is any provision in the Customs Act for levying any tax or customs duty upon the petitioner for purchasing the car that may be brought into action under that Act and not under the criminal law or Penal Code and as such, the proceeding is quashed as the trial of the petitioner will be an abuse of the process of law and court and the petitioner will be harassed unnecessarily. *Golam Sarwar Vs. State (Criminal) 5 BLC 125.*

(61) It is contended on behalf of the petitioner that the allegations made in the petition of complaint disclose a civil dispute and the allegations do not attract the ingredients of section 420 or 406 of the Penal Code and hence the proceeding is liable to be quashed. Since a prima facie case has been disclosed in the petition of complaint, as has been found by the High Court Division, the proceeding cannot be quashed. *Parvez Alam Khan Shapan Vs. State and another (Criminal) 6 BLC (AD) 93.*

(62) The accused-petitioner took Taka one lac sixty-four thousand from the informant in three instalments as loan for his business purpose. In the absence of any promise to repay the loan money to the complainant within a specific period of time and in the absence of any allegation of inducement for getting the loan money from the complainant, mere failure or refusal to repay the said loan money shall not constitute the offence under sections 406/420 of the Penal Code and hence the proceeding is quashed. *Abdul Mannan Sarker (Md.) Vs. State and another (Criminal) 6 BLC 450.*

(63) The accused petitioner did not directly induce the informant to give the money but he helped the other accused to realise the money from the interment and misappropriated the same and hence there are ingredients of sections 420/109 of the Penal Code instead of sections 406/420 of the Penal Code against the accused petitioner, the proceeding cannot be quashed. *Abul Kashem Talukder Vs. State (Criminal) 6 BLC 251.*

(64) On perusal of the first information report and chargesheet it appears that there is specific allegation of misappropriation of some amount by the petitioner and as he is not a public servant, the offence comes within the definition of section 405 and as such, he is triable only under section 406 of the Penal Code. The order of taking cognizance of the offence under sections 409 and 420 of the Penal Code and framing of charge under section 409 of the Penal Code and section 5(2) of Act II of 1947 by the learned Special Judge is without jurisdiction. As there is specific allegation against the petitioner of breach of trust the case record is sent back on remand to the Court of Magistrate concerned for holding trial in the light of observation made in the judgment. *Ganesh Chandra Halder Vs. Manindra Nath Baien and others (Criminal) 6 BLC 207.*

(65) In the absence of specific promise for payment by any specific date no existence of initial intention for deception on the part of the accused petitioner is proved. For due course of normal and regular business transaction no criminal action lies but civil action lies and hence the proceeding under sections 420/406 of the Penal Code against the petitioner is an abuse of the process of the Court and it is quashed. *Mohiuddin (Md.) Abdul Kader Vs. State and another (Criminal) 6 BLC 117.*

(66) This section deals with a species of criminal misappropriation dealt with by Section 403 ante, namely, dishonest misappropriation by persons entrusted with property or with dominion over property. *AIR 1923 Nag 146.*

(67) The essential ingredients of the section are :

(i) The accused must have been entrusted with property or with dominion over property.

(ii) The accused must have:

(a) misappropriated or converted to his own use, that property; or

(b) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged; or

(c) used or disposed of the property in violation of any legal contract (express or implied) which he has made touching the discharge of such trust; or

(d) wilfully suffered any other person so to do.

(iii) Such misappropriation or user or disposal must be dishonest or such sufference must be wilful. *AIR 1953 SC 478.*

(68) The section consists of two parts: the first part consists of criminal misappropriation or conversion of the property and the second part consists of dishonestly using or disposing of the property in violation of any direction of law or of any legal contract. *AIR 1956 All 619 (626).*

2. Accused must have been "entrusted" with property (or dominion over property).—(1) In the absence of proof of entrustment of property or of dominion over the property of another, this section will not apply. *1979 ChandLR (Cri) 43.*

(2) Entrustment connotes ordinarily that property is handed over by A to B in whom A reposes confidence for a specific purpose. *AIR 1936 Mad 353.*

(3) The word "entrustment" has a corresponding meaning and embraces all cases in which goods are entrusted (i.e., voluntarily handed over) for a specific purpose. *AIR 1956 Raj 20.*

(4) The expression 'entrusted' in Sec. 409 is used in a wide sense and includes all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession has been handed over. A person authorised to collect moneys on behalf of another is entrusted with the money when the amounts are paid to him, and though the person paying may no longer have any proprietary interest nonetheless the person on whose behalf it was collected becomes the owner as soon as the amount is handed over to the person so authorised to collect on his behalf. *AIR 1972 SC 1490.*

(5) The property in respect of which the breach of trust is committed must be the property of some person other than the accused, or the ownership or beneficial interest in it must be in some other person and the offender must hold the property on trust for such other person or in some other way for his benefit. *AIR 1967 Cal 568.*

(6) The expression entrustment carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another continues to be its owner. Further, the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them. A mere transition of sale cannot amount to an entrustment. *AIR 1968 SC 700.*

(7) A mere breach of contract or of the condition of a permit is not necessarily a criminal breach of trust. *1970 PatLJR 600; AIR 1953 Pat 225.*

(8) The entrustment need not be for any lawful object. *AIR 1958 Pat 272.*

(9) The question whether the accused could have been legally entrusted with the property is irrelevant. *AIR 1959 All 698.*

(10) Whether a trust has been created in particular case will depend upon the particular facts, circumstances and evidence in the case. *AIR 1956 Raj 20.*

(11) Misappropriation of Provident Fund money of school by school authorities—Absence of statutory rules is no ground to quash proceedings. *AIR 1981 SC 81.*

(12) Police Sub-Inspector was given bundles of currency notes by complainant during his search—Bundles handed over by S. I. to L after opening them to be returned to complainant—Some currency notes not returned by L to complainant—Held, complainant had entrusted the notes to Sub-Inspector for inspection and return who, therefore, committed offence under this section. *AIR 1961 SC 751.*

(13) Power given to operate on funds in Bank is no entrustment. *AIR 1962 SC 1821.*

(14) Where a transaction for supply of paddy created the relationship of debtor and creditor between A and B no trust was created within S. 405 *(1912) 13 CriLJ 888.*

(15) The very concept of the matrimonial home connotes a jointness of possession and custody by the spouses even with regard to the movable properties exclusively owned by each of them. Consequently barring a special written agreement to the contrary, no question of any entrustment or dominion over property would normally arise during coverture or its imminent break-up. Therefore, the very essential prerequisites and the core ingredients of offence under S. 406 would be lacking in a charge of criminal breach of trust of property by one spouse against the other. *AIR 1982 Punj 372.*

(16) As to further illustrative cases of no 'entrustment'. *AIR 1968 Tripura 36; AIR 1965 Tripura 36; AIR 1963 Pat 52; AIR 1957 Cal 148; AIR 1957 Mad 722.*

3. "in any manner."—(1) The entrustment may be in any manner. *AIR 1936 Mad 353.*

(2) As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms and for the benefit of the owner. But the words "in any manner" do not enlarge the term "entrustment." *AIR 1972 SC 1490.*

4. Criminal breach of trust and theft: Distinction.—(1) In the case of theft the original taking of the property is itself dishonest. In the case of a breach of trust, the original taking is lawful and is, indeed , with the consent of the owner. *(1966) 8 Law Rep 291.*

(2) A labour employed in a storage depot for grain, substituting dust for food grains is guilty of theft and not criminal breach of trust. *AIR 1955 NUC (Sau) 5053.*

5. Criminal breach of trust and cheating.—(1) To constitute a breach of trust, the property must, in the first instance, have come into the hands of the accused in a lawful manner or with the consent of the owner. *(1977) 4 CriLT 244 (Punj).*

(2) The word "entrustment" itself implies the handing over of property by lawful means and the phrase "any other manner" means any other legal manner. The word "entrustment" again implies that the person handing over the property has confidence in the person taking the property so as to create a fiduciary relationship between them. That confidence cannot arise, where the property is acquired by the offender by a trick or deceit, if the property is obtained by a trick or false representation to the owner thereof, there is an offence under S. 420 of the Code. *AIR 1936 Mad 353.*

6. Trust and loan.—(1) The relationship between a debtor and creditor is not a fiduciary one and the advance of a loan is not entrustment of money *(1912) 13 CriLJ 888.*

(2) Where the debtor pays an amount to the creditor intending to repose trust in the creditor and expecting him to dispose of the money in a particular manner, there is an entrustment of the money. *AIR 1940 Mad 329.*

(3) Where the accused took an advance from a firm on promissory note promising to use the money solely in buying paddy and to deliver it to the firm within a certain time at the market rate, the value to be credited to the loan, it was held that the dealing was not an entrustment. *(1913) 14 CriLJ 145.*

(4) A transaction, which in its real nature is a loan, cannot, by agreement of parties, be brought under the provisions of Sec. 405. *AIR 1914 Low Bur 1.*

(5) Where A and B went to the goldsmith and falsely represented that their mother wanted a necklace of particular design for getting the design copied for another lady and the goldsmith gave a necklace of the required design to the accused who promised to return the same in the evening but failed to do so, it was held that there was no entrustment but only a loan and that the accused were not guilty under Section 406, but would be guilty under S. 403 and also under S. 420 of the Code *AIR 1960 All 387.*

7. "Dominion over property."—(1) It is not necessary for the purpose of this section that the property must be physically with the accused. All that is necessary is that he should have dominion over it and that it could be disposed of under his direction and in case he acts in violation of any direction of law prescribing the mode in which such trust is to be discharged and the property is accordingly disposed of, he would be liable for criminal breach of trust. *1980 All CriR 105.*

(2) Where X has been given the power to operate on the funds in a Bank, he can be said to be entrusted with dominion over it. *AIR 1962 SC 1821.*

(3) The mere existence of dominion over property is not enough. Every partner of a firm, for example, has dominion over the property of the firm by reason of the fact that he is a partner. But this is a kind of dominion which every owner has over his property. But S. 405 will apply only where the dominion over A's property has entrusted to B who commits the breach of trust as described in this section. *AIR 1965 SC 1433.*

8. "Property."—(1) There is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in S. 405 or in other sections of the Penal Code. Whether the offences defined in any particular section of the Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word "property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. *AIR 1962 SC 1821.*

(2) The following have been held to be "property' within the meaning of this section:—

(a) Sale proceeds of property entrusted to a bail. *ILR (1960) 10 Raj 1527.*

(b) A debt or actionable claim. *AIR 1955 SC 590.*

(c) Property purchased with amounts entrusted to the accused for purchasing property. *AIR 1955 Trav-Co 271.*

(d) A cancelled cheque. *(1904) 1 CriLJ 603 (All).*

(e) A chose in action and the funds of a person in a Bank. *AIR 1962 SC 1821.*

9. Carrier.—(1) A criminal breach of trust by a carrier would fall within Section 407. A person who is charged under Section 407, but is found not to be a carrier can be convicted under S. 406. *(1885) 8 MysLR No. 335 p. 561.*

(2) To establish an offence against a carrier under this section it is necessary to show that at least some of the property entrusted to him could not be accounted for. *(1907) 5 CriLJ 235 (Bom).*

10. Pledge.—(1) A dishonest misappropriation or conversion to his own use, by the pledgee of the property pledged would be a criminal breach of trust. So also would be dishonest use by him of the pledged property in violation of any direction of law or of any legal contract touching the user of the property. It cannot, therefore, be stated as a broad proposition of law that a pledgee cannot be guilty of criminal breach of trust. *(1870-1871) 6 Mad HCR App XXVIII.*

(2) A sub-pledge by the pledgee to the extent of his interest (in the absence of any condition to the contrary in the contract of pledge) would be fully within the rights of the pledgee and would not constitute a breach of trust. *AIR 1942 Rang 62.*

11. Stack-holder.—(1) Moneys deposited with a stack-holder are moneys entrusted to him and a misappropriation by him dishonestly will render him liable under this section. *(1904) 1 CriLJ 730.*

12. Deposit of money.—(1) A deposit by A with B of money which is to be paid back with interest is merely a transaction of loan unless under the terms of a contract the amount is to be used for a specified purpose. *1976 ChandLR (Cri) 393 (Punj).*

13. Collection of money by delegated authority.—(1) Where a Naib Tahsildar is authorised to collect rent and he lawfully authiorises his moharir to collect the same the collection of rent by the moharir is, under the circumstances, under an implied authority and the payment to the moharir constitutes entrustment. *AIR 1969 Orissa 190.*

14. Broker and customer.—(1) Where A advanced money to a broker with a condition that it should be used in a particular manner, that the broker should be responsible for the repayment of the money and should indemnify A against all loss, it was held that the transaction did not constitute an entrustment, but was a loan. *AIR 1914 LB 1.*

(2) Where A purchases property for B and the price is paid to C, the vendor who pays A a certain sum by way of brokerage or commission such amount cannot be considered as being paid to A on behalf of or for the benefit of B. *AIR 1926 Rang 171.*

15. Vendor and purchaser.—(1) A transaction of sale is not an entrustment. *AIR 1968 SC 700.*

(2) Where the Government sold to the accused contractor cement for the purpose of constructing a building, but the contractor used only a part of the cement for the building and disposed of the balance in other ways, it was held that in the absence of evidence of any conditions or particulars of the agreement between the Government and the accused, it could not be said that there was any fludciary relation between the Government and the accused or that the Government had any proprietary rights over the cement after the sale, or that there was any entructment of the property so as to render the accused guilty under this section. *AIR 1968 SC 700.*

(3) A, a buyer obtained from the seller certain documents of title under a 'trust receipt whereby the buyer agreed to pay interest on the price of the goods purchased until payment was made, it was held that the seller did not intend to retain any ownership of the goods, that no entrustment was made and that A did not commit any breach of trust. *AIR 1939 Sind 27.*

(4) The question whether the property in the goods has or has not passed to the purchaser is thus relevant to the decision of cases under this section but it is not decisive. The decisive test is whether there was 'entrustment' and the necessary criminal intent. The property in the goods may have passed to the purchaser: he is, therefore, the legal owner but he may nevertheless constitute himself a trustee of the goods for the vendor who thereby becomes the beneficial owner. *AIR 1939 Sind 1.*

16. Hire-purchase transaction.—(1) Mere failure to return the hired articles does not prove dishonesty. *(1951) 52 CriLJ 1178.*

(2) Where the hirer pledges or sells the property hired in violation of the contract of hire it will be an offence under this section. *AIR 1914 LowBur 1.*

(3) M hired a motor from W on a rent of Rs. 40 a month. The motor remained in the use of M and hire charges were paid by M to W from April 1958 to January 1959. In June 1959 M wrote a letter to W claiming that he had purchased the motor from W for Rs. 600 on condition that he would try the motor for 3 months and that if it was found satisfactory the money would be paid and the purchase completed. Rupees 620 had been paid as the purchase was complete and W should give him slips of papers stating that the motor was sold to M. It was held that there being no change in the possession of the motor by M, there was no misappropriation by M, that consequently there could be no breach of trust and that the dispute as to the trust of the statements in the letter was merely a civil dispute. *AIR 1965 SC 1319.*

17. Partner.—(1) A partner has the undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purpose, he may be accountable civilly to the other partners but certainly he does not thereby commit any misappropriation. *(1984) 11 CriLT 3.*

(2) The section is wide enough to include the case of a partner if it is proved that he was in fact entrusted by agreement with the partnership property or with dominion over property and that he dishonestly misappropriated the property. *(1970) 3 SCR 765.*

(3) Where there is no such special agreement of entrustment, it cannot be said that a partner receiving partnership property receives it in a fiduciary capacity or that he was 'entrusted' with such property. *AIR 1965 SC 1433.*

(4) Partners using firm's money for his own purposes—Not a criminal breach of trust—Alienating his joint family property to set right misappropriation—Consideration for alienation not immoral—His sons bound by alienation. *AIR 1982 All 60.*

18. Joint owner.—(1) Muhammadan co-owners are not joint owners of the property but own specific shares and that the principle that in the absence of agreement of entrustment a co-owner cannot be guilty of breach of trust of the joint property cannot apply to them. *AIR 1950 Cal 523.*

19. Pleader and client.—(1) Where a solicitor being entrusted with a sum of 2,500 pounds to be invested on mortgage and for safe custody for the benefit of the persons interested, did not do so but told the prosecutor that he had done so, but in fact converted the amount to his own use, it was held that he was guilty of fraudulent appropriation of the trust money within Section 76 of 24 and 25 Vict. C. 95.*(1879) 14 Cox 370.*

(2) It is not a criminal offence in every case for a pleader to retain the client's monies for fees, the legal recovery of which may be timebarred. *AIR 1924 Nag 47.*

20. Guardian and ward.—(1) The mixtures of funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular and in the third, both irregular and criminal. Apart from constructive criminal responsibility which of course may be imposed by statute, a Court of Justice cannot reach the conclusion that crime has been committed unless it be a just result of the evidence that the accused, in what was done or omitted by him, was moved by the guilty mind. *(1914) 15 CriLJ 305.*

21. Banker and customer.—(1) Money deposited by depositors with a Banker cannot be said to be entrusted to the banker. The relationship between a banker and his customer is one of debtor and creditor. *1974 CriLJ 232 (Punj).*

(2) Where A has a current deposit in B Bank, and a cheque issued by A is dishonoured, it is not a breach of trust but a mere breach of contract. *AIR 1941 Cal 713.*

(3) Manager of Bank approving payment of cheques to the drawer although in excess of the overdraft facilities given to the drawer and though he had no authority to give such overdraft facilities—Held, that the Bank Manager had committed criminal breach of trust and the drawer had abetted to the same. Held, further that although the loan facilities granted by the Bank Manager had been ratified by the Board of Directors, this could not exonerate the criminal offence committed by him. *(1981) 2 MalayanLJ 176.*

22. Craftsman and customer.—(1) Where A hands over a gold ornament to B, a goldsmith, intending to transfer the right thereto out and out to B on the promise of B to give A a certain amount of gold, the transaction is not an entrustment but a contract. But if A hands over the ornament for being melted and converted into gold and returned to A, the transaction is one by which the ornament is entrusted to B. The failure to give the gold in the first case is not a breach of trust but in the second case, it is. *AIR 1936 All 691.*

23. Entrusting property for repair.—(1) Allegations made in a complaint were that a truck was entrusted to the accused for the purpose of repairing it and he had agreed to return it in three days. The accused however instead of returning it started using the same. The allegations held constitute an offence under Section 406. *1977 PunLJ 265.*

24. Contract to do certain work.—(1) Omission to return earnest money on failure to perform contract only creates a civil liability and does not amount to criminal breach of trust. *1977 PunLJ (Cri) 369.*

25. Directors of Company.—(1) Directors of a Company are not only agents, but in some sense and to some extent trustees. *AIR 1962 SC 1821.*

26. Miscellaneous.—(1) The mere non-delivery of relevant papers or money of a society by the previous secretary to the new secretary does not amount to a criminal breach of trust. *(1971) 7 Co-opLJ 181 (Pat).*

27. "Dishonestly."—(1) Dishonest intention is one of the essential ingredients of the offence of criminal misappropriation and also of the offence of criminal breach of trust. *AIR 1959 SC 1390.*

(2) In the absence of proof of dishonest intention this section will not apply. *AIR 1965 SC 1319.*

(3) There may be cases where it is possible to draw an inference of dishonest intention from retention. It is not possible to lay down a hard and fast rule to the effect that in no case retention would lead to an inference of misappropriation. In other words, whether or not an inference of misappropriation can be drawn in any particular case would depend upon the particular facts of the case. *AIR 1958 Mys 82.*

(4) The retention by a rent collector of the collections made by him for another, for pay due to him by that other. *AIR 1935 All 922.*

(5) The user of money for his own purposes by a person having a claim against another for more amounts than the amount belonging to that other in his hands cannot be said to be dishonest. *AIR 1940 Mad 329.*

(6) An intention to misappropriate in future is not within this section. *AIR 1934 Lah 843.*

(7) A mere failure to deliver the goods entrusted with the accused for delivery is not an offence under this section. *AIR 1950 Cal 35.*

(8) Deduction from employees wages on account of their contribution to provident fund—employer's failure to credit amounts in fund—Offence. *AIR 1961 MadhPra 37.*

28. "Misappropriates."—(1) Misappropriation of money is the wrongful setting apart or assigning of a sum of money to a purpose or use to which it should not lawfully be assigned or set apart. *AIR 1940 Mad 329.*

(2) Where A entrusts B with a document for a particular purpose and B hands over the same to C for a purpose harmful to the interests of A, B will be guilty under this section. It is not necessary that B should have received any money in order to constitute the offence. *AIR 1950 Kutch 52.*

(3) It is not necessary to prove precise mode of conversion or misappropriation. *AIR 1965 All 233.*

(4) The appropriation by the accused need not be for his own use or benefit. If the accused assert that he is holding the property on behalf of some one other than the person for whose benefit the property has been entrusted to him, his assertion will amount to dishonest misappropriation. *AIR 1926 All 302.*

(5) A misappropriation does not cease to be a misappropriation because it is only for a short time. *AIR 1936 Pat 350.*

(6) It is not necessary that the accused should have taken tangible property such as money, from the possession of another and transferred it to his own possession. The transfer of an amount from the account of another to his own account is sufficient to constitute the offence. *AIR 1926 Lah 385.*

29. "Converts to his own use."—(1) A dishonest conversion of property by the accused to his own use or for purposes other than those for which it was entrusted is an offence under this section. *AIR 1958 Ker 103.*

(2) Conversion is committed only when a man does an unauthorised act which deprives another of his property permanently or for an indefinite time. *AIR 1949 Pat 326.*

(3) A servant entrusted with property who refused to return it, claiming it as his own, was held to have converted the property to his own use. *AIR 1916 Cal 310.*

30. "In violation of any direction of law."—(1) Where the Managing Director of a Bank being entrusted with monies of the Bank dishonestly disposed of some of that property contrary to the Bank's Articles of Association he was held guilty under this section. *AIR 1915 Lah 471.*

(2) An employer who uses his Employees' Provident Fund money in his own business is not guilt under this section as there is no legal obligation to employ it in any particular manner. *AIR 1956 Mad 6.*

(3) Where the accused was appointed a Receiver by the Court whereby he was given all powers of management of the business of a certain Mill to be exercised in accordance with the Articles of Association of the Mill but took illegal gratification for the sale of articles belonging to the Mill to the complainant, it was held that the illegal gratification paid by the complainant cannot be said to be entrusted to the accused on behalf of the Mill, that such taking of the illegal gratification could not be said to be any violation of any direction in the Articles of Association prescribing the mode in which such trust was to be discharged and that the accused could not be convicted for breach of trust under Section 405 of the Code. *AIR 1953 SC 478.*

31. "In violation of any legal contract."—(1) The breach of a contract relating to property is in itself not an offence. *AIR 1942 Cal 575.*

(2) Where a jewel was taken from a goldsmith for a particular purpose under a promise to return it, and the person, instead of returning it, claimed to retain it in lieu of a debt due to him and claimed the jewel as his own, he was held guilty of an offence under Section 406. *AIR 1950 Mad 49.*

32. Express trust.—(1) Where A accepts a salary for the purpose of collecting money and accounting for the same and giving receipts to the payers he must be taken to accept an express trust. *(1909) 10 CriLJ 482.*

33. "Willfully suffers any person so to do."—(1) A negligence of rules by A which facilitates a criminal misappropriation by B, is not a willful suffering B to commit criminal breach of trust. *AIR 1958 Orissa 194.*

(2) Where A who was in charge of the record room dishonestly gave the keys of the room to X for giving access corruptly to the records, it was held that A willfully suffered X to dispose of property in violatio of the direction of law touching the discharge of the trust and was guilty under this section. *AIR 1936 Pat 108.*

(3) The word "allows" is much wider in its import than the expression "willfully suffers.." "Willfully" presupposes a conscious action while even by negligence one can allow another to do a thing. *AIR 1957 SC 458.*

34. Onus of proof and appreciation evidence.—(1) As in all criminal cases the presumption is that the accused under this section also is innocent until he is found guilty. The onus of establishing the existence of all the ingredients of offence is on the prosecution. It is not for the accused to prove his innocence. *1975 UCR (Bom) 274.*

(2) The onus of establishing ingredients of the offence never shifts. *AIR 1955 Tripura 35.*

(3) The fact that an explanation given by the accused is not believed by the Judge or Jury does not discharge the onus that rests on the prosecution to establish the guilt of the accused. *AIR 1955 Tripura 35.*

(4) Once, the prosecution makes out a prima facie case against the accused, it will then be for the accused to show how he is not liable. In this sense the onus may be said to shift to the accused. *AIR 1953 Raj 117.*

(5) Where the non-payment of amount entrusted to the accused is established it will then be for the accused to explain what he did with the money and to rebut the presumption arising from the prosecution evidence. *AIR 1953 Raj 117.*

(6) The burden is on the prosecution to prove every ingredient of the offence including the misappropriation by the accused. The mere proof of payment of a certain sum of money to the accused does not shift the onus to the accused to prove that he did not convert it to his own use. *AIR 1954 HimPra 33.*

(7) Where a reasonable explanation given by the accused as to how the money entrusted to him was lost, the accused is entitled to be acquitted in the absence of proof of criminal misappropriation beyond reasonable doubt, even if the explanation is not convincing. *AIR 1949 All 412.*

(8) Where a person makes use of money belonging to another without the latter's consent and contrary to the purpose for which possession thereof was given by the latter to the former, the intention of the person so making use of the money must prima facie be dishonest. *AIR 1935 Rang 453.*

(9) The usual evidence of breach of trust in regard to moneys received for the purpose of payment over is either non-payment or non-accounting. Breach of trust is a definite act like theft or misappropriation and the above circumstances do not per se constitute such act but merely evidence it. The presumption arising from non-payment may be negatived by evidence that the delay was caused by forgetfulness, or that it was acquiesced in by the person to whom the money was due. *AIR 1956 Mad 452.*

(10) A, a public servant, was entrusted with charge of goods. It was found that there was a large shortage in those goods. A was found to have falsified the accounts in order to hide the loss. It was held that the only inference that could be drawn from the said facts was that A was guilty under this section. *AIR 1933 All 356.*

35. Failure to account or delay in accounting or in payment or omission to pay.—(1) Mere failure or omission to return property to the owner is not sufficient to constitute an offence under these sections unless a dishonest misappropriation or conversion to the accused's own use is proved. *AIR 1977 SC 1766.*

(2) The mere fact that the President of a cooperative society kept the key to the stores with him during night-time will not by itself be sufficient to prove a charge of criminal misappropriation of cash and stores therefrom. *AIR 1976 SC 1132.*

(3) A mere refusal to render account does not necessarily prove an intention to defraud. *AIR 1937 Rang 505.*

(4) Where repayment is made at once on demand, courts should be slow to assume the guilt of the accused, though it is a possible view that a person may be guilty of breach of trust between the misappropriation and the repayment. *AIR 1927 Sind 28.*

36. Failure to certify payment into Court under O. 21, R. 2, Civil P. C.—(1) Under the Civil P. C., 1882 an uncertified payment could not be taken notice of by "any Court" and it was held that the words "any Court" would not include Criminal Court and that a prosecution by an injured judgment-debtor, of a fraudulent decree-holder in a Criminal Court for any offence under the Penal Code including S. 406 was not barred. *(1886) ILR 10 Bom 288.*

37. Negligence.—(1) Negligence in payment or depositing the moneys entrusted will not render the accused guilty of criminal breach of trust as there is no dishonest intention in such a case. *1976 MadLW (Cri) 76.*

38. Abetment.—(1) A person helping or aiding another to commit breach of trust may be liable as an abettor under this section read with Sec. 109 or Section 116 as the case may be. *AIR 1950 Kutch 37.*

(2) Where A knew that B had handed over to C jewellery to be deposited in a Bank, and that C, instead of so depositing misappropriated it, and he did not inform B about it but told him an untruth, it was held that A and C were engaged in a criminal conspiracy to commit the offence. *AIR 1928 Oudh 277.*

39. These sections and S. 105 of the Insurance Act.—(1) An offence of criminal breach of trust under the Penal Code and an offence under section 105 of the Insurance Act do not constitute the same offence and a conviction under the former will not bar a trial for the latter. *AIR 1961 SC 578.*

(2) Offences under Ss. 104 and 105 of the Insurance Act, 1938 are not identical with offences punishable under Ss. 405 and 409 of the Penal Code—Offence punishable under S. 120B Penal Code

not reproducted in Insurance Act—Prosecution under Penal Code cannot be said to be instituted to by-pass requirement of sanction under Insurance Act. *AIR 1969 Delhi 330.*

40. Agreement to give time to repay amount.—(1) The fact that the complainant had agreed to give time to the accused to repay the amount misappropriated is no ground for acquittal of the accused for an offence under S. 406. *(1909) 10 CriLJ 417.*

41. Place of trial.—(1) Under S. 181(4) the offence of criminal misappropriation or breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction:

(i) any part of the property which is the subject-matter of the offence is received or retained by the accused person; or

(ii) the offence was committed. *1976 BBCJ 575 (Pat).*

(2) Section 178 of the Code provides that where it is uncertain in which of several places an offence was committed the Court of any one of those places can try the offence. *AIR 1957 SC 196.*

(3) It is the Court within whose jurisdiction the property was received or detained or the dishonest intention formed that has jurisdiction to try the offence and not the Court of the place where the loss to the owner or other consequence occurs. *AIR 1930 Bom 490.*

(4) Where a breach of trust is committed in pursuance of a conspiracy, the Court having jurisdiction to try the offence of conspiracy has also jurisdiction to try the offence of breach of trust which is the overt act committed in pursuance of the conspiracy. *AIR 1962 SC 1821.*

(5) Where neither convention nor entrustment has taken place within the territorial jurisdiction of the Court where the complaint is lodged, the Court has no jurisdiction to proceed with the complaint.. *AIR 1970 Cal 110.*

42. Procedure and jurisdiction.—(1) A Magistrate cannot refuse to take cognizance of an offence under this section on the ground that the amount misappropriated is very small. *1974 BLJR 49.*

(2) Where the accused had been given the benefit of S. 360, and a long time elapsed before the matter came to the High Court, the High Court held that it was not proper to interfere with the order after such a long time. *AIR 1928 Lah 926.*

(3) Where in the previous proceeding, no charge had been framed under Ss. 405 and 406 nor had the complaint in the proceeding mentioned any of the essential ingredients of the offence under S. 405, a second prosecution of the accused on the same facts for criminal breach of trust will not be barred under S. 403 of the Criminal Procedure Code (1898). *1966 Cri App R (SC) 301.*

(4) Where A was charged for criminal breach of trust and also under S. 120-B of the Code (conspiracy) and the charges were inextricably connected with each other and the charge so far as regards breach of trust was concerned was vitiated as being in contravention of S. 212 of the Criminal P. C., it was held that the trial under S. 120-B of the Code was vitiated. *AIR 1960 Bom 205.*

(5) Section 203 of the Companies Act (Bd), does not bar the investigation by the Police under Section 154 of the Criminal P. C., of an offence alleged to be committed by an officer of a Company. *AIR 1957 Mad 65.*

(6) Where 3 persons are charged with breach of trust in collusion with one another, they can be tried jointly. Section 212 of the Criminal P. C. does not make separate trials necessary in such a case. *AIR 1917 Mad 524.*

(7) Where the facts in a complaint indicate a fair case under this section against the accused, it is not proper to dismiss the complaint under S. 203 of the Cr. Procedure Code. *AIR 1952 Ajmer 58.*

(8) A first class, Magistrate has no power to award more than 6 months imprisonment on a conviction under this section. *AIR 1972 SC 1309.*

(9) Cognizable—Warrant—Not bailable—Compoundable when the permission is given by the Court—Triable by Metropolitan Magistrate or Magistrate of the first and second class, Village Court. If the offence is committed by public servant, not compoundable—Triable by Special Judge under Act XL of 1958 and Act II/47.

43. Offences, falling under this section and under a Special Act.—(1) Where the same facts constitute an offence under this section as well as offence under the provision of a Special Act, there is in view of S. 26 of the General Clauses Act, 1897, no bar to the offence being tried under the Code. *1974 LabIC 691.*

44. Existence of civil remedy.—(1) Merely because there is a civil remedy a complaint for criminal breach of trust cannot be thrown out. *1978 CriLJ 609.*

(2) Criminal proceedings should be stayed pending a civil suit in respect of the same matter. *AIR 1916 Lah 137.*

45. Charge.—(1) The provisions of S. 212(2) must be strictly observed in framing a charge under this section. *(1913) 14 CriLJ 219 (Cal).*

(2) The charge must also specify the dates between which the offence is alleged to have been committed. *AIR 1957 MadhPra 225.*

(3) Section 219, Cr. P. C. provides that 3 offences of the same kind committed within one year may be charged together. The joinder therefore of more than 3 distinct offences of criminal breach of trust committed within the space of one year is an illegality which vitiates the trial. *AIR 1933 Rang 325.*

(4) A charge for criminal breach of trust in different modes is really a charge for a single offence. *AIR 1962 SC 1821.*

(5) A charge for an offence under this section cannot be joined with a charge for an offence of extortion. *AIR 1936 Sind 29.*

(6) A charge under this section is defective if it omits to set out the time and manner of the entrustment alleged with sufficient particularity. When the accused is charged with criminal breach of trust, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence.

(7) 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 of—, at—, being entrusted with certain property, to wit—committed criminal breach of trust; and that you thereby committed an offence punishable under section 406 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

(A) Alternative charges.—(1) Alternative charges can be framed under Ss. 406 and 420 of the Code. *1969 CurLJ 554.*

(2) Once the offender is punished under S. 420, the other charge cannot be sustained. *AIR 1954 Orissa 213.*

(3) The failure of the prosecution to split up the first count into two sub-counts cannot obviously be regarded as introducing a fatal infirmity in the validity of the trial. Such an irregularity can be cured both under S. 225 and S. 537 of the Code provided of course no prejudice has been thereby caused to the appellant's case. *AIR 1960 SC 661.*

46. Sanction or leave of Court.—(1) Sanction or leave of the Court is necessary in the following cases:

(a) Charge of criminal breach of trust against the Manager of the Court of Wards, after the estate is released and the Manager's accounts finally passed. *AIR 1931 Pat 86 : 32 CriLJ 555.*

(b) Complaint against a Receiver appointed by a civil Court. *AIR 1919 Cal 647.*

(c) Complaint against administrator appointed by Court. *AIR 1921 Cal 431.*

(2) Where the main offence charged against the accused was one under S. 471 of the Code and offences under Ss. 406, 407, 467 and 420 were merely tacked on to it, it was held that the case was not thereby taken out of the ambit of S. 195(1)(b)(ii). *AIR 1969 All 189.*

47. Acquittal.—(1) Where a person charged under Ss. 406 and 420 on the same facts is acquitted of the charge under Section 420, as having been compounded with the permission of the Court, he cannot be tried for the charge under S. 406. *AIR 1936 Mad 353.*

48. Sentence.—(1) Where a long time had elapsed since the offence took place it was held that a heavy sentence of fine was sufficient to meet the ends of justice. *1968 CriLJ 983.*

(2) There may be extenuating circumstances which render a severe punishment unnecessary. Thus where the hirer under a hire-purchase agreement sold the property, but continued to pay the installments, the insurance and other expenses, it was held that a sentence of simple imprisonment was sufficient. *AIR 1923 All 598.*

(3) Where the accused is a man of position and the Secretary of a Co-operative Society a sentence of fine of Rs. 175 and imprisonment till the rising of the Court was held inadequate and the fine was raised to Rs. 1000. But a jail sentence was held unnecessary under the circumstances of the case. *AIR 1943 Sind 164.*

(4) The fact that the amount involved in the breach of trust is large and the offence has been committed by a member of the legal profession in which the litigating public must repose entire trust and confidence calls for a severe sentence. *AIR 1935 Rang 453.*

(A) Forfeiture of property.—(1) Section 62 of the Code which was repealed by S. 4 of Act XVI of 1921 provided for forfeiture of property in cases of offences punishable with imprisonment. It was held that such punishment should be inflicted only in rare cases and that cases of embezzlement were not contemplated by the section. *(1903) 4 CriLJ 371 (All).*

49. Alteration of conviction.—(1) A conviction under Section 406 cannot be altered to one under Sec. 411 and vice versa, they not being cognate offences. *1967 AllCriR 399*

50. Interference by High Court.—(1) The High Court would be slow to interfere with a finding of fact by the lower Court based on appreciation of evidence. *AIR 1969 Goa 40.*

(2) Appeal against acquittal by State—Leave refused by High Court without assigning reasons and without speaking judgment as to how there was no entrustment to accused—Order set aside and High Court directed to restore appeal on its file. *AIR 1982 SC 1215.*

51. Practice.—Evidence—Pfove: (1) That the accused was entrusted with property or with dominion over it.

(2) That he (a) misappropriated it, or (b) converted it to his own use, or (c) used it, or (d) disposed of it.

(3) That he did so in violation of (a) any direction of law prescribing the mode in which such trust was to be discharged, or (b) any legal contract, express or implied, which he had made touching the discharge of such trust, or that he willfully suffered some other persons to do as above.

(4) That he acted dishonestly.

Section 407

407. Criminal breach of trust by carrier, etc.— Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *"Carrier".*
3. *"Wharfinger".*
4. *Presumption from short delivery of goods entrusted.*
5. *Procedure.*
6. *Place of trial.*
7. *Sentence.*
8. *Practice.*
9. *Charge.*

1. Scope of the section.—(1) This section may be read along with section 106, Evidence Act. The word "carrier" has not been defined in the Penal Code but the definition given in the Carriers Act (III of 1865) may be accepted for the purpose of this section. The carrier other than Government engaged in the business of transporting for hire movable property from place to place by land or inland navigation. Any one who undertakes to carry the goods of all persons indifferently for hire is a common carrier. Those who receive property under a contract, express or implied, to carry it or keep it in safe custody are punishable under this section for a criminal breach of duty with respect to such property. "Warehouse-keeper" is one who keeps a warehouse, which is a house to deposit or keep wares in. 'Wharfinger' means a person who owns or keeps a wharf, which is a broad plain place, near some crek or haven, to lay goods and wares on that are brought to from the water. To establish the essential elements of the offence under this section, it is necessary to show at least that some of the property entrusted to the accused cannot be accounted for by him. Where the accused was entrusted with the carriage of salt from Cox's Bazar to a merchant firm at Chittagong, and a portion of the salt was abstracted, the Metropolitan Magistrate, Chittagong has got jurisdiction to try the accused on a charge of criminal breach of trust, as there is a failure to deliver the salt at Chittagong in accordance with the terms of the entrustment.

(2) Criminal breach of trust by carrier—Where accused gives an explanation or even circumstances indicate that there was no misappropriation—Will entitle him to acquittal. Ordinarily when a person is entrusted with the goods and fails to deliver them there will be an onus on him to show that he was not himself retaining the goods. If he gives an explanation and that explanation may be true he cannot be convicted of misappropriation. Even if he himself does not give that explanation, but the circumstances suggest that he may not be in possession of the goods and that the goods may have been

lost otherwise, he still cannot be convicted. The onus of proving misappropriation is on the prosecution and, though in the absence of explanation, there may be a presumption from non-delivery that the goods have been misappropriated, the existence of facts which suggest an explanation would be sufficient for giving the accused the benefit of doubt. *Gaizuddin Vs. State (1962) 14 DLR (SC) 94=1962 PLD (SC) 132.*

(3) Case u/s. 417 and 420, PC read with Regulation No. II of Martial Law Regulations No. I of 1975—Agreement between a Partnership firm and the Government for carriage of paddy by country boat—Agreement prescribing the manner and procedure for settlement of dispute arising from a breach of obligation by the parties concerned—Boat sank, consignment lost in part—Carrier firm's repeated requests expression willingness to pay value of the consignment lost as per rate stated in the consignment—Authority insisted on payment of price three times the value of the consignment and did not permit the firm to deposit the value of consignment—Whether the case against the Firm's representative and others comes within the purview of either Ss. 417 or 420, PC or M.L.R. No. 11 of Martial Law Regulations No. I of 1975—Whether criminal prosecution lies against the firm for loss of consignment without taking resort to the procedure detailed in the agreement—Transaction between the parties was of civil nature and the liability arising therefrom is a civil liability dischargeable by accepting the person of the firm—Firm allowed to deposit the value of consignment to the authority—Proceeding quashed. *Chowdhury Nuruzzaman Vs. The State. 5 BSCD 46.*

(4) The transaction between the parties is of civil nature and the liability arising therefrom is a civil liability which can be discharged by accepting the payment of the price of 2221 maunds 10 seers of paddy sank in river—Appellants be allowed to deposit the amount—The Price of the paddy sunk in river. *8 BCR 180 AD.*

(5) This section is applicable to a criminal breach of trust by a carrier, wharfinger or warehouse-keeper. Dishonest intention is an essential element of the offence of criminal breach of trust and therefore where the act of the accused is not "dishonest" as defined in Section 24 ante no offence under this section is committed. *1979 TAC 79 (Ker).*

(6) Where a corporate body is carrier, it cannot be prosecuted for an offence under this section, as it cannot be said to have the necessary mens rea. *(1972) 1 Cal HC N 400.*

(7) Where a carrier firm is accused of an offence under this section the necessary ingredients of the offence of criminal breach of trust as defined in S. 405 must be established. *(1976) 78 Bom LR 677.*

(8) Normally a criminal breach of trust would be where a trust is created. In the absence of any communication between a complainant and an accused no question of trust can arise, and S. 407 will not be attracted. *1981 CriLR (Guj) 151.*

2. "Carrier".—(1) A carrier is a person who undertakes for hire the conveyance of parcels or goods. *(1849) 154 ER 1254.*

(2) In the absence of proof of short delivery of the goods entrusted to him for carrying, a carrier cannot be held liable under this section. *(1907) 5 CriLJ 235 (Bom).*

(3) The civil liability of a common carrier for loss of goods entrusted to him is much greater than that of an ordinary carrier. *(1884) ILR 10 Cal 166.*

(4) Expression 'Carrier' includes all types of carriers including ommon carrier or private carrier. Section does not make any distinction between 'carrier' and 'common carrier'. *1981 CriLJ 824.*

3. "Wharfinger".—(1) Wharfingers are not carriers or common carriers and the civil liability of common carriers does not apply to them. *(1895) 64 LJQB 250.*

4. Presumption from short delivery of goods entrusted.—(1) In the absence of explanation for short delivery of goods entrusted to a carrier the presumption of misappropriation can properly be drawn against him. *AIR 1952 Mad 322.*

(2) Failure to deliver goods intact is sufficient evidence of breach of trust. *AIR 1928 Mad 1136.*

5. Procedure.—(1) Where 3 persons were jointly tried, one for the offence under S. 407 and the other two under S. 411 and convicted respectively for the said offences, it was held that, in the absence of prejudice to the accused, the convictions need not be set aside. *(1901) ILR 28 Cal 7.*

(2) Cognizable—Warrant—Not bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Metropolitan Magistrate or Magistrate of the First Class, and Special Judge under Act XL of 1958 and Act II/47 provided the offence is committed by public servant in discharge of official duty, in that case it is not bailable—Not compoundable.

6. Place of trial.—(1) Where the goods entrusted to the carrier were not delivered intact at the place of delivery, and there is no evidence as to where the misappropriation took place, it must be presumed that the place of delivery is the place where the misappropriation took place and the offence committed. *AIR 1928 Mad 1136.*

7. Sentence.—(1) The fact that the accused was civilly liable for damages for the loss of the goods entrusted to him, can be taken into consideration in awarding the sentence. *AIR 1952 Mad 322.*

8. Practice.—Evidence—Prove: (1) That the accused is a carrier, wharfinger, or warehouse keeper.

(2) That he was as such entrusted with the property in question.

(3) That he committed criminal breach of trust in respect of it.

9. Charge.—The charge should run as follows:

I (name and office of the Magistrate/Special Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, being entrusted with property, to wit—, as a carrier (or wharfinger, or warehouse-keeper) committed criminal breach of trust in respect of such property; and that you thereby committed an offence punishable under section 407 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 408

408. Criminal breach of trust by clerk or servant.—Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *"Whoever".*
3. *"Clerk or servant".*
4. *Agent is not servant.*
5. *Partner.*
6. *"Entrusted with property".*
7. *"In such capacity".*
8. *"Property".*

1. Scope of the section.—(1) In order to constitute criminal breach of trust by a clerk or servant, there must be dishonest misappropriation. The offence is committed even where the act of the accused is to cause wrongful loss to his master for a time only *(5 CrLJ 5)*. A clerk or servant by virtue of his position enjoys the confidence of their master where such clerk or servant is entrusted with property or dominion over property and if he commits breach of trust of property entrusted to him, he will be guilty of an offence under this section. Where the dispute between the opponent and applicant relates in the main to the settlement of their accounts arising out of the partnership entered into between them and the complainant is endeavouring to use the criminal Court for the purpose of enforcing civil liability, the Court should refuse to proceed with the criminal complaint *(1968 PCrLJ 1432)*. The secretary of a co-operative society converting the money of the society as his own and using the same for his own purposes was held guilty under this section *(58 CrLJ 518)*. Where the accused is a manager of a co-operative society had to deal with cash, gave instruction to the accountant to make false entries in regard to credit the inference that he wanted to misappropriate was established.

(2) Partner cannot be convicted under section 408. Where a partner receives partnership goods, he does not do so in a fiduciary capacity and therefore, when he sells some quantity of jute of the partnership business which was made over to him to carry to some place and himself appropriated the price thereof, he cannot be convicted on a charge of criminal breach of trust under section 408. *Abdul Gafur Vs. D. Ahmed (1951) 3 DLR 449.*

(3) Double sentence—Not proper—Though it is permissible under section 408 to inflict sentence of fine simultaneously with the substantive sentence of imprisonment, ordinarily the double sentence should not be inflicted unless necessary in the interest of justice. *Kismat Ali Vs. A. Kader (1952) 4 DLR 36(c).*

(4) The mere fact that the petitioner had been acquitted previously on a charge under section 408 Penal Code does not render him immune from prosecution for disobedience or neglect to obey a valid Martial Law Order. Provisions of section 403 of Code of Criminal Procedure or section 26 of the General Clauses Act cannot be successfully invoked on behalf of the petitioner in this respect. *Ghulam Nabi Vs. The State, 18 DLR 82 WP.*

(5) Where the accused is not a clerk or servant of the complainant, the section will not apply. *(1868) 9 Suth WR (Cr) 37.*

(6) Where a servant is entrusted with funds to purchase some articles for the master but diverts the money for his own use, his offence amounts to criminal breach of trust by a servant under this section and not to cheating under Section 420 infra. *AIR 1919 Low Bur 60.*

2. "Whoever".—(1) A minor over 12 years of age can be guilty of an offence under this section. *AIR 1959 All 698.*

3. "Clerk or servant".—(1) A clerk or servant is a person bound by an express or implied contract of service to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such clerk or servant to transact. *(1875) 44 LJMC 65.*

(2) Where a contract of employment is for a specified period but the employment continues after such time, the presumption is that the employment after the expiry of the period is on the same terms as the previous contract. *(1936) 37 Cri LJ 856 (Nag).*

(3) Where the accused was working as a cashier of the Society, even if he was an elected member of the Managing Committee of the Society and was working as an honorary cashier at the time of commission of offence, he would be considered to be a servant for the time he worked as a cashier. Thus he was held to be rightly convicted under S. 408. *1982 Chand CriC 379.*

(4) Government Undertaking—Its Managing Director and the Secretary are neither servants nor clerks. S. 408 is not attracted. *(1983) 1 Crimes 385 (Delhi).*

(5) A broker for a person is not necessarily his servant. A broker is well understood to be a middleman, a person who brings together the buyer and the seller. A broker can be a seller as well. *AIR 1941 Rang 189.*

(6) A disobedient but inocent act of a clerk is not criminal, as there is no element of dishonesty in such an act. *AIR 1929 Pat 506.*

4. Agent is not servant.—(1) While a breach of trust by a clerk or servant will fall under this section, a breach of trust by an agent will fall under Section 409. *1966 All WR (HC) 511.*

(2) Where a person who was really an agent was charged for breach of trust under S. 408 and on conviction was awarded a sentence of 4 years imprisonment, it was held that though the case fell under S. 409 of the Code, the question became of no importance in view of the fact that the sentence awarded could be maintained under either section. *AIR 1956 SC 149.*

5. Partner.—(1) A partner is not a servant even if he is a working partner, not contributing any capital but contributing only his labour. *1952 CriLJ 291.*

(2) Where the relationship between the complainant and the accused is one of partnership and the dispute is one regarding their respective liabilities to each other, it is a civil dispute and conviction under this section is not sustainable. *AIR 1931 Pat 159.*

6. "Entrusted with property".—(1) The Secretary of a Co-operative Society in possession of the funds of the Society must be regarded as a servant of the Society entrusted with such funds and cannot be regarded as a banker with whom the money has been deposited, merely because he has extensive properties. *AIR 1956 Bom 524.*

(2) Where a clerk in the service of an estate is authorised to receive money on its behalf and to pay it into the estate-treasury, the money so received by him is the estate money which is entrusted to him and if he misappropriates it he would be guilty under this section. *AIR 1920 Mad 965.*

(3) Entry in account book showing payment to accused—No other evidence—Entrustment held absent. *AIR 1974 SC 388.*

(4) Employee of a firm not authorized to receive or encash cheques of the firm by getting an employee of the treasury to identify him as a partner induced the treasury officer to deliver money to

himself on certain cheques. It was held that his act might amount to cheating but not breach of trust as there was no trust. *AIR 1955 NUC (Pat) 4900.*

7. "In such capacity".—(1) The entrustment to the clerk or servant must be in his capacity as such clerk or servant. A charge which omits to state this is imperfect. *(1865)3SuthWR(Cr Letters) 12.*

8. "Property".—(1) A cheque is property within the meaning of this section. *AIR 1930 All 449.*

(2) Res nullius is not a "property". A servant, who was directed to burn waste paper but who sells it, is not guilty under this section. *(1902) ILR 29 Cal 489.*

9. "Commits criminal breach of trust".—(1) It is not necessary, to constitute a criminal breach of trust, that the misappropriation or conversion should continue for any length of time. Even a temporary misappropriation or conversion would be as much an offence as misappropriation or conversion for a long period. *(1907) 5 Cri LJ 5 (Bom).*

(2) The loss caused to the complainant, though a normal result of misappropriation or conversion, is not, an essential ingredient of the offence. Section 179 of the Criminal Procedure Code does not apply to such a case so as to give jurisdiction to try the offence to the Court within whose local jurisdiction the loss occurs. *AIR 1931 Rang 164.*

(A) Illustrative cases.—(1) A, an employee, gives security deposit on terms that it will be refunded when the accounts are duly submitted and accepted. A left service and took from the deposit what he considered to be the balance due to him, reckoning the deposit as credited with his master. It was held that A cannot determine his own liability in the matter and take what he considers is the balance due to him and that he was guilty under this section. *AIR 1938 Cal 451.*

(2) Where, there is no dishonest intention on the part of the clerk or servant, no offence under this section is committed. *AIR 1936 Cal 520.*

(3) Accused who was Secretary of a Co-operative Society received certain amount—It was entered in books of Society—Wrong cross-entry made at his instance—Accused also working as Manager—Misappropriation upheld. *AIR 1974 SC 222.*

10. Dishonest intention.—(1) A dishonest intention is a necessary ingredient of the offence under this section. *AIR 1958 Andh Pra 765.*

(2) Where a clerk of the complainant collected rents and after deducting the salary due to him offered the balance to the complainant who refused to accept it and the accused therefore had to retain it with him it was held that the accused had no dishonest intention and was not guilty under this section. *AIR 1935 All 922.*

(3) Delay in remittance of money is prima facie evidence of dishonest intention but it is not conclusive on the question of criminal misappropriation or breach of trust. *AIR 1917 All 273.*

(4) Dishonest intention held proved. *AIR 1955 NUC (Assam) 2825.*

11. "In respect of that property".—(1) The breach of trust must be in respect of the property entrusted to the accused. A, who had dealings with B, settled the accounts and sent C, his servant, with the amount to pay B, C paid the amount to B and received a present from B, it was held that C was not guilty of any misappropriation of the money entrusted to him by A, but that it would have been otherwise if A's account with B was an open account and the transaction amounted to a reduction of the amount due. *(1886) ILR 8 All 120.*

12. Entrustment with two or more persons.—(1) The joint responsibility of two or more persons entrusted with monies is not sufficient to support a criminal charge under this section against both of them unless it is shown that they acted in concert. *1959 MPLJ (Notes) 85.*

13. Onus of proof and appreciation of evidence.—(1) It is for the prosecution to prove the case against the accused who pleads not guilty. *AIR 1934 Cal 425.*

(2) Courts should be slow to presume dishonesty. *AIR 1936 Nag 160.*

(3) The failure to account or giving a false account is not sufficient to hold the accused guilty, though it is an indication of dishonest intention; it must be considered along with the other facts and circumstances of the case. *AIR 1957 Orissa 165.*

(4) Charge against President of Co-operative Society along with other office-bearers, for misappropriation of store—Evidence and proof—Circumstance that key of store used to remain with the President during night—Not sufficient to prove charge beyond reasonable doubt. *AIR 1976 SC 1132.*

14. Civil liability.—(1) The fact that the employer had taken a bond from the accused employee for the amounts misappropriated will not preclude a prosecution for the offence under this section. *1 Weir 465.*

(2) Where the facts of the case establish only a civil and not a criminal liability, this section will not apply. *(1936) 163 Ind Cas 657 (Nag).*

15. Vicarious liabillity.—(1) A master will be liable for the offence of criminal breach of trust by his servant only if he had wilfully allowed the servant to commit the offence. *1969 Ker LT 849.*

(2) Defalcation of properties of Co-operative Society—Conspiracy to cause defalcation alleged—No charge on this count against chairman of Managing Committee of Society—Charge of conspiracy failing—Conviction of chairman of society vicariously under Ss. 406, 408, 409, 467 merely because he happened to be chairman—Improper. *AIR 1984 SC 151.*

16. Place of trial.—(1) Where the accused is liable to account at place X for the property entrusted to him and fails to do so, the Court at place X is empowered under S. 181(2) of the Criminal P. C. to try the accused for the offence under this section. *AIR 1928 Rang 217.*

(2) Section 179 of the Criminal P. C. does not govern the jurisdiction of a Court to try the accused for an offence under this section, as there is a special provision for it under S. 181(4) of the Criminal P. C. *AIR 1924 Lah 663 (665); 25 Cri LJ 410.*

(3) Where A was entrusted with certain bushels of coffee seeds at place X, to be delivered to B at place Y, and when A delivered the seeds to B it was found that a certain quantity had been abstracted, it was held that the Court at Y had jurisdiction to try the accused for an offence under this section. *AIR 1928 Mad 1136 (1138) : 30 CriLJ 245.*

(4) Where it is uncertain, on the evidence, where the breach of trust actually took place the venue of enquiry or trial is primarily to be determined by the averments contained in the complaint or chargesheet and, unless the facts alleged are positively disproved, ordinarily, the Court where the chargesheet or complaint is filed has to proceed with it except where action has to be taken under Section 202 of the Criminal P. C. *AIR 1957 SC 196.*

17. Procedure.—(1) No order under S. 360, Criminal P. C. can be made on a conviction under this section. *(1900-1902) 1 Low Bur Rul 142.*

(2) Trial for offence of falsification of accounts was unduly prolonged and ended in acquittal—Fresh trial for offence under this section in respect of items covered by falsification of account was held improper. *AIR 1942 Pat 401.*

(3) Merely recording order of acquittal on order sheet is not a proper judgment—A regular judgment should be written on all points. *AIR 1935 Pat 495.*

(4) Cognizable—Warrant—Not bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Metropolitan Magistrate or Magistrate of the first class. If the accused is a public servant, it becomes, triable by the Special Judge under Act XL of 1958 and Act II of 1947 and the case is not compoundable and not bailable.

18. Charge.—(1) Section 212, sub-section (2) of the Criminal P. C. provides that it is sufficient to specify the gross sum or, as the case may be, describe the movable property in respect of which the offence of criminal breach of trust or misappropriation is alleged to have been committed and the dates between which it is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge for a single offence. *AIR 1939 Bom 129.*

(2) Section 219 of Criminal P. C. provides that where a person is accused of more offences than one of the same kind within the space of twelve months, he may be charged with and tried at one trial for any number of them not exceeding three. *AIR 1927 All 223.*

(3) Where a person commits criminal breach of trust in respect of various sums at different times in a single year he may be charged with the total sum as for a single offence but the giving of the items and the dates and the amounts does not vitiate the charge provided the gross sum is mentioned inasmuch as the giving of such details is only favourable to the accused. *AIR 1930 Cal 717.*

(4) A joinder of charges under this section and under S. 477A (falsification of accounts) would be a misjoinder of charges and would vitiate the trial. *AIR 1931 Oudh 86.*

(5) A joinder of charges under this section and under S. 477A would be a misjoinder vitiating the trial unless both the transactions can on the facts of the case be said to form part of the same transaction. *AIR 1971 SC 1543.*

(6) Joint trial of several accused on several items of embezzlement—Apeal against conviction—Failure of justice, if any, not established—Plea of misjoinder of charges at appellate stage is of little consequence. *AIR 1971 SC 1543.*

(7) The charge should run as follows:

I (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, being a servant in the employment of X, and in such capacity entrusted with (or with dominion over) certain property, to wit,—committed criminal breach of trust with respect to the said property, and thereby committed an offence punishable under section 408 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

19. Several persons charged under Ss. 120B and 408—Acquittal of all except one—Effect.—(1) Where 2 out of 3 persons charged under S. 120B and 408 for conspiracy and embezzlement are acquitted the third person is entitled to an acquittal as a matter of course. *AIR 1926 Cal 345.*

20. Trial for offences under S. 408 and other offences.—(1) A joint trial for offences under Ss. 408 and 420 would be illegal where the two offences do not form part of the same transaction. *(1909) 10 CriLJ 476 (Cal).*

21. Abetment.—(1) Where a person is accused of the abetment of an offence under this section (criminal breach of trust by a servant) it must be proved that the accused had clear knowledge that the servant was committing a breach of trust. *(1900) 4 Cal WN 309.*

22. Delay in preferring complaint.—(1) There is no limitation for preferring a complaint of a criminal offence. But the Court will be justified where there has been a long delay, in holding that the complainant was not very serious in initiating the criminal proceeding. *AIR 1956 Bom 247.*

(2) Where a complaint under S. 408 was dismissed in 1921 for the non-appearance of parties and there were subsequent civil proceedings, after the termination of which in 1924, the complainant again renewed the same complaint (which was dismissed in 1921), with the motive of blackmailing the accused it was held that the complaint should be dismissed. *AIR 1926 Lah 213.*

23. Sanction.—(1) In a case arising under this section when the Government of India Act, 1935 was in force, it was held that the accused could not claim the protection of S. 270 of the Act. *AIR 1945 FC 24.*

(2) Where an offence falls under S. 5(2) of the Prevention of Corruption Act, such offence required sanction before prosecution, the prosecuting cannot avoid it by prosecuting the accused under this section. *AIR 1957 Andh Pra 663.*

(3) No sanction is necessary for prosecution of a railway servant for an offence under Section 408, Penal Code, which occurs in Chap. XVII of the Code. *AIR 1958 Pat 441.*

24. Sentence.—(1) The fact that the servant lost the benefit of his service is no ground for mitigating the sentence for the crime. *(1890) 13 Mys LR No. 421, p. 656.*

(2) Where the accused was 18 years of age and a person of good character and the offence was due to unpardonable laxity in management and his own miserable pay, a sentence of one year was held sufficient. *AIR 1937 Sind 242.*

(3) Where a clerk of many years' standing and in a position of trust embezzled large sums of money, it was held that a sentence of 5 years' R. I. was not too severe. *AIR 1934 All 173.*

(4) A sentence passed by the High Court under S. 408 can be reconsidered by the High Court under its powers under S. 482, Criminal P. C. which is not limited by S. 362 of the Criminal P. C. *AIR 1927 Lah 139.*

(5) Young law graduate as an employee committing his first offence of misappropriation. Supreme Court held no serious notice needs to be taken of the lapse. He was sentenced to a nominal sentence of 1 month's R. I. and a fine of Rs. 500.00. *AIR 1979 SC 1195.*

25. Acquittal.—(1) Where a charge against servant under this section specified a gross sum as having been misappropriated between particular dates, and the accused was acquitted, but subsequently the accused was prosecuted again on a fresh charge of breach of trust between the same dates of an amount which was not included in the gross sum mentioned in the previous charge, it was held that the previous acquittal did not bar the trial on the fresh charge. *AIR 1923 Cal 654.*

26. Order under S. 452, Criminal P. C.—(1) Where A was convicted under this section in respect of certain property belonging to B, the Court has no power to make an order under S. 452, Criminal P. C., directing the payment to B of any amount out of the amount seized by the Police from A where there is nothing to show that any offence had been committed with regard to that property or that that amount had been used for the commission of any offence. *(1897) ILR 24 Cal 499.*

(2) Where A entrusted jewels to B who pledged them to C, a Magistrate convicting B for breach of trust cannot order C to return the property to A. *AIR 1922 Low Bur 17.*

27. Interference by High Court and Supreme Court.—(1) Where the verdict of the jury acquitting the accused was perverse, the High Court would set aside the acquittal and convict the accused. *AIR 1935 All 970.*

(2) Appeal against acquittal by State—Leave refused by High Court without assigning reasons and without speaking judgment as to how there was no entrustment to accused—Order set aside and High Court directed to restore appeal on its file. *AIR 1982 SC 1215.*

28. Practice.—Evidence—Prove: (1) That the accused was the clerk or servant of the person reposing trust.

(2) That he was in such capacity entrusted with the property in question or with dominion over it.

(3) That he committed criminal breach of trust in respect of it.

Section 409

409. Criminal breach of trust by public servant, or by banker, merchant or agent.—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [6][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Criminal breach of trust, theft, cheating and criminal misappropriation—Distinction.*
3. *Civil and criminal liability—Distinction.*
4. *"Being entrusted with property".*
5. *Entrustment and loan.*
6. *"With property".*
7. *Property entrusted may belong to anybody.*
8. *"In any manner".*
9. *"In his capacity of a public servant".*
10. *"In the way of his business as banker, etc."*
11. *"Dominion over property".*
12. *"Banker".*
13. *"Factor".*
14. *"Broker".*
15. *"Attorney".*
16. *"Agent".*
17. *"Commits criminal breach of trust".*
18. *This section and S. 34.*
19. *This section and Prevention of Corruption Act.*
20. *This section and S. 477A.*
21. *This section and S. 27, Cattle-trespass Act.*
22. *This section and Ss. 104 and 105, Insurance Act.*
23. *This section and the offence of theft.*
24. *This section and S. 420.*
25. *This section and S. 203 of the Companies Act (Bd).*
26. *This section and S. 52, Post Office Act, 1898.*
27. *Abetment.*
28. *Charge.*
29. *Dishonest intention.*
30. *Onus and proof—Appreciation of evidence.*
31. *Procedure.*
32. *Separate trials for each item misappropriated.*
33. *Jurisdiction.*
34. *Place of trial.*
35. *Sanction.*
36. *Plea before Supreme Court for first time.*
37. *Alteration of conviction.*
38. *Vicarious liability.*
39. *Previous acquittal or conviction—Effect.*
40. *Civil liability.*
41. *Sentence.*
42. *Order under S. 517 of the Criminal P. C.*
43. *Bail.*
44. *Practice.*

1. Scope of the section.—(1) For an offence under this section the first requirement is that the property must be proved to have been entrusted and a subsequent conversion of the property entrusted to the use of the accused. "Dishonesty" is the essential ingredient of the offence and that must be proved before an accused is held guilty of the offence under section 409. If the acts or omission committed by the accused do not convey an impression that any dishonest intention was harboured by him, no offence results. This section does not include an intention to misappropriate at future date *(36 CrLJ 165)*. A person cannot be convicted of criminal breach of trust in respect of immovable property. This section classes together public servant, bankers, merchants, factors, brokers, attorneys and agents. As a rule the duties of such persons are of a highly confidential character, involving great powers of control over the property entrusted to them: and a breach of trust by such persons may often induce serious public and private calamity. Entrustment of property is to be proved beyond any reasonable doubt before a person can be convicted under section 409 of the Penal Code. Where the prosecution has definitely failed to prove that any amount at any particular time was entrusted to the appellant, which he could and in fact did misappropriate conviction was set aside *(1973 PCrLJ 148)*. Where there is neither evidence that the accused had dominion over property lying in the store nor the property lying in the store was ever entrusted to him, the accused cannot be held guilty of an offence under section 409. Where the prosecution evidence leaves considerable room for doubt with regard to both the points, namely, entrustment as well as misappropriation, there can be no conviction *(PLD 1964 Dhaka 368)*. A public servant in this section means a person covered by the definition in section 21 of the Penal Code. Criminal breach of trust committed in the capacity of secretary of a private organisation cannot be treated as a breach of trust committed by public servant as such *(PLR 1960 Dhaka 1043)*. Where a Sub-inspector of Police wanted to search the "Potli" containing the currency notes and the complainant made over the potli to the officer, it was a clear case of entrustment, and if the amount returned by the Sub-inspector was short by a certain amount the offence of criminal breach of trust under section 409 Penal Code was made out *(AIR 1958 All 584)*. If it is shown that money entrusted to the accused or received by him for a particular purpose, was not used for such purpose, neither was the same returned by him in accordance with his duty, it lay on the accused to prove his defence, if he has set-up any. The fact that money entrusted to be used for a particular purpose, was not used for such purpose, that there was retention for a sufficiently long time, would justify the inference that the accused did not intend to pay *(38 CWN 467)*. The relationship between a banker and customer normally is that of a creditor and debtor. There are, however, cases where banker may be constituted trustees. Where a Bank takes deposits from customers it takes then on the understanding that such deposits will not be utilised for paying dividends and if contrary thereto such deposits are utilised for paying dividends, the Bank will be liable under section 409. The Manager, the Accountant or the Assistant Manager do not fall under the expression "Banker" to attract section 409 Penal Code. Bankers in the course of their expanding business, Maintain safe vaults, receive jewels for safe custody, lend on pledge etc., Where the relationship of bailor and bailee might arise, in such cases section 409 Penal Code will be attracted. Under the present amendment of section 21 of the Penal Code the Bank employees of nationalised Banks are public servants and if they commit offence they come within the mischief of section 409 Penal Code. Factor is a substitute in mercantile affairs; and agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for a compensation commonly called factorage or commission. 'Attorney' is one who is appointed by another to do something in his absence, and who has authority to act in his place. An agent is a person employed to do any act for another or to represent another, in dealings with a third person. The term

'agent' in section 409 is not restricted only to those persons who carry on the profession of agents. Commission agents are agents within section 182 of the Contract Act, but are not agents pure and simple. Failure to account for various sums of moneys collected as agent of bank amounts to criminal breach of trust. Brokers are intermediaries between the namfacturer or producer and the customer or consumer. More commonly he is an agent employed by one party only to make a binding contract with another *(1957 CrLJ 265 All).*

(2) *Public Servant*—Where a public servant is sought to be tried for criminal breach of trust, it is necessary that sanction for his trial should be obtained. Where trial is held without obtaining sanction from a competent authority it is illegal and conviction and sentence imposed must be set aside. The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of prosecution and the Government have an absolute direction to grant or withhold their sanction under section 197 CrPC when any public servant who is not removable from his office some by or with the sanction of Government (Public Division) or some authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his duty, no court shall take cognizance of such offence except with the previous sanction of the appropriate Government sanction is not necessary in the case of all public servants. A public servant can only be said to act or to purport to act in the discharge of his official duty if his act is such as to be within the scope of his official duty. The test may well be applied whether the public servant, if challenged, can reasonably claim that, what he does, in virtue of his office in proper discharge of his official duties is a question of defence, to be investigated at the trial and could not arise at the stage of grant of sanction which must precede the institution of the prosecution. The act complained of must be an offence. There must be a reasonable connection between the act complained of and the official duty, so that the public servant could lay a reasonable but not a pretended or fanciful claim that he did it in the discharge of his official duty. Once the delegate of the sanctioning authority has refused to grant sanction, the power to grant or refuse sanction is exhausted it cannot be exercised thereafter even by the sanctioning authority for the purpose of granting sanction for prosecution *(1918 PCrLJ 1262).*

(3) *Theft and criminal breach of trust*—If any person entrusted with property, deals with it wrongfully or contrary to the terms of entrustment, then that is plain breach of trust or misappropriation, it can be termed or described as theft *(PLD 1961 Lah 669).* Falsification of accounts and misappropriation are separate offences and the accused cannot be tried jointly for the offences under section 409 and section 477A *(14 DLR 398).*

(4) *Place of Trial*—The complainant who resided at Ujantia, Cox's Bazar appointed the accused his agent for sale of his goods at Chittagong and sent his goods. The accused sold the goods and misappropriated the sale proceeds. The Court at Chittagong has jurisdiction to try the offence. If there is a contract that the accused is to render accounts at Dhaka and he fails to do so as a result of his Criminal Act in respect of the money, he can be said to dishonestly use the money, at that aforesaid place as well, in violation of the express contract, which he has made touching the discharge of the trust by which he came by the money, and so he commits the offence of criminal breach of trust at that place also, and the courts at Dhaka have jurisdiction to try him.

(5) Misappropriation charge—What amounts to admission.—The accused when charged with having misappropriated a sum of money impliedly admitted his liability to pay by asking for time in which to make good the deficit, which time was extended on several occasions at his request, but he failed eventually to make up the loss and the case was reported to the police. Held: This does not amount to an admission that he committed an offence of criminal breach of trust. *A Latif Vs. Crown (1953) 5 DLR (WPC) 40 (42).*

(6) Prosecution under section 409 and the provisions of section 5 of Act II of 1947. Where in respect of a prosecution of a public servant under section 409, it was contended on behalf of the accused that so far as public servants are concerned, the provisions of section 409 have been repealed by section 5 of Act II of 1947, so that if it is sought to prosecute a public servant for such an offence, it must be for criminal misconduct under Act II of 1947 and for no other offence. Held: The prosecution of the accused under section 409 was in accordance with law. *A Latif Vs, Crown (1953) 5 DLR (WP) 40.*

(7) Money not paid into exchequer—Case covered by the section—Prosecution need prove actual conversion on the part of the accused. It has never been understood to be the duty of the prosecution to prove that the accused converted the property to his own use; it is sufficient if the Government was deprived of the use of the money for an unexplained period, it being presumed in such a case that the accused had applied this money to his personal needs. *State Vs. Abu Reza (1966) 18 DLR (SC) 512; 1959 PLD (SC) 309.*

(8) Collection of revenue—Lambardar collecting revenue from land-owners, but did not deposit in Government treasury—Misappropriation—Offence under section 409 committed. *Crown Vs. Imdad Khan (1953) 5 DLR (WC) 106.*

(9) Criminal breach of trust—Not only entrustment of or the dominion over property must be proved but also that the accused dishonestly misappropriated the sum himself or suffered some other person to do so. In a case where the charge against an accused person is that of criminal breach of trust, the prosecution must prove not only entrustment of or dominion over property but also that the accused either dishonestly misappropriated, converted, used or disposed of the property himself or that he wilfully suffered some other person to do so. The prosecution must affirmatively prove these ingredients of the offence unless the receipt of the money is admitted and the accused offers no satisfactory explanation of what he did with it. *Almas Ali Khan Vs. State, (1957) 9 DLR (SC) 14.*

(10) Prosecution need not always prove misappropriation by direct evidence—Circumstances showing the factum of misappropriation by direct evidence—Circumstances showing the factum of misappropriation may be sought to prove the guilt. *Addl. Advocate-General WP Vs. Tahir Beg, (1965) 17 DLR (WP) 90.*

(11) Criminal breach of trust can be inferred from circumstances. Retention of money for sufficiently long period may itself raise an inference of a temporary misappropriation. Dishonest intention is manifest form the act of the appellant giving an unnumbered receipt to the complainant. If money due to a particular person is not paid the law allows only a civil suit and not criminal proceeding, for in the case of mere retention without any misappropriation, there is only a civil liability . Mere retention of money entrusted to a person without any prior misappropriation, even though he was directed by the person to pay it to so and so or to deal with the money in a particular way, is not a criminal breach of trust, and unless there is some actual user by him which is in violation of law or contract, there is no criminal breach of trust, and even if there is such user there must be a dishonest intention. *Abdul Barek Vs. State, (1962) 14 DLR 292.*

(12) Charge for defalcation of money and falsification of accounts—Misjoinder. When the accused was charged under section 409, in a lump for an aggregate sum defalcated by him consisting of 13 different items of value received for 13 demand drafts and also charged under section 477A under one head for falsification of accounts by omitting to enter these receipts in the account books of the Bank. Held: There was a misjoinder of charges vitiating the trial. *Sailendra Parasad Vs. Crown (1950) 2 DLR 349.*

(13) Offence under section 409—Amounts alleged to be misappropriated, forming basis of conviction, must be specifically put to accused for being explained under sec. 342, Cr. P. C.—Omnibus question on total amount misappropriated not enough. *1956 PLD (Kar) 310.*

(14) Charge under section 466 and 477A sustainable even if accused be found not guilty of criminal breach of trust. *Addl. Advocate-General W. P. Vs. Tahir Beg, (1965) 17 DLR (WP) 90.*

(15) The accused (a Superintendent of certain Government department) admitted by his endorsement in the Cash Book of the department receipt of a certain sum of money at the time of his assumption of the charge—A few days later, on a count, the actual balance found was much less than the amount shown in the cash book—Evidence establishes that there was a practice from long before the accused's assumption of office whereby the officers and employees of department used to take advances from the cashier on deposit of chest & cheques and the advances were subsequently recouped—The amount short was covered by such advances—No element of dishonest intention is disclosed—Entitled to be acquitted of the charge. *Sirajul Islam Vs. State, (1973) 25 DLR (SC) 73.*

(16) Charge of misappropriation—Accused offering an explanation which if reasonable exonerates him of the charge. Where the entrustment of certain goods with the accused has been proved and the shortage in the quantum of such goods has not been denied by the accused, if he fails to give any satisfactory account for the shortage, the presumption will be that the accused has dishonestly converted, used or disposed of that property. But if the explanation is reasonable and if there is no circumstances or evidence of dishonest conversion or disposal, the accused cannot be held liable for misappropriation. *Abu Saleh Chowdhury Vs. State, (1970) 22 DLR 339.*

(17) Relief goods distributed without complying with the standing rules—Distributor liable for disobeying the rules and not for criminal breach of trust. *Abu Saleh Chowdhury Vs. State (1970) 22 DLR 339.*

(18) Conviction under two separate statutes—In the present case under section 409 P. Code and section 5(2) of Act II of 1947 lawful; but imposing separate and independent punishment for each conviction, that is, double punishment, is prohibited. The accused has been found guilty under section 409, P. C. read with section 5(2) of the Act II of 1947 and has been sentenced under section 409, P. C. The position is that the accused has been found guilty under both the provisions of law , i.e., under section 409, P. C. as well as under section 5(2) of the Act II of 1947.The learned Special Judge did not pass any separate sentence under section 5(2) of the Act II of 1947 but passed the sentence only under section 409, P. C. It was argued that the accused could not be convicted under two different laws mentioned above. There is no force in this contention. Section 26 of the General Clauses Act prohibits punishment under two different encatments; but it does not prohibit trial or conviction under those enactments. Furthermore, section 5(4) of Act II of 1947 says that the provisions of section 5 are in addition to and in derogation of any other law for the time being in force and nothing contained in that section shall exempt any public servant from any proceeding which could be instituted against him. There is similar provision in section 71 of the P. Code which prohibits punishing an offender for more than once for the same act which is punishable under one or more definitions. Thus the law and principle contained in section 26 of the General Clauses Act, section 5(4) of the Act II of 1947 and section 71 of the P. Code, is the same, i.e., double punishment is prohibited but trial and conviction for different offences are not at all prohibited. *Muhammad Sadiq Javeed Vs. State, (1969) 21 DLR (WP) 62.*

(19) In a charge for criminal breach of trust the prosecution must prove that the amount against the receipt issued by the accused was actually paid to him and the accused misappropriated the amount and

that in the absence of such proof the conviction is bad in law. *Afsar Ali Vs. The State, (1973) 25 DLR 131.*

(20) 3 ingredients to be proved in order to convict—Held: Second and third ingredients not proved. *Shamsul Huq Chowdhury Vs. State, (1987) 39 DLR 393.*

(21) A person receiving property in a fiduciary capacity must deal with the property according to the terms of the agreement or trust. *Haji Md. Mohsin Vs. State, (1988) 40 DLR 431.*

(22) Two distinct parts in an offence of criminal breach of trust—One is creation of an obligation in relation to the property over which there is dominion and the other is misappropriation or dishonestly dealing with the property by the accused. *Haji Md. Mohsin Vs . State (1988) 40 DLR 431.*

(23) Cognizance of the offence u/s. 409 P. C. taken by the Sessions Judge as the Senior Special Judge is a mere irregularity in registering the case as a special case. *Haji Md. Mohsin Vs. State, (1988) 40 DLR 431.*

(24) A person receiving property in a fiduciary capacity must deal with the property according to the terms of the agreement or trust. *Haji Md. Mohsin Vs. State, 40 DLR 431.*

(25) Two distinct parts in an offence of criminal breach of trust—one is creation of an obligation on relation to the property over which there is dominion and the other is misappropriation or dishonestly dealing with property by the accused. *Haji Md. Mohsin Vs. State, 40 DLR 431.*

(26-27) In order to prove the offence of Criminal Breach of Trust there must be the allegation of entrustment of property and misappropriation thereof. In the absence of either of the two ingredients the offence is not complete. *Mir Amir Ali Vs. State, 45 DLR 250.*

(28) Allegation was that the appellant dishonestly misappropriated 10 bags of powder milk, which was meant for distribution among the poor students—Defence version was that he did not submit any application seeking allotment of relief powder milk nor did he take delivery of them—Question arose as to whether the legality of the conviction on the ground of contradictory and insufficient evidence which necessarily calls for the scrutiny of the evidence is maintainable. Held—"We have given our anxious consideration to the facts of the case and discrepancy in evidence as to 8 bags or 10 bags and our conclusion is this conviction cannot be sustained. *Moslemuddin Talukder Vs. State, 42 DLR (AD) 103.*

(29) There is no merit in the submission that the prosecution has to prove its case of misappropriation of entire shortage. The accused is bound to account for every pie entrusted to him. *AMA Wajedul Islam Vs. State 45 DLR 243.*

(30) Appellant deposited the amount for which he was charged for misappropriation—Co-accused having been already released on bail—The bail of the appellant should not have been refused—Appeal allowed and appellant allowed to remain on ad-interim bail granted by the Appeal Division. *Md. Serajul Hoque Vs. State 42 DLR (AD) 52.*

(31) Sentence of imprisonment till rising of the Court—whether it is an imprisonment—An import question arose to be answered in this case. It is whether a sentence of imprisonment till rising of the Court can be said to be a sentence of imprisonment within the meaning of section 409 of the Penal Code as well as under section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947). Detention till rising of the Court is imprisonment. In the light of the aforesaid dictionary meaning and judicial pronouncements I have no hesitation to hold that the detention of the accused-appellant till the rising of the Court is imprisonment within the meaning of section 409 of the Penal Code and section

5(2) of the Prevention Corruption Act, 1947 (Act II of 1947) as his liberty freely to go about his business as at other times was restrained by order of the Court as he was confined in the Court precincts. *Jalaludin Ahmed Chowdhury Vs. State, 41 DLR 87.*

(32) The accused having withdrawn money of the account holder PW2 upon a previous understanding between them, the trial Court misdirected itself in assessing evidence in the case in its true perspective and thereby wrongly convicted him. *AKM Mohiuddin Vs. State, 50 DLR 447.*

(33) The matter should be sent back to the Magistrate for hearing specifically on the point whether the investigation can be proceeded and police report can be submitted under section 509 Penal Code without the permission of the Magistrate. *Abul Hossain (Md.) and others Vs. State (Criminal) 53 DLR 402.*

(34) Criminal Breach of Trust—Misappropriation—Entrustment—Re-examination of evidence—Appellant having failed to account for the goods in question entrustee to him (which fact was proved on evidence) and in consequence the Offence of Criminal Breach of Trust is complete. It is no part of the prosecution to prove how appellant misappropriated wheat—On re-examination and consideration of evidence, no doubt was found in truth of prosecution case. No ground, therefore, to interfere with conviction and sentence of the appellant. *Abul Hossain Molla Vs. The State, 1 BSCD 246.*

(35) Offences mentioned in S. 3 of Act II of 1947 do not include one punishable u/s. 409 Penal Code—Sec. 5(2) of Act II of 1947 provides for punishment of a public servant who commits the offence of criminal misconduct mentioned is Sec. 5(1) (a) to (d)—An act of dishonestly or fraudulently mis-appropriating any property entrusted to a public servant constitutes an offence of criminal misconduct u/s. 5 (1) (c).—Petitioner was tried not merely for an offence u/s. 5 of Act II of 1947 but for an offence u/s. 409 of the Penal Code—Sub-Sec. (5-A) of Sec. 5 of Act II of 1947 has no bearing on the point of investigation of offence u/s. 409 of the Penal Code and the competency of the police officer who investigated the case cannot be challenged. *Jamdhar Khan Vs. The State, 27 DLR (AD) 35.*

(36) Accused acquitted in respect of charge under former offence but convicted for the latter offence—Conviction and sentence, whether valid—Question as to misjoinder of charges and statement of accused u/s. 342 of Cr. P. C. not referred to in the judgment—validity of the decision. Held: (i) The finding of fact that the petitioner by abusing his official position obtained pecuniary advantage for the contractor, the conviction u/s. 5(2) of Prevention of Corruption Act 1947, was valid even though the petitioner had been acquitted of the charges u/s. 403 of the Penal Code, and S. 5(2) permits the Court to impose the sentence of fine even when he had obtained pecuniary advantages not for himself but for another. (ii) The test of determining whether several offences were connected together so as to form one transaction depended upon whether they were so related to one another in point of purpose or as cause and effect as to constitute one continuous action. In the instant case, it is proved that all the four advantages were given for the same work and the various acts were done with one end in view, *i.e.*, to obtain pecuniary advantage for the contractor. The series of acts were connected by proximity of time, unity of purpose and continuity of action and formed part of the same transaction within the meaning of S. 235, Cr. P. C. (iii) The petitioner's trial with 2 other public servants and a contractor is legal and valid. Since the petitioner was examined u/s 342 Cr. P. C., absence of reference of that point in Judgments do not make the decisions invalid. *K. M. Zaker Hossain Vs. The State, 1 BSCR 71=29 DLR (SC) 250.*

(37) Dishonest misappropriation or criminal breach of trust is an offence which is committed by a person who not only himself misappropriates the property or converts it to his own use, but is also committed by a person, who being entrusted with the property, dishonestly disposes of it in violation

of any direction of law or of any contract express or implied made touching the discharge of such trust or "if he wilfully suffers any person as to do." Government allotted paddy of 242 maunds to the petitioners—Chairman for re-excavadtion of Kashi Khali Khal. For implementation of the scheme a Committee known a Kashi Khali Khal Project Committee was formed with the petitioner—Chairman as its president. The petitioner took delivery of the paddy but he along with three other persons including the Secretary of the Committee, instead of doing paddy and thereby misappropriated the sale-proceeds and thereafter the petitioner and these members fabricated a false Muster-roll by forging the left thumb impressions of some labourers showing that the latter received the paddy as their wages for doing the excavation. On these allegations the petitioner along with four others was brought for trial before the Special Judge under the Criminal Law Amendment Act. Different pleas were taken by the accused-persons but the trial court found the petitioner and three other accused guilty of Criminal misappropriation as well as forgery and convicted them under these sections and sentenced them each to rigorous imprisonment for one year and fine of Tk. 5000/- in default to rigorous imprisonment for three months more by judgment and order dated 30 April 1982. The Project Implementation Officer, Co-accused M was convicted and awarded the same sentence for abetting the commission of these offences. On appeal as mentioned above conviction and sentence of the accused persons excepting M were maintained; conviction of M was set aside Chairman challenged the order of his conviction and sentence confirmed by the High Court Division—It was urged Mr. Malek does not dispute the entrustment of the paddy, non implementation of the project, sale of the paddy and fabrication that after receiving the allotment from Government the petitioners made it over to the Secretary of the Project Committee, Co-accused A against a receipt, Ext. A, and thereby he absolved himself from further responsibility in the matter. As to the preparation of the Muster-roll which contains signature of the petitioner as President of the Implementation Committee, it was contended that the petitioner simply counter-signed the Muster-roll as a matter of course without knowing it to be a forged document. Observed: These explanations are devoid of any substance. When the petitioner took delivery of the paddy from the Government and when he himself was the President of the Implementation Committee his responsibility did not cause by handing over the paddy to the Secretary, for it was his duty to see that the khal was re-excavated and the paddy was distributed to the labours who actually did the work. There is no evidence that after handing over the paddy to the Secretary the petitioner enquired as to what happened with the paddy and whether the khal was re-excavated. Held: Dishonest misappropriation or criminal breach of trust is an offence which is committed by a person who not only himself misappropriates the property or converts it to his own use, but is also committed by a person, who being entrusted with the property, dishonestly disposes of it in violation of any direction of law or of any contract express or implied made touching the discharge of such trust or "if he wilfully suffers any person so to do." *Md. Fazlur Rashid Vs. The State, 6 BSCD 35.*

(38) Bail matter—Confirmation of bail—Appellant deposited the amount for which he was charged for misappropriation—Co-accused having already been released on bail, the appellant's bail should not have been refused—Ad interim bail granted. *Serijul Hoque Vs. The State 42 DLR (AD) 52=BCR 1990 AD 154.*

(39-40) Allegation of mis-appropriation of 10 bags of powder milk meant for distribution amongst poor students—Defence version was that he did not make any application seeking allotment of relief powder milk nor did take delivery of them—Legality of the conviction on the ground of contradictory and insufficient evidence—In view of discrepancy in evidence as to 8 bags or 10 bags the conviction cannot be sustained. *Moslemuddin Talukder Vs. The State, 42 DLR (AD) 103.*

(41) Criminal Breach of Trust—As per agreement the appellant was bound to take the wheat to his own area—Non disclosure about his retention of the unspent quantity of wheat before a case was started against him and he was served with a notice in connection therewith—A public servant who is entrusted with any property can use the same only for the purpose and/or in the manner he is required to do under any agreement, instruction, order or law. He cannot part with the property even temporarily or covert it for any other purpose beyond the terms governing such entrustment. If he cannot produce the property on demand without any satisfactory explanation it will be presumed that he has committed a criminal breach of trust, no matter he thereafter makes good the loss by returning the same in cash or in kind. *Md. Nurul Haque Howlader Vs. The State, 11 BLD (AD) 260.*

(42) Criminal breach of trust by a public servant—For an offence under Section 409 of the Penal Code it is obligatory on the part of the Court to award a sentence of imprisonment with or without fine—A sentence of fine only is not legal. *Tamizuddin Sarker Vs. The State, 1 BLD (HCD) 302.*

(43) Criminal breach of trust by public servant—Mere irregularity in purchasing articles will not attract the provision of Section 409 of the Penal Code—To bring home the charge the prosecution must prove not only the entrustment of or dominion over the property but must also prove that the accused either dishonestly misappropriated the property or converted, used or disposed of that property himself or that he wilfully suffered some other person to do so. *Alauddin and others Vs. The State 4 BLD (HCD) 75.*

(44) Detention till the rising of the Court—Whether imprisonment extends to confinement not only in a jail but also in a house and some other place so long as the accused does not have the liberty to move out freely—The detention of the accused in the Court premises till the rising of the Court is imprisonment within the meaning of the term 'imprisonment'. *Jalaluddin Ahmed Chowdhury Vs. The State 9 BLD (HCD) 141.*

(45) Criminal breach of trust on a charge of misappropriation relying on the uncorroborated testimony of PWl—No measurement book, no papaer of delivery of paddy, no Master Roll was produced—Investigation Officer was not also examined—The trial Court gave a moral conviction which is not permissible in law. *Abdul Jabbar Dewan Vs. The State 12 BLD (HCD) 38.*

(46) Awarding sentence of fine along with sentence of imprisonment for life, whether can be said to be illegal. Awarding sentence of fine along with imprisonment for life cannot be said to be illegal in view of the said provision of section 409 of the Penal Code. *A. M. A. Wazedul Islam Vs. The State 13 BLD (HCD) 296.*

(47) The word "banker" used in section 409 of the Penal Code, whether has been used in the technical sense of the Banking Companies Act. Held: The word "Banker" occurring in section 409 of the Penal Code has not been used in the technical sense of the Banking Companies Act but it signifies any person who discharges any of the functions of the customary business of banking. The word also includes a firm or company that carries on such business. *Mustafizur Rahman Vs. The State and others, 13 BLD (HCD) 287.*

(48) Mere delay in payment of money entrusted to a person, whether amounts to misappropriation. Mere delay in payment of money entrusted to a person, when there was no particular obligation to pay at a certain date, does not amount to misappropriation. *A. H. M. Siddique Vs. The State, 13 BLD (HCD) 85.*

(49) In S. 409 of the Penal Code there is no provision for confiscation of property. Yet the Appellate Division refused to consider the prayer of the petitioner at this stage as this point was

not specially raised before the High Court Division. *Bibhuti Bushan Talukder Vs. The State, 17 BLD (AD) 168.*

(50) Mere retention of money by the accused for some time without actual use for which it was meant or mere delay in disbursement of money due from him, if properly explained, does not constitute an offence u/s. 409 of the Penal Code. *A. K. M. Hafizuddin Vs. The State, 15 BLD (HCD) 234.*

(51) The ingredients of section 409 of the Code are misappropriation and criminal breach of trust in respect of property over which he had dominion as public servant. The appellant had no criminal intention to commit such criminal breach of trust in respect of the property which was held within dominion, rather it shows his bonafide intention to help one of the customers of the Bank in tiding over his financial difficulties and as such the appellant is entitled to acquittal as of right. *A. K. M. Mohiuddin Vs. The State, 20 BLD (HCD) 172.*

(52) In order to constitute offence punishable under section 409 there must be the ingredient of criminal intention to misarrpopriate the money. *A. K. M. Mohiudin Vs. The State—4 MLR (1999) (HC) 105.*

(53) Misappropriation—Necessary evidence when not produced—When the Investigation Officer fails to seize the entire stock and Distribution Registers and none of the prosecution witnesses stated anything about the misappropriation of the insecticides the accused appellant cannot be held guilty of the offence under section 409 of the Penal Code and the conviction and sentence passed by the trial court is liable to be set aside. *Kalipada Pal Vs. The State—4, MLR (1999) (HC) 185.*

(54) In order to constitute offence punishable under section 409 there must be the ingredient of criminal intention to misappropriate the money. *A. K. M. Mohiuddin Vs. The State—4. MLR (1999) (HC) 105.*

(55) Charge of Misappropriation—Criminal misconduct by public servant—Charge of misappropriation under section 409 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 has to be established with consistent and cogent evidence in order to secure conviction of accused public servant. In the case of misappropriation in relation to earth work the measurement book is the relevant evidence to establish the charge. When the measurement book is not produced and the evidence so brought on record are discrepant, no conviction in such a case is held to be sustainable. *7 MLR (HC) 458.*

(56) It is settled that once entrustment is proved then it becomes the duty of the accused to account for the money entrusted to him. *Abdur Rahman Vs. State (Criminal) 1 BLC 215.*

(57) Duties of Bank officials regarding payment of cheque—As per Service Rules of Agrani Bank the duty of a cashier, on receipt of a cheque, is to see whether it is duly posted with marking by the ledger keeper and cancelled with the initial of the cancellation officer and in case of a big amount whether it was cancelled with the initials of two officers including the Manager. In the instant case without following such Rules the absconding officer-in-charge of cash and the second officer who had responsibility of supervision of ledger posting and payment of cash and the cashier by corrupt practice and by abusing their position as public servants obtained illegal payment of Taka 4 core for the drawer of the cheque through an unauthorised and concealed overdraft and they were rightly convicted under sections 409/109 of the Penal Code read with section 5(2) of Prevention of Corruption Act. *Fazlul Karim (Md) Vs. State (Criminal) 1 BLC 300.*

(58) The appellant Bibhuti Bhusan Talukder abetted the officials of the Bank in committing a criminal breach of trust of 4 crore takas by presenting a cheque and the signature on it is tallied with the admitted signature of him and the cheque was in his custody which conclusively proves that he had

presented the cheque for taking away a huge amount of money in collusion with some officials of the Bank and he was rightly convicted under sections 409/109 of the Penal Code. *Fazlul Karim (Md) Vs. State (Criminal) 1 BLC 300.*

(59) It was the duty of the Manager, Agrani Bank, Khatunganj, Chittagong to keep the safe cash limit amounting to Tk. 20 lac but he used to keep excess cash upto 1 crore or 2 crore in violation of the circular of the Bank but in the absence of mens rea or criminal intent the manager cannot be held guilty of the offence under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act but it is open to the Bank to prove the acts of commission or omission, if any, committed by the Manager. *Fazlul Karim (Md) Vs. State (Criminal) 1 BLC 300.*

(60) Both the trial court as well as the High Court Division believed the evidence of PWs 4-5 that despite repeated reminders and despite the resolution taken by the Upazila Parishad, the petitioner did not submit the completion report of the project even during the trial and as such the case of the petitioner has been ended on appreciation of evidence for which it merits no consideration. *G M Nawsher Ali Vs. State (Criminal) 2 BLC (AD) 183.*

(61) Considering the facts and circumstances of the case the Appellate Division is inclined to take a sympathetic view in the matter of the sentence. The conviction of the appellant under sections 409/109 of the Penal Code is maintained but the sentence of RI for two years is reduced to the period already undergone. In lieu of the said reduced sentence, the sentence of fine is enhanced to Taka 10,000.00, in default, the appellant shall suffer RI for six months. *Jalaluddin Ahmed alias Jalaluddin Ahmed Vs. State (Criminal) 3 BLC 216.*

(62) Although on the bainapatra in question a title suit is pending but cognizance of the offence was taken not only under section 467 of the Penal Code but also under sections 409 and 420 of the Penal Code and under section 5(2) of Act II of 1947 and as such the criminal case is not barred under section 195(1)(c), CrPC. *Sadat Ali Talukder (Md) @ Sadat Ali Vs. State & another (Criminal) 4 BLC (AD) 228.*

(63) Sentence—It is a case of temporary defalcation which is a serious offence. The ends of justice will be met in the facts and circumstances of the case if the sentence of fine of each of the appellants is maintained and the substantive sentence is reduced to the period already undergone as prayed for. *Sekander Ali Howlader and others Vs. State (Criminal) 4 BLC (AD) 116.*

(64) The petitioner supplied the required quantity of rice to the Food Department when from the side of State neither filed any counter-affidavit nor disputed any of the official papers and as such the Court under section 561A, Code of Criminal Procedure could examine the admitted documents of the accused. On a plain reading of the first information report and charge sheet it would appear that the facts stated therein clearly and manifestly fail to prove the alleged charge against the petitioner is an abuse of the process of Court and interference is required under its inherent jurisdiction to secure the ends of justice and hence the proceeding is quashed. *Shokrana (Md) Vs. State (Criminal) 5 BLC 611.*

(65) In all 130.661 metric tons of wheat were allotted in four installments for construction and re-construction of a road and the project implementation officer, PW 8, was in charge of supervision of the said project but he failed to state as to when he visited the project in question nor has he come in Court with any measurement book showing pre-measurement and post-measurement of the said project and hence the prosecution has hopelessly failed to prove about the alleged work done by the accused persons and the alleged misappropriation of the wheat in question is also not proved and as such there is no scope to hold that the appellants are guilty for the alleged offence. *Abdul Motaleb Mia Vs. State (Criminal) 6 BLC 5.*

(66) Section 409 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 are attracted when a criminal offence of breach of trust is committed by a public servant. Sections 409 and 420 of the Penal Code are included in the schedule and offences punishable under the Prevention of Corruption Act, 1947 but such offences must be committed by a public servant but under paragraph 3 of the Schedule, any person acting jointly with the public servant or abetting the public servant may also be tried by a Special Judge but in the instant case the petitioner is the only accused as such, the question of trying him by a Special Judge with a public servant does not arise and hence taking the cognizance of the offence and framing of charge against the Petitioner under sections 409, 420 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 is without jurisdiction. *Ganesh Chandra Halder Vs. Manindra Nath Baien and others (Criminal) 6 BLC 207.*

(67) None of the prosecution witnesses has deposed that the appellant by manipulating and interpolating the certificate by inserting figure 3 before 23 misappropriated 323 maunds of jute seeds from the godown. None from the department concerned came before the trial Court to depose that actual misappropriation was done by the appellant himself. Thus, the prosecution has failed to prove its case. *Mozibur Rahman (Md) Vs. State (Criminal) 6 BLC (AD) 127.*

(68) The petitioner is a member of the Union Padrishad and was a Chairman of the Project Committee consisting of other members who have not been implicated in the cases and alleged completion to have submitted muster roll after completion of work and it is in evidence that he did some work. Ends of justice would be best served if the sentence is reduced to the period of sentence already served out and fine of Taka 10,000 in default to suffer rigorous imprisonment for one month only. *Moselemuddin (Md) Vs. State (Criminal) , 6 BLC (AD) 138.*

(69) Sentence—Considering the fact the convict-appellant has already undergone 6 (six) months of imprisonment the Appellate Division has remitted his substantial sentence of rigorous imprisonment for 4 (four) years but maintained fine of Taka 60,000.00 in default, to suffer rigorous imprisonment for one year more. *Mohibul Islam Vs. State (Criminal) 6 BLC (AD) 44.*

(70) The petitioner by showing false documents induced the purchaser to enter into an agreement to purchase the house on receipt of Taka 12 lacs on a plea that he would refund Taka 14 lacs in the event of failure to execute sale document. The contention of the petitioner to the effect that it was a civil dispute and that the Court of Settlement had given a final decision over all the disputes including the question of criminal liability is not sustainable. The criminal proceeding cannot be held to de liable to be quashed. *43 DLR 95.*

(71) The accused having withdrawn money of the account holder PW 2 upon a previous understanding between them. The trial Court misdirected itself in assessing evidence in the case in its true perspective and thereby wrongly convicted him. *50 DLR 447.*

(72) Meaning of entrustment—Entrustment connotes that the accused held the property in fiduciary capacity—CI Sheets of Tahsil Officer which were blown off by storm were collected and kept in the Tahshil office—Whether the Tahshilder incharge was entrusted with CI sheets. The learned Judge appears to have misconceived the legal concept of the word "entrustment" occurring in the section 405 Penal Code. It is the blown-off CI sheets which are the subject matter of entrustment and not the Tahshil Office as a whole. Further there is no evidence that appellant Abu Baker was entrusted with task of preserving property of Tahshil Office. Therefore, his finding that the property i.e. the blown off CI sheets were entrusted with the appellant is entirely based on erroneous view. *40 DLR 483.*

(73) Trial held on perusal of order of sanction—Objection, if any, as to sanction, must be taken at the time of the trial—Appeal dismissed. *10 BCR 456 AD.*

(74) To establish charge of criminal breach of trust distinct proof of criminal misappropriation is necessary. Entrustment or dominion over the property implies handing over the property—but evidence disproved handing over. The learned Judge relied much on moral conviction than legal testimony. Criminal Trial—Prosecution has to establish by definite and clear evidence that case for defence is untrue . Basic ingredients of offence of criminal breach of trust have not been proved. In absence of proof of basic ingredients of offence of criminal breach of trust, conviction and sentence cannot be sustained. *39 DLR 414.*

(75) The transaction between the parties is of civil nature and the liability arising therefrom is a civil liability which can be discharged by accepting the payment of the price of 2221 manunds 10 seers of paddy sank in river—Appellant be allowed to deposit the amount—The price of the paddy sunk in river. *8 BCR 180 AD.*

(76) The accused—Appellant wanted to prove his defence with the help of the receipts granted by prosecution witness who was not examined and whose non-examination was not explained. The rejection of defence prayer to examine the said witness who granted receipts to the accused resulted in failure of justice. *2 BCR 329.*

(77) A law changing the character of an accused person from an ordinary citizen to that of public servant and providing variation of punishment to such accused person to his prejudice cannot be said to be a procedural law. Amending enactments were not given retrospective operation and hence on the date when the offences were alleged to have been committed by accused petitioners they are not public servants and as such the learned Special Judge had no jurisdiction to try them under Pakistan Criminal Law (Amendment) Act, 1958. *33 DLR 83.*

(78) Evidence establishes that there was a practice from long before the accused's assumption of office whereby the officers and employees of the department used to the advances from the cashier on deposit of chits and cheques and the advances were subsequently recouped. The amount found short was covered by such advances. No element of dishonest intention is disclosed. The accused is entitled to be acquitted of the charge *(Ref: 14 DLR 292): 25 DLR 73 SC.*

(79) Acquitted in the Ist trial on a charge u/s. 409 Penal Code on the finding that signatures in question who made in good faith. Second trial started u/s. 477A Penal Code for falsification of accounts is not maintainable as same question was in issue as in the second trial. *14 DLR 550.*

(80) Offence of criminal breach of trust by public servant is exclusively triable by the Special Judge with sanction by appropriate Government. *14 DLR 18 SC.*

(81) Non-submission or delay in submission of the completion report along with accounts cannot by itself be an incriminating circumstance. *4 BCR 458 SC.*

(82) Shortage of cash in post office—Prosecution case resting on statement of witnesses one of whom declared hostile who are not proving shortage of cash in safe of Post Office beyond reasonable doubt—Inventory of safe also not found correct—Prosecution, Held, failed to establish charge against accused. *1983 PCrLJ 1610.*

(83) In the case of a public servant the property must have been entrusted to him in his capacity as a public servant. In the case of others i.e. bankers, merchants factors, brokers, attorneys and agents, the entrustment must have been made in the way of their respective business. *(1980) 82 PunLR 435.*

(84) The essential ingredients to be established in a charge against a public servant of an offence under this section are:

(i) that the accused was a public servant;

(ii) that he was entrusted, in such capacity, with property;

(iii) that he committed breach of trust as defined in S. 405. *1977 PunLJ (Cri) 208.*

(85) The word 'Trust' is a comprehensive expression which was has been used is S. 409 on covering not only relationship of trustee and beneficiary but also that of bailor and bailee, master and servant, pledger and pledgee, guardian and ward, and all other relationship which postulates fiduciary relationship between the complainant and the accused, without existence of such relationship there cannot be an offence under S. 409. *1984 CriLJ 76.*

2. Criminal breach of trust, theft, cheating and criminal misappropriation—Distinction.—(1) In theft the original taking is without honesty and without the consent of the owner and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest, but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner. *AIR 1928 Nag 113.*

3. Civil and criminal liability—Distinction.—(1) As a matter of civil liability, persons entrusted with property, might properly be held liable for the value of property which had disappeared, owing to caselessness or negligence or mlparactice of any kind on the part of the party. But criminal liability under S. 409 of the Penal Code is a totally different matter. Not only must there be an initial entrustment of the goods, but there should be a subsequent dishonest conversion to the use of the concerned accused. That alone constitutes criminal breach of trust. *(1971) 1 MadLJ 240.*

4. "Being entrusted with property."—(1) One of the essential elements of the offence of breach of trust is that the accused must have been entrustment with property. *1978 CriLJ 1379.*

(2) A chose in action which is "property" within the meaning of this section. *AIR 1980 SC 439.*

(3) In the absence of entrustment of property this section also will not apply. The question whether A entrusted property to B is one which depends upon the actual facts and circumstances of the case and not merely upon the legal terms employed by the parties. *AIR 1938 Sind 57.*

(4) Offence of criminal breach of trust—Proof of entrustment of money is condition precedent. *AIR 1983 SC 631.*

(5) Money handed over to money-order issue clerk in a post office is money entrusted to him. *AIR 1957 Orissa 268.*

(6) Where under an agreement entered into by the accused with Government the accused is under a duty to sell to persons grain stored in Government building and pay the sale proceeds to the Government, the accused is entrusted with the property. *AIR 1956 Hyd 180.*

(7) "Entrustment" implies that the persons handing over the property to another continues to be the owner and has placed confidence in the other so as to create a fiduciary relationship between them. *AIR 1968 SC 700.*

(8) Where the ownership has passed to a person he cannot be said to be entrusted with the property. *AIR 1967 Cal 568.*

(9) The section does not provide that the entrustment of the property should be by someone or the amount received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted

with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. *AIR 1972 SC 1490.*

(10) Where goods are entrusted to A for sale and A sells them, the sale proceeds also must be regarded as property entrusted to him. *AIR 1932 Sind 169.*

(11) Public servant entrusted with Government money—Misappropriation for personal use —Refund of amount when act of defalcation discovered does not absolve him of offence. *AIR 1983 SC 174.*

(12) Amount alleged to be misappropriated was drawn in the name of a chowkidar who had given receipt for the same. Chowkidar nowhere stating that the amount was not received by him or that he was forced to sign the receipt. Held accused cannot be convicted under Section 409. *AIR 1979 SC 1080.*

(13) Securities delivered with a view to cover the repayment of any overdraft by the pledger Bank to the pledgee Bank—On delivery of the securities pledgee Bank becomes trustee in terms of the contract, not for all purposes, but only for the limited purpose indicated by the agreement between the parties. *AIR 1956 SC 575.*

(14) Accused under contractual obligation to return amount if not spent—Accused spending amount for specific purpose—Held, accused committed no offence. *AIR 1966 Orissa 106.*

5. Enstrustment and loan.—(1) A transaction of loan is not an entrustment as the ownership in the money borrowed passes to the debtor. *AIR 1954 All 583.*

(2) Denial by debtor of having received loan is, therefore, not breach of trust. *AIR 1954 All 583.*

6. "With property."—(1) The offence of criminal breach of trust involves entrustment of property or of dominion over property and dishonest misappropriation, conversion, etc. It is not possible to find these elements unless one can form a conception as to what the property is. Therefore, there must be a definite finding of a definite property or sum of money traced to the accused in order to form the basis of a conviction. *AIR 1925 Cal 260.*

7. Property entrusted may belong to anybody.—(1) provided there is entrustment it matters little whether the person entrusting the property is the owner or not. *AIR 1960 Bom 53.*

8. "In any manner."—(1) It is not necessary that the entrustment should be one that is attended by all legal formalities required for the creation of a trust. *AIR 1956 SC 575.*

(2) Where a police officer made a search for currency notes and the complainant handed over the same to the officer who after counting them returned the same to the complainant when it was found short of certain amount, it was held that the police officer was guilty under this section. *AIR 1961 SC 751.*

9. "In his capacity of a public servant."—(1) The entrustment to a public servant must in order that the section may apply have been made to him in his capacity as public servant. *AIR 1979 SC 1841.*

(2) An entrustment made to a public servant in his private capacity is not within this section. *AIR 1974 SC 794.*

(3) The following persons have been held to be public servants for the purposes of this section:—

(a) Naib Nazir. *(1870) 2 NWP (HCR) 298.*

(b) The officiating Kulkarni of a village. *AIR 1939 Bom 63.*

(c) A Mouzadar in Assam. *(1933) 40 Cal WN 1154.*

(d) A Qurq Amin. *1960 AllLJ 357.*

(4) Sanitary Inspector of Municipality is a public servant. *AIR 1923 All 480.*

10. "In the way of his business as banker, etc."—(1) In the case of a charge under this section against persons referred to in the section other than a public servant it must be alleged that entrustment was made to the accused "in the way of his business" as banker, etc. *1968 All WR (HC) 117.*

(2) The words "in the way of his business" mean that the property is entrusted to him in the ordinary course of his duty. *AIR 1962 SC 1821.*

(3) In the case of an agent the requirements of the section would be satisfied if the person be an agent of another and that other person entrusts him with property or with dominion over property in the course of his duties as such agent. But an entrustment for a purpose unconnected with the agency will come within this section. *1962 SC 1821.*

11. "Dominion over property."—(1) A, a public servant, was responsible for the proper spending of a certain sum of money. But he had no dominion over the money other than passing orders for payment thereof. He could not produce vouchers for the expenditure owing to the death of the person who actually spent the money. The owner of the money himself was satisfied with the payments made and exonerated A from every liability, civil or criminal. It was held that there was no case for criminal prosecution against A. *AIR 1933 Oudh 387.*

(2) In a case where the right and title to the property in respect of which an offence under this section is alleged to be committed must be established by a civil suit before the criminal liability can be fixed beyond reasonable doubt, the dispute is essentially of a civil nature and the question of liability for breach of trust cannot be adjudicated upon before the title to the property is established by a civil Court. *AIR 1974 SC 290.*

12. "Banker."—(1) In this section the word "banker" has not been used in the technical sense of the Banking Companies Act, but signifies any person who discharges any of the function of the customary business of banking and would include a firm. *AIR 1960 All 103.*

(2) The fact that large sums of a cooperative society were allowed to remain with a person because he was possessed of extensive properties cannot make him a banker of the society. *AIR 1956 Bom 524.*

(3) Large sums of money deposited in Bank—Overwhelming evidence against accused Manager that, but for fictitious entries, bank was not able to show repayments in question—Conviction held was justified. *AIR 1974 SC 1354.*

13. "Factor."—(1) An adatya with whom goods are left to be sold on instructions in the market is in the position of a factor to whom the property in the goods passes, and if he sells without permission, he would not be guilty under this section. *AIR 1943 Nag 168.*

14. "Broker."—(1) Where money is paid to the accused, a share broker, specifically for purchase of share and he neither delivers the shares nor returns the purchase money, he would be guilty under this section. *1957 CriLJ 265.*

15. "Attorney."—(1) Money entrusted to solicitor to invest on mortgage—Held solicitor was not entrusted with property under 24 and 25 Vict Ch. 96. *(1882) 8 QBD 706.*

16. "Agent."—(1) A factor is an agent, but he has got a lien for his commission on the property entrusted to him for sale. The factor does not lose such right by reason of his acting under special

instructions from his principal to sell the property at a particular price or to sell in the principal's name. *(1883) 25 Ch. D 31.*

(2) The Directors of a company are agents of the company. *AIR 1980 SC 439.*

(3) In some respects the Directors of a company are also trustees. *AIR 1962 SC 1821.*

(4) Where a bank advanced loans to certain members of a cooperative society to be realised by the society and repaid to the bank, the Secretary of the society who collected the amounts from the members for payment to the bank, was held to be the agent of the bank. *AIR 1969 Pat 173.*

(5) A commission agent who is not entrusted with property or any dominion over a property cannot be held guilty of breach of trust in respect of such property. *AIR 1962 Cal 197.*

17. "Commits criminal breach of trust."—(1) In order to attract this section the accused must be one of the classes of persons specified in the section and he must have committed breach of trust as defined in Section 405. A clerk in a Government record room making over a document forming part of the records in his custody, to a person who had not applied for it by application on a stamped paper is guilty under the section. *(1904) 1 CriLJ 894.*

(2) A Peshkar whose duty is to receive moneys and deposit the same in a bank and maintain accounts, making false entries and creating false receipts and misappropriating the amounts received are guilty under the section *AIR 1958 AndhPra 29.*

(3) A person in charge of Government dump removing the material under false permits is guilty under this section. *AIR 1950 Lah 199.*

(4) Loans advanced by bank to members of cooperative society—Loans realised by society to be repaid to bank—Secretary of Society failing to deposit realised amounts—Secretary liable under S. 409. *AIR 1969 Pat 173.*

(5) Mere retention of money entrusted is not a breach of trust. *AIR 1970 Pat 311.*

(6) The mere fact that accounts have been wrongly kept by the public servant is not an offence unless misappropriation is established. *AIR 1930 Oudh 324.*

(7) A misappropriation or conversion to one's own use being a necessary ingredient of the offences of breach of trust, there can be no conviction under this section in the absence of proof of such misappropriation or conversion. *AIR 1952 Ajmer 23.*

18. This section and section 34.—(1) Where A commits breach of trust under Section 409 of the Code in furtherance of the common intention of A, B and C, B and C also will be liable for the offence under Section 409 read with Section 34 of the Code. The presence of B and C when the offence was committed by A is not necessary. *AIR 1960 SC 889.*

(2) If there is any criminal conspiracy, the accused should be punished for that offence even though the charge in respect of the substantive offence of theft or criminal breach of trust may not be brought home to them. *AIR 1959 All 75.*

19. This section and Prevention of Corruption Act, 1947.—(1)The offence created under Section 5(1)(c) of the said Act is distinct and separate from the one under Section 409 of the Code. It does not repeal or abrogate Section 409. *AIR 1960 SC 397.*

(2) There can be a trial and conviction under Sec. 409 of the Code even though the accused may have been acquitted in a trial for an offence under Section 5(2) of the Prevention of Corruption Act. *AIR 1957 SC 592.*

(3) It is open to the prosecution to proceed against the accused under either provision. *AIR 1955 Bom 451.*

(4) Whereas a sanction by the Government to prosecute the accused under Section 5(2) of the Prevention of Corruption Act is necessary, no such sanction is necessary for a prosecution under S. 409. *AIR 1967 SC 776.*

20. This section and section 477A.—(1) Section 477A deals with falsification of accounts by a clerk, officer or servant. It is an offence distinct from misappropriation or criminal breach of trust by a clerk, officer or servant which is punishable under S. 408 or S. 409. An accused may be guilty of offences under both S. 409 and S. 477A. *AIR 1927 Mad 626.*

(2) A single charge under S. 408 or 409 and also under S. 477A is illegal unless both the offences form part of the same transaction in which case S. 235, Criminal P.C. will apply to the case. *AIR 1956 SC 149.*

(3) No sanction is necessary for a prosecution under Section 409 but it is necessary for a prosecution under S. 477A. *AIR 1939 FC 43.*

21. This section and S. 27, Cattle-trespass Act.—(1) Where a cattle-pound keeper levied from the complainant Rs. 5 for five buffaloes in the pound but entered only Rs. 4 in the account and on learning of the complaint altered the entry and remitted the full amount, it was held that the accused was guilty under this section and S. 511 and not under S. 27 of the Cattle-trespass Act. *Rat Un CrC 632.*

22. This section and Ss. 104 and 105, Insurance Act.—(1) Sections 104 and 105 of the Insurance act are not identical with this section and therefore a prosecution under this section cannot be said to be instituted in order to by-pass the requirement of sanction under the Insurance Act. *AIR 1969 Delhi 330.*

23. This section and the offence of theft.—(1) Where the original taking of the property by the accused is lawful and there is subsequent misappropriation the case is one of breach of trust and not of theft. *AIR 1950 Lah 199.*

24. This section and S. 420.—(1) A lottery agent under agreement with the government purchased lottery tickets not as an agent but by way of outright purchase. The cheque that he gave was dishonoured. The case will not fall under S. 409 but would come under S. 420 P.C. *1981 BLJ 434.*

25. This section and S. 203 of the Companies Act (Bd).—(1) Section 203 of the Companies Act (Bangladesh) is only an enabling provision and does not deprive a police officer of his jurisdiction under Ss. 154, 156, and 157 of the Criminal P. C., to investigation into a complaint of an offence under Ss. 406 and 409 of the Code and initiate proceedings in the Court, even if he acts in respect of which the offences arise were committed in relation to the affairs of a company. *AIR 1957 Mad 65.*

26. This section and S. 52, Post Office Act, 1898.—(1) Where an accused was charged before a Magistrate with offences under S. 52, Post Office Act and under S. 409, Penal Code and the Magistrate instead of committing the accused to the Court of Session to stand his trial for the offence under S. 52 of the said Act, proceeded with the trial and acquitted him, a retrial for an offence under S. 409 would be barred (as the Magistrate and jurisdiction to try the accused for the offence), but a retrial for the offence u/s. 52 of the said Act would not be barred inasmuch as by virtue of S. 461 of the Criminal P. C. the trial by the Magistrate for that offence was void as being without jurisdiction. *AIR 1970 Goa 7.*

27. Abetment.—(1) Where the offence of criminal breach of trust was exhypothesi complete long before, and something was done subsequently to help the real offender to conceal the embezzlement, it

was held that the accused was not guilty of abetment of the offence, though he might be guilty of some other offence. *AIR 1928 Lah 382.*

(2) The accused was charged of criminal breach of trust. The charge was not proved but the evidence indicated the abetment of an offence under S. 409. It was held that the conviction under S. 409 should be set aside and that in view of the fact that a conviction for abetment would imply a definite finding that another who was not before the Court was guilty of the offence, it was not expedient to alter the conviction to one for abetment. *AIR 1954 SC 621.*

28. Charge.—(1) Where it is possible to prove that a specific sum received has been embezzled the charge should be confined to that particular item. Where this is not possible he may be charged on a general deficiency in his accounts. *(1895) ILR 18 All 116.*

(2) A charge specifying the gross sum embezzled within 12 months is not bad merely because details of the items, more than three, are given. *AIR 1957 MadhPra 225.*

(3) Two charges under Section 409 and two alternative charges under Section 420 in respect of the same transaction cannot be validly joined together. *AIR 1952 Bom 177.*

(4) A charge and trial for an offence under Section 409 of the Code is not barred by reason of the act that the offence falls under Section 16(7) of the Pawn Broker Act. *AIR 1966 Mad 368.*

(5) A charge of conspiracy in respect of an offence under Section 409 need not be as specific as a charge for an offence under S. 409. *AIR 1938 Cal 195.*

(A) Charge against two persons.—(1) Where A, a servant in a workshop, steals a silver article from the workshop and hands it over to B immediately at the same place, and B knows the article to be stolen one, and receives it with a dishonest intention, the offences of A and B both form parts of the same transaction, and under Section 223 of the Criminal Procedure Code, they can be charged and tried together at the same trial. *(1904) 1 CriLJ 330.*

(B) Error in charge.—(1) No error in stating the offence or the particulars required by Section 212(2) of Criminal P. C. will be regarded as material if the accused is not misled by such error and the error has not occasioned a failure of justice. *AIR 1956 Mad 209.*

(C) Quashing of charge.—(1) When there was no material to support a charge framed under S. 409 but it transpired that the case was a pure fabrication, an outcome of malice, the charge was quashed by the High Court under its inherent powers. *1980 ChandLR (Cri) 51 (Punj).*

(D) Form of charge .—(1) The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—at—were entrusted with property (specify the property) in your capacity as a public servant, attorney etc. and you committed criminal breach of trust in respect of the property so entrusted and thereby committed an offence punishable under section 409 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said.

29. Dishonest intention.—(1) Dishonest intention is an essential ingredient of the offence. *(1973) 1 Malayan LJ 154.*

(2) It is for the prosecution to place materials before the Court from which such inference can be drawn. *AIR 1946 All 227.*

(3) Mere failure to return or account for the property entrusted to the accused does not conclusively prove dishonest intention. Such failure may be due to other causes consistent with accused's honesty. *AIR 1977 SC 1966.*

(4) A great delay in remitting money may give rise to inference of dishonest intention. *AIR 1934 Cal 532.*

(5) Where there is no dishonest intention the act of accused may give rise to a civil liability for damages. *AIR 1937 Rang 505.*

30. Onus and proof—Appreciation of evidence.—(1) Burden of proof of establishing all the ingredients of the offence such as entrustment, misappropriation, dishonest intention, etc. is on the prosecution. *(1979) 81 PunLR 247.*

(2) Where embezzlement was ascribed to two persons A and B, B being the subordinate of A and B was ordinarily required and supposed to pass over the sums collected by him to A, and pleaded that he had done so, and the plea could not be said to be improbable, it was held that B could not be convicted under this section. *AIR 1955 NUC (Sau) 5757 (DB).*

(3) Where the evidence creates a doubt whether the accused is guilty or not, he is entitled to the benefit of doubt. *AIR 1972 SC 521.*

(4) Prosecution of clerk in cooperative department performing duties of accountant—Charge of delayed payments, no payments and false payments of T. A. Bills—Asst. Registrar being the paying and disbursing officer—No proof of complaints made to the Asst. Registrar—Held that the prosecution case could not be regarded as proved beyond reasonable doubt. *AIR 1960 SC 476.*

(5) Accused was alleged to have misappropriated monies drawn in favour of some persons whose names were absent in the school register though actually working there. Absence of name in register cannot lead to an inference of misappropriation. *AIR 1979 SC 1080.*

(6) Cashier in possession of safe with all its keys—Embezzlement of cash—No evidence to show that he had parted with keys before the incident—He must be held guilty under Section 409. *AIR 1973 SC 488.*

(7) Moneys payable towards Government dues paid by debtors to collection Amin—Amin crediting in Treasury only negligible amount from out of amounts received and acknowledged by him—On evidence accused held rightly convicted under Sec. 409. *AIR 1973 SC 82.*

31. Procedure.—(1) A Magistrate to whom a complaint has been made against the accused of an offence under this section can, if he considers that there is no ground for proceeding, dismiss the complaint under Section 203 of the Criminal P. C. *(1887) ILR 9 All 666.*

(2) Merely inducing a complainant to compromise a criminal case under this section will not amount to cheating (on the ground that the offence is not compoundable) as the non-compoundability is a matter of law (which everybody is presumed to know) and hence the element of deception which is an essential ingredient of the offence of cheating under Section 415 will be lacking in such a case. *AIR 1943 Cal 41.*

(3) The consent of the accused to be tried on a misjoinder of charges cannot validate the trial. *AIR 1956 All 466.*

(4) There were two separate trials of A and B both of whom were charged under Ss. 409/120B of the Code. A was first tried and convicted. B was subsequently tried and acquitted. It was held that the conviction of A is not rendered illegal by reason of the co-conspirator being acquitted subsequently. It would be different if A and B had been tried together at the same trial in which case the acquittal of one must result in the acquittal of the other. *AIR 1925 Cal 501.*

(5) Where on a complaint under his section. made at Ahmedabad, the accused was arrested at Calcutta and produced before the Magistrate at Calcutta who granted the accused bail and asked him to appear before the Magistrate at Ahmedabad, it was held that the Magistrate at Calcutta should have asked for a warrant from Ahmedambad and should have released the accused on bail calling upon him to appear before himself when required. *AIR 1924 Cal 893.*

(6) A was charged for conspiracy to commit criminal breach of trust and was also specifically charged for criminal breach of trust with regard to definite sums of money and one charge-sheet was submitted. At the time of trial the prosecution split up the case to be tried into four separate trials. It was held that the procedure adopted was harassing to the accused. *AIR 1938 Cal 697.*

(7) Where the accused was put on his trial before a First Class Magistrate on three charges of offences under this section and the accused applied to the Sessions Court claiming a sessions trial, and the Session Judge directed the Magistrate to commit the accused to the sessions for trial, it was held that the Sessions Judge had no jurisdiction to make such order and that he could only make a reference to the High Court. *AIR 1938 Cal 416.*

(8) In a case under S. 409 P.C. which ended in acquittal the High Court without assigning any reasons refused to grant leave to appeal and its order was not speaking order. Supreme Court set aside the order and directed the High Court to restore the appeal on its file. *AIR 1982 SC 1215.*

(9) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session. If the offence committed by public servant, it becomes triable by Special Judge under Act XL of 1958, and Act II of 1947.

32. Separate trials for each item misappropriated.—(1) Where a post-master was alleged to have misappropriated three money orders of Rs. 1,066, 605 and 450 respectively and prosecutions were instituted separately for the Ist item and for items 2 and 3 it was held that although there was nothing illegal in holding separate trials for offences of the same kind committed within 12 months or which form part of the same transaction, it was not described to do so. *1967 AllWR (HC) 611.*

33. Jurisdiction.—(1) Where a Second Class Magistrate convicted the accused under S. 406 of the Code and submitted the proceedings to the District Magistrate under S. 349, Criminal P. C., and the latter found that the offence was one under S. 409 of the Code which was not triable by a Second Class Magistrate, it was held that the District Magistrate had no jurisdiction to convict the accused under Section 409 on the evidence taken by the Second Class Magistrate. *(1899) 1 BomLR 27.*

(2) Where a First Class Magistrate tried the accused for offences under Ss. 409 and 477, (the latter offence being one not triable by him under the Criminal P.C. but only by a Court of Session), it was held that in so far as the offence under Section 409 was concerned, the trial was not void and that he was competent to try the same. *AIR 1960 Mys 86.*

(3) Under Items 2 of the Schedule to Criminal Law Amendment (Special Courts) Act, offences punishable under section 409 and triable by Special Courts are limited to those committed by public servants in their capacity as such. *AIR 1974 SC 794.*

34. Place of trial.—(1) An offence of criminal breach of trust may be tried; where the property is received or retained. *AIR 1942 Oudh 473.*

(2) The Court of the place where the loss or damage occurs has no jurisdiction to try the offence. A contrary view has however been expressed in a case. *AIR 1928 Sind 166.*

35. Sanction.—(1) A public servant, whose duty included the disbursement of wages to workmen, drew the amount form the treasury, but falsely entered the name of a fictitious person in the

acquaintance roll and utilized the amount for himself. It was held that sanction under S. 197 of the Criminal P. C. was necessary for the prosecution against him for an offence under Section 409. *AIR 1955 SC 309.*

(2) Where the accused was charged not only under Section 120B but also under Ss. 409 and 477A of the Code and no sanction was obtained as was required for a prosecution under S. 120B, it was held that the offence under S. 120B was a distinct offence from the offences under Ss. 409 and 477A to commit which the conspiracy was entered into and the want of sanction for the prosecution under S. 120B did not affect the prosecution for the other offences. *AIR 1967 SC 1590.*

(3) Where the breach of trust has no connection with the performance of public duty, no sanction is necessary. *AIR 1960 SC 745.*

36. Plea before Supreme Court for first time.—(1) Where in a trial on a charge under S. 409 no plea was raised by the accused that the money was not entrusted to him in his capacity as a clerk or as part of his duties, it was held in an appeal from the conviction that such a plea will not be allowed to be raised for the first time before it inasmuch as such plea depended on evidence. *AIR 1967 SC 1590.*

37. Alteration of conviction.—(1) A conviction under Section 409 of the Code can be altered to one under Section 403. *1966 All WR (SC) 695.*

(2) A conviction of the accused under Section 414 of the Code by a Second Class Magistrate cannot, in appeal, be altered to a conviction under Sec. 409, as the latter offence is not triable by a Magistrate of the Second Class. *AIR 1938 Mad 315.*

38. Vicarious liability.—(1) An employer or the principal is not liable criminally for the criminal breach of trust committed by his employer or agent unless he has wilfully suffered the employee or agent to commit the offence. The reason is that mens rea, dishonest intention, is the gist of the offence of criminal breach of trust and cannot be attributed to the employer or principal merely by reason of the relationship of master and servant or principal and agent. *AIR 1952 Trav-Co 158.*

(2) Where in respect of serious defalcation of the properties of the cooperative society, entering into conspiracy by the accused to cause defalcation was one the charges and that charge failed, conviction of the Chairman of the Managing Committee of the Society under S. 409, with other sections on the basis of vicarious liability was improper when he was not charged under S. 120B and when there was no direct evidence connecting the Chairman with the acts of commission and omission for which he was convicted. *AIR 1984 SC 151.*

39. Previous acquittal or conviction—Effect.—(1) A conviction under Section 409 will not bar a subsequent trial for an offence under Section 477A as the ingredients of the two offences are different. *AIR 1963 Raj 14.*

(2) A conviction or acquittal in respect of misappropriation of certain sums of money during a year is no legal bar to a trial for misappropriation of other sums of money during the same year, though this is not desirable. *AIR 1969 Bom 1.*

40. Civil liability.—(1) The conviction or acquittal of a person accused of an offence under this section does not affect the civil liability of the accused for damages or loss caused to the owner of the property entrusted to the accused. Even the Government itself who is the owner of the entrusted property is not precluded from taking civil action against the person who has committed an offence under this section in respect of the property. *AIR 1939 Lah 340.*

(2) Where goods were entrusted by A to B (for sale and not for mere safe custody) and it was with the knowledge of A (who did not object to the sale but only wanted its price) that B sold the property,

it was held that A could have only a civil remedy for damages for breach of contract by B to pay the price to A. *AIR 1955 NUC (Trav-Co) 5078.*

(3) The use of criminal Courts to litigate civil claims must be condemned. *AIR 1920 All 274.*

41. Sentence.—(1) Where separate trials were held in respect of various items misappropriation and sentences were passed in each to run consecutively (totally 11 years) it was held that the sentence could not be attacked as too severe having regard to the fact that the accused was holding a responsible post of trust. *AIR 1965 SC 1248.*

(2) The breach of trust by a clerk or public servant is of an aggravated nature calling for substantial punishment. *AIR 1950 Lah 199.*

(3) The admission of the accused of his guilt and his paying up the amount misappropriated before the filing of charge-sheet and the lapse of a long period after the date of the offence, are all matters which may be considered in awarding the sentence. *AIR 1954 SC 715.*

(4) The fact that the amount misappropriated was deposited during the pendency of the appeal may also be considered by the appellate Court. *AIR 1974 SC 2336.*

(5) No general rule can be laid down as to the sentence to be awarded. It depends upon the facts and circumstances of each case. *AIR 1949 PC 22.*

(6) The accused was acquitted by the trial Court but sentence to 4 months' regorous imprisonment by the High Court. The Supreme Court on appeal reduced it to the period of 19 days already severed in view of the fact that the accused had secured another job after his acquittal and was working at it. *AIR 1972 SC 1618.*

(7) When an accused was found to have only committed temporary misappropriation and had lost his job his sentence to 6 months' R. I. was reduced to period already served. *AIR 1980 SC 639.*

(8) Accused was inexperienced and new to his job and was made a scapegoat in an offence under Section 409. His sentence to three years' R. I. was reduced by Supreme Court to period already served. Sentence of fine was maintained. *AIR 1979 SC 1120.*

(9) Revenue paid to Tahsildar's reader who issues receipts designed by Tahsildar—Latter is entrusted with "dominion" over the property—Embezzlement—Tahsildar guilty but sentence reduced in the circumstances of the case. *AIR 1979 SC 1006.*

(10) Accused sentenced to two years' R. I. and a fine of Rs. 1,000—Accused likely to lose his job—Accused already had undergone imprisonment of six and half months—In the ends of justice substantive sentence reduced for the period already undergone. *AIR 1979 SC 825.*

42. Order under S. 452 of the Criminal P. C.—(1) Where the accused was convicted for breach of trust by pledge or pawning the property entrusted to him by complainant, the Court cannot, on conviction of the accused, order the pledgee or pawnee under Section 452 of the Code to return the property to the complainant in the absence of bad faith on the part of the pawnee or pledgee. *AIR 1923 Rang 68.*

43. Bail.—(1) A Magistrate has no power under Section 437 of the Criminal Procedure Code to grant bail to the accused in cases falling under Section 409 of the Code. *AIR 1930 Rang 335.*

(2) Where a complaint under this section was filed alleging misappropriation to have been committed more than 2 years before the date of the complaint entirely unsupported by any evidence whatsoever, it was held that there were no reasonable grounds for believing that the accused was guilty of the offence with which he was charged and that bail should be granted. *AIR 1937 Rang 474.*

44. Practice.—Evidence—Prove: (1) That the accused was either a public servant or a banker, or a merchant, or an attorney, or an agent, or a broker, or a factor.

(2) That he was in such capacity entrusted with the property in question or with dominion over it.

(3) That he committed criminal breach of trust in respect of it.

Of the Receiving of Stolen Property

Section 410

410. Stolen property.—Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which [9][* *] criminal breach of trust has been committed, is designated as "stolen property" [10][whether the transfer has been made, or the misappropriation or breach of trust has been committed within or without [11][Bangladesh]]. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Cases : Synopsis

1. *Scope.*
2. *Property acquired by cheating, forgery etc.*
3. *"Property."*
4. *Property into which stolen property has been converted.*
5. *Proof of property being stolen property.*
6. *Removal of property from deceased person.*
7. *Stolen property got back by the owner ceases to be stolen property.*

1. Scope.—(1) The term "stolen property" as defined presupposes the commission of the offence of theft. Property once stolen remains stolen for ever afterwards, irrespective and independent of the volition of its lawful possessor till it reverts to him. Stolen property losses its character the moment it reverts to its lawful possessor. Such possessor may be actual or constructive. It is elementary that there can be no offence of dishonestly receiving stolen property unless the property which is alleged to be the subject of such receiving answers the description of "stolen property" given in section 410 of the Penal Code. "Possession whereof has been transferred" does not mean that the receiver should receive directly form the thieves. All it implies is that the receiver should receive property which has been obtained by theft since only the property the possession of which has been transferred by theft etc. is designed as stolen property. It follows that if the property is changed, converted or altered, so as to destroy its original identity it ceases to be stolen property *(AIR 1944 Sind 237)*. Property acquired by fraudulent transfer is not stolen property since whatever may be the object, ownership therein is transferred by consent.

(2) This section defines "stolen property." It includes not only property acquired by theft, but also property acquired by extortion or robbery. It also includes property possession of which was originally acquired innocently, but which possession subsequently became dishonest and wrongful by reason of misappropriation or breach of trust. *1970 All WR (HC) 368.*

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9. The word "the" before the words "offence of" was by repealed the Amending Act 1891 (Act XII of 1891), and the words "offence of" were repealed by s. 9 of the Indian Code Amendment Act, 1882 (Act VIII of 1882).
10. Ins. by Act VIII of 1882, s. 9.
11. Substituted by Act No. VIII of 1973, for "Pakistan".

(3) Before a person can be punished for receiving stolen property, the property alleged to have been receiving by him dishonestly, must fall within the definition of this section. In other words, its possession must have been transferred by any of the offences enumerated in this section. *AIR 1976 SC 917.*

2. Property acquired by cheating, forgery, etc.—(1) Property of which possession has been transferred in ways other than those specified in the section is not within the definition of stolen property. Thus, property, possession of which has been obtained by cheating, is not stolen property. *ILR (1963) Guj 1002.*

(2) Stolen property is that which is limited to that acquired in one of the ways mentioned in the section. *AIR 1914 Sind 133.*

3. "Property."—(1) Res nullius and ferae nature over which no one has any proprietary right are not property at all, and cannot, therefore, be 'stolen property'. Property abandoned by the owner ceases to be property and cannot come within the definition of stolen property. A bull set at large by a Hindu at the time of performing some religious ceremony is not property and the taking of it by another will not convert it into a stolen property. *(1887) ILR 9 All 348.*

(2) A bull dedicated to the idol for the benefit of the public and which was being looked after by the Mahant of the temple is not res nullius and hence is capable of becoming a subject-matter of an offence under S. 411 P. C. *AIR 1952 Assam 123.*

4. Property into which stolen property has been converted.—(1) Property into or for which stolen property has been converted or exchanged or mixed with is not stolen property. *1881PunRe39.*

(2) Money received as a result of selling stolen property is not stolen property. *AIR1952Punj178.*

(3) An ingot of gold or silver obtained by meeting gold or silver articles which were stolen does not cease to be stolen property. *AIR 1954 Mad 433.*

5. Proof of property being stolen property.—(1) In order to prove that property is stolen property, it is not necessary that the stolen property should have been proved to have been in the possession of a particular person and in a particular locality before it was stolen. It is enough that possession of property has been transferred by theft or by extortion or by robbery or by criminal misappropriation. *1965 (2) CriLJ 570.*

6. Removal of property from deceased person.—(1) Property removed from a dead person and misappropriated dishonestly is stolen property and one who dishonestly helps in disposing of the property commits an offence under S. 414. *AIR 1938 Rang 109.*

7. Stolen property got back by the owner ceases to be stolen property.—(1) Property the possession of which has been transferred by theft, robbery, extortion or in respect of which criminal breach of trust has been committed or which has been criminally misappropriated is stolen property. Where the stolen property has again come into the possession of a person legally entitled to the possession thereof it ceases to be stolen property. *(1892) 2 QBD 597.*

Section 411

411. Dishonestly receiving stolen property.—Whoever dishonestly receives or retains any stolen property knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Receipt—Retention.*
3. *"Stolen property."*
4. *Theft by child—Receiving property from child.*
5. *Acquittal of alleged theft.*
6. *Dishonest intention.*
7. *Knowledge or belief.*
8. *Presumption under illustration (a) to S. 114 of the Evidence Act.*
9. *Possession, as evidence of the receipt of goods.*
10. *Exclusive or joint possession.*
11. *Possession by wife.*
12. *Possession with sister.*
13. *Possession of servant.*
14. *Possession should be soon after the theft.*
15. *Identification of stolen property.*
16. *Explanation by accused.*
17. *Evidence and proof.*
18. *This section and Section 215.*
19. *This section and S. 380.*
20. *This section and Section 414.*
21. *Charge and conviction.*
22. *Sentence.*
23. *Procedure.*
24. *Practice.*
25. *Charge.*

1. Scope.—There can be no offence of receiving unless the property in respect of which the offence of receiving is alleged aswers the description of "stolen property" as given in section 410 and accordingly, it is sufficiently clear that stolen property must have been acquired by theft, or criminal misappropriation or other offences allied to them. As this fact has to be established against the accused it is necessary to prove all the circumstances constituting the property as stolen property. It is not necessary that the stolen goods should have been physically produced from the actual possession of the accused. It is sufficient to show that the accuseds after the articles were stolen came into the control of stolen goods and that he did so dishonestly and having reason to believe that it was stolen. Dishonest receipt and retention implies possession and such possession to be criminal must be actual and exclusive, for criminal liability does not attach to constructive possession *(AIR 1955 Ajm 10)*. When stolen property is recovered from the open and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of it *(AIR 1954 SC 39)*. The word 'possession' in this connection obviously means 'conscious possession' for any other possession could not be taken into account in charge person with criminal liability. If the circumstances are such as to raise a presumption that two or more persons in joint possession of stolen property, both of them may bed convicted. There is no justification for the view that there cannot be joint criminal possession *(34 CrLJ 604)*. Where a property is found in a house in the possession of more than one person, mere discovery of any stolen property in that house is not in itself sufficient to prove that the possession was of any one of those persons *(42 CrLJ 293)*. Possession with guilty knowledge is essential. Where the only evidence against the accused is that he was with the other accused before and after the theft, this can hardly warrant his conviction under section 411 Penal Code *(41 CrLJ 96)*. Mere knowledge that stolen property is lying hidden somewhere is not incriminating circumstances for the offence off theft or receiving stolen property, and such knowledge cannot by itself raise a presumption of possession. It is the prosecution that has to establish the possession of the accused apart from his knowledge and it is only when his possession is proved that the accused has to account for it in order to escape from the presumption under illustration 114(a) of the Evidence Act. The production or pointing out may indicate that the accused was in possession or that he had innocent knowledge that the articles had been left there by someone else *(13 CrLJ 529)*. Conviction of co-accused on the basis of confession is not correct as confession cannot by itself be treated as evidence against him *(AIR 1967 Pat 283)*. Where an accused is found in possession of stolen articles forming the subject-matter of distinct theft, he cannot

be convicted separately in respect of each article, unless there is evidence to show that he had received them on different occasions *(34 CrLJ 458).* The accused cannot be convicted under section 411 unless the identity of the stolen property is established. The burden of proof lies always upon the prosecution to bring the guilt home to the accused. Illustration 114(a) of the Evidence Act enables presumption to be drawn regarding a person in possession of stolen goods, depending upon its likelihood of its charging hands, unless a fairly acceptable explanation is forthcoming. Money is an ambiguous commodity and as such no such presumption can be drawn if the denomination has been changed. Moreover, the drawing of presumption is discretionary and the Court may in special circumstances refuse to draw such presumption *(1958 CrLJ 534).* Where stolen property is found in possession of the accused soon after the theft and no explanation for his possession is offered, an inference of guilty under section 411 Penal Code is justified *(AIR 1934 Bom 458).* No fixed time limit can be laid down to determine whether possession of stolen articles is recent or otherwise. Every case must be judged on its own facts *(PLD 1956 Lah 190; AIR 1926 Cal 925).* No hard and fast rule can be laid down that after expiry of any particular period no presumption under section 114 of Evidence Act can be drawn. The nature of presumption in each individual case under section 114(1) Evidence Act depends entirely upon the nature of evidence adduced. Where long interval has elapsed before stolen property has been recovered; it is often unsafe to assume that the possessor was the actual thief. In the absence of any special identification marks, no absolute inference can be drawn from the mere similarity in size between the articles. Where in such a case no identification proceedings are conducted before a Magistrate, the accused would be entitled to benefit of doubt. Where no property whatever was produced before the trial Court, the accused is entitled to the benefit of doubt *(1974 CrLJ 219).* The offence of being in possession of stolen property may be inquired into and tried either in the district in which the property was stolen or in the district in which it was found to be dishonestly possessed *(27 CrLJ 21 All).*

(2) Discovery of stolen property at pointing out of accused "from bush at call's distance from his house—Accused not explaining how he came by his knowledge of place of recovery—Property presumed to be in 'possession' of accused. *Jiand Vs. State (1962) 14 DLR (WP) 34.*

(3) There cannot be conviction when the man in possession of the stolen property gives a reasonable explanation on the possession. *F. H. Blanchette Vs. Crown (1952) 4 DLR 212.*

(4) Accused's possession of the stolen property to be established by the prosecution—Several persons besides the accused live in the same house. Prosecution does not prove accused's possession—Conviction not sustainable. *Sultan Ahmed Vs. State (1965) 17 DLR 228.*

(5) Accused offering reasonable explanation of his possession of the stolen goods—Entitled to be acquitted. In the present case one bullock alleged to have been stolen from the house of the informant on 18.6.64 was found in the possession of the accused petitioner on 20.6.64. The accused petitioner did not deny the fact of possession but produced in court a receipt indicting that he purchased the bullock bonafide. The trial court rejected the receipt which bore over-writing as regards its date, convicted and sentenced the petitioner under section. 411 P. C. Held: There is no other evidence in the present case as to the guilty knowledge of the accused. The accused has given an explanation regarding his possession which may reasonably be true .In view of the reasonable probability of the explanation of the accused being true, from the mere fact that the possession of the accused was recent, it cannot be presumed that he received the stolen property knowing it to be stolen. *Alimullah Mia Vs. State (1969) 21 DLR 644.*

(6) Dishonestly retaining or receiving stolen property—In order to sustain a conviction under section 411 of the Code the prosecution must prove affirmatively by reliable evidence that the accused had exclusive possession and effective control or domain over the stolen property or he received or retained the same knowing or having reason to believe it to be a stolen property. *Md. Afsar Ali Pramanik Vs. The State, 20 BLD (HCD) 356.*

(7) Alternation of sentence. Even at the revision or appellate stage the conviction under section 411 of the Penal Code can be altered into one under section 379 in proper case where the charge appears to have been proved beyond doubt. *Nizamddin Bhuiya Vs. The State—1, MLR (1996) (AD) 266.*

(8) Section 411 of the Penal Code provides for punishment of imprisonment or fine or both. In the instant case, the ends of justice will be sufficiently met if the sentence of imprisonment is reduced to the period already undergone and the fine remitted. *Nizamuddin Bhuiya Vs. State and another (Criminal) 1 BLC (AD) 222.*

(9) The prosecution has hopelessly failed to prove that the petitioner had exclusive possession and effective control over the stolen television set in question and that it was recovered from his possession and control and hence the prosecution has failed to prove the ingredients of section 411 of the Penal Code. *Afsar Ali Pramanik (Md) Vs. State (Criminal) 5 BLC 478.*

(10) Stolen goods discovered at pointing out by the accused from a place not within his domain but close to his house and the accused not explaining how he came to know of the same. Court's presumption in circumstance is that the stolen goods were presumed to be planted and possessed by the accused *(Ref: 14 DLR 34 WP). 22 DLR 99.*

(11) A person in possession of the stolen property entering into an agreement with the owner thereof for restoration of such property without helping to bring the thief to justice cannot be convicted both under sections 411 and 215 of the Penal Code. No finding that the properties recovered were dishonestly retained by the accused knowing them to be stolen. He cannot be convicted under section 411 Penal Code. *16 DLR 574.*

(12) Possession of stolen property must be 'recent' to lead to the inference constituting proof of offence. Delay to two months in production of property does not justify inference of guilty knowledge. *15 DLR 122 WP.*

(13) A person cannot be convicted both under sections 380 and 411 of the Penal Code, and sentenced separately under both the sections. If the accused is convicted under section 380, he cannot be convicted under section 411 as well. *14 DLR 595.*

(14) The condition precedent for the application of illustration (a) of Section 114, Evidence Act is that the accused must be in possession of stolen goods. The production of property by itself would not necessarily prove his possession. In the absence of any incriminating statement made by the accused leading to the discovery of property, its production alone from a place which was accessible to the public would not be sufficient to establish his possession. The possession of the article must be clearly traced to him in order to justify the presumption under the illustration. *6 DLR 8 WP.*

(15) Eye witnesses having no animosity against accused—Recovery of stolen articles effected from accused—Mere fact that FIR was lodged after completion of investigation by the Police Officer. Held—did not make trial illegal in circumstances of case—Conviction maintained. *1968 PCrLJ 350.*

(16) This section as well as the succeeding sections are directed not against the principal offenders such as the thief, or robber, or misappropriator but against the class of persons who trade in such

stolen articles and are commonly described as 'Receivers'. Hence , a thief or a misappropriator is outside the scope of the section. *AIR 1972 SC 635.*

(17) The conviction of the thief for the offence of theft is not a prerequisite to the conviction of the receiver under this section. *AIR 1964 SC 170.*

(18) There must be a finding as to receipt of stolen property. The receipt or retention of stolen property must with a dishonest intention. If the receipt or retention is not with a dishonest intention but say, with the bona fide intention of restoring it to the rightful owner, then no offence will be committed. *AIR 1952 All 481.*

(19) In order to establish an offence under this section, the prosecution has to establish the following ingredients:

(i) A used, received or retained property.

(ii) That property was stolen property.

(iii) Such receipt or retention is dishonest.

(iv) Accused knew that the property so received or retained by him is stolen property. *1970 Mad LJ (Cri) 461.*

(20) An offence under this section is proved where it is established:

(i) that the stolen property was in the possession of the accused;

(ii) that some person other than the accused had possession of the property before the accused got possession of it; and

(iii) that the accused had knowledge that the property was stolen property. *AIR 1954 SC 39.*

2. Receipt—Retention.—(1) The prosecution must establish that the accused either received or retained stolen property. *AIR 1933 Sind 359 (361) : 35 CriLJ 206 (DB).*

(2) The word 'received' implies that the stolen property was in the possession of another person before the accused got possession. *AIR 1954 SC 39.*

(3) It is not necessary for the prosecution to prove affirmatively that the possession was with another person before it was received by the accused. The fact that the accused is found in possession of stolen property soon after the theft will raise a presumption under Section 114, Illustration (a) of the Evidence Act that the accused received it from another person. *AIR 1959 All 718.*

(4) Where A picks the pocket of B and immediately hands it over to C who has all along been standing with him and after the pick-pocketing both A and C run away, C will be a participant in the crime of pick-pocketing itself and would be guilty of theft under S. 34 read with S. 379 and not of receipt of stolen property. *AIR 1957 All 678.*

(5) It is enough if the accused charged for receiving or retaining stolen property and evidence is adduced to prove guilty knowledge at some period antecedent to its recovery by the Police. *AIR 1958 Orissa 106.*

3. Stolen property.—(1) The basis for the offence under this section is that the accused is in possession of stolen property. Therefore the prosecution must establish that the property in question is stolen property, before it can ask for a conviction. *AIR 1972 SC 642.*

(2) An animal which has strayed away from the herd or which was missing and which was found to be in the possession of the accused could not ipso facto be said to be stolen property. *AIR 1944 Mad 26.*

(3) Prosecution must prove that article recovered was stolen article and this could be done only by mixing recovered article with articles of similar description at time of identification parade—Held, on facts identification proceedings were a farce. *AIR 1964 SC 170.*

4. Theft by child—Receiving property from child.—(1) The property got by the child by theft will be 'stolen property' and a person receiving such property may be guilty under this section. *(1883) ILR 6 Mad 373.*

5. Acquittal of alleged thief.—(1) Under the English Law where the accused is charged with the receipt of stolen property from a named thief, and the named thief is acquitted of the offence of theft on the ground that he did not commit theft, the accused also must be acquitted of the receipt of 'stolen property'. *(1834) 174 ER 132.*

6. Dishonest intention.—(1) Mere possession of stolen property is not sufficient to constitute an offence under this section. *(1904) 1 Cri LJ 1109.*

(2) Knowledge that the property is stolen does not necessarily prove that the possessor has a dishonest intention. It is quite possible that he may only have taken the property from another, a third party, knowing it to be stolen, but with the bona fide intention of restoring it to the true owner. *AIR 1939 Mad 178.*

(3) The failure of the accused to disclose the names of persons from whom the property was purchased, or the retention of valuable property not belonging to him, are not circumstances which, by themselves, tend to establish dishonest intention. *AIR 1933 Lah 596.*

(4) Where the accused has received the stolen property as a pawnee, as opposed to a vendee, he cannot be held to be a dishonest receiver within the meaning of this section. *AIR 1939 Mad 582.*

(5) Accused found not to have come by the gold innocently, without any guilty intention or knowledge. His conviction under Section 411 was held proper. *(1903) 8 Mys CCR No. 329, p. 281.*

7. Knowledge or belief.—(1) For a conviction under this section, it must be clearly proved that the accused received or retained that stolen property with guilty knowledge. *1973 BLJR 280.*

(2) Unless there is some 'prime facie' evidence as to the knowledge of the accused, the latter is entited to be acquitted, because, merely proving that he was in possession of the stolen property establishes no offence of any kind. *AIR 1952 Cal 616.*

(3) The presumption under S. 114, illus. (a) of the Evidence Act is one of fact and not of law. *AIR 1957 Andh Pra 1006.*

(4) From the bare fact that the accused was residing in the complainant's village, his knowledge that the ornaments were stolen property cannot legitimately be assumed. *AIR 1954 SC 39.*

8. Presumption under illustration (a) to S. 114 of the Evidence Act.—(1) The presumption to be drawn is one of fact and not of law. *(1864) 9 Cox 464.*

(2) The words used in illustration (a) to S. 114 of Evidence Act are "The Court may presume..." and not "The Court shall presume...". It is a matter of discretion with the Court. *AIR 1976 SC 1097.*

(3) When soon after the occurrence of theft a person is found in possession of the stolen property, the presumption that ordinarily arises is not that he has received it knowing it to be stolen, but that he has stolen it himself. *AIR 1951 Pat 296.*

(4) Where ornaments last seen to be worn by the deceased were recovered at the instance of the accused just three days after the occurrence and were proved to be stolen property the accused, on the

basis of presumption under S. 114, Evidence Act, can be convicted under S. 411 for receiving stolen property knowing it to be stolen. *AIR 1980 SC 1753.*

9. Possession, as evidence of the receipt of goods.—(1) If the conditions mentioned in S. 114 (a) of Evidence Act are satisfied, the Court may presume that the accused is either himself the thief or received the stolen property knowing that it is stolen property. *(1976) 78 Bom LR 630.*

(2) Recovery of stolen goods at the instance of the accused from a place which is accessible to others is not tantamount to evidence of possession by accused. *AIR 1954 SC 39.*

(3) Where the place of concealment is peculiarly within the knowledge of the accused and the recovery of stolen articles is made as a result of the information given by him or of his producing them from the place of concealment, he must be taken to be in conscious and exclusive possession of it. *AIR 1970 SC 1934.*

(4) Where a person handed over the stolen watch, in the presence of the police to the accused and thereafter the police went through the formality of seizing it from the accused, it was held that the circumstances in which it was discovered cast a grave doubt and a conviction under this section is not justified. *AIR 1974 SC 777.*

10 Exclusive or joint possession.—(1) In order to raise the presumption against the accused, he must be in exclusive possession of stolen property. Therefore, the recovery of stolen goods from the house which is in the joint occupation of the accused and others will not, according to the above view, be sufficient to show that the accused (or any other member) was in exclusive possession of the accused and others will not, according to the above view, be sufficient to show that the accused (or any other member) was in exclusive possession of the stolen property. *AIR 1944 Lah 339.*

(2) The head of the family or the managing member of the family will be deemed to be in possession of the stolen goods found in the house. *AIR 1953 Mad 534.*

11. Possession by wife.—(1) The possession by the wife will be that of the husband only when the wife has possession on account of the husband. *AIR 1961 Punj 30.*

(2) The mere fact that the accused's wife produced the stolen articles from the house where both were living would not warrant his conviction under this section. *AIR 1941 Mad 694.*

12. Possession with sister.—(1) Where a stolen property was found on the accused's sister twelve days after the theft and the accused and his sister were living in the same house, it was held that the stolen property was rightly traced to the possession of the accused. *(1911) 12 Cri LJ 48 (Mad).*

13. Possession of servant.—(1) If the possession of the servant is on account of his master, in law the master is in possession of the property. Therefore, where the servant of the accused, by the order and direction of the accused, received the stolen property, the accused is liable as if his own hand received it. *(1853) 6 Cox Cri C 353.*

(2) Where the article recovered from the accused was a gun which had been carried away by dacoits as a result of dacoity and the accused failed to furnish satisfactory explanation for its possession, presumption under S. 114 Illus. (a) of Evidence Act could be drawn against the accused even after expiry of eight months from date of dacoity. Accused was liable to be convicted under S. 411 PC. *AIR 1974 SC 1830.*

14. Possession should be soon after the theft.—(1) In order to raise the presumption under illustration (a) to Section 114 of the Evidence Act, the accused's possession of stolen property must be soon after theft. The possession of such property long after the theft does not give room for this presumption. *1978 Cri LJ 379.*

(2) What constitutes possession "soon after" theft depends on the facts and circumstances of each case and also on the nature of the stolen property. *AIR 1974 SC 1830.*

15. Identification of stolen property.—(1) Where stolen property recovered from the accused at place 'A' is put up for identification in Court at place 'B' and prosecution fails to establish that seals on the bundles of articles remained intact throughout and nobody at any stage had any opportunity to break the seals and repack the articles, it cannot be said that the articles put up for identification which were recovered and the accused cannot be punished under section. *1971 All Cri R 217.*

16. Explanation by accused.—(1) The illustration (a) to Section 114, Evidence Act, shows that the presumption would arise when the accused is not able to account for his possession of stolen property soon after the theft. *1964 MPLJ (Notes) 78.*

(2) The accused must satisfactorily explain his possession. *AIR 1965 Orissa 123.*

(3) The explanation given need not be convincingly true but must be reasonably or probably true. *AIR 1943 PC 211.*

17. Evidence and proof.—(1) It is the duty of the prosecution to prove:

(i) that the stolen property was in the possession of the accused;

(ii) that some person other than the accused had possession of the property before the accused got possession of it; and

(iii) that the accused had knowledge that the property was stolen property. *AIR 1954 SC 39.*

(2) The prosecution must stand or fall on the strength of its own evidence and not on the weakness of the defence of the accused. *AIR 1972 SC 1561.*

(3) An offence under the section is strictly limited to the property recovered from the accused. The Court is not concerned with the rest of the property stolen which had not been recovered from the accused. *AIR 1953 All 752.*

(4) Where the stolen articles recovered from the shop of the accused were bronze churis whereas the Police Officer seizing them described the article in the seizure memo as brass bangles (in Bengal a distinction is made between churis and bangles), No witness supported the seizure of churis and the articles were not kept under seal, it was held that conviction under this section is not justified only on the words of the Officer who admitted that he committed a mistake in describing the articles. *AIR 1974 SC 777.*

(5) A receiver of stolen property is not necessarily an accomplice of a thief. *AIR 1948 Sind 65.*

(6) Certain pieces of cloth stolen in dacoity were recovered from the accused who lived in a village other than that in which the dacoity was committed. The evidence showed that it was not known in the village of the accused that a dacoity had been committed. The name of the accused was not mentioned in evidence as one of the participants in the dacoity. It was held that the only presumption that could be drawn from these facts was that the accused knew that the goods were stolen and not that he knew that the goods were stolen in dacoity or that he was himself a dacoit. He could be liable only under S. 411 and not under S. 396 of the Code. *AIR 1970 SC 535.*

18. This section and Section 215.—(1) A person in possession of stolen property agreeing with the owner for the restoration of the property without helping to bring the thief to justice can be convicted only of an offence under this section and not u/s. 215 of the Code. *AIR 1914 Mad 121.*

19. This section and Section 380.—(1) Where before recovery of the stolen bullocks from the house of the accused on the next day of the theft the bullocks were seen being taken towards his house

by some other persons and there is no direct evidence connecting the accused with the theft the offence falls under Section 411 and not under S. 380. *1971 All WR (HC) 469.*

20. This section and Section 414.—(1) The offence of receiving stolen property under this section is distinct from the offence under Section 414 of the Code. viz., of assisting the concealment or disposal of stolen property. *AIR 1928 Bom 145.*

21. Charge and conviction.—(1) The charge under this section should set forth that the accused knew or had reason to believe that the property he received was stolen property. *(1865) 4 Suth WR 11.*

(2) An omission to state in the charge that the accused received or retained stolen property, knowing or having reason to believe the same to be the stolen property is not, in view of S. 215, Criminal P. C., fatal to the case and the High Court can amend the charge and send the accused for retrial, if there be sufficient evidence on record which will justify such a course. *AIR 1949 Him Pra 15.*

(3) An accused charged with murder can be convicted under this section even if not charged under this section. *AIR 1953 Mad 1006.*

(4) An accused charged under S. 412 of the Code or under S. 413 of the Code can be convicted under this section though not separately charged. *AIR 1926 Bom 134.*

(5) An accused charged under Section 379 or Section 457 cannot be convicted under this section, when no opportunity was given to him to meet the case under this section. *AIR 1961 Mys 158.*

(6) A person found in possession of a stolen revolver without a licence can be convicted of an offence under this section as well as under Section 19(f) of the Arms Act. *AIR 1933 All 461.*

(7) The fact that the person found in possession of a stolen revolver without a licence was convicted under this section is no bar to his being convicted under Section 19(f), Arms Act, in a subsequent trial. *AIR 1933 Oudh 470.*

(8) Where property belonging to different owners and the proceeds of different burglaries are found in the possession of one man, he cannot be convicted of several offences of receiving in respect of the property identified by different owners unless the prosecution proves that they were received by him at different times. *AIR 1959 Andh Pra 137.*

22. Sentence.—(1) A sentence of fine only which is less than the value of the stolen property is grossly inadequate. *AIR 1935 Pesh 100.*

(2) An offence under this section being punishable with imprisonment for more than two years, neither Section 360, sub-section (3) of the Cr. P.C. nor Section 3 of the Probation of Offenders Act will apply and the offender cannot be released on admonition. *AIR 1923 Pat 297.*

(3) That the accused is a member of a criminal tribe is no ground for differentiation of sentence for an offence under this section. *AIR 1941 Mad 708.*

(4) The fact that the accused was charged for murder should not be taken into consideration in awarding the sentence. *AIR 1955 NUC (All) 2735.*

(5) Where the accused convicted under this section is below 21 years of age he is entitled to the benefit of the Probation of offenders Ordinance, 1960 as the offence under this section is not punishable with death or imprisonment for life. Hence, such an accused may be released on probation of good conduct on security as provided by the above Ordinance. *AIR 1979 SC 1048.*

(6) Accused was convicted and sentenced to 3 years' rigorous imprisonment by High Court. Appeal against conviction was heard by Supreme Court Held, that fact was not by itself a ground to interfere with sentence. *AIR 1983 SC 347.*

23. Procedure.—(1) Several persons can be tried jointly for offences under this section in respect of articles stolen in one theft in view of S. 239(f), Criminal P. C. *AIR 1955 All 696.*

(2) Under Section 223(e), Criminal P. C. a thief and the receiver of the stolen property can be tried together. *AIR 1916 All 321.*

(3) Under S. 181(3), Criminal P. C., an offence under this section can be tried at the place of theft or where the property, the subject-matter of theft, is dishonestly possessed. *AIR 1926 All 167.*

(4) When a person is accused of an offence under this section and tried jointly with the person accused of criminal misappropriation both of them can be jointly tried at the place where the entrustment of the property was made to the principal offender. *AIR 1969 Raj 266.*

(5) Where a person is found in possession of a number of stolen articles and is prosecuted in respect of some only of them, then his subsequent trial in respect of other articles is barred in view of Section 300, Criminal P. C. *AIR 1923 Cal 557.*

(6) Theft was committed in Assam and stolen property was recovered from the accused in Punjab. A case under S. 380 of the Code was registered and investigated in Assam and a case for an offence under this section was started in Punjab. On the above facts, it was held that under S. 185(2), Criminal P. C. (1898), the trial for an offence under S. 380 of the Code should get priority as it is a graver offence and carries a longer sentence. *AIR 1959 Assam 20.*

(7) Where a case covering offences under Ss. 307, 411, 414 of PC was registered against accused and he was on bail and attending Court regularly, the detention of the accused on the basis of the aforesaid offences after more than one year and a half was illegal. *AIR 1982 SC 682.*

(8) Cognizable—Warrant—Not bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

24. Practice.—Evidence—Prove: (1) That the property in question is stolen property.

(2) That the accused received or retained such property.

(3) That he did so dishonestly.

(4) That he knew or had reason to believe that the property was stolen property.

25. 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 of—, at—, dishonestly received (or retained) stolen property, to wit—, belonging to one X, knowing or having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under section 411 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 412

412. Dishonestly receiving property stolen in the commission of a dacoity.—Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to

believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with [6][imprisonment] for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *Simultaneous conviction under S. 395 and this section.*
3. *Knowledge or reason to believe.*
4. *Extent of presumption under S. 114, Illustration (a), Evidence Act.*
5. *Possession.*
6. *Evidence and proof.*
7. *Charge and conviction.*
8. *Sentence.*
9. *Procedure.*
10. *Practice.*
11. *Charge.*

1. Scope.—(1) The offence under this section is much more serious them the offence under section 411 of the Penal Code. The retaining of stolen property is a continuing offence. This section refers to persons other than the actual dacoits. It implies receipt from another person or an act by one not himself the dacoit. The receiver is punishable under it as severely as those who commit dacoity. No person can be convicted for "receiving or retaining stolen goods" unless he is shown, at the material time, to have been in possession or control of the place where they were discovered or at least to have had some knowledge of their deposit there *(41 CrLJ 647)*. For a charge under section 412, an accused person cannot be convicted under this section if it has been proved by the prosecution that the accused knew or had reason to believe that the property recovered from their possession was the proceeds of the dacoity *(1969 CrLJ 1077)*. The fact that section 114, Evidence Act does not provide an illustration with reference to dacoity does not mean that there is no such presumption. Where the accused is found to be in recent possession of property stolen in a dacoity, it can be presumed that he was one of the dacoits, or that he had dishonestly received and retained the property knowing or having reason to believe that possession has been transferred by dacoity or that he had dishonestly received or retained the property, knowing or having reason to believe that it was stolen property *(49 CWN 391)*. There must be evidence to show that the accused received the property from a person whom he knew to be a dacoit or belongs to a gang of dacoits *(AIR 1950 All 398)*. Where a person is convicted under section 395 of the Penal Code for committing a dacoity and it is in the case of that dacoity that some properties came to be under his possession he cannot be again convicted under section 412 of the Penal Code *(AIR 1956 All 336)*. The prosecution must establish three facts for proving the accused guilty. They are, namely, the ownership of the articles in question, the theft of them, and their recent possession by the accused. It is not a reasonable explanation of his possession for the accused to deny the existence of these facts. The explanation which renders the presumption unbelievable to the prosecution is an explanation of how articles belonging to the complainant are found in possession of the accused shortly after they had been stolen from the possession of the complainant. It is only when the explanation offered by the accused is with regard to that possession, that the presumption does not arise. It is for the prosecution to prove guilty knowledge. The onus of proof never passes to the accused *(37 CrLJ 976)*. Where no stolen property was recovered from the accused, but some of it was given up by his stepfather with whom the accused was living, it was held that the accused could not be convicted under this section, without sufficient proof that the property had been taken by the accused to the house inhabited by him and his father *(35 CrLJ 165)*. Where the accused is apprehended soon

after a dacoity, with part of the plunder in his possession, there is a good ground for charging him with the dacoity as with having received or retained with guilty knowledge and he ought to be charged in the alternative form. Separate conviction and sentence under section 395 and this section with respect to the same property are improper.

(2) Acquittal under the section in a previous trial is no bar for subsequent prosecution under the same section, in respect of greater number of articles received at the same time. Retaining stolen property is a continuing offence and if an accused is previously acquitted of an offence of retaining articles of stolen property, subsequent prosecution under section 412 in respect of greater number of articles is not barred thought they might have been received at the same time as those in question in the pervious trial. *Ashutosh Talukder Vs. State (1962) 14 DLR 590.*

(3) Discovery of the stolen article being pointed out by the accused not enough for conviction—Evidence that the accused himself concealed it necessary. *Manjil Fakir Vs. State (1965) 17 DLR 64.*

(4) Joint occupation of the hut—The stolen article was produced by the accused from an unlocked box lying in a house where the accused with his father and brother lived together. Held: This is not sufficient for a finding that the accused was in possession of the stolen article. *Khan Vs. Crown (1957) 9 DLR (WP) 5.*

(5) Stolen articles in a box in a hut in joint occupation of several persons—No presumption that any of them is guilty under sec. 412—Exclusive possession must be proved. *Asmat Fakir Vs. State (1958) 10 DLR 201.*

(6) Dishonestly receiving property stolen in the commission of a dacoity—To sustain conviction for such an offence the property stolen in the commission of dacoity must be received or retained by persons other than the dacoits. *Kashem Molla Vs. State 42 DLR 453.*

(7) As no search list witness was examined regarding identifying the stolen property namely, Yasiko Camera in the TI Parade, the PW 4 who identified the Camera is neither a First information Report nor charge sheet witness nor has he been examined in this case to say whether he identified it in the TI Parade nor any inmate of the house wherefrom it was stolen. In such a position and in the absence of identifying witness the trial Court was not justified in convicting and sentencing the appellant under section 412 of the Penal Code. *Pear Ali Khan alias Pear Ali Vs. State, represented by the Deputy Commissioner (Criminal) 3 BLC 555.*

(8) Prosecution failing to prove that accused knew or had reason to believe property recovered from them to be proceeds of dacoity. Conviction under section 412 altered to that of section 411. Mere relationship of witnesses cannot be equated with interestedness of witness. *(Ref: AIR 1941 Pat. 223). 1968 PCrLJ 1704.*

(9) This section deals with dishonest receipt or retention of stolen property, the possession of which has been transferred by the commission of a dacoity. *1977 Raj Cri C 289.*

(10) For a conviction under the first part of this section, it is not sufficient to prove that the accused knew that the property was stolen, it should also be proved that the accused knew or had reason to believe that its possession was transferred by the commission of dacoity. *AIR 1972 SC 635.*

2. Simultaneous conviction under S. 395 and this section.—(1) Unless there exist circumstances, which clearly separate the one crime from the other, it is not right to convict a person both of the offence of dacoity under S. 395 and of receiving the property stolen in the dacoity. *AIR 1956 All 336.*

3. Knowledge or reason to believe.—(1) The knowledge that is required to be proved under this section is that the property was transferred by the commission of a dacoity; or, under the second part of the section, that the person from whom the property was received belonged to a gang of dacoits, and that the property received was stolen. In the absence of evidence of such knowledge on the part of the accused, there cannot be a conviction under this section. *(1867) 7 Suth WR (Cri) 73.*

(2) Accused had taken a pledge of property for Rs. 45,000.00 which was not an outrageously low amount compared with the value of the property pledged. Further accused was not shown to have any knowledge of the offence of dacoity that had taken place or had any reason to believe that the property was stolen. On these facts no case under S. 412 could be made out. *1983 CriLJ (NOC) 166.*

(3) Where property looted in dacoity was recovered from a place jointly owned by three persons, then in absence of any evidence to show that the person from whom the property was recovered retained the property with the knowledge that the same had been stolen during commission of dacoity, the accused could not be convicted under section 412. *1984 All Cri Rul 190 (193).*

4. Extent of presumption under S. 114, Illustration (a), Evidence Act.—(1) Illustration (a) to S. 114 of the Evidence Act although it expressly refers only to "theft" and "theft" does not limit the scope of the section and it is possible to raise a presumption in certain circumstances that a person found in possession of property stolen in a dacoity was either a dacoit or had received it knowing it to have been stolen in a dacoity. *1956 Andh LT 915.*

(2) Whether a presumption that the accused is a receiver knowing the property to have been stolen in a dacoity could be drawn depends on the facts and circumstances of each case. Normally the presumption that arises from mere possession of such property would be of the lesser offence under S. 411. *AIR 1970 SC 535.*

(3) Stolen property—Recovery very soon after dacoity took place—Theft of property in course of dacoity proved—Held that accused could not be convicted under S. 395 on basis of presumption under S. 114, Evidence Act—Conviction altered to that under S. 412, P.C. *AIR 1982 SC 129.*

5. Possession.—(1) Possession of stolen article by the accused must be conscious, exclusive and recent in order to raise the presumption under Illus. (a) to S. 114, Evidence Act. Mere knowledge of the place of concealment of the stolen property does not necessarily lead to the conclusion that the person having such knowledge actually received the stolen articles or participated in the act of concealment. *1956 Madh BLR (Cri) 54.*

(2) Where property looted in a dacoity is discovered in a house jointly occupied by two brothers who are charged under Section 412 and the prosecution itself is not sure from whose possession the property was recovered it is very difficult to convict any one of them. *AIR 1955 NUC (All) 3518.*

(3) If stolen property is produced by the accused from unlocked wooden box lying in a house in which other members also lived, he cannot be said to be in possession of stolen property. *AIR 1955 NUC (Pak) 5231.*

6. Evidence and proof.—(1) A person found in possession of stolen articles may be presumed to be a thief or receiver of stolen property. *1980 BLJ 32 (Pat).*

(2) Evidence of mere possession of stolen goods is not sufficient to fix guilty knowledge as required under this section. But where there was further evidence to show that some property looted from the house of the victims was handed over to the accused by the dacoits, soon after the dacoity was committed in the night, near a temple and not at his house, it was held that the accused knew or had reason to believe that the property was stolen in a dacoity. *AIR 1949 All 245.*

(3) Where articles which were the subject matter of a dacoity were recovered from the accused at his instance but he was not identified by the witnesses in a test identification parade the Supreme Court altered the conviction from Sections 397 to 412, P.C. *AIR 1978 SC 1390.*

(4) When stolen property (gold ornaments weighing 18 tolas) of the offence of dacoity was recovered from the accused but the trial court acquitted him on the ground that the complainant was not in a position to accumulate so much gold, it was held that the ownership of the entire assets of the complainant not being in issue the finding was not proper. *AIR 1968 Orissa 20.*

(5) Recovery of stolen property from persons charged under S. 412, Penal Code cannot be ignored. *AIR 1961 All 614.*

(6) In a case under Section 412 it would be very dangerous to rely purely on the Police evidence particularly when there is contradiction in their statements and when the actual recovery witnesses have not been produced. *AIR 1955 NUC (All) 3518.*

(7) When a person is found in possession of property taken in dacoity soon after the commission of dacoity, the proper inference to be drawn is that he was one of the dacoits and not a receiver. *AIR 1955 NUC (Pat) 3235.*

7. Charge and conviction.—(1) A person found in possession of stolen property identified as belonging to different owners cannot be convicted separately in respect of properties identified by each owner, unless there is evidence to prove that they were received by him at different times. *AIR 1923 All 547.*

(2) An accused charged with an offence under this section could be convicted under S. 411 without there being a specific charge under the latter section. *AIR 1926 Bom 134.*

8. Sentence.—(1) A receiver of articles of petty value stolen in a dacoity should not be treated in practically the same manner as though he were one of the actual dacoits. *AIR 1927 Oudh 277.*

9. Procedure.—(1) Where the accused, acquitted in a previous trial in respect of some of the properties, is tried subsequently in respect of other articles, the subsequent trial is not barred though they might have been received at the same time as those in question in the previous trial. *AIR 1947 Bom 467.*

(2) As to jurisdiction regarding the place of trial. *AIR 1947 Pat 67.*

(3) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

10. Practice.—Evidence—Prove: (1) That the property in question was stolen property.

(2) That the possession of such property was transferred by the commission of dacoity.

(3) That the accused received or retained such stolen property.

(4) That he did so dishonestly.

(5) That he knew or had reason to believe that the possession of such property was transferred by the commission of dacoity.

11. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, dishonestly received (or retained) stolen property, to wit—, belonging to one X, knowing or having reason to believe that the possession of the same had been transferred by the commission of the dacoity, and thereby committed an offence punishable under section 412 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 413

413. Habitually dealing in stolen property.—Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with [6][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) In order to bring the offence under this section it must be shown that the property was received on different dates and on different occasions by the accused—the principal ingredient being habitual, constantly receiving or dealing in such goods which he believed to be stolen. An accused cannot be tried at the same trial for receiving or retaining and habitually receiving or dealing in stolen property. The proper course is to try the accused first for the offences under section 411, and then, if he is convicted, to try him for the offence under section 413, putting in evidence his previous convictions under section 411.

(2) The four ingredients of the offence are:

(i) that the articles stated to have been received by the accused were stolen property;

(ii) that he received such articles;

(iii) that he has been receiving them frequently or habitually; and

(iv) that he was receiving them knowing or having reason to believe them to be stolen articles. *1955 Ker LT 830.*

(3) A person cannot be said to be habitually receiving stolen goods who may receive the proceeds of a number of different robberies from a number of different thieves on the same day. In addition to the receipt from different persons, it is necessary to show that the property was received on different occasions and on different dates. *(1892) ILR 19 Cal 190.*

(4) Habitual thieves, if they are associated together for the purpose specified in Section 401, may come within its purview; but, habitual receivers of stolen property from these thieves will not come within the scope of that section. They will have to be dealt with only under this section. *AIR 1914 Lah 539.*

(5) Since both these offences cannot be said to have been committed in the course of the same transaction, a joint trial of different sets of persons under S. 401 and under this section is illegal. *AIR 1932 Lah 486.*

(6) Offences under S. 411 and this section not being of the same kind, there cannot be one trial for both those offences. The proper course would be to try the accused first for offences under S. 411 and then, if he were convicted, to try him for the offence under this section putting in evidence the previous convictions under S. 411 and proving the finding of the rest of the property in respect of which no separate charge under S. 411 could be made or tried by reason of the provisions of S. 300, Criminal P. C. *(1882) ILR 8 Cal 634.*

2. Practice.—Evidence—Prove: (1) That the property in question is stolen property.

(2) That the accused received it or dealt in it.

(3) That he did so habitually.

(4) That he did so knowing or having reason to believe it to be stolen property.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session.

4. Charge.—The charge should run as follows:

I (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, were a habitual receiver or dealer in property, which you knew (or had reason to believe) to be stolen property, and that you thereby committed an offence punishable under section 413 of the Penal Code, and within my cognizance of the Court.

And I hereby direct that you be tried by this Court on the said charge.

Section 414

414. Assisting in concealment of stolen property.—Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Stolen property.*
3. *Disposal.*
4. *"Making away with".*
5. *"Knows or has reason to believe".*
6. *Evidence and proof.*
7. *Charge and conviction.*
8. *Sentence.*
9. *Procedure.*
10. *Practice.*
11. *Charge.*

1. Scope.—(1) The object of this section is to punish a person who assists in the traffic of stolen goods. Section 379 Penal Code punishes a thief. Section 411 punishes a receiver of stolen property and section 414 punishes a person who assists in the disposal of stolen property *(AIR 1952 All. 481).* For the application of this section it is necessary that the accused should have assisted some one else in the disposal of the property and does not cover a case where a person receives and then disposes of stolen property entirely on his own account. The word "believe" is much stronger then the word "suspect" and involves the necessity of showing that the circumstance are such that a reasonable man must have felt convinced in his mind that the property with which he was dealing was stolen property. In a case under section 414, the ownership of the property need not be traced. It is sufficient if it is proved that property is stolen *(27 CrLJ 114).* The section reuires to show that the accused voluntarily assisted in concealing or disposing of property. An accused person's merly pointing out the place where some of the stolen property is recovered and his making an admission before the police of having concealed it there, which admission is not admissible in evidence, are not sufficient for convicting him under this section in the absence of any other independent proof connecting him with the commission of the crime *(8 CrLJ 460).*

(2) Ingredients of the section which are to be established for a conviction under the section. Mere suspicion cannot be the basis of conviction. The main ingredients of the section are that the property in question must be stolen property and the accused must voluntarily assist in concealing or disposing of or making away with such property with full knowledge or belief that the property in question is

stolen property. The intention of the section is to punish persons who subsequent to the commission of offence either conceal the alleged property or make away with it by destroying or otherwise disposing of it. The words "knows or has reason to believe to be stolen property" in the section indicate that the person volentarily assisting in concealing or disposing of or making away with property was stolen property. The word "believe" is a very much stronger word than "suspect" and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. The fact that the property dealt with is stolen property may in some instances be inferred indirectly from circumstantial evidence as from the way in which it is dealt with by the party dealing with it, but the circumstances must be such as would justify the conclusion that the property is actually stolen property. *Naki Miah Fakir Vs. State (1968) 20 DLR 700.*

(3) Unless the ingredients of the section are found to have been established by a finding of the Court, conviction untenable. The prosecution must prove the ingredients of the offence under section 414 and the Court must come to clear findings on those points. Without clear findings on those elements of the section, a conviction under section 414 of the P. Code cannot be maintained. *Md. Naki Miah Fakir Vs. State (1968) 20 DLR 700.*

(4) This section does not apply to the thief or the receiver of the stolen property but is intended to apply to persons whose dealing with the stolen property is not of such a kind as to make them guilty of dishonestly receiving or retaining it themselves. *(1866) 1 Agra HCR (Cri) No. 9, p. 291.*

(5) This section aims at bringing within its scope the category of persons who do not get possession or actual custody of the stolen property but who assist in its disposal by others. *AIR 1952 All 481.*

(6) The section requires that the accused should have assisted some on else in the disposal of the property and does not cover a case where a person receives and then disposes of stolen property entirely on his own account. *AIR 1926 Bom 71.*

(7) It is not necessary for a person to be convicted under this section that another person must be traced and convicted of an offence of committing theft and that the prosecution has simply to establish that the property recovered is stolen property and the accused provided help in its concealment and disposal. *AIR 1964 SC 170.*

2. Stolen property.—(1) A finding that the property in question was stolen property is an essential requisite for a conviction under this section. *1968 CriLJ 1670 (Pat).*

3. Disposal.—(1) The words 'disposing of in this section must be interpreted in the light of the words they are associated with, viz., "concealing" and "making away with" and they cannot cover a case where the person restores to the owner the property stolen by his son but denies having restored anything when he is asked to explain from whom he got the property. He cannot be convicted under this section. *1948 Bur LR 103.*

(2) A man spending money stolen by another is not disposing of it within the meaning of this section. *AIR 1935 Lah 587.*

4. "Making away with".—(1) The accused, a driver of taxi, was carrying persons who had hired it. On the way the taxi stopped and two persons got down from it and within a distance of about 3.5 yeards they suddenly attacked and robbed a man of his purse, and boarded the taxi and the accused, in

spite of the cries of the victim, drove away as fast as he could. On the above facts, it was held that the accused voluntarily assisted the robbers in making away with the money obtained by such robbery and was guilty under this section. *ILR (1940) 2 Cal 9.*

5. "Knows or has reason to believe".—(1) The word "believe" occurring in this section is much stronger than the word "suspect" and 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 was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired or not. *(1963) 5 Orissa JD 370.*

6. Evidence and proof.—(1) Where persons are charged with assisting in concealing or disposing of property which they knew or had reason to believe to be stolen property, the nature of the property as well as the circumstances under which it was being made away with must be taken into consideration in assessing their guilty knowledge. *(1864-1866) 2 Bom HCR 130.*

(2) The mere knowledge of the place of concealment does not necessarily lead to the conclusion that the person having such knowledge actually received the stolen property or participated in the act of concealment. *AIR 1917 Lah 48.*

(3) Dacoity—Accused not taking part nor receiving any articles but throwing away a bundle into well—Offence falls under Section 414. *AIR 1957 Andh Pra 482.*

(4) In a case under Sections 411 and 414, P.C. proper way to charge the jury is to tell them that when once the presumption under Section 114, Evidence Act, ceases to be applicable there is no evidence of guilty knowledge at all. Omission to tell this is misdirection being a most serious error vitiating the conviction based on it. *AIR 1937 Pat 191.*

7. Charge and conviction.—(1) A person cannot be tried for an offence under this section and under S. 379 in one trial. *1935 Mad WN 652.*

8. Sentence.—(1) A second class Magistrate convicted the accused under S. 411 for receiving, along with another person, stolen property. He also convicted him under this section for assisting in the concealment of other stolen property, and sentenced him to suffer 4 months R.I. under each of these two sections and directed the sentences to run consecutively. It was held that the sentences were quite legal. *AIR 1928 Bom 145.*

9. Procedure.—(1) When a stolen article is criminally disposed of by one person and at the same time and place dishonestly received by another, the two offences form part of the same transaction and the two persons can be tried jointly at one trial. *(1904) 1 CriLJ 330.*

(2) The fact that certain persons were convicted under this section for possessing a stolen revolver is no bar to their being convicted in respect of it under Section 19(f), Arms Act in a subsequent trial. *AIR 1933 Oudh 470.*

(3) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

10. Practice.—Evidence—Prove: (1) That the property in question is stolen property.

(2) That the accused assisted in concealing or disposing of, or making away with, such property.

(3) That he did the act of assisting in concealing or disposing of, or making away with, such property voluntarily.

(4) That he knew or had reason to believe that the property was stolen property.

11. Charge.—The charge should run as follows:

I (name of office of the Magistrate) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, voluntarily assisted in concealing (or disposing of, or making away with) property, to wit—, which you knew (or had reason to believe) to be stolen property, and that you thereby committed an offence punishable under section 414 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Of Cheating

Section 415

415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonored, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver and thereby dishonestly

induces Z to advance money upon the faith of such delivery, A cheats; but if A, at the time of obtaining the money intends to deliver the indigo plant and afterwards break his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

Cases

1. For cases relevant to this section, see under section 417 infra.

Section 416

416. Cheating by personation.—A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

Cases

1. For cases relevant to this section, see under section 419 infra.

Section 417

417. Punishment for cheating.—Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Deceive.*
3. *Dishonest concealment of fact.*
4. *"Fraudulently or dishonestly."*
5. *Induced to deliver property.*
6. *Property and delivery of property.*
7. *"Causes or is likely to cause damage or harm in body, mind, etc."*
8. *Effect must be the proximate consequence of the deceit.*

1. Scope.—(1) In the offence of cheating there are two elements—deception and dishonest inducement to do or omit to do something. Mere dishonestly is not a criminal offence. Moreover, to establish the offence of cheating, the complainant would have to show not only that he was induced to do or omit to do a certain act but that this induced omission on his part caused or was likely to cause him some harm, or damage in body, mind, reputation or property which are presumed to be the four cardinal assets of humanity *(AIR 1938 Mad 129)*. In order to bring a case within the second part of section 415, damage or harm caused, or likely to be caused must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom, and law does not take into account remote possibilities that may flow from the act. The damage or harm must be the proximate and natural result of the act or omission and does not include vague and contingent injury *(36 CrLJ 276)*. In a case of cheating the intention of the accused at the time of the offence is to be seen and the consequence of the act or omission itself is to be judged. Deceiving is common to both parts of the section. The person deceived must have acted under the influence of the deceit. The facts must establish damage or likelihood of damage and the damage must not be too remote. It is clear from the words of section 415 that mere deceit of a person is not sufficient. The mere doing of something fraudulently or dishonestly is not sufficient. The deceit of the fraudulent or dishonest person must induce the person deceived to deliver some property, or to consent that some property shall be retained, or intentionally which he would not otherwise do or omit to do, and, the words "and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property" are important. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth or recklessly, or without caring whether it be true or false. The giving of a cheque on a bank as payment for goods, or in payment of debt does not amount for goods, or in payment of a debt does not amount to a representation that the person giving the cheque has money to the amount in the bank at time, but does amount to a representation: (a) that he has authority to draw on the bank for that amount; (b) that the cheque is a good and valid order for the payment of its amount and that the cheque will be paid, i.e. that the existing state of facts is such that in the ordinary course the cheque will be met *(31 CrLJ 1096)*. Whenever the words 'fraud' or "with intent to defraud" or 'fraudulently' occur in the commission of a crime, two elements at least are essential to the commission of a crime, viz (a) deceit or an intention to deceive or, in some cases mere secrecy and (b) either actual injury or possible injury, or an intention to expose some person either to

actual injury or a risk of possible injury, by means of that deceit or secrecy. The term "fraudulent" may be defined to imply an intent to deceive in such a manner as to expose any person to loss , or risk of loss. The term "dishonestly" implies a deliberate intention to cause wrongful gain or wrongful loss, and when such an intention is proved and is coupled with cheating and the delivery of property, the offence is punishable under section 420 of the Penal Code, in which the word "fraudulently" finds no place. There is nothing in section 415 to exclude from the scope of its provision cheating which has relation to immovable property. It is true that so far as that part of section which relates to dishonest concealment of facts is concerned, it must be read subject to the qualification that there is no duty on a seller to disclose defects in title in immovable property which the buyer with ordinary case could discover. But where loan is made upon certain property burdened with charge on the representation that the property was free of any charge and these questions were answered falsely, and the charge upon the property was not a registered charge, it cannot be said that in this case the creditor could have discovered this charge by reference to the registers. It is a misappropriation deliberately made for the purpose of deception, amounting to cheating *(AIR 1937 Sind 56)*. It is well settled that a mere breach of contract cannot give rise to a criminal prosecution. This is so, because at the time of entering and carrying out the contract a man may honestly have intention of the contract but later may not be able to do for more than the reason, or may charge his mind. This distinction between a mere breach of contract and one of cheating therefore depends upon the intention of the accused at the time of alleged inducement. Where there is no clear or conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in a civil court, the matter should not be allowed to be fought out in a criminal court. Subsequent conduct is no doubt a piece of evidence of criminal intention but that along cannot be enough in every case, and it is the circumstances of each case which have to be considered along with subsequent conduct *(AIR 1959 Tri 40)*.The offence of cheating may be done in a variety of ways based on human ingenuity. It may be committed through advertisement.

(2) Simple cheating is punishable under section 417 Penal Code. Section 417 covers cases of cheating in which though there is fraud yet there is no intention of causing wrongful loss or wrongful gain. Section 417 punishes the offence of cheating committed which is not otherwise provided for. Section 420 also punishes for the same offence and the question often arises as to which section is applicable. Section 417 provides punishment for the offence of simple cheating which are not covered by sections 418, 419 and 420. The two essential ingredients of the offence under this section are firstly deceit and secondly inducement. The crux of the case against the accused is the state of their mind at the time when they committed the alleged offence, regardless of any remedy, whether civil or criminal, that may be available upon the facts to the case *(PLD 1965 Lah 676)*. This section will apply only where the act complained of falls within the mischief of the section 415. Where the dispute is of a civil nature the Court will not convict an accused for cheating*(AIR 1940 Lah 93)*. If there is no deceit, there cannot be cheating. Question involving civil rights should not be tried in the guise of criminal proceedings. Mere breach of contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and a case of cheating lies upon the intention of the accused at the time of the alleged inducement and where there is no criminal intention of the accused at the time the offence is said to have been committed the matter ought not to be entertained in a criminal court. *(AIR 1973 SC 326)* Evidence with regard to previous act of fraud alleged to have been committed by an accused who is on his trial on a charge of cheating, is inadmissible in law *(26 CrLJ 906)*. Subsequent conduct is, no doubt, a piece of evidence of criminal intention but that alone cannot be enough in every

case and it is the circumstances of each case which have to be considered along with subsequent conduct. Where the accused had entered into a contract with the complainant to work for the latter but did not commence work in spite of complainant's making two payments as agreed, the complainant in order to make out the offence of cheating has to establish a preconceived intention on the part of the accused of not carrying out the terms of the agreement. Such an intention cannot be presumed from the mere receipt of money and not working subsequently according to the terms of the agreement. If the intention is changed subsequently it would not be cheating. The prosecution in all criminal cases is really the state of mind. Therefore in a case of cheating it is not necessary that complainant should have been the person deceived *(7 CrLJ 342)*. In a prosecution for an offence under section 415, the burden is on the prosecution to prove fraud or dishonesty. The burden of proof is not on the accused to prove their honesty. In a charge of cheating, the charge must set out the manner in which the offence was committed. The omission to state the manner of the cheating is regarded as material or not according as the accused has or has not in fact been misled by the commission and the omission has or has not occasioned a failure of justice *(29 CWN 408; 28 CrLJ 849)*. Since the offence is noncognizable, the investigation of it can only be undertaken by police on the instruction of a Magistrate.

(3) "Property", meaning of—Procuring certificate to get admission in a college —not a 'property'—No harm to reputation is caused by attesting such certificate. *Rana Muhammad Fazal Khan Vs. State (1962) 14 DLR (SC) 235: (1962) PLD (SC) 397.*

(4) 'Property' does not depend upon its possession a money or market value and still it may have a value for its owner. It may still be capable or being owned, possessed or transferred and, therefore capable of creating property or legal rights in its owner, possessor, holder or transferor. *Rana Muhammad Fazal Khan Vs. State (1962) 14 DLR (SC) 235.*

(5) "Cheating"—The word 'person' occurring in section 415 includes Government—Government property in possession of Government servant is deemed to be in possession of Government. *Muhammad Rashid Vs. State (1960) 12 DLR (SC) 207.*

(6) Initial intention to cheat must be proved—In order to constitute cheating it must be established that someone is made to part with some property on the promise of another to return something in lieu thereof which the latter had no intention to give. The initial intention to deceive, therefore, must be established in order to justify a conviction for cheating. *Prithiraj Bacha Vs. State (1958) 10 DLR 325.*

(7) Intent to cheat must be proved to have existed at the time when the offences were committed. Subsequent conduct is no valid criterion—The mere fact that the accused denied the transaction at the trial and refused to return the money, does not necessarily show that they had a criminal intent from the beginning and their denial may merely amount to the usual mistaken attempt to protect themselves from the result of the prosecution. Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may judged by his subsequent act. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party is said to be aggrieved has an alternative remedy in the civil court, the matter should not be allowed to be fought in the criminal courts. *Abdul Awal Chowdhury Vs. Md. Waliullah (1960) 12 DLR 520: 91961) PLD (Dac.) 53.*

(8) No cheating without deception; no deception without misrepresentation. If a person undertakes to supply goods of a specific description on the condition that the goods will be subjected to scrutiny before final acceptance, and will be liable to rejection if they are discovered to be of different quality

and quantity, and supplies goods which are not of the specified quality and takes the risk of loss arising from rejection, he does not commit the offence of cheating as defined in section 415 of the Penal Code. He commits no deception unless he so plays with the goods as to conceal its defects, and gives to them the colour to appear as goods of the specified quality. There can be no cheating without deception and there can be no deception without misrepresentation, and misrepresentation takes place only when a person by his conduct changes the face of the article offered for acceptance. There was complete choice in the authority to reject the timber offered if it did not correspond to the specifications. Submission of goods to inspection and rejection, without any attempt to conceal their defects, does not constitute the offence either of cheating or attempt to cheat. *M. Sharif Asghar Vs. State (1959) 11 DLR (WP) 90: (1959) PLD (Lah) 238.*

(9) Cheating under section 415 is not a prerequisite to a conviction under section 419. *Md. Shafiullah Vs. The State, (1967) 19 DLR 255.*

(10) When a person promises to pay price of goods and on his undertaking to pay the goods were delivered to him—Afterwards he fails to pay price thereof—No case of cheating will lie. "Cheating" has been defined in section 415 of the Penal Code. The ingredients of cheating are deception of one person by another person and fraudulently or dishonestly inducing the person so deceived to deliver any property. It is, therefore, clear that the acts of deceiving and thereby dishonestly or fraudulently inducing the person deceived are acts which must precede the delivery of any property. Consequently if the delivery of the goods is made not as result of any dishonest inducement then no offence of cheating is committed. In a case of supply of goods on promise to pay its price the all important question to be determined is whether the intention not to pay the price was there when the promise was made. For subsequent failure to keep the promise to pay does not constitute cheating. This will be a mere breach of contract for which the person breaking it is liable for a civil action. It clearly appears from the complaint petition that some unspecified quantity of jute was supplied by the complaint's firm to the company of the accused from December 1972 to January 1973. The price of the jute came to Rs. 72,750.42 paisa but when some time after delivery of the jute its price was demanded the price was no paid and the promise was broken. Breach of the promise to pay the price in these circumstances hardly shows that when the promise had been made the accused had no intention to pay the price. It is contended that the initial intention of the accused can be better determined on the basis of evidence and that it is not yet proper time to quash the proceeding on the plea of absence of dishonest intention at beginning of the transaction. Held: On perusal of the complaint petition there is nothing to show that when the accused had made the promise to pay the price of the jute on delivery they had the dishonest intention not to pay it. On the contrary, it appears that the jute was supplied for over a considerable period in the normal course of business on credit. The subsequent denial of the transaction amounts to a mistaken attempt to save themselves from criminal prosecution. *Md. Anwar Ali Vs. State & Md. Nezamuddin (1978) 30 DLR 327.*

(11) Ingredients of cheating—Those have to be established on a charge of cheating. In order to constitute cheating it must be established that someone is made to part with some property on the promise of another to return or to give something in lieu thereof which the latter had no intention to give. The initial intention to deceive, therefore, must be established to justify conviction for cheating. Intention to cheat is to be gathered from surrounding circumstances. *Nasiruddin Mahmud Vs. Momtazuddin Ahmed, (1984) 36 DLR (AD) 14.*

(12) Cheating—Ingredients which must be established in an offence of cheating. *Shaik Obaidul Huq Vs. The State (1986) 38 DLR 105.*

(13) A post-dated cheque in payment for goods received, if dishonoured, creates only a civil liability. *Shaik Obaidul Huq Vs. The State (1986) 38 DLR 105.*

(14) False representation with a view to cheat need not be addressed to specific individual. It may be addressed to the public in general. *M. F. N. Rewail Vs. State (1956) 8 DLR 569.*

(15) By false representation the accused induced the revenue authority to have his name mutated in respect of certain property whereas that property belonged to somebody else. The offence being detected the accused was tried for cheating under section 420 Penal Code. On appeal it was contended that the State being the complainant and as the State was not the person who was cheated the charge under section 420 a against the accused did not lie. Held: The conviction is valid in law. The revenue authority was the agent of the Government which granted protection to the right of the subject. *Md. Shafi Vs. State (1966) 18 DLR (WP) 151.*

(16) The initial intention to deceive must be established to justify a conviction of cheating and the intention is to be granted from the surrounding circumstances. *Arifur Rahman alias Bablu Vs. Shantosh Kumar Sadhu and another 47 DLR (AD) 180.*

(17) It there is allegation that goods were delivered on credit on specific promise of repayment within a specific date but the payment was not so made, it may be inferred that there was initial intention of deception. *Asaduzzaman (Md) Vs. Md. Salamatullah & others (Criminal) 52 DLR 530.*

(18) Cheating—Whether issuance of post-dated check constitutes an offence of cheating—The insurance of post-dated check means a promise for future payment and if future payment is defaulted on account of subsequent dispute that does not constitute any offence of cheating while there is nothing to show that the accused had any initial intention to cheat or deceive the other party—In order to constitute cheating there must be fraudulent and dishonest inducement for delivery of property—The all important question to be determined is whether the intention not to pay was there when the promise was made—The subsequent failure to keep the promise to pay does not constitute cheating. *Sheikh Obadiul Haque Vs. Rezaur Rahman Khan 7 BLD (HCD) 23.*

(19) Distinction between cheating and breach of contract—In order to constitute cheating it must be established that one is made to part with his property on the promise of another or to give something in lieu thereof which the latter had no intention to give with a view to deceiving at the outset. The averments in the petition of complaint that the accused turned down the respect for execution and registration of the sale deed on receipt of the balance of the consideration in pursuance of an agreement for sale clearly show that no criminal offence was made out—At best it may be treated as a breach of contract entailing civic liability—The distinction between the breach of contract and cheating depends upon the intention of the accused at the time of the alleged inducement, which may be judged by his subsequent acts—In the instant case facts show complete absence of dishonest intention on the part of the accused at the time when the agreement was executed between the parties—Prolongation of the proceedings in the criminal Court amounts to an abuse of the process of the Court and is therefore liable to be quashed. *Shahjahan Vs. Atiqur Rahman 7 BLD (HCD) 164.*

(20) Simple dishonouring of a cheque itself is not cheating. To constitute an offence in section 415 of the Penal Code, there must be a specific allegation that the accused had initial intention to deceive the complainant. It is also true that such intention can be gathered from the facts and circumstances of a case, because such intention normally is concealed in the mind and is not expressed. If there are allegations that goods were delivered on credit on specific promise of repayment within a specific date but the payment was not made within the specific time, it may be inferred that there was initial intention of deception. *Md Asaduzzaman Vs. Md Salamatullah, 19 BLD (HCD) 461.*

(21) It is a settled principle that the initial intention to deceive must be established to justify a conviction for cheating. The intention is to be gathered from the surrounding circumstances. *Md. Arifur Rahman alias Bablu Vs. Shantosh Kumar Sadhu and another, 14 BLD (AD) 78.*

(22) Cheating, offence of—Ingredients. Held:—(i) In order to constitute cheating it must be established that some one is made to part with some property on the promise of another to return or give something in lieu thereof which the latter had no intention to give the initial intention to deceive, therefore, must be established to justify conviction—however that intention to cheat to be gathered from surrounding circumstances. (ii) A dishonest concealment of facts is a deception within the meaning of Sec. 415 P. C. Such a deception is an ingredient of cheating. *Akamuddin Ahmed Vs. The State, 27 DLR (AD) 175.*

(23) Prosecution for cheating—Plea of civil liability—The sum and substance of the complainant's case is that the accused released a total sum of Tk. 50,000/- form the complainant on a promise to secure him a highly paid job in Abu Dhabi. The point canvassed on behalf of the accused in support of his application u/s. 56/A Cr. P. C. was that the liability, if any, was of a civil nature for which no prosecution would lie. Since according to the petition of complaint the accused totally denied receipt of any sum from the complainant, the question of civil liability does not arise. *Abdur Rahim Vs. Enamul Huq & ors. 43 DLR (AD) 173=12 BLD (AD) 130.*

(24) Cheating—The initial intention to deceive must be established to justify a conviction for cheating. Intention of cheating shall have to gathered from the facts of the case and its surrounding circumstances. Where there is no fraudulent intention of the accused from the beginning, there can be no question of cheating. In the absence of mens rea, mere breach of contract cannot constitute cheating. Inability to fulfil a promise or contract does not amount to cheating. *Mahbubul Alam Gazi alias Mahbub Alam Vs. State and another (Criminal) 5 BLC 380.*

(25) Quashing of criminal proceeding—prosecution of cheating—plea of civil liability-In petition of complaint, accused totally denied receipt of any sum from the complainant. Held, the question of civil liability does not arise. *12 BLD (AD) 130.*

(26) (a) There cannot be any criminal case simply because the petitioner failed to deliver the contracted goods within the stipulated period and thereafter refused to refund to the opposite party No. 1 moneys advanced for purchase of goods by way of import. There is no allegation that the complainant retained control over moneys paid to the accused petitioners by way of any stipulation so as to bring the accused petitioner and the complainant within the ambit of a fiduciary relationship. There being no entrustment there cannot be any offence under section 406 Penal Code.

(b) In the present case essential ingredients of entrustment and cheating are missing. However, in a proper case a breach of contract may also amount to cheating or criminal breach of trust punishable under the Penal Code. Dispute being of civil nature petitioner may be liable for breach of contract. *3 BCR 15.*

(27) The ingredients required to constitute the offence "cheating" under Section 415 are:—

(i) There should be fraudulent or dishonest inducement of a person by deceiving him;

(ii) (a) The person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) The person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) In cases covered by (ii)(b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property. *AIR 1974 SC 1811.*

(28) Deceiving one person and inducing another to deliver property will not amount to cheating. It is of the essence of the offence of cheating as defined in this section that delivery of property should be by the person who himself was deceived by the accused. So also, no offence of cheating can be said to have been committed if one person is induced by deception to do or omit to do something and the act or omission causes or is likely to cause damage or harm to another person. *AIR 1954 Mys 9.*

(29) The offence in English law, which corresponds to the offence under this section, is known as "obtaining property by false pretence ." But the offence under the English law is different from the offence of cheating as defined in this section in some respects. Under the English law, a false pretence must be of a fact that exists or has existed. A promise as to future conduct not intended to be kept is not by itself a false pretence under English law, but under this section this will amount to cheating as is clear from a reading of illustrations (f) and (g) to this section. *AIR 1966 All 594.*

(30) Preparation for cheating—Does not amount to attempting to cheat. Accused filed 2 insured covers insured for Rs. 1200-0-0 with blank sheets and attempted to despatch them through the post office—Attempt failed—Contents discovered by the post office—Offence u/ss. 417/511 not made out—Neither offence u/ss. 193/511 made out. It is quite clear that in so doing the petitioner was making preparation for committing an offence of cheating. But the evidence does not establish that he went any further than that and it does not show that he made an attempt to cheat anybody. *Jogesh Chandra Guha Vs. Crown (1954) 6 DLR 483.*

(31) Circumstantial evidence—Other evidence abducted does not make the court believe and hold that the appellants dishonestly made insertion in the sale—deeds as alleged—Low consideration money by itself would not show that accused persons dishonestly inserted excess area of land in two documents—Appeal allowed. *7 BCR 128 AD.*

(32) Whether Government servants can be tried in the ordinary Criminal Court for offence of cheating and forgery with private persons—Whether such offence against public servant is exclusively triable by the Special Judge—Offence of forgery under section 468 and cheating under section 417 PC are not triable by ordinary Criminal Court—Those offences are to be tried by the Special Judge appointed under the Criminal Law amendment Act—The Additional District Magistrate has no jurisdiction to try the case for offences under sections 417 and 471, PC. *7 BLD 137.*

2. Deceive.—(1) Deceit is one of the essential elements of the offence of cheating. *1977 CriLJ (NOC) 19.*

(2) Where there is no evidence of deception an offence under this section cannot be made out. *AIR 1952 Orissa 149.*

(3) A fraudulent representation can be made directly or indirectly. A fraudulent representation got made through a person acting as agent for the accused amounts to fraudulent representation by and on behalf of the accused. *AIR 1962 All 582.*

(4) Where the complainant knew the truth, the accused cannot be convicted of the offence of cheating him. In such a case, the accused will be guilty only of an attempt to cheat. *AIR 1960 SC 979.*

(5) Where the accused obtained payments of money orders from postman showing identity card of payee with own photograph pasted on it and by signing as payee, the accused was guilty of offence of cheating. *AIR 1972 Delhi 13.*

(6) Bogus scheme promoted by accused—Persons induced to deposit money with them on false representation and suppression of material facts— Held, accused were guilty of offence of cheating. *AIR 1960 All 103.*

(7) In cases of deceit by representation, it is necessary to establish that the accused knew from the very beginning that the representation which he was making to the complainant was false. *AIR 1954 Manipur 13.*

3. Dishonest concealment of fact.—(1) Every concealment of fact does not amount to deception. The concealment must have been made dishonestly. Even a deliberate and illegal concealment of fact, unless it be a dishonest concealment will not amount to deception. *1980 Jab LJ 45.*

(2) Concealment of a fact is not quite the same thing as mere refraining from starting it. Something more is required to constitute concealment. But it is not necessary that there should be a statuary duty to speak. A duty such as may arise out of the circumstances in which the parties are placed and the nature of the negotiations between them is enough. Also any act done or precaution taken to prevent the real fact from being brought to the notice of the other party is concealment, even in the absence of a duty to state it. *AIR 1963 Guj 239.*

(3) The silence of the accused may amount to "dishonest concealment" under some circumstances and hence may amount to deception within the meaning of this explanation. *AIR 1925 Cal 14.*

(4) Cross-word Puzzle Rule that the decision of the Editor is final—Complainant claiming that he had sent correct solution but was not awarded the prize—Others were awarded prize—No cheating by the Editor. *AIR 1955 NUC (Pat) 105.*

4. "Fraudulently or dishonestly.—(1) It is not necessary to prove that the acts done by the accused are dishonest as well as fraudulent. *1968 CriLJ 1149.*

(2) Wrongful retaining of property which does not belong to accused is also dishonesty. *1980 CriLJ 369 (All).*

5. Induced to deliver property.—(1) Mere deception will not constitute cheating under Section 415. There must be evidence to show that the complainant was induced by such deception to deliver or part with property or to do or omit to do certain acts which were detrimental to his interest. *(1975) 41 CutLT 1085.*

(2) Where drugs are sold in bottles bearing labels containing false statements as to the brand of the drug etc. there must be evidence to show that the buyers were induced to buy the drug by the misappropriation on the level. *AIR 1959 Cal 427.*

6. Property and delivery of property.—(1) There is nothing in the section to exclude from its scope cheating which has relation to immovable property. *AIR 1937 Sind 56.*

(2) The following have been held to be "property" with the meaning of this section:

(a) a licence. *AIR 1948 Mad 268,*

(b) a health certificate. *AIR 1920 Mad 131,*

(c) a warrant of attachment. *(1904) 1 Cri LJ 332 (Bom),*

(d) an admission card to sit for a University examination. *AIR 1961 SC 1698,*

(e) a salary of a person. *AIR 1942 Pat 53.*

(3) A passport is 'property' in respect of which the offence of cheating can be committed. *AIR 1977 SC 1174.*

(4) Property is delivered when something in the ownership or possession of one man is delivered into the ownership or possession of another. Thus, Railway wagons are no doubt property, but where by wrong entries, more number of Railway wagons are taken to the colliery siding (which belongs to

the Railway) for purposes of loading, there is no delivery of property within the meaning of this section, as the amount of control exercised for this purpose is of a very limited character. *AIR 1924 Cal 495.*

(5) A man can give delivery through another of property within the meaning of this section which is not in his possession but which is at his order. *AIR 1937 Sind 293.*

7. "Causes or is likely cause damage or harm in body, mind etc."—(1) Where the Oath Commissioner is induced by the accused to attest an affidavit by falsely identifying as G, a person who was not G, the act done by the Oath Commissioner could not cause any damage or harm to the Oath Commissioner in body, mind, reputation or property. The accused could not be held guilty under S. 415 or S. 419. *AIR 1974 SC 1811.*

8. Effect must be the proximate consequence of the deceit.—(1) Under the first part of the section, delivery of property induced by the deceit constitutes the offence of cheating. According to the second part, an act or omission of the complainant which causes or is likely to cause damage or harm to him in body, mind, reputation or property is necessary to make out an offence of cheating. But in both cases, the effect must be the direct, proximate or natural consequence of the deceit practised upon the complainant by the accused. *(1972) 1 Cut LR (Cri) 450.*

9. Intention.—(1) A guilty intention is an essential ingredient of the offence of cheating. In other words, 'mens rea' on the part of the accused must be established before he can be convicted of an offence of cheating. *AIR 1956 SC 575.*

(2) Intention to cheat can only be gathered from the facts and circumstances of each case. *AIR 1960 All 103 (112) =1960 CriLJ 188 (DB).*

(3) The facts and circumstances must be such as to exclude any reasonable hypotheses of good faith. *AIR 1944 Mad 410.*

(4) It is necessary, in order to constitute the offence of cheating, that the intention to deceive should exist at the time when the inducement is offered. *AIR 1954 SC 724.*

(A) Illustrations (a) Cases where dishonest or fraudulent intention is made out.—(1) The accused, a head constable of Police, tried by means of a letter which was not genuine to obtain two bags of paddy from the complainant. It was held that he rightly convicted of an offence under this section read with S. 511 of the Code *AIR 1951 Nag 315.*

(b) Cases where it was held that there was no dishonest intention.—(1) A promised to marry B and cohabited her, with the result that B became pregnant. Subsequently A refused to marry her. For want of proof that A had no intention to marry B at the time of his proposal of marriage, he was acquitted of the offence of cheating and his subsequent conduct in refusing to marry the girl was held not to be the sole criterion of his intention at the time of earlier proposal. *1955 BLJR 17.*

(2) No loss or damage of any kind caused to person misled—No offence. *AIR 1963 SC 1572.*

(3) Procuring petrol coupons by fraud—Charge against manager of transport company—Held, intention to cheat was not proved. *AIR 1957 SC 466.*

(4) Dishonest intention of the accused persons not proved—Order of acquittal held was correct in law. *AIR 1964 Cal 64.*

10. Omit to do.—(1) Where the accused produced an altered Railway pass and attempted to travel without paying the fare, it was held that the accused was guilty under this section, as by deceiving the

Railway Company, he induced the Railway Company to do or omit to do what otherwise they would not have done, or omitted to do, but for his production of the altered pass. *1868 Pun Re (Cri) No. 6, P. 9.*

11. Damage or harm.—(1) The expression 'harm' connotes injury to a person in body, mind reputation or property. *AIR 1966 SC 1773.*

(2) An offence of cheating as defined in the second part of this section cannot be made out where there is no evidence to show that the accused had any intention of causing damage or harm by his act or that his act was ever likely to cause damage or harm to the deceived person in body, mind, reputation or property. *AIR 1974 SC 1811.*

(3) The Public Service Commission has got a reputation as an entity. The reputation pertains to its ability to make the right selection of candidates after due consideration of the applications before it. If therefore it is led or beguiled to make an unworthy selection or to select a person who is incompetent or unqualified, such an act cannot but be held to affect the reputation of the Public Service Commission. *AIR 1960 AndhPra 441.*

(A) Illustrations.—(1) The accused induced a Station Master to make out a railway receipt stating that the consignment was said to contain 251 bags of chilies with letters 'L/U' endorsed, meaning that the responsibility for loading and unloading vested with the consignor. The wagons were found to contain only 197 bags of chaff. On the above facts it was held by the Supreme Court that the Railway did not incur additional liability by the false statement regarding the quantity and contents of bags and the issue of R/R was therefore not likely to cause damage or harm to the Railway. *AIR 1970 SC 843.*

(2) Damage 'in mind' includes mental pain or anguish. It is not limited to mere injury to mental faculties. Thus, where the accused, pretending to be a certain well-known eye specialist, induced the complainant to allow him to perform an operation on his 12 years old child and thereby caused the complainant a good deal of mental anguish, it was held that the accused was guilty under this section. *AIR 1961 All 639.*

12. Person.—(1) Government is a corporate body and will certainly come within the definition of the word "Person" in S. 11 of the Code. *1977 CriLJ (NOC) 157.*

13. Breach of contract and cheating.—(1) There is a thin line of difference between a case of a breach of a contract and a case of cheating. *1980 WLN 83 (Raj).*

(2) A mere breach of contract is not necessarily cheating. The element which convert the breach of contract into an offence of cheating is the dishonest or fraudulent intention of the accused at the time he induces the complainant to enter into the contract. *AIR 1974 SC 301.*

14. Void contracts.—(1) A criminal prosecution for cheating can be based on a contract even if it cannot be enforced in a civil Court on the ground that it is void as being opposed to public policy, etc. *AIR 1952 All 428.*

15. Civil liability.—(1) That the accused is liable in a Civil Court under a contract or agreement is no defence to a charge of cheating, if his action amounts to an offence under this section. *AIR 1966 All 594.*

(2) The fact that the complainant has taken a security bond to obtain satisfaction from the accused after the deceit had become known is also not an answer to a charge of cheating. *AIR 1957 Assam 148.*

(3) A obtained a decree for money against B, C and D, C and D adjudicated insolvents. A proceeded to execute the decree against B and did not press the execution on B executing a fresh bond

for the debt. A also proved his debt before the Receiver and received a small dividend. It was held, A was not guilty of cheating. The matter was one of adjustment of the amount received as dividend towards the amount of the new bond taken. *AIR 1928 Lah 945.*

16. Issue of cheque which is dishonoured.—(1) Where a cheque is issued to meet an antecedent liability, the dishonouring of the cheque will not give ground for a prosecution for cheating as there is no delivery of property nor is there an induced act or omission which has caused or is likely to cause damage or harm to the complainant in body, mind, reputation or property. *1977 Punj LJ (Cri) 263.*

(2) The position is different where property is purchased by the accused and the price is paid by cheque. When a person draws a hundi or issues a cheque, there is an implied representation that (i) he has the authority to draw and draw for that amount; (ii) that the cheque or hundi is good or valid order for payment of the amount; and (iii) that the cheque or hundi would be paid when presented for payment. *AIR 1957 All 246.*

(3) Where a cheque issued by the accused is dishonoured it will be for the accused to establish any facts there may be in his favour to show that the failure to honour the cheque was not due to any design but was purely due to accident. *AIR 1930 Bom 179.*

(4) Giving a post-dated cheque by a person who has no funds to his credit in the bank does not amount to an offence of cheating when there is no evidence to show that the person to whom the cheque was given parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured. *AIR 1940 Lah 93.*

17. Attempt.—(1) A false representation made with the necessary intention will constitute only the offence of attempt to cheat, when nobody is deceived by that representation. *AIR 1934 Bom 48.*

(2) The accused represented to the complainant that he would duplicate currency notes. Complainant gave some currency notes to the accused feigning belief in the above false representation. On the above facts, it was held that the accused was guilty of an offence of attempt to cheat and that the fact that the complainant was not deceived was immaterial. *AIR 1960 SC 979.*

18. Abetment.—(1) A, B and C who were known to the complainant represented to him that one F whom he did not know was a rich Seth and would fall an easy prey if the complainant gambled with him. F was in fact a notorious gambder. The complainant who was no match for F at play, gambled with F and was done out of his property by F's tricks. It was held that A, B and C were guilty of abetment of cheating. *(1905) 2 CriLJ 38.*

(2) One B procured quantities of saccharine and bicarbonate of soda and mixed them and put the misture into tins which he gave to a broker to sell. The broker accordingly sold them as genuine saccharine. It was held that B was guilty of abetment of cheating. *AIR 1924 Bom 303.*

19. Theft, cheating, criminal breach of trust, criminal misappropriation.—(1) In theft, the original taking of the property itself is dishonestly done and it is also done without the consent of the owner. In criminal breach of trust the original taking of the property is not dishonest and it is also with the consent of the owner. In obtaining property by cheating, the taking is dishonest, but with the consent of the owner and in criminal misappropriation, it is honest but without the consent of the owner. *AIR 1936 Mad 353.*

20. Cheating and uttering counterfeit coins.—(1) Where the accused attempted to sell or pawn silver rupees of Shajahan period as gold Mohurs of that period by coating the coins with some layer of gold, it was held that the offence committed by him was cheating and not uttering counterfeit coin. *(1906) 4 CriLJ 453.*

21. Cheating and extortion.—(1) In extortion, the offender induces the victim to deliver the property by intimidation and in cheating the victim is induced to deliver the property by deception. *AIR 1961 AndhPra 266.*

22. False information to public servant and cheating.—(1) Where in a proceeding for the issue of a certificate of marriageable age of a certain girl, the applicant by producing another girl misrepresents to the Magistrate that the girl produced is the girl whose age is required to be certified the offence committed is not cheating, since the Magistrate would not suffer any harm in mind, body, reputation or property. The offence made out is one under S. 182 of the Code. *AIR 1951 Sau 8.*

23. Using false measure and cheating.—(1) Where the accused used a false meassure and sold liquor and was convicted under Section 265 of the Code, it was held that the accused could more appropriately have been tried for the offence of cheating. *Rat Un CrC 386.*

24. Traveling by Railway without ticket.—(1) A railway passenger traveling in a class higher than that for which he had paid his fare is not liable to be convicted under S. 417. There is no question in such a case of any inducement on the part of the accused of any person to part with any property. *(1862-1863) 1 Bom (HCR) 140.*

25. Section 415, Section 417 and Section 420.—(1) In cases where there is delivery of property on account of cheating, the section that specially provides for it viz., S. 420 ought to be made use of. S. 417 which provides for punishment for cheating simpliciter ought to be used for those cases of cheating as defined in S. 415 in which the victim has not been induced to deliver any property. *1977 CriLJ (NOC) 219.*

(2) The vital difference between the offences under Sections 417 and 420, P. C. is that whereas an offence against the latter section is a cognizable one, that against the former is non-cognizable and investigation of it can only be undertaken by the police on the instructions of Magistrate, whereas in other case the police can act on their own motion under Sections 154 and 156, Criminal P. C. *AIR 1945 PC 18.*

(3) A submitted false claims to the Government and obtained payment in respect of works not carried out by him. It was held that A was guilty under Section 420 and not under this section. The contention of A, that as soon as officers of the Government passed orders for payment, the offence was complete and that he was liable under this section only was not accepted. It was held that the making of bogus claims was concluded only when payment was made and hence A was held guilty under S. 420. *AIR 1967 SC 752.*

26. Furnishing false information and cheating.—(1) A gave the accused 4 annas to buy a stamp for A and when the stamp-vendor asked the name, the accused gave A's name instead of his own. It was held that accused was guilty under Section 177 and not under this section. *(1866-1867) 3 Bom HCR 42.*

27. Charge and conviction.—(1) In a case of cheating, the charge must set out the manner in which the offence was committed. Where the wording of the charge is reasonably sufficient to give the accused notice of the accusation which he has got to meet, depends upon the circumstances of each case. *AIR 1977 SC 2433.*

(2) The charge must contain allegations regarding the deceit and the intention with which the accused deceived the complainant. *AIR 1933 Sind 169.*

(3) Accused cannot be charged for more than three items of cheating and for a period beyond one year unless it is held that various acts of deception alleged against him were so connected together as to form the same transaction. *AIR 1969 All 489.*

28. Evidence and Proof.—(1) In a prosecution for an offence under this section, every ingredient which is included in the definition of the offence must be established by the prosecution. Specifically, the burden of proof is in the prosecution to establish fraud or dishonesty. *AIR 1949 Cal 586.*

(2) In cases of deceit by false representation it is necessary to establish that the representation was false to the knowledge of the accused. *AIR 1949 Cal 586.*

(3) Previous acts of fraud committed by accused have no relevancy in a trial for a charge in respect of a particular act of cheating. *AIR 1960 SC 391.*

(4) The mere taking of a person's thumb impression on a blank piece of paper is not sufficient to prove an intention to use the paper dishonestly and does not constitute an offence under this section. *AIR 1926 Pat 267.*

(5) An accused cannot be held responsible for his brother's representation, unless it is proved that he had authorised the brother to make that representation. *AIR 1956 SC 544.*

29. Sentence.—(1) Where a person's proved connection with the specific offence of cheating is only through the general conspiracy to cheat and he has already received a sentence of a certain term of imprisonment for his part in the general conspiracy, there should be no additional sentence on the charge of cheating. *AIR 1939 Cal 376.*

(2) Offence of attempting to issue counterfeit University degrees—Offender a Reader holding M.Sc. and Ph. D. degrees—Held that award of a sentence of imprisonment till rising of Court by Sessions Court was too lenient and award of sentence of imprisonment for 3 years by High Court was just and reasonable—Observation against soft sentencing of white collar and economic offenders. *AIR 1978 SC 1548.*

30. Procedure.—(1) The offence of cheating could be tried either at the place where fraudulent misappropriation or deception took place or where as a consequence thereof the complainant was induced to deliver property. *1974 WLN (UC) 152.*

(2) The appellant living at Karachi was making representations by letters, telegrams and telephones to the complainant who was at Bombay that he had ready stock of rice and had reserved shipping space and that he would send rice on receipt of payment; in fact, he held no ready stock of rice; nor had he reserved any shipping space. On this false representation, the complainant at Bombay parted with the property to the tune of Rs. 5.5 lakhs, on different dates. It was held by the Supreme Court that the entire offence of cheating was committed at Bombay and the Indian Court had jurisdiction to try the offence. *AIR 1957 SC 857.*

(3) Accused sent by V.P.P. from Madras certain boxes purporting to contain tea at the order of A to Hyderabad. A paid the value payable amount and took delivery of the boxes, but on opening found them to contain merely sawdust. It was held that the offence was completely committed at Hyderabad and the Madras Court had no jurisdiction. *AIR 1927 Mad 544.*

(4) A complaint for cheating filed in the Court at H alleged:

(i) that at place A, the accused induced the complainant (woman) to have sexual intercourse with him on the false representation that he would marry her;

(ii) that on similar inducement the complainant gave money to him at place A, which he promised to return; and

(iii) that subsequently, the accused wrote a letter to her when she was in H asking her to make arrangement at H for the marriage and that upon this representation the complainant at H spent

about Rs. 200/- for the marriage arrangements, but that subsequently, the accused wrote a letter to the complainant that he did not wish to marry her and that he intended to marry another girl. It was held that the Court at H had jurisdiction to try the accused for the 3rd item of cheating but had no jurisdiction to try accused for the Ist and 2nd items of cheating. *AIR 1961 AndhPra 266.*

(5) Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Metropolitan Magistrate or Magistrate of the first class, Village Court. If the offence is committed by public servant; it becomes: Cognizable—Not bailable—Not compoundable—Triable by Special Judge under Act XL of 1958 and Act II of 1947.

31. Practice.—Evidence—Prove: (1) That the person deceived delivered to some one or consented that some person shall retain certain property.

(2) That the person deceived was induced by the accused to do as above.

(3) That such person acted upon such inducement in consequence of his having been deceived by the accused.

(4) That the accused acted fraudulently or dishonestly when so inducing that person.

32. Charge.—(1) The charge should run as follows:

I, (name and office of the Magistrate/Judge, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, (set out the manner in which the cheating was committed), and thereby committed cheating, an offence punishable under section 417 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 418

418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.—Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by [a] legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) This section prescribes the punishment for an aggravated form of cheating, namely, cheating by a person standing in a fiduciary capacity to the person cheated. All that the section requires is the existence of an obligation created by law or by a legal contract, by which the deceiver is bound to protect the interest of the deceived. In other words this section applies to cases of cheating by a guardian, a trustee, a solicitor, an agent or karta of a Hindu family, or by directors or managers of a bank in fraud of the share-holders. It is the abuse of trust that is visited with severe punishment. The existence of a civil remedy for a criminal offence does not bar jurisdiction of the criminal court to try the accused. But as a rule a Criminal Court must stay its hands when a civil suit about the same matter is pending *(32 CrLJ 463).*

(2) The directors and other officers of a Bank are bound by law to protect the interests of the depositors and shareholders of the Bank. If by submitting false balance sheets before the shareholders and depositors, the directors cheated the depositors, then they are guilty of the aggravated form of cheating made punishable under this section. *(1894) ILR 16 All 88.*

(2) One of the partners of a partnership firm with his wife and minor children got a new firm registered in the same name of his old firm and transferred the money of that firm to the account of new firm—Complaint filed by the other partner of old firm under sections 418, 420 etc.—As not maintainable against the wife of partner forming new firm. *1984 All Cri Rul 18.*

(4) Complainant gifted articles in "chuni" ceremony at the time of engagement—Placing of such articles in the hands of accused persons of the engaged girl cannot be said to create any kind of trust with them—The liability to return those articles may be of civil nature and criminal Court is not the right forum. *1983 Chand Cri 471 (P&H).*

(5) Where a person obtained sugar, by misrepresentation , from a Cooperative Society for distribution to its members but did not so distribute it, it was held that he might be liable under the Sugar Control Order but could not be convicted under this section inasmuch as the Society itself was not cheated. The damage was caused not to the Society but to its members who are a different entry. *1973 AllWR (HC) 577.*

(6) Where neither the complaint nor evidence proved the existence of a dishonest intention on the part of the accused not to pay for the goods purchased from the complainant at the time the purchase was made and the promise to make the payment the next day, held the offence of cheating was not made out. The fact that subsequently the accused failed to pay for the goods was by itself not sufficient to hold that he entertained such dishonest intention. *1978 CriLJ 401 (Andh Pra).*

(7) Where the bank from whom a partner of a firm had purchased a draft, on the basis of the representation made by other partner of the firm that the draft issued had been lost, issued a duplicate draft and on cancellation of the draft by 'other partners' adjusted the amount towards cash credit account of the firm, it could not be said that bank had misappropriated any amount. *(1983)2LandLR 65.*

(8) Knowledge of the accused that he is likely to cause wrongful loss to the person cheated is an essential element of the offence under this section. In order to charge the director of a Bank, it will therefore, be necessary to show that he acted with the knowledge of his being likely to cause wrongful loss. *(1910) 11 CriLJ 624 (Mad).*

(9) The existence of civil remedy is no bar to the trial by the Criminal Court of an offence. *AIR 1933 All 42.*

(10) Where a civil suit is pending in respect of the same matter the Court should stay its hand till the disposal of the suit. *AIR 1930 Lah 664.*

2. Practice.—Evidence—Prove: (1) That the accused cheated some person.

(2) That he was under a legal obligation to protect the interest of that person.

(3) That the cheating had relation thereto.

(4) That he knew he was likely to cause wrongful loss to such person.

3. Procedure—Not cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending —Triable by Metropolitan Magistrate or Magistrate of the first or second class. If the case comes under the mischief of Act XL of 1958, it becomes: Cognizable—Warrant—Not bailable—Triable by the Special Judge.

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—Day of—, at—, cheated X by doing an act, to wit—, the knowledge that you were thereby likely to cause wrongful loss to the said X whose interest in the transaction to which the cheating related you were bound either by law (or a legal contract) to protect, and that you thereby committed an offence punishable under section 418 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 419

419. Punishment for cheating by personation.—Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Section 416 and Section 170.*
3. *Personation at an election.*
4. *"Pretending to be some other person."*
5. *"Individual presented need not be real person."*
6. *Knowingly substituting one person for another.*
7. *Representing to be other than what he really is.*
8. *Charge.*
9. *Evidence and proof.*
10. *Sentence.*
11. *Procedure.*
12. *Practice.*

1. Scope.—(1) There are two elements in the offence namely cheating and personation. Personation by itself is no offence but when he in addition fraudulently and dishonestly does a fraudulent act as if he is himself that other person, then section 416 will be attracted. Where an accused pretending to be a certain candidate for an examination, forges, answer papers purporting to be answered by such candidate, he is guilty of both cheating and forgery, and the fact that such candidate has failed in other papers answered by himself does not affect the guilt of the accused *(AIR 1936 Cal 403)*. It is not necessary for the purpose of cheating that the person presented is a real person. He may even be an imaginary person. In either case, the personation must aid deception and inducing others to deliver property, so as to constitute an offence. Mere personating another is not cheating. A represented to B that he was bachelor and proposed for the hand of his daughter and B was willing and admitted him to his house but before the marriage came off, A was discovered to be a married man but girl went away with A. It was held that the seduction having taken place after the deception of A was discovered, it could not be said to be the consequence of deception and therefore, A cannot be convicted of cheating *(22 CWN 1001, 19 CrLJ 781)*. To 'Personate' means to pretend to be a particular person.

(2) This section provides punishment for offence under section 416. Cheating by personation is an offence of a general character under which a person may pretend to be any one other than what he is. A person making a false representation that he possesses a degree does not commit an offence under section 419 because he does not thereby pretend to be any other person than who he is. Accused number 1 made accused No. 2 falsely personates the complainant and execute a document of sale in his

favour of property which belonged not to accused No 2, but to the complainant. Accused No. 1 took accused No. 2 to the Sub-Registrar's Office and the document was registered by accused No. 2. In these circumstances, it was held that condition as regards deception might be said to be fulfiled because, but for the deception, the Sub-Registrar would not have consented to register the document. But as no harm or damage could be said to have been caused to the Sub-Registrar in body, mind, reputation or property conviction under section 419 Penal Code not be supported, but the case of forgery under section 468 Penal Code had been fully made out *(1958 CrLJ 275).* Where A was selected for appointment as a police constable but he fell ill and K appeared for medical test in his place. He passed it and got the job. The false identity of K was discovered many years later and he was tried for an offence under section 419 of the Penal Code. It was held as he had performed his duties to the satisfaction of all no loss or damage had been caused by his appointment, and he could not be convicted under section 419 *(PLD 1964 Dhaka 92).* Where the deception is discovered before any damage or loss has been caused there can be no conviction under section 419. To bring home an offence of abetment of cheating by impersonation, it must be shown that the accused committed an offence with guilty knowledge and made some illegal gain in the transaction. Offences under sections 170 and 419 of the Penal Code are entirely different from each other and so if the fact of cheating by false personation fails it does not follow that the offence of false personation itself and its facilitation must also fail.

(3) Offence under the section not punishable unless the person concerned suffers either in mind, body or reputation. It was contended that in a charge for offence of cheating the complaint to the court must be made by the person who has been deceived and no one else. Held: The offence of cheating under section 419 of the Penal Code is a cognizable offence, and there can be no reason why it cannot be taken cognizance of like other such offences and therefore there can be no legal bar to any other person giving information of such a cognizable offence. *Syed Musharraf Hossain Vs. State, (1960) 12 DLR 834.*

(4) Where no injury or possible injury to the person deceived has either been alleged or proved section 419 of the Penal Code cannot apply. *M. A. Motalib Vs. State (1961) 13 DLR 436.*

(5) The petitioner by showing false documents induced the purchaser to enter into an agreement to purchase the house on receipt of Taka 12 lakh on a plea that he would refund Taka 14 lakh in the event of failure to execute sale document. The contention of the petitioner to the effect that it was a civil dispute and that the Court of Settlement had given a final decision over all the disputes including the question of criminal liability is not sustainable. The criminal proceeding cannot be held to be liable to be quashed. *Aga Kohinoor Alam Vs. State 43 DLR 95.*

(6) The allegation as alleged in the FIR prima facie constitute the offence of cheating and forgery and that the present dispute is not a civil dispute for which the proceeding cannot be quashed. *Aga Kohinoor Alam Vs. State (Criminal) 3 BLC 204.*

(7) In a Bank defalcation case an order of retrial will be proper where the trial in the lower court has been vitiated by illegality, irregularity or otherwise defective or when the original trial has not been satisfactory for the particular reason, for example, if the evidence had been wrongly rejected which should have been admitted when it should have been rejected or the court refused to hear certain witnesses who should have been heard or where the accused have been prejudised by the conduct of the case and on similar grounds. *10 BCR 101 AD.*

(8) A disputed question as to complicity of the appellant in the crime, who is the recipient in the forged sale-deed cannot be determined except on evidence in the trial. Proceedings against the appellant cannot be quashed. *7 BCR 148 AD.*

(9) Cheating under section 415 is not a pre-requisite to a conviction under section 419. *19 DLR 255.*

(10) Prosecution having failed to prove that accused had committed cheating by personation. Charge under section 419 Penal Code was not sustainable. *1984 PCrLJ 603.*

(11) Section 416 defines the offence of cheating by personation. In order to come within Section 416, there must be both cheating and personation. *AIR 1941 Lah 460.*

(12) In order to come within the scope of this section, all the ingredients of S. 415 must be present. *AIR 1974 SC 1811.*

(13) The accused should have had an intention to cheat. *AIR 1967 All 123.*

(14) There must be evidence to show that the person deceived was induced by such deception to deliver property or otherwise to act to his own detriment. *AIR 1974 SC 1811.*

2. Section 416 and Section 170.—(1) Cheating by personation is an offence of a general character under which a person may pretend to be any one other than what he really is; but, personating a public servant is a specific offence provided for under Section 170 of the Code. Where the accused was convicted of both these offences for falsely representing himself as belonging to the Police Force, the High Court maintained the conviction under Section 170 and set aside the conviction under this section. *AIR 1958 Madh Pra 230.*

3. Personation at an election.—(1) To personate means to pretend to be a particular person; and the moment F handed in the voting paper purporting it to be B's, personation was complete. *(1864) 122 ER 628.*

4. "Pretending to be some other person."—(1) The following are illustrative cases of personation, where the accused puts himself forward as another person:—

(a) Accused pretended to be a certain well known Eye Specialist and induced the complainant to allow him to perform an operation on the eye of his 12 year old son. *AIR 1961 All 639.*

(b) Accused pretended to be a certain candidate for an examination, forged answer papers purporting to be answered by such candidate. *AIR 1936 Cal 403.*

(c) Accused used the railway season ticket issued in the name of the different person by pretending to be that person. *AIR 1957 AndhPra 4.*

(d) A, a well-known runner, entered for a race pretending to be another person who had never won a race and thus secured a more favourable handicap and thus attempted to win the prize. Held that A had personated the other person in whose name he entered for the race. *(1900) 19 Cox CC 568.*

(e) A, an American National, pretended to be B, a British National, and gained entry into India, by use of a forged passport. It was held that A had committed the offence of cheating by personation. *AIR 1968 Mad 348.*

(2) 3rd accused pretended to be Chandra Dass in whose favour a letter of authority to pay Rs. 15,000 was forged by A 4 in conspiracy with A 1 and 2 and 9—Offences under Ss. 120-B and 420 held committed by each and under S. 419 by 3rd accused. *AIR 1970 SC 648.*

5. Individual personated need not be real person.—(1) The explanation to the section shows that the offence is committed, whether the individual personated is a real or imaginary person. Therefore, it is not necessary for the prosecution to make out whom the accused has been personating. *1977 CriLJ (NOC) 105 (Him Pra).*

(2) Where the prosecution had established that one K. V. Rama Rao who was an overseer had, by his representation that he was one K. Rama Rao, (a fictitious person) an Engineering graduate of Mysore University, and had on that basis induced the Public Service Commission to select him for a post in the Government service, it was held that the accused was guilty of the offence of cheating by personation. *AIR 1960 Andh Pra 441.*

6. Knowingly substituting one person for another.—(1) A woman claiming herself to be D was introduced to a lawyer by two men known to him. He recovered some money from Government treasury on behalf of the woman. The personation was detected later and a case started against him. The proceedings against him were quashed by the High Court. It was observed that the lawyers many times do not know personally the accused hence no case against him was prima facie made out. *1973 All WR (HC) 402.*

(2) Accused knowingly represented J to be B, the mother of a sepoy who had been killed, and induced the military authorities to grant pension to J. Held, that he committed the offence of cheating punishable under Section 419. *AIR 1938 Lah 828.*

7. Representing to be other than what he really is.—(1) It is an essential element of the offence that the accused should have represented himself to be other than what he really is. If there is no such representation there is no offence under this section. *1969 Mad LW (Cri) 253.*

(2) Where a woman is palmed off as belonging to a caste different to the one to which she really belongs with the object of obtaining money, there is no question of personation in such cases which are, only simple cases of cheating by false representation falling under the general provision of Section 415 and not under the specific provision of this section. *AIR 1920 Nag 261.*

(3) Accused belonging to the Burmo sub-caste of Brahmins went though the ceremony of being married to the complainant's daughter who belonged to the Barindra sub-caste, by representing that he also belonged to the sub-caste. It was held that the accused had committed the offence of cheating by personation. *AIR 1937 Cal 214.*

(4) Where the facts found were that the accused sold a minor married girl to the complainant representing her to a virgin, it was held that the accused was guilty under section 420. *AIR 1918 Lah 49.*

8. Charge.—(1) Where the facts stated in the complaint make out a case under this section the wrong mention in the summons of the provisions of the Railways Act is an irregularity, which does not affect the validity of the charge framed under this section after the examination of the witnesses for prosecution. *AIR 1957 AndPra 4.*

(2) Where the statements in the charge otherwise make it clear that the accused is charged with cheating by false personation the mere fact that the words "cheating by false personation" are not used in the charge is only an irregularity nor vitiating the trial where the accused had not been prejudiced thereby. *AIR 1977 SC 2433.*

(3) 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 of—, at—, pretending to be (specify the personated) (or knowingly substitute X for Y or represented that you or Y were so and so) and thereby committed an offence punishable under section 419 of the Penal Code and within any cognizance.

And I hereby direct that you be tried by this court on the said charge.

9. Evidence and Proof.—(1) In a case of cheating by personation it is not sufficient for the prosecution to prove that the complainant was cheated by personation. It must be established beyond doubt that it was the accused who cheated by personation. *1962 RajLW 263.*

(2) A health certificate is 'property' within the meaning of Section 415 of the Code and if a person fraudulently induces a Health Officer to deliver to him a health certificate by false personation, he is guilty of an offence under this section. *AIR 1920 Mad 131.*

(3) Acquittal of the accused of an offence under this section does not render the evidence as to impersonation inadmissible for purpose of S. 420. *AIR 1968 Orissa 79.*

(4) Where the accused was charged under Sections 419, 420 and 465 and it was found by the Court that there was no false representation proved and acquitted the accused under Sections 419 and 420, the charge under Sec. 465, which also involves as an essential element a false representation, cannot survive and the accused could not be convicted under Section 465 of the Code. *AIR 1955 Cal 473.*

(5) Where the accused claimed to be the brother in law of another, there cannot be a conviction under this section without first establishing that the alleged relationship in false. *AIR 1935 All 566.*

10. Sentence.—(1) Previous conviction of the accused for offences of theft and burglary ought not be taken into account in imposing a sentence for an offence under this section. *AIR 1927 Lah 220.*

11. Procedure.—(1) Report made by Police Officer on investigation disclosing cognizable offence under Section 416 P. C. and also non-cognizable offence under Section 417 P. C.—Entire case is to be deemed as a cognizable case. *1977 CriLJ (NOC) 228.*

(2) Complaint indicating offence under sections 419, 420, 467, 120B and 109 of Penal Code—Offences under sections 419 and 420 committed in course of same transaction in which other offences were committed—Held, complaint cannot be split up and cannot be allowed to proceed in respect of offences under sections 419 and 420 for which no complaint by Court is necessary. *1983 CriLJ 24.*

(3) Cognizable—Bailable—Compoundable when permissing is given by the Court before which the prosecution is pending—Triable by Metropolitan Magistrate or Magistrate of the first or second class. If the offence is committed by a public servant, it becomes: Cognizable—Not bailable—Not compoundable—Triable by Special Judge under Act XL of 1958.

12. Practice.—Evidence—Prove: (1) That the accused cheated the complainant.

(2) That he did so by pretending to be some other person; or by knowingly substituting one person for another; by representing that he, or some other person, is a person other than the person he really is.

Section 420

420. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security

or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *This section and Ss. 415 and 417.*
3. *There must be cheating.*
4. *"Whoever."*
5. *Dishonest intention.*
6. *Promoting speculative schemes.*
7. *Property and delivery of property.*
8. *Valuable security.*
9. *Issuing cheques.*
10. *Adulteration.*
11. *Taking deposit of moneys.*
12. *Attempt.*
13. *Abetment.*
14. *Conspiracy to cheat.*
15. *Abuse of Railway pass—Section 68, Railways Act and this section.*
16. *Section 64, Post Office Act and this section. (Sending blank papers in insured cover).*
17. *This section and Section 215.*
18. *Charge and conviction.*
19. *Evidence and proof.*
20. *Existence of civil remedy.*
21. *Pleas which are not valid defences.*
22. *Denial of liability.*
23. *Sentence.*
24. *Procedure.*
25. *Practice.*
26. *Charge.*

1. Scope.—(1) In the offence of cheating there are two elements—deception and dishonest inducement to do or omit to do something. Mere dishonesty is not a criminal offence. Moreover, to establish the offence of cheating, the complainant would have to show not only that he induced to do or omit to do a certain act but that this induced omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property—which are presumed to be the four cardinal assets of humanity *(AIR 1933 Mad 129)*. In a case of cheating the intention of the accused at the time of the offence is to be seen and the consequence of the act or omission itself is to be judged. The damage or harm caused or likely to be caused must be the necessary consequence of the act done by reason of the deceit practised or must necessarily and likely follow therefrom, and the law does not take into account remote possibilities that they may flow from the act. The person deceived must have acted under the influence of the deceit. Under section 420, the representation may not be the sole cause of damages or loss. It is sufficient if the complainant was party and materially, though not entirely, influenced by the false pretence. A wilful misrepresentation of a definite fact with intent to defraud would be cheating, along with this, it has to be shown that the representation made was false to the accused's knowledge at the time when it was made. An act would not come within the definition of cheating if the representation has turned out to be untrue at a future date *(1952 CrLJ 1230)*. In a case of cheating it is for the prosecution to show that at the time the accused entered into transaction with the complainant, the accused had no intention to pay the money and that he was actuated by a dishonest intention to cheat the complainant *(1960 Cr LJ 787)*.

Refusal to act upon a contract is a civil dispute. It is not a criminal offence under this section. Cheating amounts to inducing the victim to enter into a bargain which he would not enter into if he knew the real facts. The distinction between a case of mere breach of contract and one of the cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act but of which the subsequent act is not the sole creation *(37 CrLJ 38)*. Where in

fulfilment of a contract for supply of cotton of a certain quantity, cotton of a lower quality is deliberately supplied, the offence falls under section 420 *(13 CrLJ 285)*. Where a cheque is dishonoured and from that it could be presumed that the accused must have been aware that the cheque would be dishonoured he would be guilty under section 420. Where it was represented that currency notes will be duplicated, but the complainant never believed that it could be done but on feigned belief only to trap the accused, it was held that an offence under section 420 was not committed but that the accused was found guilty of an attempt to cheat *(AIR 1960 SC 979)*. It is well settled that a mere breach of contract cannot give rise to a criminal prosecution. This is so, because at the time of entering the contract a man may honestly have intention of carrying out the contract, but later may not be able to do so for more than one reason or may change his mind. Where there is no clear or conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in civil court, the matter should not be allowed to be fought out in a criminal court. Giving a post dated cheque by a person who has no funds to his credit in the bank does amount to an offence of cheating when there is no evidence to show that the person to whom the cheque was given parted with any property or that he did or omitted to do anything which he would not have done or omitted to do, if he had known that the cheque would be dishonoured. The dispute in such a case is of a civil nature *(AIR 1940 Lahore 93)*. Ordinarily a post-dated cheque is a mere acknowledgment of a loan and promise to pay in future, therefore, if the cheque is not honoured no criminal offence is committed *(PLD 1978 Lah 521)*. Even the issue of a post-dated cheque with knowledge that drawer had no funds in the bank does not amount to cheating *(41 CrLJ 394)*. The use of a forged cheque fraudulently and dishonestly as genuine, knowing the same to be forged, make one of offences under section 420 and 471 Penal Code *((1970 P CrLJ 308)*. Mere suppression of some facts at the time of borrowing money does not amount to cheating where there is no evidence of either active deception or dishonest or fraudulent action. Where a purchaser neglects his duty to make due inquiries about the title and encumbrances of the property under sale, he cannot hold the seller liable for non-disclosure any fact which he could have discovered with ordinary diligence. The case of non-mention of encumbrances cannot be taken as dishonest non-disclosure of any material defect in the property because the buyer could have found out about it if he was only diligent as a vendee ought to be. It could not be said that there was any dishonest representation nor concealment of anything which the accused were duly bound to disclose. An easy method of differentiating between the offence of theft, cheating with delivery of, property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is without honesty and without the consent of the owner and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest but with the consent of the owner, and in criminal misappropriation, it is honest but without the consent of the owner *(29 CrLJ 86)*. Ingredients of offences under sections 420, 403 and 406 are to a substantial extent available in most cases of breach of contract. Similarly a default by a borrower in repayment of a debt without admission of liability may also frequently partake of the character of an offence under section 406 Penal Code. Wilful misrepresentation of a definite fact with intention to defraud would be cheating. Where a person parts with his property as a result of misrepresentation and deceit, there can be no question of entrustment by him of that property to the other. Therefore, the accused could be guilty of an offence under section 420 and not one under section 406 Penal Code *(PLD 1962 Kar 741)*. A party to an immoral contract should not be allowed to prosecute on a criminal charge when he could not get performance of the contract in a civil Court *(13*

CrLJ 521). A complaint under this section need not necessarily be filed by the cheated person alone *(PLD 1968 Lah. 451).* Where for goods already delivered, the accused gives a post-dated cheque and gets a receipt but the cheque is dishonoured, the receipt not being a valuable security within the meaning of section 30, no offence of cheating is committed. The remedy of the complainant lies in a civil court for breach of the contract *(AIR 1936 Cal 324, 37 CrLJ 828).* Where the complainant executed a deed of divorce of his wife and his signature was obtained in a state of intoxication caused by the giving of a large amount of liqour by the [mon] who decoyed him to another village on the pretence that they were going to purchase a buffalo for him with money that would be advanced by them and where some of the accused took away the wife, the offence is one under section 420 and not under section 417. In framing a charge under section 420 it is necessary to set out not merely the fact that the accused had obtained goods by dishonest means, but also deception which has been practised. It is necessary that the representation should be mentioned in the charge, so that the accused may have an opportunity of saying either that he never made such representation, or that representation was not in fact false, or that it was not in consequence of this representation that the goods were obtained. The need of framing a precise charge is all the more stronger when the charge is based on a transaction of goods by tendering post-dated cheque, in which the representation is implied rather than directly expressed *(40 CrLJ 494).* The offence punishable under section 420 Penal Code clearly comprises two distinct phases, namely the act of cheating and delivery of property as a result of dishonest inducement brought on by the act of cheating. The offence consists of something which has been done by the perosn accused of the consequence which has ensued as a result of the doing of that thing. In the case the misrepresentation by the two principal accused persons was done at X whereas the delivery of money as a consequence thereof took place at Y. Under the provision of section 179 Cr. PC an offence under section 420 Penal Code would therefore be triable either at X or at Y *(PLD 1962 Karachi 499).* The Village Court has exclusive jurisdiction to try offence under section 420 Penal Code when the amount in respect of which the offence is committed does not exceed Taka 5000.00 (five thousand Taka) vide Ordinance No. IV of 1979 dated 29-1-79. The mere fact that the accused denied a transaction at the trial and refused to return the money does not necessarily show that he had a criminal intent from the beginning and his denial may merely amount to the usual mistaken attempt by himself from the result of prosecution *(12 DLR 520, PLR 1961 Dhaka 187, 34 CrLJ 1255).*

(2) Charge under sections 420/120B—Conviction under sections 420/34 valid. A charge under section 420 read with section 120B. P. Code, would lie where the accused had entered into an engagement or association to do an illegal act but nothing were done in pursuance thereof. A conviction under section 420 read with section 34 of the Code is valid in law if the offence had been committed in furtherance of the common intention of all, even though the original charge laid against them was u/s. 420 read with section 120B of the Code. *Md. Yaqub Vs. Crown (1955) 7 DLR 75.*

(3) Conviction under the section—Civil suit lies for refund of money or specific performance of contract. The conviction of the petitioner under section 420 of the Penal Code for cheating does not debar the man cheated from filling a civil suit for specific performance of contract or for return of the money taken by the petitioner by practising deception *Abdul Awal Vs. Waliullah (1960) 12 DLR 520: PLD (1961) (Dac) 53: PLR (1961) (Dac) 187.*

(4) Ingredients which shall have to be established before recording an order of conviction. In order to bring home the charge under section 420 it is necessary of the prosecution to prove beyond all reasonable doubts that the representation made by the accused was known to him to be false and that acting on that false representation the complainant parted with his money. In dealing with an offence

under section 420, it is necessary for a court of law to find whether the person making the representation had the knowledge that the statement made by him was false. In a case under section 420, a court is not concerned with a correct interpretation of a statute but with existence or otherwise of a bona fide belief whether there was a reasonable ground for the accused to think that he was entitled to act in the way he did in the particular case. *A. M. Serajul Huq Vs. State (1962) 14 DLR 265.*

(5) Complaint by a person who is not himself cheated is valid in law. It is true that the accused of a prosecution launched for cheating somebody to a large extent depends, in view of the ingredients of the offence of cheating, upon the examination of the person cheated. *Jagadish Chandra Ray Vs. Joynarayan Biswas (1962) 14 DLR 198.*

(6) Complaint of cheating if not made by the perosn cheated, the case would fail. Where a complaint of cheating before the court has been made not by the person defrauded but by another on his behalf, the case must fail. In a case where the complaint of cheating several debtors of a Cooperative Central Bank by the accused was made to the court not by the persons cheated but by the Executive Officer of the Bank. Held: The case against the accused must fail. *Surendra Nath Saha Vs. State (1960) 12 DLR 178.*

(7) Company lauhching wild and patently absurd scheme, but making no false statement and concealing nothing—People contributing to scheme induced by hopes to make easy money against probabilities—Offence of cheating not established. Before a person could be convicted for cheating or for conspiracy to cheat on the basis of a speculative or improbable scheme issued to the public, it must be established that the promoters of the scheme themselves did not believe in the working of the scheme and that they had themselves no faith in it. *Zahid Hasan Vs. State (1964) 16 DLR 23.*

(8) Compromise in part not lawful—Accused was convicted and sentenced under sec. 420 P.C. on appeal, both the parties filed a joint petition for compromise before the appellate Judge who directed that the compromise be effected in part only. Held: If the Appellate Court permitted the case to be compromised, then under section 345, clause (6), Cr. P. C. he had no alternative but to acquit the accused and set aside the conviction and sentence. If he was refusing to allow the case to be compromised, then he had no alternative but to hear the appeal on its merits and he had no right to say that the compromise was permitted in part merely by reducing the sentence of imprisonment to the period already served. *Sahar Ali Vs. Samed Ali (1954) 6 DLR 28.*

(9) Complaint by a person other than the person cheated—Not entertainable. Where a complaint under sec. 420 was preferred by a person not actually cheated. Held: The complainant had no *locus standi* to make a complaint. *Md. Hayat Khan Vs. Ghulam Md. (1954) 6 DLR (WP) 177.*

(10) Joint trial of one S with other accused who were public servants u/s. 120B P.C. read with S. 5 (2) of the Prevention of Corruption Act—Illegal. *Sayeed Hai Vs. State (1968) 20 DLR (WP) 20.*

(11) Money realised for works done on contract but one imperfectly and with materials other than those agreed to, by presenting a voucher certified by two union council members which voucher not signed by the accused but by someone else in his (accused) name does not make out case of cheating under sec. 420. *Lutfar Rahman Vs. State, (1973) 25 DLR (SC) 101.*

(12) Complaint under section 420—Need not necessarily be filed by cheated person alone. *Muhammad Ehsan Vs. State (1968) 20 DLR (WP) 132.*

(13) Cheating—To establish the offence of cheating it must be shown that the criminal intent to cheat exists from the very beginning—Its subsequent exhibition is not a test of cheating. *Meser Ali Vs. State (1974) 26 DLR 146.*

(14) What constitutes cheating—In order to constitute cheating it must be established that someone is made to part with some property on the promise of another to return or to give something in lieu thereof which the latter had no intention to give. The initial intention to deceive, therefore, must be established to justify conviction for cheating. It is to be mentioned, however, that intention to cheat is to be gathered from surrounding circumstances. A dishonest concealment of facts is a deception within the meaning of S. 415 of the Penal Code. Such a deception is an ingredient of cheating. *Akamuddin Ahmed Vs. State (1975) 27 DLR (AD) 175.*

(15) Not alone by word of mouth, but equally by inducement to cheat may be inferred from attending circumstances. An inducement to wrongly deliver, by false representation or by false pretence , need not be always by word of mouth. It can be inferred from all the circumstances attending the obtaining of the property. What is required is a dishonest intention which again can be gathered from the act or series of acts, even distinct and unconnected but committed with the one aim in view, this is, to cheat. *Kazi Mozaharul Huq Vs. State (1981) 33 DLR 262.*

(16) Cheating—Where any breach of contract is an offence and amounts to cheating, punishable under the Penal Code. *Kazi Mozahuril Haq Vs. State (1981) 33 DLR 262.*

(17) A induces B by false representation to deliver some property to C—Offence of cheating is complete even though A does not gain anything. It is never the necessary ingredient of an offence like this that the person (which expression shall also include a person by a legal fiction) cheated should deliver the property to the cheat. For an offence punishable under section 420 of the Penal Code would be complete if A cheats B to deliver to C and in that case it would not be even necessary that A should stand to gain by its delivery to C for if B had suffered wrongful loss by the wrongful delivery of his property to C, A's act should be equally dishonest though he did not profit by it. *Kazi Mozaharul Haq Vs. State (1981) 33 DLR 262.*

(18) If drawer of the post-dated cheque knew that it will not be honoured, then intention to cheat established. *Shaikh Obaidul Haq Vs. State (1986) 38 DLR 105.*

(19) Appellate Court's power to award sentence consequential to the affirmance of conviction if the trial court imposes no sentence upon the accused prescribed under that law. *Jahangir Hossain Vs. State (1988) 40 DLR 545.*

(20) Questions arose whether the appellant could be proceeded against without sanction under S. 197 Cr. P. Code, he claiming that he was a public servant and therefore sanction for his prosecution was necessary and he further claimed that offences under sections 420/511 were scheduled offences under the Criminal Law amendment Act, 1958 and such offence was exclusively triable by the Special judge. *Mansur Ali Ahmed Vs. Bangladesh (1977) 29 DLR (SC) 224.*

(21-22) It is not correct to say that in a case of cheating there is no necessity to prove initial intention to deceive and that subsequent conduct of the accused is enough to find him guilty. *Abdul Karim Vs. Shamsul Alam 45 DLR 578.*

(23) Loan taken on representation to play dishonestly inducing a person to lend the money having no intention to repay will be an offence of cheating. *Shafiuddin Khan Vs. State 45 DLR 102.*

(24) Where a prima facie case of criminal offence has been clearly made out, the High Court Division in a proceeding under section 561A CrPC has little scope to scrutinise the truth or otherwise of any document or other evidence, which may be used as a defence in a criminal proceeding. *Kamrul Islam (Md) Vs. Atikuzzaman, 49 DLR 258.*

(25) The first information report having made out an allegation that the information was persuaded by the petitioner to part with his money through a clever device and was ultimately threatened with murder for demanding repayment of the money, the initial intention to deceive appears on the face of the First Information Report. *Nurul Islam Vs. State and another 49 DLR 464.*

(26) An offence under section 138 of the Negotiable Instruments Act is for dishonour of a cheque simpliciter for insufficiency of fund, etc. whereas an offence under section 420 of the Penal Code for cheating is a distinct offence. The rule of law about the peremptory application of the special law in place of the general law for trial of an offence hardly applies when the offences are distinct under the two law. *Nurul Islam Vs. State and another 49 DLR 464.*

(27) Transaction based on contract ordinarily gives rise to civil liabilities but that does not preclude implications of a criminal nature in a particular case and a party to the contract may also be liable for a criminal charge or charges if elements of any particular offence are found to be present. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time as alleged which may be judged by his subsequent act. *State Vs. Md Iqbal Hossain and others 48 DLR (AD) 100.*

(28) From reading of section 48 of the Act we do not find that institution of this case under Penal Code is barred under section 48 of the Act by an explicit provision of this Act. *Salahuddin (Md) and others Vs. State 51 DLR 299.*

(29) To constitute an offence under section 420 Penal Code, there must be allegation of deception at the initial stage of the transaction. *Habib (Md) and another Vs. State represented by the Deputy Commissioner (Criminal) 52 DLR 105.*

(30) When there has been specific promise by the accused for the return of the deeds by specific time and then when the promise was violated by them the ingredient for offence under section 406/420 Penal Code is well present. *A Rouf and others Vs. State and another (Criminal) 52 DLR 395.*

(31) The cheque was issued by the accused knowing it well that there is no sufficient fund in his account for its enactment. Issuing of such cheque is by itself a criminal offence. *Moniruzzaman (Md) Vs. ANM Didar-e-alam and others (Criminal), 54 DLR 445.*

(32) As the money was taken after giving a specific promise of returning it within a specified time the failure to pay the money attracts the offence of cheating. The proceedings cannot be quashed. *Siddique Abedin Vs. Md. Musa Alam and State (Criminal), 54 DLR 506.*

(33) Punishment for cheating—For the offence of cheating the substantive sentence of imprisonment is mandatory while the sentence of time is discretionary—The substantive sentence is an essential requirement of law and in case of failure to pass substantive sentence under Section 420 of the Penal Code it must be held to be a case of failure to exercise an authority vested under the law—It also amounts to dereliction of duty on the part of the Court—When the law provides for a sentence of imprisonment, the Court in its discretion cannot omit to pass the legal sentence. *Md. Yeakub Kazi Vs. Kaloo Khandaker, 7 BLD (HCD) 150.*

(34) The trial court convicted the accused under Section 471 of the Penal Code and sentenced them to suffer R. I. for 4 years for using the photocopy of an Execution Register knowing it to be a torged document—The High Court Division called the relevant Execution Register and found it tallying with the photocopy of the same and acquitted the accused—The Appellate Division held that since two contradictory things cannot be true and genuine at the same time, the learned Judge of the High Court

Division should have taken additional evidence for ascertaining which of the alleged Execution Registers was genuine by re-calling P. W. 7, who produced the Execution Register before the trial Court—The case was remanded to the trial Court for disposal according to law. *The State Vs. Hanif Sheikh and others 11 BLD (AD) 77.*

(35) To sustain a charge of cheating, the prosecution must prove the initial intention of the accused to deceive. *Abdul Karim Vs. Shamsul Alam and another, 14 BLD (HCD) 167.*

(36) Whenever a loan is taken by one from another on a representation to repay the same dishonestly inducing the perosn to lend money having no intention to repay, whether it will be an offence of cheating punishable under section 420, P.C. Intention of a person, whether can only be gathered from his conduct. Whenever a loan is taken by one from another on a representation to repay the same dishonestly inducing the perosn to lend the money, having no intention to repay the same, it will be an offence of cheating as defined under section 415 and to be punished under section 420 of the Penal Code. Intention of a person can only be gathered from his conduct at the time of the occurrence and the surrounding circumstances. *Md. Shafiuddin Khan Vs. State & another, 13 BLD (HCD) 362.*

(37) Dishonouring of the cheque itself cannot be considered as an ingredient of the offence of cheating unless there is evidence to show that after issuing it he has done something more to defraud the payee. Even such a cheque issued with the knowledge that he has not such amount in the Bank account at the moment it will not amount to cheating if he has intention to deposit the money before the cheque is presented for encashment. Mere dishonouring of the cheques itself is not an ingredient of cheating. *Mohiuddin Md Abdul Kader Vs. the State, and another, 20 BLD (HCD) 499.*

(38) An offence under section 138 of the Negotiable Instruments Act and section 420 of the Penal Code are two distinct offences, one independent of the other. The aggrieved party has right to seek remedy under either of the two penal provisions of law. *Md. Aminur Rahman Vs. The State and another, 23 BLD (HCD) 488.*

(39) Proof of false entry in Register—necessary, when forgery is alleged—When the charge relates to false entry in the Register and the genuineness of the signature is not proved during trial by producing the Register in question, the accused cannot be convicted only on the basis of oral evidence. *Jamaluddin (Md) and others Vs. The State—2, MLR (1997) (HC) 366.*

(40) No re-appraisal of evidence, simply on the ground that High Court's Judgment of reversal, *i.e.*, two Courts having taken two different views of the evidence, special leave to appeal should be granted for examining the evidence afresh. *The State Vs. Nezamul Huq Chowdhury & others, 1 BSCD 247.*

(41) Plea not taken before the High Court Division cannot be allowed to be taken before the Appellate Division. One stand taken by the prosecution before the High Court Division that the declaration by the Co-accused who was not before the High Court and not also before the Appellate Division might not be true. The declaration even if it was untrue and even it was a misrepresentation amounting to a deception that would not furnish a ground for roping in the petitioners. *Bangladesh Vs. A. P. Pieries & others 1, BSCD 248.*

(42) To justify prosecution for cheating under this section there must be initial intention to deceive. *Nasiruddin Mahmud & others Vs. Momtazuddin Ahmed & another, 4 BSCD 26.*

(43) Money claimed not the outcome of a particular transaction but arose after year-end accounting following regular business between the parties—If settlement of account at the end of a period some

money falls due to one party from the other party and the other party fails to pay the dues, such liability by no stretch of imagination can be termed a Criminal liability—No allegation that the appellants fraudulently or dishonestly induced the complainant by practising deception on them to deliver goods—Delivery made both on cash and credit—It is impossible to hold, even if some money remained due after accounting, that cheating was committed—Allegation that dues were allowed to accrue dishonestly neither attract an offence u/s. 420 nor u/s. 406 or under any other section—The whole allegation in complaint petition even if true cannot form the basis of any Criminal proceedings much less for cheating—Proceeding quashed. *Syed Ali Mir & anr. Vs. Syed Omar Ali & ors. 10 BLD (AD) 168=42 DLR (AD) 240.*

(44) The alleged transaction between the complainant and the appellant is clearly and admittedly a business transaction when the appellant had already paid a part of the money under the contract to the complainant, then the failure on the part of the appellant to pay the complainant the balance amount under the bill does not warrant any criminal proceeding as the obligation under the contract is of civil nature and hence the complainant case is quashed, *Dewan Obaidur Rahman Vs. State and another (Criminal), 4 BLC AD 167.*

(45) None of the witnesses has deposed that the appellant induced PW 2 to execute kabala or to deliver the property to him. The prosecution has not led any evidence to prove the ingredient of the offence punishable under section 420 of the Penal Code when the trial Court as well as the High Court Division failed to appreciate this aspect of the matter and wrongly held that the appellant was guilty of the offence under section 420 of the Penal Code. *Mohasin Ali (MD) @ Mohsin Vs. State (Criminal), 5 BLC (AD) 167.*

(46) Nothing was stated in the FIR, the accused denied that he would not pay the balance payment. No allegation of initial deception has also been alleged. The High Court Division rightly quashed the proceeding. *50 DLR (AD) 163.*

(47) The question of balance of cheating does not arise (in the instant case) as there is nothing to show that the accused has dishonestly induced the complainant to sell the fish to him on credit. There is nothing to show that any entrustment of the fish was made to the accused for sale of fish on credit is not "entrustment" of the fish which is to be disposed of according to the direction of the person making the entrustment. *13 BLD (AD) 28.*

(48) Petition of complaint induces an initial mention to deceive the complainant no right to quash. *2 BLC 227.*

(49) Leave to appeal was granted to consider whether in view of Clause ten of the Agreement and the correspondence between the District Controller of Food, Khulna and the firm there appears that prosecution has been instituted with a malafide intention to compel the firm to pay compensation for the consignment in question and whether the appellant's case comes within the purview of either sections 417 or 420 PC or Martial Law Regulation 11 of Martial Law Regulations No. I of 1975. The transaction between the parties is of civil nature and the liability arising therefor is a civil liability which can be discharged by accepting the payment of the price of 2221 maunds ten seers of paddy sunk in river—Appellant be allowed to deposit the amount—The price of the paddy sunk in river. *8 BCR 180 AD.*

(50) Business transaction between the parties for long time—Money claimed has fallen due in course of long business transaction which cannot be the foundation of a proceeding for cheating and breach of trust in Criminal Court. Liability in course of business transaction is of civil nature. The

impugned proceeding is misconceived. Criminal proceeding not maintainable as civil liability cannot constitute any basis of any Criminal Proceedings—It is essentially civil nature—to hold otherwise would be to ignore the realities of business transaction and to encourage civil claims to be brought into criminal courts under some contrivance for the purpose of repayment of alleged dues. *10 BCR 287 AD.*

(51) Allegation stated in the complaint petition that the appellants filed a civil suit being OS No. 112 of 1982 and obtained an exparte decree from the court of sub-judge, Rangpur to the effect that a deed of gift executed on 21-6-1980 by the respondent's late husband was forged, collusive and void as it was obtained by giving false evidence making false statement and false personation. The alleged offences have been committed in relation to a proceeding in the Civil Court and no Court is competent to take cognizance of an offence mentioned in clause (b) of section 195 CrPC except on a written complaint by the Court concerned. *7 BCR 94.*

(52) Where issuance of post-dated cheque constitutes an offence of cheating. The issuance of post-dated cheque means a promise for future payment and if future payment is defaulted on account of subsequent dispute that does not constitute any offence of cheating while there is nothing to show that the accused had any initial intention to cheat or deceive that other party. In order to constitute cheating there must be fraudulent and dishonest inducement for delivery of property. The all important question to be determined is whether the intention not to pay was there when promise was made. Subsequent failure to keep the promise to pay does not constitute cheating. *7 BLD 23.*

(53) Partnership—Breach of trust—A partner failing to account may not be accused for fraudulent breach of trust unless there is a clear agreement whereby the accused is entrusted with the property for specific purpose which the accused fails to carry out and misappropriated it. If a partner is to be charged under section 406 of the Penal Code it must be held that the property belonging to somebody was entrusted to him. It cannot be said that a partner who received partnership property is entrusted with his co-partner's share of the property to bring the case within section 406, Penal Code. *39 DLR 24.*

(54) On conviction under section 420 of the Penal Code the accused must be sentenced to imprisonment this being mandatory provision of law imposition of fine in addition to imprisonment is discretionary with the Court. Mere imposition of fine alone on conviction under the section is illegal *38 DLR 8.*

(55) Rule was issued upon the respondent to show cause as to why the Kushtia Police Station Case No. 19(6)84 GR No. 3 of 1984 pending in the Court of Upazilla Magistrate, should not be with drawn and transferred the same to Drug Court at Dhaka for trial disposal and pass such other or further order or orders as may seem fit and proper. Held: In view of the provisions of the Drug Ordinance read with Drug Act there is no hesitation in saying that proceeding before the Upazilla Magistrate at Khushtia was without jurisdiction inasmuch as special procedure has been provided for investigation of the offence by the designated class of officer, namely, inspectors, and a special Court has been set up for the purpose and the case can only be tried by a Drug Court situated at Dhaka *(Ref: 5 BCR 150). 5 BCR 251 AD.*

(56) In case of partnership every partner has dominion over the partnership property by reason of the fact that he is a partner. It is a kind of dominion which every owner of property has over his property. But it is not dominion of the kind which satisfies the requirement of section 405 of the Penal Code *(Ref: 4 BLD 97, 4 BCR 301 AD). 36 DLR 14 SC.*

(57) When a person promises to pay price of goods and on his undertaking to pay, the goods were delivered to him. Afterwards he fails to pay price thereof. No case of cheating will lie. The subsequent

denial of the transaction amounts to a mistaken attempt to save themselves from criminal prosecution. *30 DLR 327.*

(58) The test to be applied in judging a person, an officer of the Government, is to see, whether he is in the service and pay of the of the Government, and whether he is entrusted with the performance of a public duty i.e., he has delegated to him the function to the Government, or in any event performing duties immediately auxiliary to some one who is an officer of the Government and is therefore an officer of the Government within the meaning of section 21(9) of the Penal Code. *29 DLR 224 SC.*

(59) By false representation the accused induced the revenue authority to have his name mutated in respect of certain property whereas that property belong to somebody else. The offence being detected the accused was tried for cheating under section 420 Penal Code and was convicted by the trial Court. On appeal it was contended that the state being the complainant and as the state was not the person who was cheated in this case, the charge under section 420 as against the accused did not lie. The conviction is valid in law. The revenue authority was the agent of the Government which granted protection to the right of the subjects. *18 DLR 151 WP.*

(60) If a person undertakes to supply goods of a specific description on the condition that the goods will be subjected to scrutiny before final acceptance, and will be liable to rejection if they are discovered to be of different quality and quantity, and supplies goods which are not of the specified quality and takes the risk of loss arising from rejection, he does not commit the offence of cheating as defined in section 415 of the Penal Code. He commits no deception unless he so plays with the goods to conceal its defects, and gives to them the colour to appear as goods of the specified quality. There can be no cheating without deception, and there can be no deception without misrepresentation, takes place only when a person by his conduct changes the face of the articles offered for acceptance. *11 DLR 90 WP.*

(61) In a charge under section 420 Penal Code, the manner of deception was not stated. Held:—Plainly the charges are vague and defective inasmuch as they failed to set out the modes in which deception was alleged to have been practised upon the alleged victims. *10 DLR 1 SC.*

(62) Charge under section 218, exclusively triable by Sessions Court. Charge framed by Magistrate under sections 218 and 420 Penal Code—held; trial was without jurisdiction. Failure to raise the objection of jurisdiction or even consent of the accused, does not validate the proceedings. *5 DLR 101 FC.*

2. This section and Sections 415 and 417.—(1) This section deals with cases of cheating whereby the deceived person is dishonestly induced:

(i) to deliver any property to any person; or

(ii) to make, alter or destroy:

(a) the whole or any part of a valuable security; or

(b) anything which is signed or sealed and which is capable of being converted into a valuable security. *1978 WLN (UC) 430.*

(2) For a person to be convicted under S. 420, it has to be established not only that he cheated someone but also that by doing so he has dishonestly induced the person who was cheated to deliver any property, or do any other act mentioned in the section. *AIR 1963 SC 666.*

(3) After the offence of cheating is completed some further act of delivery is not necessary because the said words are designed only to introduce a description of a particular sort of cheating (i.e., when

the effect of cheating is to induce the delivery of the property or the making of alteration or destruction of a valuable security. *AIR 1917 Sind 89.*

(4) Where any of the ingredients of the offence referred to above is absent, there can be no offence under this section. *AIR 1928 Mad 224.*

3. There must be cheating.—(1) Cheating, and therefore deceit, which is a necessary ingredient of cheating, is necessary to be proved before this section can apply. Where there is no cheating as defined in Section 415, there can possibly be no offence under this section. *AIR 1980 SC 366.*

(2) The ingredient to deceit must exist at the time of inducement to deliver property etc. *AIR 1974 SC 301.*

(3) Where the accused made a false representation to the Railway in a forwarding note and under the Railway Rules the Railway incurred no liability of any kind in spite of the misrepresentation, the Supreme Court held that the accused was not guilty of cheating. *AIR 1970 SC 843.*

(4) As to the illustrative cases of cheating. *AIR 1983 SC 1149.*

4. "Whoever.—(1) As the offence under this section is one which "shall be punished with imprisonment" a company cannot be prosecuted for an offence under this section. *(1973) 75 Bom LR 417.*

5. Dishonest intention.—(1) A dishonest intention at the time the offence is said to have been committed is an essential ingredient of the offence under this section. *AIR 1979 SC 1342.*

(2) Even though the person deceived may not have been put to any wrongful loss, the act may amount to cheating falling under this section where the accused has thereby made a wrongful gain for himself. *1977 CriLJ 2048 (Mad).*

(3) Accused tampered with the R.R. and made the person cheated believe that large quantity was under consignment and obtained credit on its basis. He is guilty under Sec. 420 *AIR 1963 SC 666.*

(4) As to other illustrative cases where the accused was held to be guilty of cheating. *1979 All CriR 486.*

(5) As to illustrative cases where accused was held not to be guilty of cheating. *AIR 1980 SC 366.*

6. Promoting speculative schemes.—(1) In the absence of misrepresentation or suppression of material facts with a view to cheat or defraud the public the promoters of a financial snowball scheme which could run only so long as there would be a continuous uninterrupted progressive increase in subscribers but which could not go on indefinitely would not be guilty of cheating. *AIR 1971 SC 1620.*

7. Property and delivery of property.—(1) The word 'property', as used in the section, does not necessarily mean a thing which has a money value. *AIR 1969 SC 40.*

(2) Even if a thing has no money value in the hands of the person cheated, if it becomes a thing of value in the hands of the person who may get possession of it, as a result of the cheating practised by him, it would fall within the connotation of the term 'property' used in this section. *AIR 1969 SC 40.*

(3) The word 'property' includes both movable and immovable property. *AIR 1937 Sind 56.*

(4) The question to be considered is whether the property is of the kind that can be the subject-matter of the acts covered by this section. *AIR 1962 SC 1821.*

(5) The following have been held to be property within the meaning of this section:

(a) An import licence in the hands of the Licensing Authority. *AIR 1955 Bom 82.*

(b) A passport. *AIR 1977 SC 1174.*

(c) Money. *AIR 1933 Lah 1009.*

(d) Motor Driving Licence. *AIR 1948 Mad 268.*

(e) Quota Transfer Certificate. *AIR 1940 Mad 155.*

(f) Certificate that a person has passed an examination. *AIR 1922 Nag 229.*

(g) Duplicate motor driving licence. *AIR 1966 Raj 182.*

(h) An admission card to sit for an examination. *AIR 1961 SC 1698.*

(i) Payment order passed by a Treasury Officer. *1963 (1) CriLJ 716 (Tripura).*

(j) An insurance policy. *1983 Jab LJ 666.*

8. Valuable security.—(1) The following have been held to be valuable securities:—

(a) A deed of conveyance. *(1953) 6 Sau LR 466.*

(b) An Income-tax Assessment Order. *AIR 1969 SC 40.*

(c) An import licence obtained from the office of Chief Controller of Imports. *AIR 1955 Bom 82.*

(2) The following have been held to be not valuable securities:—

(a) A receipt for payment of money. *AIR 1936 Cal 324.*

(b) A postal acknowledgment receipt. *AIR 1917 Pat 699.*

(c) A copy of the decree of a Court. *AIR 1924 Cal 502.*

(d) Statement of a person before a Revenue Officer. *AIR 1941 Lah 460.*

9. Issuing cheques.—(1) If a person gives a cheque which is dishonoured and from the circumstances it can be presumed that he must have been aware that the cheque would be dishonoured, he would be guilty under this section. *(1980) 82 Pun LR 116.*

(2) When cheques issued by the accused towards balance of payment were dishonoured and he failed to make any attempt to see that cheques were encashed it was held that accused should be presumed to be guilty under S. 420. *1982 CriLJ 1482.*

(3) If a person gives a cheque which is dishonoured and if there is no evidence that he was aware of the fact that he had no sufficient money in the bank and that it was with that knowledge that he issued the cheque, he cannot be convicted under this section. *1980 Chand LR (Cri) 143 (Punj).*

10. Adulteration.—(1) The adulteration of milk by mixing water and selling it may amount to an offence under this section if the elements constituting the offence of cheating exist. *1888 Rat Un CrC 367.*

11. Taking deposit of money.—(1) When a person deposits money with another to earn interest the relationship between the parties is one of debtor and creditor giving rise to a civil liability. When, however, there is ab initio dishonest intention on the part of the deposited to knock out money from the depositor, the taking of the deposit may amount to cheating. *(1969) 71 Pun LR (D) 247.*

12. Attempt.—(1) An attempt to commit an offence under this section is committed where the accused attempts to cheat another and thereby attempts to induce him to do one or the other of the acts mentioned in this section. *(1979) 2 Cal LJ 213.*

(2) The actual transaction must have begun and an act to bear upon the mind of the victim must have been done before a preparation can be said to be an attempt. *AIR 1927 Mad 77.*

(3) It is immaterial for an act to amount to an attempt that the complainant was not deceived but only feigned belief in the false representation made by the accused. *AIR 1960 SC 979.*

(4) Attempting to obtain by false representations an admission card to sit for a University Examination will amount to an offence under this section read with S. 511. *AIR 1961 SC 1698.*

13. Abetment.—(1) There can be an abetment of an attempt to commit an offence under this section. Where A let B use his mill for storing paddy and his covernotes on the mill and stated to witnesses that 75,000 baskets of paddy were in the mill when it was burnt, knowing that the capacity of his mill was only 15,000 baskets, and further having stocked paddy refuse in the godowns pretended it was paddy, it was held that A had abetted the attempt of B to cheat. *AIR 1924 Rang 241.*

(2) A person is guilty of abetment, who introduces the complainant to be cheated knowing full well that the offence is going to be committed. *AIR 1917 Lah 291.*

14. Conspiracy to cheat.—(1) Where five accused are alleged to have combined to deceive another and four of them are given the benefit of doubt, the position of the remaining accused who is found guilty is not affected. His conviction is not vitiated by the fact that the other four are acquitted. *AIR 1936 All 357.*

(2) If a specific instance of cheating is proved against any of the accused it would be a corroboration of the offence of conspiracy. *AIR 1957 SC 340.*

(3) Where a number of persons conspire generally to commit cheating in a particular way and in pursuance of such conspiracy, cheat different persons at different times in that particular way, there is only one offence of conspiracy to cheat. *AIR 1955 NUC 2944 (Cal) (DB).*

15. Abuse of Railway pass—Section 68, Railways Act and this section.—(1) Where a Railway servant applied for and obtained a free pass for his wife and mother and handed over his pass to another woman who was neither his wife nor his mother and she used it, it was held by the Chief Court that the accused was guilty under this section and not under Section 68 of the Railways Act. *AIR 1925 Oudh 479.*

16. Section 64, Post Offices Act and this section (Sending blank papers in insured cover).—(1) Where the acts of the accused amount to an offence under this section read with Section 511 and also under Section 64 of the Post Offices Act, it was held that it is not illegal to convict the accused for the major offence under this section read with Section 511. *AIR 1930 Pat 622.*

17. This section and Section 215.—(1) The offence under this section is more serious in nature than the one under Section 215; where therefore the act of the accused may amount to an offence under this section, as well as under Section 215, it is desirable to convict and sentence the accused for the more serious offence, viz., the offence punishable under this section. *AIR 1923 Rang 37.*

18. Charge and conviction.—(1) A charge under S. 420 can be framed against an accused person only when the allegations made against him prima facie answer the necessary ingredients of the offence of cheating as defined under S. 415. When any ingredient is short charge under S. 420 cannot be framed. *1982 Sim LC 45.*

(2) In framing a charge under this section, it is necessary to set out not merely the fact that the accused had obtained goods by dishonest inducement, but also the deception which has been practised. *AIR 1953 SC 462.*

(3) Where it was submitted that 6 items of alleged cheating were combined together in one charge and the conviction of the accused was therefore bad it was held that lower Courts having found that all the six items of cheating were part and parcel of the transaction, the trial of the accused on a single charge was permissible under S. 239, Criminal P. C. *AIR 1967 SC 986.*

(4) Contract to supply wood to Government—Money obtained from Government on various bills at different times in pursuance of conspiracy entered into between various accused—Held single charge

under S. 420, Penal Code did not contravene S. 233, as object of conspiracy was not to obtain diverse amounts but to obtain entire contract money from Government. *AIR 1963 SC 1620.*

(5) Where the charge as framed, discloses one single conspiracy, although spread over several years there is only one object of the conspiracy and that is to cheat members of 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 change the conspiracy and does not split up a single conspiracy into several conspiracies. *AIR 1957 SC 340.*

(6) A conviction of an accused under the section would be valid though the charge is under this section read with S. 34, unless prejudice is shown to have occurred. *AIR 1957 SC 857.*

19. Evidence and proof.—(1) To justify a conviction under this section, deception must be proved. *1976 Chand.LR (Cri) 23(Him Pra).*

(2) The false representation which constitutes deception need not always be express. It can be inferred from the conduct of the parties. *AIR 1967 SC 986.*

(3) The burden is on the prosecution to show that the representation was false to the knowledge of the accused at the time he made it. *AIR 1973 SC 326.*

(4) The deception must be proved to have been practised with a dishonest or fraudulent intention. *AIR 1969 Cal 481.*

(5) Dishonest intention cannot be inferred from the mere fact that the accused could not subsequently fulfil his promise or refused to fulfil it. *AIR 1973 SC 326.*

(6) Error of judgment or breach of performance of duty cannot be equated with dishonest intention. *AIR 1974 SC 1560.*

(7) The burden of proving the falsity of the representation is never shifted from the prosecution and if a reasonable explanation is given by the accused, the Court will have to take that into consideration and if it considers that the explanation may reasonably be true though it is not convinced about its truth, it should acquit the accused. *AIR 1957 SC 466.*

(8) Where there is no evidence to show that the accused had authorised another to act on his behalf, the latter's false representation cannot be made the basis for convicting the accused for an offence under this section. *AIR 1956 SC 544.*

(9) One of the partners procuring goods by practising fraud on complainant—Absence of evidence that another partner had any knowledge of this state of affairs—Goods stored in room hired by them—Not by itself sufficient to convict another partner under S. 420 read with S. 34. *AIR 1981 SC 476.*

(10) Mere moral conviction of the Court should not be allowed to fill in the gap in the evidence or be substituted for legal proof. Mere suspicion or even reasonable doubt cannot take the place of proof. *AIR 1980 SC 499.*

(11) In a trial for an offence under this section, the acquittal of the accused for an offence under Section 419 (cheating by personation) does not render the evidence as to impersonation inadmissible. *AIR 1968 Orissa 79.*

(12) Accused charged with getting Government work done departmentally but submitting bill and getting payment as if the work was done by contract and contractor's labourers—Burden of proof is on prosecution to bring home to accused all the essential ingredients of the offence—Proof of mere irregularities and non-compliance with rules not enough. *AIR 1980 SC 499.*

(13) A lawyer's account should be clear and clean and above suspicion of manipulation, but that there may arise some omissions and commissions in the account cannot give rise to a criminal charge for which strong and unimpeachable proof will be necessary. *AIR 1977 SC 1760.*

20. Existence of civil remedy.—(1) The existence of a civil remedy is no bar to a trial for an offence under this section. *1978 CriLJ 1360.*

(2) There can be a prosecution under this section even though the agreement on which the offence is based is illegal or is opposed to public policy. *1976 CriLJ 1403.*

(3) Accused was to close down the factory and return machines but did not do so and in violation of his letter trying to dishonestly misappropriate and convert to his own use the machines—Accused not admitting execution of letter—Under an agreement between complainant and accused if at any time either during the continuance of the agreement or thereafter, a dispute arose it was to be referred to arbitrator—Held, the dispute being purely of civil nature and it has to be determined by an arbitrator or civil court no offence under S. 420 of Penal Code is made out. *(1984) 25 DelHi LT 146.*

(4) Accused taking loan from complainant—Agreement that accused would not sell a truck until loan is repaid—Sale of truck by accused before repayment of loan—Breach of agreement gives rise to a civil and not a criminal liability. *1982 WLN (UC) 195.*

(5) Accused a commission agent in grains, and complainant a merchant in grains having intimate relations between them—Numerous past transactions between them—It would be difficult to determine the extent to which complainant was duped or persuaded by misrepresentation or cheating by applicants to part away with money or goods alleged to be subject matter of breach of trust and cheating—It would be dispute essentially of a civil nature and not of criminal nature—Prosecution held, amounted to abuse of the process of the court. *(1983) 2 Crimes 109.*

21. Pleas which are not valid defences.—(1) A defence that the association of the complainant with the accused has resulted in a profit to the complainant is not a valid defence to a charge under this section. *AIR 1943 Sind 51.*

(3) A defence that a partnership existed between the accused and the complainant is not a valid defence to a charge under this section. *AIR 1969 Cal 232.*

22. Denial of liability.—(1) A mere denial of liability does not amount to cheating. *AIR 1925 Sind 231.*

23. Sentence.—(1) The offender convicted under this section "shall be punished with imprisonment and shall also be liable to fine". This means, that a term of imprisonment is compulsory and the court has a discretion to add or refrain from adding a fine. *1946 AMLJ 8.*

(2) Where there is a strong indication, on the evidence on record, that there were other and perhaps bigger persons involved in the fraud for which the accused was tried and they were not brought to book, the circumstance, though it does not excuse or exonerate the accused from his guilt which has been established beyond reasonable doubt, has, nevertheless, a bearing on question of sentence. *1968 SCD 210.*

(3) Loss of membership and reputation can be taken into consideration in awarding a linient sentence. *AIR 1953 All 381.*

(4) Loss of service is a circumstance which can be taken into consideration in awarding a lenient sentence. *AIR 1950 All 639.*

(5) Where the offence under this section and the Prevention of Corruption Act was in respect of a small sum and committed 12 years back and the accused had served some rigorous imprisonment, the Supreme Court reduced the sentence to the period already undergone but maintained the fine. *AIR 1974 SC 898.*

(6) As to illustrations of lenient views on point of sentence. *1981 (Supp) SCC 82=AIR 1977 SC 1926, 1977 CriLJ 2048.*

(7) As to illustrations of cases, where a deterrent sentence was called for. *AIR 1934 Pat 114.*

(8) Unless discretion is improperly exercised, Supreme Court would not interfere—Sentence of rigorous imprisonment for six months held not severe in the circumstances. *AIR 1960 SC 734.*

24. Procedure.—(1) It is desirable that cases of cheating should be initiated by the person cheated. *AIR 1931 Cal 452.*

(2) Where civil proceedings are started along with criminal proceedings for the offence of cheating, criminal proceedings should be stayed till the civil cases are finally terminated. *AIR 1969 Andh Pra 54.*

(3) Misrepresentation by the accused was at Simla and consequence was at Lahore as the Government of Burma was induced by the misrepresentation to deliver property at Lahore—Held, that the offence of cheating by the accused could have been tried either at Lahore or at Simla. *AIR 1960 SC 266.*

(4) Accused made representations from Karachi to the complainant at Bombay and induced him to part with money at Bombay—Held that Bombay Court had jurisdiction. *AIR 1957 SC 857.*

(5) Where A executed a Kobala, presented it for registration but took it back from the sub-registrar on a pretext, before registration, and tore it off, but the sub-registrar did not make any complaint and the complainant filed a complaint for cheating and also filed a suit for specific performance it was held that in the absence of any complaint by the sub-registrar who was the person cheated, prosecution under Section 420 is not advisable, as a civil suit was pending. *AIR 1920 Cal 47.*

(6) An offence under this section is triable by a First Class Magistrate, a Magistrate of the Second Class is not competent to try an offence under this section, and if he does so, his proceedings are void under Section 461, Criminal P. C. *AIR 1933 Lah 1009.*

(7) Where the Regional Commissioner issues a warrant for extradition of an offender for enquiry into offences under Ss. 383 and 420 of the Penal Code no sanction under S. 197, Criminal P. C., or Art. 17 of the Covenant is necessary with respect to such offences. *AIR 1950 All 342.*

(8) Offence by public servants against Government under S. 420 or Section 120B read with S. 420, Penal Code—Sanction held necessary. *AIR 1950 Raj 51.*

(9) Where the object of the conspiracy is to commit an offence under this section and in pursuance of that conspiracy, offences under this section and Sections 427 and 467 of the Code are committed no sanction is necessary for a prosecution for these offences. *AIR 1955 NUC (Bom) 5890.*

(10) A Special Judge appointed under the Criminal Law Amendment Act will have that jurisdiction which he is competent to exercise under the Prevention of Corruption Act or the Criminal Law Amendment Act. And in view of Criminal Law Amendment Act, he can also try an accused person for offences under S. 120B read with Secs. 466, 467 and 420, P. C. *AIR 1961 SC 1241.*

(11) Accused extradited from a foreign territory and brought to India for a different offence. A case under Section 420 can be initiated against him. *AIR 1957 SC 857.*

(12) Sanction for prosecution under Sec. 120B/420—Charge altered under Section 120B/161 on same facts—Court held justified. *AIR 1948 PC 128.*

(13) As to illustrations of cases on point of jurisdiction and other procedural points. *1984 CriLJ 593 (Orissa); 1983 CriLJ 1661; 1983 CriLJ 24; (1982) 1 Bom CR 756.*

(14) Cognizable—Warrant—Bailable—Compoundable by the person cheated the permission is given by the Court before which the prosecution is pending—Triable by Metropolitan Magistrate or Magistrate of the first class, and by the Village Court if the amount does not exceed Taka 5000. If the offence is committed by public servant, it becomes cognizable—Not bailable—Not compoundable—Triable by the Special Judge under Act XL of 1958 and Act II of 1947.

25. Practice.—Evidence—Prove: (1) That there was deception of any person.

(2) Fraudulently or dishonestly inducing such person—(i) to deliver any property to any person; or (ii) to consent that any person shall retain any property.

(3) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived; and (ii) Such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

26. Charge.—The charge should run as follows:

I (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, cheated X by dishonestly inducing him to deliver (specify the property to you and which was the property of the said X (or to make, alter or destroy the whole or any part of a valuable security), and that you thereby committed on offence punishable under section 420 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Of Fraudulent Deeds and Dispositions of Property

Section 421

421. Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.—Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) Sections 421 to 424 Penal Code relate to frauds against creditors. This section is intended to punish fraudulent debtors. It specially refers to fraud connected with insolvency. This section applies to property both movable and immovable. The gist of the offence is to take the property out of the reach of the creditor by—(a) a dishonest and fraudulent transfer: (b) without adequate consideration; and (c) with intent to prevent the lawful distribution of property among the creditors. This section covers benami transactions in fraud of creditors. Section 103 of the Insolvency Act, does not substantially interfere with section 421 of the Penal Code and ordinary jurisdiction of the criminal courts cannot be held to be excluded. Under the civil law, section 53 of the Transfer of

Property Act, and section 54 of the Insolvency Act, the transaction is void if the transferee was privy to the fraudulent transfer.

(2) Where a special enactment such as the Insolvency Act, Section 69 deals with an offence similar to the offence which is dealt with by a general enactment such as the Penal Code, Sections 421 and 424, it does not follow that the provisions of the Penal Code are repealed to that extent. The prosecution in such a case may be under either of these enactments as provided by S. 26 of the General Clauses Act. *1971 Mad LW (Cri) 164 (Pr 7).*

(3) The section applies to property both movable and immovable. The word "property' in the section is wide enough to include a chose in action. If all the ingredients of the section are present, then the offence would be established even if that property is in a foreign State. *AIR 1936 Bom 167.*

(4) A shop-keeper who has stocked his shop with goods obtained on credit and who sells those goods without making any payment to his creditors, commits no offence under this section. In selling those goods which are his own in spite of the fact that he has not yet paid for them, he is not causing wrongful gain to himself; neither is he causing wrongful loss to anybody, because unless the creditors have obtained some legal right over the property, he is not, by his action, depriving them of any right of theirs. *AIR 1938 Rang 242.*

(5) In order to sustain a conviction under this section the points requiring proof are as follows:

(i) That the accused removed, concealed, delivered or transferred to any person any property or caused it to be so transferred.

(ii) That he did so (a) dishonestly or fraudulently, (b) without adequate consideration and (c) intending thereby to prevent, or knowing it to be likely that he will thereby prevent the distribution of that property according to law among his creditors or the creditors of any other person. *(1893-1900) Low Bur Rul 593 (Guj).*

(6) Where an offence falls under S. 206 and not under this section, it is not open to the Magistrate to ignore the essential ingredients of the complaint and treat the offence as one under this section. *AIR 1942 Mad 675.*

(7) The Insolvency Act does not take away a Magistrate's jurisdiction to try the insolvent under this section and S. 424. *AIR 1929 Rang 14.*

(8) It is open to a District Court to grant permission to the Official Receiver to prosecute an insolvent for an offence under this section and Section 424, upon the strength of the Receiver's report, which is sufficient material for that purpose. *AIR 1918 Mad 460.*

2. Practice.—Evidence—Prove: (1) That the accused removed, concealed, or delivered the property or that he transferred it or caused it to be transferred to someone.

(2) That such transfer was without adequate consideration.

(3) That the accused thereby intended to prevent, or knew that he was thereby likely to prevent, the distribution of that property according to law among his creditors, or creditors of another person.

(4) That he acted as above dishonestly or fraudulently.

3. Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

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—, dishonestly (or fraudulently) removed (or concealed, or delivered to a certain person, to wit,—without adequate consideration) certain property, to wit,—intending thereby to prevent or knowing it to be likely that you would thereby prevent the distribution of the said property according to law among your creditors (or the creditors of—); and that you thereby committed an offence punishable under section 421 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 422

422. Dishonestly or fraudulently preventing debt being available for creditors.—Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) This section is intended to prevent the defrauding of creditors by making property available. Any proceeding to prevent the attachment and sale of debts due to the accused will fall under it. The offence consists in the dishonest or fraudulent evasion of one's own liability. A transfer of the equity of redemption by the mortgagor to a third person does not constitute an offence under section 422 of the Penal Code *(14 CrLJ 141).*

(2) This section cannot apply unless the prevention is accompanied by a dishonest or fraudulent intention. It was not applied to a case where the accused mortgaged his house but a year afterwards sold the house to another person. The mere transfer of his interest by a mortgagor cannot be said to be fraudulent or dishonest merely because he has, as a matter of fact, previously mortgaged his property. *(1913) 14 CriLJ 141 (All).*

(3) A mortgaged his property to B and agreed with him that C shall manage his property and pay B from the realisations. C filed a suit in the name of A against D and got his property sold in execution. D approached A and A agreed that if D deposited Rs. 1,000.00 into Court the sale can be set aside. D deposited the amount and A, without reference to C and B applied for its payment to him by the Court. C then instituted the prosecution against A under this section. It was held that on the facts A was not actuated by any dishonest or fraudulent intent, of defeating the mortgagee B, in applying for the payment and was not liable under this section. *(1900) 5 Cal WN 174.*

(4) Where A entered into an agreement with B not to compromise a case with C because he had assigned the benefit of the suit to B as a security for the due payment of some monthly instalments of money, but notwithstanding this A did afterwards compromise the suit with C, it was held that A could not be convicted under this section unless the compromise with C was made to defraud B or cause wrongful loss to him. *(1874) 22 Suth WR (Cri) 46.*

2. Practice.—Evidence:—Prove: (1) That the debt or demand was due to the accused, or some other person.

(2) That the accused prevented such debts or demand from being made legally available for his debts, or for the debts of another person.

(3) That he did as above dishonestly or fraudulently.

3. Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

4. 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 of—, at—, prevented a debt (specify) or demand due to you or to X, from being made available, according to law for payment of your debt or the debt of X and thereby you have committed an offence punishable under section 422 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 423

423. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.—Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) This section deals with fraudulent and fictitious conveyances and trusts. The false recital of consideration or a false statement of the beneficiary in a deed is made an offence by this section, if the false recital or statement is made fraudulently or dishonestly. The object is to punish fraud, when it is perpetrated to the immediate prejudice of their party. If the consideration for sale of immovable property is, with the consent of the purchaser, exaggerated in a deed of sale in order to defeat the claim of the preemptor the purchaser will be guilty of this offence. In such cases it is necessary to prove the existence of a right of pre-emption in respect of the subject matter of such sale, as it is not an offence if the property sold is not subject to such a right. Under this section the dishonest execution of benami deed will be punishable. The institution of a civil suit is not a condition precedent to the maintenance of a charge in a criminal court for this offence. A kabuliyat is not a document contemplated under section 423 Penal Code *(20 CrLJ 574)*. The accused obtained a loan from the Government by making a false statement as to the area of land in their possession. A charge for the consideration was created on the land. It was held that the false statement made did not relate to the consideration for the charge which was created on the land and hence the accused were not punishable under section 423 *(AIR 1952 Pat. 285)*.

(2) Appellate Court can make any amendment or any consequential or incidental order that may be just & proper. *Jahangir Hossain Vs. The State (1988) 40 DLR 545.*

(3) One of the necessary elements of the offence under this section is dishonesty or fraud on the part of the accused. A fictitious sale deed executed for defeating a claim made in a suit is clearly fraudulent and dishonest. *(1907) 6 CriLJ 111.*

(4) Where certain judgment debtors executed a document with a false recital as to the consent of the decree-holder to take their land and this was found to have been done fraudulently with the

intention of supporting at a later stage a case of satisfaction of the money decree which the decree-holder had obtained against them, it was held that this was enough to bring the act of the judgment debtors within mischief of this section. *AIR 1933 Pat 495.*

(5) A Kabuliyat is not an instrument contemplated under this section. Although a Kabuliyat when accepted, operates as a lease for some purposes it is not a document which purports to transfer or subjects, to any charge, any property or interest therein. *AIR 1919 Cal 430.*

(6) The law does not make punishable every false statement in an instrument of transfer. The false statement must relate to the consideration or to the person to be benefited by it in order to become criminal. *(1911) 12 CriLJ 547 (Mad).*

(7) The word "consideration" in this section does not mean the property transferred. Therefore an assertion that the whole land belonged to the transferor is not a statement relating to the consideration for the transfer and is not an offence even though such statement is untrue; consideration should not be confused with value or with the property. *1976 HBCJ 407.*

(8) When an accused person had unsuccessfully sought to obtain a woman in marriage and thereafter got registered a document containing a false recital that he had married her and purported to transfer certain land to her in lieu of her dower, it was held that in addition to an intention to deceive and mislead, the accused had the further intention to cause injury to the woman and her true husband in order to support his own false claim to that status, and was guilty under this section. *AIR 1921 Cal 226.*

(9) In a transaction of sale, the person for whose benefit the sale is intended to operate is the purchaser and not the vendor who receives the consideration. Where a woman alleging herself to be the widow of X transferred property by sale to Y and the allegation that she was the wife of X was not true inasmuch as she had remarried another person, it was held that the case did not fall under this section. *AIR 1958 Cal 130.*

2. Practice.—Evidence—Prove: (1) That the accused signed, executed, or became a party to the deed, or instrument in question.

(2) That the purport of such document was a transfer, or to subject to a charge, the property or any interest in question.

(3) That such document contained a false statement relating to the consideration, or relating to the person for whose use or benefit it was really intended to operate.

(4) That the accused did as above dishonestly or fraudulently.

3. Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

4. 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 of—, at—, dishonestly or fraudulently signed (executed or became a party to) a deed or instrument which purported to transfer or subject to any charge a property namely (specify the property) or any interest therein and which contained a false statement relating to consideration for the transfer or relating to the person or persons for whose use or benefit it is really intended to operate and that you have thereby committed an offence punishable under section 423 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 424

424. Dishonest or fraudulent removal or concealment of property.—Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials : Synopsis

1. Scope.—(1) This section provides for cases not coming within the purview of sections 421 and 422. This section is designed to meet a special class, and has no application to the case where property is openly seized by a person in the exercise of an alleged right *(41 CrLJ 111)*. Taking away property by others with a view that it might not be attached, if done with a dishonest intention, would amount to an offence under this section *(AIR 1930 Mad. 276)*. A removal of crops in violation of an order which the person making it has no authority to make, does not constitute this offence. A partner being a joint owner with other partners cannot be prosecuted under section 424 for dishonestly and fraudulently removing books belonging to a partnership *(AIR 1948 Cal. 292)*. Unless dishonesty is proved, conviction under section 424 cannot be sustained *(22 CrLJ 142)*. Therefore when a bonafide claim of title is raised, the accused is entitled to acquittal whether the claim is raised bonafide or not is a question of fact and has to be determined in the circumstances of each case *(21 CrLJ 609)*.

(2) This section deals with dishonest or fraudulent removal or concealment of property and is aimed against such persons as debtors who try to defraud creditors. It is designed to meet a special class of cases and has no application to a case where property is openly seized by a person in the exercise of an alleged right. *AIR 1939 All 710.*

(3) Where property is attached by an officer of the Court, after the date fixed for the return of the warrant of attachment, the attachment is illegal and if the person whose property is attached, takes the property for his own use he cannot be held guilty under this section for the accused's act cannot be said to be "dishonest". *AIR 1933 All 46.*

(4) A case under this section has no connection with any of the proceedings mentioned in Bargadars Act. *AIR 1952 Cal 559.*

(5) The penal provisions of the Estates Land Act leave the provisions of the Penal Code intact. *AIR 1914 Mad 398.*

2. Removal—Meaning.—(1) This section is meant not only to punish those who conceal but also those who remove property with or without concealment if the act is done dishonestly or fraudulently. *1956 Pat LR 104.*

3. "Dishonestly or fraudulently conceals or removes any property".—(1) The essence of the offence under this section is that the removal of property is dishonest or fraudulent. The finding as to dishonesty must be clear and definite. *AIR 1961 SC 803.*

(2) A dishonest intention may be presumed only if an unlawful act is done or if a lawful act is done by unlawful means. A person cannot be said to do anything dishonestly if he has merely an intention to cause wrongful loss to someone, when he cannot or does not, in fact, cause any such wrongful loss. *AIR 1936 Sind 20.*

(3) Concealment of property by debtors or taking away of property by others to avoid its attachment, if done with a dishonest intention is an offence under this section. *AIR 1930 Mad 670.*

(4) Where an accused was prosecuted under this section for having dishonestly removed branches of trees, a share of which belonged to the landlord, and he admitted having cut and removed the trees but pleaded a custom to the effect that the landlord was not entitled to any share in trees cut by tenants for domestic use but only to those which were cut and sold. It was held that as the accused failed to prove the custom alleged by him the plea of bonafide claim of title was not available to him. *AIR 1920 Pat 663.*

(5) Where the judgment debtors unlawfully took away the cattle seized in attachment in execution of a decree against them, it was held that they were guilty of an offence under this section. *AIR 1961 SC 803.*

(6) An attachment without complying with the provisions of law, would be illegal and the property would not pass from the judgment debtor to the court; the removal of crops under such illegal attachment by the judgment debtor would not constitute an offence under this section. The mere fact that he has removed the crops does not prove that he has done so dishonestly. *AIR 1942 Pat 480.*

(7) Reaping of crop and removal thereof by the tenant without the knowledge of the landlord and without delivering his share was held to be removal of the crops with intent to defeat the landlord's claim and hence an offence under this section. But the accused may prove some other reason for the removal, as for instance, that damage to the crops would otherwise result due to the landlord's default. *AIR 1951 Ajmer 33.*

(8) Section 71(4) of the Bengal Tenancy Act provides the Courts with a definite rule as to the value of crops which have been wrongly removed by the tenant. If the tenant acts dishonestly he is also liable under this section. *AIR 1916 Pat 232.*

4. Proof.—(1) Unless dishonesty is proved, the conviction under this section cannot be sustained. *AIR 1921 Lah 185.*

5. Procedure.—(1) The Insolvency Act does not take away a Magistrate's jurisdiction to try the insolvent under this section. *AIR 1929 Rang 14.*

(2) Where the necessary ingredients for an offence under this section have not been considered in a trial under Section 379 it is prejudicial to the accused to convert his conviction under Section 379 to one under Section 403 or this section. *AIR 1914 Mad 61.*

(3) Where the complainant and the accused under this section are joint proprietors of the same property and a partition suit is pending in the civil Court, with regard to their joint property including the property in respect of which the complaint is made, if the decision of the Magistrate entail prejudging the order of the civil Court, the Magistrate can discharge the accused and order custody of the property to either party on deposit of the value of the other party's share. *AIR 1929 Pat 513.*

(4) Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

6. Complaint by Court for offence under S. 206.—(1) After attachment has been effected by a civil Court, dishonest removal of movable property would constitute an offence under Section 379 or

under this section, or under Section 206 for which a complaint by the civil Court is necessary. *1933 Mad WN 722.*

7. Charge.—(1) If the prosecution establishes certain acts constituting an offence under this section and the Court misapplies the law by charging and convicting an accused person for an offence under Section 409, and if notwithstanding such error the accused has, by his defence endeavoured to meet the accusation or the commission of those acts, then the appellate Court may alter the charge and finding and convict him under this section, provided the accused is not prejudiced in the finding. *(1904) 1 CriLJ 385.*

(2) 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 of, —at—, dishonestly (or fraudulently) concealed (or removed a certain property, to wit—, belonging to yourself (or to—) (or dishonestly or fraudulently assisted in the concealment or removal thereof: or dishonestly released certain demand, to wit—) and that you thereby committed an offence punishable under section 424 Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

8. Practice.—Evidence—Prove: (1) That the accused concealed or removed the property, or that assisted in doing so.

(2) That he did as above dishonestly or fraudulently.

Or Prove: (1) That the accused was entitled to the demand or claim in question.

(2) That he released the same.

(3) That he did so dishonestly, or with intent to defraud.

Of Mischief

Section 425

425. Mischief.—Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(a) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(b) A introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z, A has committed mischief.

(c) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z, A has committed mischief.

(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z, A has committed mischief.

(e) A having insured a ship voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(f) A causes a ship to be cast away, intending thereby to cause damage to Z who has lent money on bottomry on the ship. A has committed mischief.

(g) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z, A has committed mischief.

(h) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief.

Cases

1. Scope.—(1) Sections 425 to 440 relate to offence of mischief in all its varying degree. The offence of mischief is defined in section 425. There are three essential ingredients to constitute the offence of mischief—(a) intention or knowledge or likelihood to cause wrongful loss or damage to any person or the public; (b) causing destruction of some property, of some charge in such property; or in the situation thereof; and (c) such change must destroy or diminish its value or utility. No mischief can, therefore, be committed where the acts complained of amount to an invasion of a civil right *(AIR 1958 Cal 668)*. The intention to cause wrongful loss is the main ingredient of an offence under this section. Without mens rea there can be no offence under this section *(AIR 1949 Mad. 400)*. The section contemplates a direct act leading to the wrongful loss or damage. Intention is not necessary but guilty knowledge is essential for an offence of mischief *(20 CrLJ 612)*. Taking earth from someone's land deprives him of or destroys some property which has some value and such an act will amount to mischief *(AIR 1955 Cal. 558)*. The expression "wrongful loss or damage" in sections 425, Penal Code must mean loss or damage by unlawful means. Where the accused has a bonafide claim of right, he cannot do more harm than it is necessary for him to do in exercise of his right. The element of dishonesty, that is to say, causing of wrongful loss or wrongful gain to some person is a common element in both offences under section 378 and 425. Wrongful loss to a person can be caused in a variety of ways. The nature of the loss in both cases is different and falls under the definition of distinct offences. If a person set fire to his own house in order to eject a trespasser he cannot be said to cause wrongful loss to any person or the public and cannot be convicted of mischief *(23 CrLJ 321)*.

(2) Section 425 PC which defines mischief does not contemplate that a plea of civil right will exonerate the wrongdoer from the operation of the law, if all other elements of the section are fulfilled. *Wazir Hassan Ansari Vs. The State (1969) 21 DLR 231.*

2. For more cases relevant to this section, see under section 426.

Section 426

426. Punishment for mischief.—Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Cases and Materials : Synopsis

1. Scope.—(1) This section provides the punishment for mischief. Any value, however trifling it may be quite sufficient for an offence under section 426 Penal Code. The complaint of a person aggrieved is not essential in respect of an offence under section 426 Penal Code, since that offence is not covered by section 198 or by section 199 of the CrPC. It is for the prosecution to prove that the accused caused damage with a wrongful intent—with a knowledge that he was not justified in doing it, and that the party under whose orders he was acting had no real title.

(2) Mischief in respect of one's own property may amount to an offence. It is not necessary that the act by which the mischief results must also be done on the property of the complainant; one may well commit an act on one's own property which may result in mischief, namely, wrongful loss to the property of the complainant or any other person. In this sense the criminal law does not require that both title and possession in the property on which an act itself is committed has to be found to have been with the complainant before a conviction in respect of such an offence can be made. *Mamtazuddin Vs. Crown (1956) 8 DLR 95.*

(3) Separate sentences under section 147 as well as under section 426 not legal—Conviction under both the sections is valid. *Mamtazuddin Vs. Crown (1956) 8 DLR 95.*

(4) When common object alleged is causing mischief, conviction under section 147, P.C., automatically goes, if conviction under section 426 is set aside. *Mamtazuddin Vs. Crown (1956) 8 DLR 95.*

(5) Evidence (including document) on accused's behalf must be considered by the trial Court to find out if there are ingredients of intent or knowledge. *Sakir Mullah Vs. Didar Mulla (1963) 15 DLR 287.*

2. Mischief—Elements of offence.—(1) In order that S. 425 may apply:

(i) The accused must have caused the destruction of some property or some change in it or in its situation;

(ii) Such change must have destroyed or diminished the value or utility of the property or affected the property injuriosuly;

(iii) The causing of destruction or change in the property or in its situation must have been with the intention to cause, or with the knowledge of the likelihood of thereby causing, wrongful loss or damage to the public or to any person. *AIR 1972 SC 665.*

(2) A person cannot be prosecuted for the offence of mischief where the dispute between the parties is purely of a civil nature. *AIR 1958 Cal 668.*

(3) Mischief, like most crimes, comprises two elements:—mental and physical. The mental element consists of intention, express or implied, to cause wrongful loss or damage and the physical elements is in the act of destruction or causing injurious change to the property. The mental element is the same in all kinds of mischief but the physical element is found aggravated in the offences defined in Ss. 427 to 440 of the Code. *AIR 1960 Mad 240.*

3. Intention or knowledge.—(1) The mere causing of loss is not enough for a conviction under this section. Criminal intention to cause or the knowledge of the likelihood of causing such wrongful loss should also be established. *AIR 1969 Bom 20.*

(2) Intention to cause wrongful loss or damage or knowledge of the likelihood of causing such wrongful loss or damage is thus an essential element of the offence. *AIR 1930 Rang 158.*

(3) Municipal employee removing plants of the complainant's stall and not returning till the municipal rent is paid. The Municipal employee held not guilty of theft or mischief for want of necessary intention to cause wrongful gain or loss. *AIR 1960 Mad 186.*

(4) Where it was only accidentally that the truck of the accused struck against the buffalo of the complainant which as a result fell down from a bridge and died of the injury later on held the conviction of the accused for an offence under S. 429 could not be sustained. *AIR 1958 Raj 347.*

(5) Accused digging earth from his own land—Fact that change in land diminished its value or utility not proved—Intention to cause wrongful loss of damage to complainant doubtful—Mens rea which is one of essential ingredients of offence of mischief held was not proved—Conviction set aside. *AIR 1955 NUC (Tripura) 5114.*

(6) Accused instructing her material uncle to raise the roof which necessitated cutting of complainant's eaves—He must be deemed to have intended to cause annoyance and wrongful loss to complainant and hence is liable not as a principal offender but as an abettor under Ss. 447 and 426 read with S. 109, Penal Code. *AIR 1953 Sau 158.*

4. Mischief and theft—Distinction.—(1) The essential difference between theft and mischief is that when a person commits mischief he only causes loss to another but does not gain anything himself, while in theft, the wrong-doer makes dishonest gain at the expense of the victim. *1971 CriLJ 1361 (All).*

5. Mere negligence or carelessness not sufficient.—(1) Mere negligence or carelessness is not mischief. *(1912) 13 CriLJ 536.*

6. Wrongful loss.—(1) To constitute an offence of mischief, it is necessary that wrongful loss or damage should be caused. *1975 Mad LW (Cri) 10.*

(2) Wrongful loss is the loss by unlawful means of property to which the person suffering loss in legally entitled. *AIR 1968 Orissa 18.*

(3) Over the Chabutra of mosque there was an image of a Hindu God, which was surrounded by a wall the wall being the property of Muhammadans. The accused who was a Hindu widened the doorway in the south wall of the compound round the image of the idol by demolishing a part of the wall on both sides of the doorway. It was held that by breaking the wall and taking out the bricks, the accused caused wrongful loss to the Muhammadan public and therefore an offence under this section was committed. *AIR 1926 All 704.*

(4) Where the right of the accused is not in any way impaired he cannot take law into his own hands and employ unlawful means for the purpose of causing loss to the complainant which in law the complainant is not bound to suffer. In such a case the accused cannot escape conviction under this section. *AIR 1938 Cal 669.*

(5) A dominant owner cannot himself abate a wrongful obstruction of an easement. His remedy is to obtain an order of injunction from a Court of law. If he himself removes the obstruction he will be guilty of mischief. *AIR 1958 Madh Pra 341.*

(6) There is nothing unlawful in the accused installing an oil engine in his own property and working it in any way he chooses, although if his working causes damage to a neighbour's property the accused would be liable for damages enforceable by a civil suit. The damage cannot be said to be caused by unlawful means, the working of the engine on the accused's own property being a lawful act. *AIR 1935 Bom 164.*

7. Cutting off overhanging branches of tree.—(1) A person has a legal right to cut off the branches of a tree growing on his neighbour's lands which overhangs his land. The exercise of such right does not by virtue of S. 79 ante amount to the offence of mischief. *1957 CriLJ 166 (Ker).*

8. Damage.—(1) To sustain a conviction for mischief accused's intention to cause loss or damage to the public or to any person or knowledge that such loss or damage is likely to be caused must be proved. *(1916) 22 Mys CCR (81) P. 1084.*

(2) Where the accused caused damage to the standing crops grown by the complainant on Government land in his cultivating possession, the damage caused to the complainant constitutes mischief. Even if the accused had any semblance of right on the land, they are not entitled to take the law into their hands and cause damage by unlawful means. *AIR 1969 Orissa 200.*

(3) Where A was directed by authorities to remove fish fingerlings from river by a certain date and on expiry of such date B cut the embankment and allowed the fish being washed away, it was held that B had caused wrongful damage to A. *AIR 1971 Manipur 13.*

9. "Property."—(1) Property means tangible property capable of being physically destroyed and does not include an easement. If the owner of land over which other people have a right of passage throws earth upon that land so that the use of the land by the others becomes disadvantageous or impossible, that does not amount to mischief for the reason that what is affected is not any property or its value but only a right of easement. *1967 CriLJ 1227.*

(2) Taking earth from another person's land deprives him of some property which was some value. *AIR 1955 Cal 558.*

(3) Res nullius ferae naturae are not property. *AIR 1961 Assam 18.*

(4) A bull the ownership of which is not established is not "property" and is not capable of being the subject of an offence of mischief under this section. *AIR 1966 Pat 141.*

(5) The legal conception of an animal branded and let loose on the occasion of the funeral of obsequies of a Hindu differs widely from that of a dedication to a particular deity. In the case of one it is renunciation of all proprietary right, in the case of the other it is a transfer of the proprietary right from the individual to the deity. In the latter case, the animal is not res nullius. Consequently, being to death a buffalo dedicated to a deity is an offence under S. 429 of the Penal Code. *AIR 1945 All 430.*

(6) The killing of a young calf branded at the Shradh of the complainant's deceased father, and fed and kept at the complainant's house thereafter, amounts to mischief as the calf does not cease to be the complainant's property. *AIR 1937 Pat 406.*

10. Damage to public property.—(1) Causing damage to public property will amount to mischief under this section. *1979 CriLJ 187 (Ker).*

11. Causing destruction of or change in any property or in the situation thereof.—(1) The expression "destruction of any property, or any such change in any property or in the situation thereof as destroyes or diminishes its value or utility or affects it injuriously" in this section carries the implication that something should be done to the property contrary to its natural use and serviceableness. Where some graziers by allowing their goats to graze did no more than put the grass to its normal use, their act would not amount to mischief. *AIR, 1929 Mad 5.*

(2) The section provides for cases in which property is either destroyed or altered or otherwise damaged with a particular intention. *AIR 1944 All 60.*

(3) In the absence of a clear finding to the effect, that the fact of the accused has caused extraction or change in property the accused cannot be convicted. *AIR 1954 Pat 309.*

(4) A mortgage cutting a few trees on the mortgaged property to repair another portion thereof is not guilty of mischief. *AIR 1914 Mad 379.*

12. Cutting off electric or water supply.—(1) The word "change" in the section means a physical change and a landlord cutting off the electric supply to the tenants premises in not guilty of mischief within the meaning of this section. *AIR 1928 Sind 49.*

(2) The cutting off of water supply of the premises in not an offence under this section. *AIR 1948 Cal 197.*

12. As destroys or diminishes its value or utility or affects it injuriously.—(1) It is necessary to constitute "mischief" that the property should either be destroyed or such a change caused therein or in its situation as destroys or diminishes its value or utility or affects it (the property) injuriously. *1969 CriLJ 242 (Cal).*

(2) When one of several co-sharers in constructive possession of joint land, dug part of it and appropriated it for his exclusively use, it was held that the digging amounted to mischief as the removal of earth would diminish the value of utility of the land and affect it injuriously. *AIR 1934 All 829.*

(3) If, in order to diminish the utility of the property rubbish etc. are dumped such prevention from using the property will amount to mischief. *AIR 1954 Cal 192.*

14. Bona fide claim of right or bona fide dispute.—(1) A mistake as to criminal law only will not give rise to a claim of right; an error as to civil law may do so. So far as the offence of mischief is concerned, a claim of right believed to exist, even though unreasonably, is a valid defence. *(1975) 2 CriLT 385 (Him Pra).*

(2) If the accused honestly believed in good faith that he had the right to do what he did even if he did not in law have that right, he cannot be said to have had the necessary intention or knowledge that he was likely to cause wrongful loss or damage. He cannot, therefore, be guilty of an offence of mischief. *1978 CriLJ 715 (Bom).*

(3) A mere assertion of a claim of right is in itself not a bona fide claim of right. *(1975) 41 CutLT 228.*

(4) The onus of proving that the accused acted under a bona fide belief of his having a right to do the act is on him. *(1973) 39 Cut LT 200.*

15. Act affecting one's own property—Explanation 2.—(1) Ordinarily no offence of mischief can be said to be committed by the accused causing damage to his own property, but if the act causes damage to or injuriously affects another person's property it would amount to the offence of mischief. *(1972) 38 CutLT 496.*

(2) A dispute between the accused and the complainant about the ownership of the Pardha wall would not entitle that the accused to demolish the wall, when it is found that the wall was the common property of both. *AIR 1953 All 409.*

(3) The Explanation to the section makes it clear that the utility affected need not be to the owner of the property. Hence, where a right of way allowed to the complainant over the accused's plots is interfered with by the later digging a ditch, which makes the passage of carts impossible, the accused is guilty. *AIR 1948 Oudh 97.*

(4) Where the complainant had dug a well in the land which belonged to him and the accused along with others, thinking, without proper enquiry and information, that the land belonged to him, went recklessly upon the land and damage the well, it was held that even if the accused believed in good faith that the well was in his land and that the complainant was a trespasser, he had no right whatever to damage the complainant's property in the way he did. *AIR 1943 Sind 127.*

(5) A man may be held to commit "mischief" even by damaging his own property, provided he does so in order to cause wrongful loss to somebody else or knowing it to be likely to cause wrongful loss to somebody else. *AIR 1968 Orissa 18.*

16. Employer's liability for employer's negligence.—(1) The employer is not criminally liable for the damage caused to his neighbour as a result of a contractor's negligence in omitting to prop the neighbour's wall. *AIR 1919 All 385.*

17. Act causing slight harm.—(1) Taking some earth of hardly any appreciable value from an open piece of land does not amount to offence of mischief, *(1882) All WN 229.*

18. Destruction of property of trespasser.—(1) The owner of land has no right to destroy the property of a trespasser found upon the premise even if he has a right to eject the trespasser. *1964 Ker LT 757.*

19. Evidence and onus.—(1) It is for the prosecution to prove that the accused caused damage with wrongful intent with a knowledge that he was not justified in doing it and that the party under whose orders he was acting had no real title. *(1966) 32 Cut LT 788.*

(2) Possession is prima facie proof of title and for a conviction for mischief the complainant need not prove his ownership in the property in respect of which mischief is committed. *AIR 1927 All 724.*

20. Procedure.—(1) The Irrigation Act provides for punishment where the act of the accused does not amount to mischief. It is not permissible to split up into different parts the act of the accused and of pick up that part of the act which would not amount to mischief but obtain a conviction under the said Act. *1873 CriLJ 1052 (Orissa)*

(2) Not Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate, Village Court—Triable summarily.

21. Summary trial.—(1) Offences of criminal trespass and mischief unless they involve a bona fide dispute of right can be tried summarily. *(1884) ILR 10 Cal 408.*

(2) Where the accused persons were summoned and placed on trial summarily under this section and the Magistrate convicted them under S. 427 of the Code, this charge in procedure was held to be wrong. *AIR 1955 NUC (Cal) 4268.*

(3) In a summary trial, if the Magistrate neither records the accused's plea and examination nor gives a brief statement of the reasons for conviction under this section the conviction is bad. *AIR 1928 All 266.*

22. Conviction for theft and mischief.—(1) If the accused steals a bullock and kills it, separate sentences for theft and mischief (Sec. 429) are not illegal. *Rat UN Cri C 430.*

23. Jurisdiction and powers.—(1) The authority vested in a criminal Court of punishing persons for acts of mischief should be exercised with great caution. *(1866) 6 Suth WR 59.*

(2) Where a Magistrate applies his mind to the evidence and in finding that the accused had committed mischief he was satisfied that the ingredients of the offence under this section were present in the case, the finding is sufficient to warrant a conviction. It is not necessary to embody in the judgment the precise expressions used in the section. *AIR 1941 Cal 185.*

(3) Where a case falling under S. 430 of the Code which a Bench Court had no jurisdiction to try, was treated as one under this section and sent to the Bench Court which tried the same for the lesser offence under this section it was held that the trial was not void. *AIR 1966 Raj 115.*

(4) Where the complainant had grown plants under the belief that he had a right to do so and the accused cut them down and the Magistrate acquitted the accused holding that the complainant had no right to grow the trees, the acquittal was set aside holding that it was not a matter for the Magistrate to decide in a case of a mischief. *AIR 1963 Manipur 15.*

24. Charge, conviction and sentence.—(1) The addition of a charge under S. 143 of the Code by the Appellate Court to the charges under S. 451 and this section prejudices the accused. *AIR 1916 Mad 1222.*

(2) Section 222(2) Criminal P. C. justifies conviction under this section where the original charge was made under S. 452 of the Code. *AIR 1925 Oudh 89.*

(3) A conviction under this section cannot be altered into one under S. 352 of the Code in appeal when there is nothing to show that the accused was informed by the Magistrate that he had to defend himself against the offence of assault as well. *AIR 1936 Pat 536.*

(4) Where on a complaint against A and B for offences under this section and Ss. 504 and 506, the Magistrate proceeds against A only under this section and passes an order, the order would amount to a dismissal of the complaint against B and will further show that no charge under Ss. 504 and 506 is made out against A and B. *AIR 1948 All 46.*

(5) An appellate Magistrate dealing with an appeal against conviction under S. 423(1)(b) of the Criminal P. C., was held to be competent to alter the conviction under this section into one under S. 24, Cattle Trespass Act, on the same facts proved against the accused. *AIR 1954 Orissa 145.*

(5) Accused, a young man, convicted, of offence under this section read with Section 149 (rioting). In circumstances of the case it was held by the S. C. that he must be dealt with under the Probation of Offenders Act and released after admonition. *AIR 1976 SC 2566.*

25. Joint trial.—(1) Various independent acts connected either subjectively or objectively and producing a particular result form one transaction. When the series of acts that took place were (i) rash and negligent driving of the bus by the driver of the bus; (ii) rash and negligent driving of the car by the driver of the car; (iii) the acts of both the drivers in acting negligently leading to the collision it was held that all the three acts were no doubt independent transactions. The connection was established by the result which followed. Therefore, for offences under Sections 279, 327 and this section the drivers of the two vehicles could be tried together. *AIR 1962 Raj 155.*

26. Abatement.—(1) The death of the complainant in a case under this section does not put an end to the prosecution. The trying Magistrate has discretion in proper cases to allow the complainant to continue by a proper and fit complainant if the latter is willing to continue the complaint. *AIR 1926 Bom 178.*

27. Complaint by aggrieved person.—(1) An offence under this section not being covered either by S. 198 or by S. 199, Criminal P. C., a complaint of the aggrieved person for the offence is not necessary. *AIR 1952 Mad 170.*

28. Section 279, 379 and this section (S. 425).—(1) Driving rashly on a public road so as to collide with another's carriage and to injure the horse of that carriage amounts to an offence under S. 279 of the Code and not under this section. *1980 Pun Re (Cri) No. 13 P. 31.*

29. Practice.—Evidence—Prove: (1) That the accused caused the destruction of some property, or some change in such property or in the situation thereof.

(2) That the above act destroyed or diminished the value or utility of such property, or affected it injuriously.

(3) That the accused did as in (1) intending or knowing that he was likely to cause loss or damage to the public or to any person.

(4) That the causing of such damage or injury was wrongful.

30. Charge.—(1) 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 of—, at—, committed mischief by causing wrongful loss or damage to the property of X valued at Tk.—and that you have thereby committed the offence under section 426 of the Penal Code and within my cognizance.

And I hereby direct you be tried by this Court on the said charge.

Section 427

427. Mischief causing damage to the amount of fifty [5][taka].—Whoever commits mischief and thereby causes loss or damage to the amount of fifty [5][taka] or

upwards shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Ingredients of the offence.*
3. *Abetment of offence under this section.*
4. *Evidence.*
5. *Procedure.*
6. *Jurisdiction.*
7. *Act of accused falling under this section as well as under Special Act.*
8. *Jurisdiction over offenders on the high seas.*
9. *Charge and conviction.*
10. *Security order.*
11. *Sanction.*
12. *Practice.*
13. *Charge.*

1. Scope.—(1) The difference between sections 427 and 426 of the Penal Code is that whereas section 426 provides for punishment for mischief generally, section 427 provides for enhanced sentence in cases where loss or damage occasioned by the mischief is to the amount of Tk 50.00 or upwards. Criminal intention is necessary ingredient of the offence under this section. Where the accused in bonafide belief that the complainant had encroached upon his land removed the encroachment and sold the materials, held that in the absence of criminal intention he had not committed any offence under section 427 *(AIR 1950 Orissa 196).* In the absence of a finding as to the extent of damage caused by the mischief of uprooting paddy seedlings, conviction of the accused under section 427 Penal Code cannot be sustained *(1957 CrLJ 149).* Actual possession of property by the complainant must be proved before a charge under section 427 Penal Code can be brought home to the accused *(Ref: 21 DLR 231).*

(2) Intention inferred from facts—Intention must be a dominant intention. Intention which is state of mind can never be proved as a fact; it can only be inferred from facts which are proved. It may well be that in doing a particular act a man may have more intentions than one and to bring a case within section 427 of the Ceylon Penal Code , the intention specified in the section must be the dominant intention. *S. Selvanayagan Vs. King (1952) 4 DLR (PC) 74.*

(3) Acquittal under section 427 does not lend support to the view that the accused cannot be tried and convicted for offence under section 447. Held: The trial Magistrate had jurisdiction to try the case; simply because he acquitted the accused on the charge under section 427 he cannot furnish an argument that he had no jurisdiction to try this case and convict the accused. *Jogesh Chandra Mondal Vs. Kani Lal Mondal (1966) 18 DLR 79.*

(4) Initial complaint discloses an offence of theft—Conviction under section 427 not lawful. Where the initial complaint and charge against the accused disclosed an offence under S. 379 of the Penal Code, his conviction under section 427 cannot be maintained. *Tarab Ali Mondal Vs. Jafaruddin Mondal (1954) 6 DLR 32.*

(5) Plea of bonafide claim of right by demolishing a boundary wall is not available when the act of construction was long ago complete. On the charge of mischief under section 427 Penal Code for demolition of a boundary wall 4 months after its construction, the plea was that the wall had been raised on the land in exclusive possession of the accused, it was held. A mere plea of bona fide claim of right cannot exonerate him from the responsibility. He cannot take the law in his own hands. He had no right to abate the wrong and demolish the wall even if it had slightly encroached upon his land. He could very well take resort to section 133 Cr. P. C. to undo the nuisance. *Wazir Hassan Ansari Vs. The State (1969) 21 DLR 231.*

(6) Offence triable by Magistrate and not by village court—Where in a case an offence triable by the village court is joined with the offence triable by the Magistrate, the case shall be triable by the Magistrate and not by the village Court. *Abul Kalam and others Vs. Abu Daud Gazi and another—4, MLR (1999) (AD) 414.*

(7) Concurrent findings of the Courts of facts that the complainant party possessed the land and grew paddy thereon and that the petitioners cut and damaged the same, while it was green, offer no scope for interference. *Ramjan Ali & others Vs. The State, 1 BSCD 248.*

(8) Conviction under this section of the Code set aside in view of civil courts decision on the question of title and possession. The complaint (respondent) claiming possession in the land constructed latrine but the civil court on evidence found both title and possession in the land in favour of the appellant. This finding related back to the date of the alleged occurrence. Observed:—When the land as found by the civil court, was in the possession of appellant, the complainant respondent had no authority to go upon this land and raise any construction. The appellate was fully justified in removing the latrine on *bona fide* assertion of his title and possession in the land. Held: In view of the decision of the civil court finding title and possession in favour of the appellant, the order of conviction and sentence under Sec. 427 of the Penal Code cannot be sustained. *Moazzem Hossain Vs. Mossaraf Ali Sowdagar & another, 3 BSCD 13.*

(9) Case involving offence u/s. 427, PC punishable with sentence of imprisonment exceeding one year—order of acquittal—Single Bench of the High Court Division not competent to hear a Criminal Revision Case involving an offence u/s. 427 P. C. which is punishable with sentence of imprisonment exceeding one year. *Ahsan Sarfun Nur @ Makul & ors. Vs. N. 1. Sarkar & ors. 42 DLR (AD) 90 = 1990 BLD (AD) 90=BCR 1990 AD 435.*

(10) The only distinction between an offence punishable under Section 426 and an offence punishable under this section is the extent of the damage done by the mischief. *AIR 1942 Mad 594.*

(11) The section contemplates some direct act on the part of the accused. Where the accused stored earth and other materials on the open space between his house and that of the complainant and owing to the accumulation of water due to abnormal heavy rains, the wall of the complaint's house was damaged, it was held that the accused could not be convicted under this section as there was no direct act on the part of the accused. *AIR 1950 All 464.*

2. Ingredients of the offence.—(1) The ingredients of the offence under this section include all the ingredients of the offence of mischief. In addition, the loss or damage caused must amount to Rs. 50 or upwards. *(1916) 22 Mys CCR No. 81 pp. 1084.*

3. Abetment of offence under this section.—(1) A person aiding another to commit the offence of mischief will be guilty of abetting that offence. *AIR 1973 SC 1388.*

4. Evidence.—(1) The prosecution must establish all the ingredients of "mischief" as defined in S. 425 and must further prove that the loss or damage caused amounted to Rs. 50 or more. In a prosecution for mischief by uprooting paddy seedlings the onus is entirely upon the prosecution to prove that the seedlings alleged to have been uprooted had been grown by the complainant and that possession of the plot in question was with the complainant. *AIR 1955 NUC (Assam) 2823.*

5. Procedure.—(1) When an officer charged under S. 409 of the Code was found guilty under S. 409 or under this section and convicted, it was held that alternative conviction under this section was bad inasmuch as mischief is not a minor form of criminal breach of trust but was quite distinct from

it, that there was not an alternative charge under this section and that the accused had no chance of defending himself as to the allegation of mischief. *AIR 1930 Rang 158.*

(2) It is competent to the Sessions Judge to commit a person on a charge not excessively triable by a Sessions Court e.g., under this section, if it is intimately connected with a charge exclusively triable by the Sessions Court (e.g., a charge under S. 436 of the Code) and if it forms part of the same transaction, but it is clear that the above requirements are not satisfied in a direction for commitment to the Sessions Court for trial on a charge under S. 380 of the Code, the offence thereunder being totally different from the category of offences under which are included charges under this section and S. 436 of the Code. *AIR 1926 Cal 1090.*

(3) Not cognizable—Warrant—Bailable—Compoundable by the person to whom the loss or damage is caused—Triable by any Magistrate, Village Court.

6. Jurisdiction.—(1) Unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress the statement of the complainant has to be accepted for the purpose of jurisdiction. *AIR 1925 All 290.*

(2) A complaint alleging an offence under this section cannot be taken on file for an offence under S. 426 of the Code and the Magistrate has no jurisdiction to acquit the accused under S. 256, Criminal P. C. which has no application to warrant cases. *AIR 1942 Mad 594.*

7. Act of accused falling under this section as well as under a Special Act.—(1) The fact that on the same facts, the accused may be guilty under a Special Act, cannot prevent a prosecution under this section, see Section 26 of the General Clauses Act 1897. *ILR (1972) 1 Cal 72.*

8. Jurisdiction over offenders on the high seas.—(1) A Magistrate having jurisdiction near sea shore has jurisdiction to try offenders committing offences under this section on the high seas within three miles from the shore. *(1871) 8 Bom HCR 63.*

9. Charge and conviction.—(1) The general principle underlying Section 403, Criminal P. C. is that a man should not be put on his trial twice over on the same facts. Where an accused was once charged with mischief under this section and acquitted on the ground that he was not present at the scene of occurrence, he could not on the same facts be subsequently charged with rioting under Section 147 of the Code. *AIR 1924 Mad 478.*

(2) If a person is charged with dacoity, but an offence under this section which has no connection whatsoever with the offence of dacoity and with which he was not charged is proved to have been committed he cannot be convicted of the latter offence under this section although it may be a comparatively less serious offence and as such it may be described as a minor offence. *AIR 1950 All 471.*

(3) In a case of rash and negligent driving leading to collision causing hurt to persons on the road a conviction of the driver under this section is illegal. *AIR 1962 Guj 318.*

10. Security order.—(1) No order under Section 106, Criminal P. C. can be passed upon conviction of the accused for an offence under section 143 of the Code or this section. *AIR 1927 All 136.*

11. Sanction.—(1) No sanction is necessary to prosecute a public servant for an offence punishable under this section when the complaint does not allege that the accused committed mischief while acting or purporting to act in the discharge of his official duty as a public servant. *AIR 1954 Sau 132.*

12. Practice.—Evidence—Prove: (1) That the accused caused destruction of some property, or some charge in such property or in situation thereof.

(2) That the above act destroyed or diminished the value or utility of such property, or affected it injuriously.

(3) That the accused did as in (1) intenting or knowing that he was likely to cause wrongful loss or damage to the public or to any person.

(4) That the causing of such damage or injury was wrongful.

13. 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 of—, at—, committed mischief by causing wrongful loss or damage to the property of X valued at Tk—(more than taka fifty) and you have thereby committed an offence punishable under section 427 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 428

428. Mischief by killing or maiming animal of the value of ten [5][taka].—Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal or animals of the value of ten [5][taka] or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Killing.*
3. *poisoning.*
4. *Maiming or rendering useless.*
5. *"Animal."*
6. *Practice.*
7. *Procedure.*
8. *Charge.*

1. Scope.—(1) This section is intended to prevent cruelty to animals and consequent loss to the owner. 'Maiming' implies a permanent injury. The intention to cause wrongful loss will have to be established. Hen is covered by the definition of "animal" in section 47 of the Penal Code and hence conviction of accused can be legally maintained *(1972) All CrLJ 590.*

(2) The killing, poisoning or maiming or rendering useless any animal must be done with intention or knowledge specified in Section 425. So, throwing a stone at a cow and thereby breaking its leg would not amount to mischief in the absence of evidence as to the size of the stone used, to indicate the intention or knowledge on the part of the accused. *(1881) 1 Weir 497.*

(3) Where there is no evidence as to whether the accused who threw only a small strike at a bullock did it merely for driving it away and intending no harm, or where he made use of such a strike as, at the time of using it, he knew or had reason to believe that it would be likely to injure the animal, the conviction cannot be sustained. *(1906) 3 CriLJ 107.*

(4) Where the accused gave axe and lohangi blows to a cow, it could not be said that they had no knowledge of their being likely to cause wrongful loss or damage to the complainant. *1955 MBLJ 1600.*

(5) Where the accused struck a mare with dandas for some time and fractured its bone, the intention to maim the animal was presumed. *AIR 1948 Oudh 113.*

(6) When a buffalo trespassed into the accused's field and the accused tried to drive it away by throwing at it a stone which hit and killed the buffalo, it was held that the accused was within his right to protect his property and was hence not guilty of mischief for want of knowledge or intention to kill or maim. *AIR 1953 Sau 158.*

2. Killing.—(1) In this case arising under an analogous provision on a charge for unlawfully and maliciously killing a mare, it was proved that the prisoner caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina. It was held that though the prisoner did not intend to kill the mare he knew that what he was doing would or might kill her, and he was therefore guilty of the offence. *(1876) 1 QBD 23.*

3. Poisoning.—(1) Where the prisoner had mixed sulphuric acid with the corn intended for the feed of horses and then gave each horse this feed from this mixture, he was held not guilty since the acid was given under the impression that it would improve the appearance of the horses and not with intent to kill them. *(1830) 172 ER 741.*

4. Maiming or rendering useless.—(1) In its primitive meaning the verb "to maim" involves the notion of mutilation of some part of the body useful for fighting. the framers of the Code did not intend to give the word this restricted meaning. The expression would fairly include the amputation of any member or the injury of an animal by which its speed, or endurance, or use is permanently diminished. *(1872-1892) Low Bur Rul 404.*

(2) The term maiming refers to injuries permanently affecting the use of a limb or other member of the body. *AIR 1947 Sind 66.*

(3) The word maiming includes :—

(a) Pouring acid into the eye of a mare and thereby blinding her. *(1828) 168 ER 1242.*

(b) Cutting off the ears of a horse. *(1911) 12 CriLJ 482 (Mad).*

(c) Cutting the ears of an ass clean off at their base so as to affect their hearing. *AIR 1918 Mad 638.*

(d) Mutilating or permanently diminishing the use of a limb and breaking a rid. *(1921) 2 Pat LT 26 N.*

(4) The word 'maim' connotes a permanent injury and not a mere disfigurement. Cutting off one-half of one ear of an animal without impairing its sense of hearing does not amount to maiming. *AIR 1916 Bom 220.*

5. "Animal."—(1) The word "animal" is defined in S. 47 ante as denoting any living creature other than human being. The animal destroyed must be the subject of property. Ferrae naturae are not 'property'. Where a bull is released and set at large at a funeral, as a religious ceremony, the question whether the owner had abandoned his rights to it depends upon the particular facts of the case. The mere release of the bull is not necessarily an abandonment of rights over it. *1 Weir 500.*

6. Practice.—Evidence—Prove: (1) That the accused caused the destruction of some property or some change in such property or in the situation thereof.

(2) That the above act destroyed or diminished the value or utility of such property, or affected it injuriously.

(3) That the accused did as in (1) intenting or knowing that he was likely to cause loss or damage to the public or to any person.

(4) That the causing of such damage or injury was wrongful.

(5) That the property injured consisted of an animal.

(6) That the value thereof at the time of injury was Tk. 10.00 or more.

(7) That the injury in question was caused by killing, poisoning, maiming, or rendering useless such animals.

7. Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by any Magistrate, Village Court.

8. 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 to wit—, of the value of—, and thereby committed an offence punishable under section 428 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 429

429. Mischief by killing or maiming cattle, etc. of any value or any animal of the value of fifty [5][taka].—Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty [5][taka] or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) This section provides enhanced punishment owing to the greater value of the animals mentioned therein. Intention is the gist of the offence. The animals enumerated in the section are all domestic animals as opposed to wild animal. Killing a wild animal in a forest is not covered by this section *(AIR 1961 Assam 18).* An offence may fail under the Motor Vehicles Act and section 429 and separate convictions may be ordered under two enactments.

(2) The commission of a "mischief" involves intention or knowledge such as is referred to in S. 425. When the accused had no intention of either killing, poisoning or maiming or rendering useless animal, this section does not apply. *AIR 1970 Raj 203.*

(3) Where an accused drove a lorry in the evening with poor lights and in the outskirts of a village the lorry ran into a herd of animals, killing four buffaloes and injuring two others, it was held that he must be presumed to have had the knowledge that he was likely to cause wrongful loss or damage to any person though there might be no intention to cause wrongful loss or damage to any person. *AIR 1957 Andh Pra 100.*

(4) The causing of non-permanent injuries may be an offence under S. 426. *AIR 1960 Ker 74.*

(5) Beating to death a buffalo dedicated to a deity in an offence under this section. An animal branded and let loose on the occasion of the funeral or obsequies in a Hindu family may be nullius **proprietas**, but an animal dedicated to a deity is not res nullius. *AIR 1945 All 430.*

(6) A mare will come within the meaning of the word 'horse' in the section. *AIR 1948 Oudh 113.*

(7) The words "or any other animal" in the section refer to animals of the same kind or class i.e. ejusdem generis with domestic animals and not wild animals. *AIR 1961 Assam 18.*

2. Practice.—Evidence—Prove: (1) That the accused caused the destruction of some property, or some change in such property or in the situation thereof.

(2) That the above act destroyed or diminished the value or utility of such property, or affected it injuriously.

(3) That the accused did as in (1) intending or knowing that he was likely to cause loss or damage to the public or to any person.

(4) That the causing of such act or injury was wrongful.

3. Procedure.—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Metropolitan Magistrate or Magistrate of the first class, Village Court.

4. 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 of—, at—, committed mischief by killing (poisoning, maiming or rendering useless) (specify the animal: where the animal is not of the kind mentioned in the section specify its value), and that you thereby committed an offence punishable under section 429 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 430

430. Mischief by injury to works of irrigation or by wrongfully diverting water.—Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Cases and Material : Synopsis

1. *Scope of the section.*
2. *Diminution of water supply.*
3. *Diverting water.*
4. *Cutting embankment or bund.*
5. *Bona fides.*
6. *Wrongful loss or damage.*
7. *Civil dispute.*
8. *Procedure.*
9. *Charges separately under Ss. 144 and 430—Acquittal on charge under Section 430—Effect.*
10. *Evidence and proof.*
11. *Charge.*
12. *Punishment.*
13. *Practice.*

1. Scope of the section.—(1) This section is intended to protect sources of water supply against mischief. It also applies to irrigation through channels, other sources of irrigation, tanks and ponds. For conviction under this section, the prosecution must prove criminal intention or knowledge of the accused *(AIR 1920 Cal 835)*. This section applies only to mischief likely to diminish water supply in certain cases. This section speaks of an act. An act includes an illegal omission. If a person was bound by law to do an act and he failed to perform it, he would be liable in the same as he would be for a positive act. Where, therefore, a landlord was bound by law to make arrangement for supply of drinking water for his tenant and he neglected to do so, he would be liable under section 430 Penal

Code *(PLD 1959 Kar. 392)*. Before a landlord or his agent can be convicted under section 430 on a complaint by his tenants, for interfering with water supply of the tenants, it is absolutely necessary to prove that there was intentional inflicting of loss and that the landlord had no right to interfere in any way and the tenants had a right to the supply or preservation of water *(AIR 1930 Cal 318)*. Every person has a perfect right to do a particular act upon his own land, and if a person breaks open his 'bund' or opens his own sluice, no one can complain of until some injurious consequence follows from it. The cutting of a 'bund' erected on a channel whereby a person is wrongfully deprived of use of water, is an offence under section 430 of the Penal Code. Even where cutting of a dam was done by the accused with the object of saving his crop, it would be an offence under section 433, if it can be proved that he caused diminution of water for the complainant *(AIR 1932 Pat, 224)*. Cutting a bund on a channel wrongfully depriving a person of the use of water, is punishable under section 430 Penal Code *(19 CriLJ 356)*. If a supply channel is filled up or is obstructed by a dam put up or by raising a dam already existing there is a change made in the channel which diminishes its value or utility, and which, if it was done with the intention to cause or with knowledge that it was likely to cause and if it does cause, wrongful loss to any person, would constitute the offence of mischief *(24 CrLJ 30)*. Where the matter is primarily of a civil character, there sound be no criminal proceedings against the accused *(27 CrLJ 1354)*.

(2) Mischief by stopping irrigating water cannot be caused unless right over supply of water existed for 20 years. The question at issue is whether the complainant acquired any right to get water from the land of the accused, the complaint being that the accused closed the drain through which the complainant got his supply of irrigating water for 12 years. Held: Even assuming that he was getting such water for about 12 years it would not create any right or title for him if he claims prescriptive right. There must be use of such water passage for the minimum period of 20 years. But as he has not done it, he cannot get such right except by uninterrupted use for a period of 20 years. *Jaidhar Ali Vs. Abdul Malek (1966) 18 DLR 291.*

(3) Diversion of water—Offence committed. Accused forcibly diverting water from another's field to his own field—Offence committed under section 430. *(1955) PLD (Lah) 170.*

(4) This section deals with mischief causing a particular kind of wrongful loss, namely loss caused by the diminution of the supply of water for the purposes specified in the section. It is necessary therefore that the act of the accused amounts to mischief as defined in Section 425 before he can be convicted under this section. *(1969) 35 Cut LT 1176.*

(5) It must be shown that the accused intended to cause or knew that he was likely to cause wrongful loss to any person. *AIR 1925 Mad 577.*

(6) "Wrongful loss" is defined by S. 23 of the Code as loss by unlawful means of property to which the person losting it is legally entitled. The prosecution must therefore show in a charge under this section that the complainant was legally entitled to the supply of water and that the accused wrongfully interfered with the right. *AIR 1924 Oudh 132.*

2. Diminution of water supply.—(1) Diminution of water supply for the purposes mentioned in the section is an essential ingredient of the offence under this section. *(1971) 2 Cut WR 779.*

(2) The taking of water from a source of supply causes loss, but in order that the section may apply the loss must amount to a diminution of the supply of water for the purposes specified. *AIR 1930 Cal 289 (289); 31 CriLJ 751.*

(3) Where the accused forcibly opened the canal distributors and diverted the water but there was nothing to show that they diminished the supply of water to the complainant, it was held that the accused was not guilty under this section. *AIR 1934 All 687(2).*

(4) The words "diminution of the supply of water for agricultural purposes" cannot be limited to cases where the water has been allowed either to go waste or has been diverted to non-agricultural purposes. The section, read as a whole, also refers to a case where the water is intended for use by particular persons for particular purposes (specified in the section such as, for example, for food or drink for human beings or animals) and is delivered by an accused for his own purposes though of a like nature. *AIR 1939 Mad 794.*

(5) Preventing a person from opening a sluice which had been closed for some day before the date of occurrence would not amount to mischief under this section. *AIR 1940 Mad 144.*

3. Diverting water.—(1) Cutting a watercourse and forcibly diverting the water to one's own field comes within the purview of this section. *AIR 1955 NUC (Pak) 3501.*

(2) Where the accused took water for agricultural purposes to which he was not entitled and thereby diminished the supply to other ryots who were entitled to it, his conviction was held good *AIR 1924 Pat 704.*

4. Cutting embankment or bund.—(1) To throw a bund across a supply channel is to destroy its utility and is prima facie an act of mischief. *1933 Mad WN 427.*

(2) Where the accused cut a dam created by the complainant in order to secure their own crops and it was not proved that the act of the accused caused any diminution of water for agricultural purposes nor was it proved that he knew that it was likely to cause such diminution in the future, it was held that the accused was not guilty under this section. *(1904) 1 CriLJ 245 (Cal).*

5. Bona fides.—(1) To constitute an offence of mischief it is necessary to show that the act was done with mischievous intent and not in the bona fide assertion of a right. *1 Weir 505.*

(2) There cannot be a conviction under this section when there is a right or bonafide claim of right. *AIR 1917 Cal 687.*

(3) Accused knowingly diminishing supply of water without a bona fide claim are guilty. *AIR 1924 Pat 704.*

(4) Where the accused was alleged to have cut open a bund and caused diminution of water supply to the complaint's fields, but the bund was not found to belong to the complainant and there was evidence that the accused had been in the habit of obtaining a permit for diverting the water, in the previous years, and he did the act anticipating the permit, it was held that as the accused acted in the bona fide belief that he would get the permit, his action did not amount to mischief. *AIR 1920 Mad 119.*

6. Wrongful loss or damage.—(1) Intention to cause wrongful loss (or the knowledge of being likely to cause such loss) is one of the essential ingredients of the offence of mischief as defined in S. 425 and is, therefore, an ingredient of the offence under this section also. *AIR 1916 Mad 1021.*

(2) For constituting an offence under this section, it must be shown that the complainant had some right to carry water to his fields through a channel and there was an intention on the part of the accused to cause wrongful loss. *AIR 1923 Mad 141.*

(3) The accused who without any right, dammed the water of a channel and diverted it in another way were held to be rightly convicted as they had an intention to cause wrongful loss. *AIR 1921 Mad 536.*

(4) If the intention of the accused was only to protect his own property from danger of injury the fact that the accused by cutting through a bund and permitting a portion of the water of a tal to escape,

caused a diminution in the supply of water for agricultural purposes without proof of actual wrongful loss or damage resulting therefrom to some person does not afford sufficient basis to convict the accused. No presumption that loss or damage was caused to some person can arise from a mere diminution of water supply. *AIR 1943 Sind 130.*

(5) Where a Sessions Judge dismissed an appeal against a conviction under this section, by referring to the reason given in the judgment in a connected case, convicting the accused under S. 379, the Sessions Judge was held to have acted irregularly in not taking into consideration the intention requisite for an offence under this section. *AIR 1916 Mad 1021.*

(6) If a person breaks open or opens his own sluice, the mischief would consist, not in breaking the bund in opening the sluice but in flooding or withering up the complainant's crops. but where the property was not of the accused but Government property (Kotwah) and the mischief complained of as giving a cause of action to the Crown was the change in the Kotwah which diminished its utility and affected it injuriously, it was held that it was not necessary for the Crown to rely on the injury caused to other persons who were receiving water as giving a cause of action and to prove actual damage therefrom. *AIR 1927 Sind 39.*

7. Civil.—(1) A Criminal Court has authority to decide the case, on the rights asserted, for the purpose of a criminal charge though its decision would not determine the civil rights of the parties. *1 Weir 508 (509).*

(2) A conviction of an accused under this section is not proper where there is a dispute regarding the right to use water which is pre-eminently a matter for the civil Court to decide. *AIR 1927 All 112.*

(3) Where the Amin had opened the middle sluice of a tank to irrigate certain lands registered as wet and it was closed by the accused, unless it can be said that the opening of the middle sluice was according to custom, it cannot be said that the closing of it was with the intention of causing any wrongful loss or wrongful gain. *AIR 1940 Mad 306.*

8. Procedure.—(1) In the absence of any intention or knowledge to cause wrongful loss to justify a conviction for mischief, a Magistrate should not act on his own impulse to deal with the case. *(1876) 25 Suth WR Cr 69.*

(2) Procedure—Cognizable—Warrant—Bailable—Compoundable when permission is given by the Court before which the prosecution is pending—Triable by Metropolitan Magistrate or Magistrate of the first class.

9. Charges separately under Ss. 114 and 430—Acquittal on charge under S. 430—Effect.—(1) When the accused was charged separately under Ss. 144 and 430 and he was acquitted of the offence under S. 430 the common object not being to commit mischief under S. 430, but to commit mischief connected with the offence of rioting, the acquittal under S. 430 does not entitle him to acquittal under S. 144. *1972 CriLJ 700 (Pat).*

10. Evidence and Proof.—(1) For a conviction under this section it must be proved that the accused has brought himself within the true meaning of S. 425 of the Code. Otherwise this provision of law will be frequently resorted to as a trenchant mode of deciding disputed question of civil right. *(1866) 6 Suth WR Cr 59.*

(2) For a conviction under this section the prosecution must prove that there has been an unlawful and intentional interference by the accused with the admitted or proved rights of the complainant. *AIR 1920 Cal 835.*

(3) Before a landlord or his agent can be convicted under this section on a complaint by the tenants for interfering with the water supply of their tenants, it is absolutely necessary to prove that there was an intentional inflicting of loss and that the landlord had no such right to interfere in any way and that the tenants had a right to the supply or preservation of water. *AIR 1930 Cal 318.*

11. Charge.—(1) When the accused were charged under this section for committing mischief by cutting the bandh of a river causing thereby diminution of water supply for agricultural purposes and they were also charged for being members of an unlawful assembly with the common object of cutting the bandh and the Magistrate did not convict them on the ground that no diminution in water supply was caused, it was held that the accused were entitled to be acquitted of the offence under Ss. 143 and 144 of the Code. *AIR 1934 Pat 505.*

(2) 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—, committed mischief by doing—which act caused (or which you knew to be likely to cause) a diminution of the supply of water for agricultural purposes (or for food, etc.) and thereby committed an offence punishable under section 430 of the Penal Code and with my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

12. Punishment.—(1) An accused wrongfully obstructed a channel and failed to remove the obstruction and continued the wrong; the Panchayati Adalat imposed a recurring fine of Rs. 2/- per diem till he removed the obstruction. It was held that the imposition of recurring fine was illegal. *AIR 1970 J and K 31.*

13. Practice.—Evidence—Prove: (1) That the accused committed mischief (section 425).

(2) That the mischief caused or was likely to cause diminution of supply of water.

(3) That such supply was for agricultural purposes for food or drink of human being or animals or for cleanliness or any manufacture.

(4) That such mischief was committed with knowledge that it would or was likely to cause diminution of the supply of water for agricultural purposes.

Section 431

431. Mischief by injury to public road, bridge, river or channel.—Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) "Public road" as used in this section means a road which is used by the public generally. Road used by the public for going from village to village for over thirty years is public road. To support a conviction under this section there must be evidence of intention of causing wrongful loss or damage or knowledge that wrongful loss or damage was likely to be caused. Where the accused dug a trench adjoining a public road to protect his land from drainage water, it was held that no offence was committed though the road was incidentally damaged, where there is no evidence to prove mischief there can be no conviction under this section.

(2) Cutting a public road making it impassable or making it less safe for travelling or conveying property is an offence under this section. *1967 All WR (HC) 572.*

(3) The word "public" in the section refers to user by people at large and not to ownership. A car-track used by the public for over 30 years though passing through the patta land a person was held to be a 'public road' under this section. *1973 CriLJ 508.*

(4) Floating timber down the river which strikes against and causes injury to bridges across the river may amount to mischief. Where, however, the accused was not proved to have the necessary intention or knowledge envisaged by the section he would not be guilty of the offence.*(1975) 77 Pun LR 57.*

2. Practice.—Evidence—Prove: (1) That the accused committed mischief within the meaning of section 425.

(2) That the act was committed by doing an act which rendered or which the accused knew it likely to render a public road, bridge, navigable river or channel, natural or artificial, impassable or less safe for travelling or conveying of property.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—, at—, committed mischief by doing an act (specify the act) which rendered or which (you knew to be likely to artificial) impassable (or less safe) for travelling or conveying property, and you have thereby committed an offence punishable under section 431 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 432

432. Mischief by causing inundation or obstruction to public drainage attended with damage.—Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Cases and Materials

1. Scope.—(1) This section provides for a more severe punishment where the mischief is committed by causing inundation to public drainage as it affects the health of the community.

(2) A erected a dam across the bed of a river claiming a right to do so. This resulted inundation of B's land. There was no evidence to show that inundation or other injury was likely to be caused by the dam put up. It was held that the accused was not guilty under this section. *(1968-1969) 4 Mad HCR App 15 (xvii) (FB).*

(3) Merely because some inconvenience has been caused to the complainant or the person living in the vicinity by the stoppage of the flow of water, S. 432 would not be attracted. The complainant

has to prove that the inundation or obstruction to the public drainage was likely to cause injury or damage and that it was within the knowledge of the accused that it would cause such injury. *(1982) 84 Pun LR 55.*

(4) Where the necessary intention or knowledge required for the offence of mischief is absent, no offence under this section is committed. *(1876) 25 Suth WR (Cri) 69.*

(5) Subject-matter of criminal case and civil suit same—Nature of offences with which accused had been charged, not so serious as to warrant continuance of criminal case stayed till disposal of civil suit. *(1975) 77 Pun LR. 57.*

2. Practice.—Evidence—Prove: (1) That the accused committed mischief within the meaning of section 425.

(2) That the mistake consisted of inundation or obstruction to drainage.

(3) That the said drainage was a public drainage.

(4) That such inundation or obstruction was likely to result in injury or damage.

(5) That the said mischief was done with the knowledge that it was likely to cause injury to damage.

3. Procedure.—Cognizable—Warrant—Bailable—Not Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. Charge.—The charge should run as follows:

I, (name and office o the Magistrate) hereby charge you (name of the accused) as follows:

That you on or about the—day of—, at—, committed mischief by doing (specify the act) which caused (or which you knew to be likely to cause) inundation (or an obstruction) to a certain public drainage, to wit—attended with injury or damage and that you have thereby committed an offence punishable under section 432 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 433

433. Mischief by destroying, moving or rendering less useful a light-house or sea-mark.—Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Materials

1. Scope.—(1) This section deals with destruction of sea-marks intended to be the main guides for safety in navigation. Any tempering with or destruction of such marks lead to serious consequence. The offence under this section is more serious and the punishment is also more severe.

2. Practice.—Evidence—Prove: (1) That the accused committed mischief as defined in section 425.

(2) That the mischief was committed by destroying or moving any light-house (or other lights used as a sea-mark or buoy or other things intended as a guide for navigators).

(3) That mischief was committed by an act which rendered such light-house, etc. less useful as a guide to navigators.

3. Procedure.—Cognizable—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—, at—, committed mischief by destroying or moving a light-house (or other lights used as a sea-mark) or any sea-mark or buoy, or any other thing (specify) placed as a guide to navigators or that you did an act (specify) which rendered such light-house, etc. less useful as a guide for navigators and that you thereby committed an offence punishable under section 433 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 434

434. Mischief by destroying or moving, etc., a land-mark fixed by public authority.—Whoever commits mischief by destroying or moving any land-mark fixed by the authority of a public servant, or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Cases and Materials

1. Scope.—(1) This section relates to destruction or removal or any land-mark, where such land-mark is fixed under the authority of a public servant. Removal of survey stones conducted at a statutory survey is covered by this section *(17 CrLJ 491)*. Removal of boundary marks set up by a Magistrate on the property in dispute in proceeding under section 145 CrPC is not punishable under this section *(1 CrLJ 1042 All)*.

(2) Section 433 deals with mischief to sea-mark. This section deals with mischief to land-marks such as survey-stones *(1911) 12 CriLJ 405 (All)*.

(3) A Magistrate is not authorised to order under S. 145, Criminal P. C., any boundary mark to be erected on property, and such mark, if erected, cannot be considered to be erected by a lawful authority. *(1904) 1 CriLJ 1042 (All)*.

(4) Boundary pillars erected by an arbitrator appointed by mutual consent of parties in proceedings under S. 145, Criminal P. C. cannot be said to be land-marks erected by a lawful authority. *(1903) ILR 30 Cal 1084*.

(5) The removal of land-marks fixed by the Assistant Consolidation Officer without lawful authority is not an offence under this section. *1967 All WR (HC) 707*.

(6) The propriety of the exercise of authority by the public officer placing the mark or the question whether the mark was correctly or incorrectly placed is not a relevant consideration. *AIR 1917 Mad 889*.

(7) A boundary mark erected by public authorities according to law comes under this section and its removal is an offence under it. *1979 CriLJ 1433 (All)*.

(8) Where survey stones are fixed by Amin after demarcation of land in pursuance of orders of Tahsildar , the Amin is acting under the authority of Public Servant, Removal of such survey stones will constitute an offence under this section. *ILR (1980) 2 Cut 598.*

(9) The fact that the accused is himself in possession of the land in which the land-marks have been fixed is not a sufficient defence, in a case where the ingredients of the offence are made out. *1961 Ker LT 656.*

(10) The removal of a land-mark may, though not necessarily, involve a breach of the peace and the Court can order security to keep the peace on conviction of the accused under Section 434. *(1911) ILR 33 All 771.*

(11) Under this section fine is one of the punishments laid down for the offence. The amount of the fine is left to the discretion of the Court. *1979 CriLJ 1433 (All).*

2. Practice.—Evidence—Prove: (1) That the accused committed mischief within the meaning of section 425 of the Penal Code.

(2) That it was committed by destroying or moving a land-mark or by doing any act which rendered it less serviceable.

3. Procedure.—Not cognizable—Bailable—Not compoundable—Triable by any Magistrate.

4. 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 of—, at—, committed mischief by destroying (or removing) a land-mark (specify) which was fixed by the authority of a public servant and that you thereby committed an offence punishable under section 434 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 435

435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten [5][taka].— Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred [5][taka] or upwards, [12][or (where the property is agricultural produce), ten [5][taka] or upwards], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) The word "fire" would include anything that generates fire. Where the accused set fire to hut belonging to the complainant but standing on land claimed by accused to belong to him, the accused was held guilty under this section *(AIR 1936 Cal 157).* Where the mischief is committed by means of fire or any explosive substance and the evidence enables the court to conclude that the offender intended or knew himself to be likely to cause wrongful loss or damage to the amount of Tk. 100.00, the conviction must be under this section. In the case of agricultural produce the value fixed

12. Ins, by the Indian Penal Code AmendmentAct, 1882 (Act VIII of 1882), s. 10.

under the section is Tk. 10.00, in the case of other property it is Tk. 100.00. Mere negligence or carelessness would be of no avail. Where the accused set fire to a heap of rubbish in his filed which was close to a protected forest and the wind carried the flames to a forest and destroyed a part of it, it was held that he was not guilty of mischief *(4 CrLJ 446).*

(2) Where the accused pulled down the Chapper standing on ploes, and then set fire to it, it was held that the offence did not cease to be one under this section merely because the Chapper was pulled down first which act was an offence under S. 425. *AIR 1953 All 749.*

(3) Where the accused, in possession of a disputed piece of land, destroys by setting fire to a hut belonging to the complainant in that land dishonestly, he will be guilty of an offence under this section. *(1972) 74 BomLR 341.*

(4) In order that this section may apply it is necessary that the property affected must be of the value mentioned in the section. Hence where the value of the property is not proved, this section will not apply. *1974 Ker LT 328.*

(5) Where A lighted a fire on his own land for burning grass and the fire spread and caused damage to a neighbour's property, it was held that no offence under this section was committed, but that the case might fall under S. 285. *(1878) 1 Mys LR No. 178 p. 114.*

(6) Where the accused's object is only to remove the impediment in his path to a certain well from which he bona fide believes himself to have a lawful right to draw water, the accused cannot be held to have been actuated by an intention of causing wrongful loss to the complainant if he burns the bushes obstructing his path. *1980 SC Cri R 304.*

(7) Where two accused were charged under S. 435 read with S. 34 P.C. for their act of setting a house on fire and presence of only one of them on the spot was proved, then even though the another shared a common intention with the first, she cannot be convicted for the said offence, and the only person liable to be convicted is the first one whose presence on the spot is proved. *(1980)CriLJ 1143.*

(8) Where property is jointly owned by complainant and accused, it does not stand to reason that accused would cause mischief by fire to the property. *1982 WLN (UC) 92 (Raj).*

(9) Charge for mischief by fire etc.—Crowd assembled as consequence of inaction of police in one criminal case—No intention to commit offence proved—No presumption of common object—Accused could be held liable for their individual acts only. *1982 CriLJ 1998.*

(10) The fact that there was dispute between the complainant and the accused in respect of the possession of a certain land does not entitle the accused to set fire to a hurt erected by the complainant on the land. *(1972) 74 Bom LR 341.*

(11) The expression "damage to property" must be constructed with reference to S. 425 and means destruction of property, diminution in its value or utility or being otherwise injuriously affected. It is wide enough to include the entire incidental loss suffered by the owner of the property as a consequence of the mischief. *AIR 1952 All 146.*

(12) Where, due to the mischief of the accused a thatched roof destroyed by fire and a horse tied therein is badly burnt incapacitating it for work for some time the correct measure of damage would be the cost of replacement of the thatched roof, the cost of treatment of the horse and also the loss of income during the period the horse was incapacitated. *AIR 1952 All 146.*

(13) Property in this section has been held to include a tent. *(1917) 21 Cal WN 162.*

(14) Property in this section includes a forest. *(1897) 2 Mys CCR 374.*

(15) A person charged under this section can be convicted under S. 285 of the Code provided he is not prejudiced thereby. In case there is prejudice there should be a retrial. *(1966) 1 MadLJ 385.*

(16) Where a breach of the Defence Rules formed part of the offence under this section and the accused was convicted under S. 435 of the Code, it was held that a separate sentence for the offence under the Defence Rules was not necessary. *AIR 1943 Pat 446.*

2. Practice.—Evidence—Prove: (1) That the accused committed mischief within the meaning of section 425.

(2) That the mischief was caused by fire or some explosive substance.

(3) That the damage caused thereby amounted to Tk. 100.00 or upwards in the case of any property or Tk. 10.00 or more in the case of agricultural produce.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—, at—, committed mischief by fire (or any explosive substance) intended thereby to (or knowing it to be likely that you will thereby cause damage to property namely—to the amount of Tk. 100.00 or upwards (or Tk 10.00 if the property is agricultural produce) and that you thereby committed an offence punishable under section 435 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 436

436. Mischief by fire or explosive substance with intent to destroy house, etc.—Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with [6][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. *Scope.*
2. *"Any building."*
3. *"Ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property."*
4. *Intention or knowledge.*
5. *Arson by member of unlawful assembly.*
6. *Abetment.*
7. *Attempt to commit the offence under this section.*
8. *Evidence.*
9. *Charge.*
10. *Punishment.*
11. *Practice.*
12. *Procedure.*

1. Scope.—(1) This section contemplates three classes of building, namely building used a place of worship, building used a human dwelling and building used a place for custody of property. Destruction of any one of the three classes mentioned in the section could complete the offence. A

structure made of straw or grass may be a building if it has doors, bars etc. *(AIR 1955 All 146).* A person who mischievously sets fire to a human dwelling may put in jeopardy the lives and the property, not only of those dwelling therein, but of others dwelling in adjoining house, of persons assisting to put out the fire and so on. Severe penalties of the section are, therefore, justified. It is necessary to prove a charge of arson under sections 436 and 149, that the accused were, from the inception or at any stage of the offence, actuated by common motive to set fire to the house or know that the act would probably be committed *(22 CrLJ 267).* Where no common intention to burn a house is proved, all the accused cannot be convicted under sections 436/149 *(AIR 1941 Oudh 487).* Thus where the common object of the assembly was to get house vacated by force but on refusal of the occupant to vacate it, the leader of the accused ordered it to be set on fire. It was held that only those members were guilty under section 436 who set the house on fire *(AIR 1942 Oudh 60).* Where in consequence of the orders given by the accused, a hut is set on fire by one of the members of an unlawful assembly whose common object was to dismantle the hut and commit an assault on remonstrance, the accused can be convicted under section 436 read with section 109 of the Penal Code *(AIR 1958 SC 813).* In a case of mischief by fire with intent to cause the destruction a building, the charge should lay the intent as an intent to cause the destruction not of a house simply, but of a house used as a place of worship, or a human dwelling or a place for custody of property.

(2) Destruction of a hut storing property by fire is an offence under section 436, hurt being a building. It is apparent on a perusal of section 436, P. Code, that the mischief by fire to any building which is used as a place of worship or as a human dwelling or as a place for the custody of property comes within the ambit of section 436, P. Code. The section contemplates three classes of buildings, namely, the building used a place of worship, the building used as a human dwelling and the building used as a place for the custody of property. The extraction of any one of the three classes mentioned in the section would complete the offence. A hut used for the custody of property shall be a building within the meaning of the section and anybody causing destruction of the same by fire shall be liable under section 436, P.C. *Muhammad Ali Vs. Md. Fazal Khan, (1968) 20 DLR 1118.*

(3) Charge being one of rioting u/s. 147, Penal Code, all who are members of the unlawful assembly are guilty of rioting but individuals who did not commit mischief by fire, an offence punishable u/s. 436, cannot be held guilty under that section by applying section 147. *Bangladesh Vs. Abed Ali (1984) 36 DLR (AD) 234.*

(4) Mere plea of right of private defence cannot be a ground for quashing the criminal proceeding, for such plea is to be established by the accused who takes it. A criminal proceeding is liable to be quashed only if the facts alleged in the First Information Report or complaint petition, even if admitted, do not constitute any criminal offence or the proceeding is barred by any provision of law. Where disputed facts are involved, evidence will be necessary to determine the issue. The appellants have produced an order of temporary injunction against the complainant's party. This must be considered along with other evidence during the trial. Their application for quashing the proceedings is found to have been rightly refused by the High Court Division. *SM Khalilur Rahman Vs. State 42 DLR (AD) 62.*

(5) In the absence of alamats of a burnt house and the complainant's failure to go to the police station make the prosecution case doubtful—The defence case that the story of burning of the dwelling hut in order to falsely implicate the accused, who are no other than brother's sons of the complainant, cannot be altogether ignored in view of the circumstances of the case—The order of conviction is set aside. *Siraj Miah and another Vs. the State 7 BLD (AD) 70.*

(6) Mere plea of private defence cannot be a ground for quashing of proceedings—Criminal proceeding is liable to be quashed if the alleged facts in the FIR or Complaint petition do not constitute any offence or is barred by any specific law. *S.M. Khalilur Rahman & ors. Vs. The State 42 DLR (AD) 62=1990 BLD (AD) 1.*

(7) Conviction on the basis of oral evidence alone—Unsafe where circumstances combine to show that a false case has been concocted to incriminate the accused in a criminal charge. In the context of admitted enmity and litigation between the parties, it is rather unsafe to uphold the order of conviction on the basis of oral evidence alone as the circumstances raise reasonable doubt as to the truth of the complainant's case of burning down his dwelling hut. Neither the trial Court nor the High Court Division considered those circumstances, particularly the absence of proper alamats of a burnt hut and complaint's failure (or avoidance) to go to the police station so near to the place of occurrence, and such omission has affected the decision based merely on oral evidence and caused a miscarriage of justice. That there could be a concocted story of burning of the dwelling hut in order to falsely implicate the disputants who are no other than brother's sons of the complainant cannot be altogether ignored in view of aforesaid circumstances. Benefit of doubt, therefore goes to the appellant's *39 DLR 56 AD.*

(8) Police after completing investigation submitted charge sheet on 31-10-73 against the accused person under sections 148/379/380/436 of the Penal Code. The case was transferred to the Special Martial Law Court, but Court could not proceed with the trial of case. On 24-5-79 the Court Inspector submitted an application stating that the Secretary, Home Department has issued order for rebuilding the case diary statements under section 161 Cr.PC, seizure list, case map, etc. which were found missing. Thereafter the accused appellants moved the High Court Division for quashing the proceedings of the case and the High Court Division refused to quash the case with observation that the case should be disposed of on the basis of available records. In the facts and circumstances of the case, the High Court Division committed no illegality in refusing to quash the proceedings of the case. *5 BLD 75 AD.*

2. "Any building."—(1) A building is a place surrounded by walls and covered with roof. Surrounding open space excluding the building inside it is not a 'building' within the meaning of this section. *1954 Mad BLR (Cri) 337.*

(2) Construction will be deemed to be a building only if it has got the necessary furnishing such as doors, bars, etc. It is not necessary that the walls should be of bricks and mortar. *AIR 1952 All 146.*

(3) An open shed for tethering horses is not a building as is contemplated by the section. *AIR 1952 All 146.*

(4) The words "any building" may not necessarily refer to the building primarily destroyed by the accused. Even apart from any question of intention if the accused knew that he was likely by his act to destroy any neighbouring house an offence under this section would be complete. *AIR 1949 All 620.*

3. "Ordinarily used as a place of worship or as a human dwelling or as place for the custody or property.—(1) It is absolutely necessary to prove that the building which the accused destroyed came within one of the three classes referred to in the section. In the absence of such proof, this section will not apply. *1977 CriLJ 837.*

4. Intention or knowledge.—(1) Intention or knowledge referred to in the section is an important element in a charge for an offence under this section. *(1967) 1 Malayan LJ 85.*

(2) Where furniture was set fire to inside a Railway Station room, and there was nothing to show that the building was such as could not be destroyed by fire, it was held that it must be presumed that the accused must have known that the fire would cause destruction to the building, and that he was guilty under this section. *AIR 1944 All 167.*

(3) It is not correct to say that a dependent should only be held to have acted recklessly within Section 1(1) of the Criminal Damages Act by virtue of his failure to give any thought to an obvious risk that property would be destroyed or damaged where such risk would have obvious to him if he had given any thought to that matter. *(1983) 1 WLR 939 (947).*

5. Arson by member of unlawful assembly.—(1) Where arson is committed in pursuance of the common object of an unlawful assembly at the time of the occurrence, every member of the assembly will be guilty of the offence under S. 436 of the Code. *AIR 1933 All 535.*

(2) It is, necessary in a charge under this section read with S. 149 of the Code to show that the accused were, from the inception or at any stage of the offence, actuated by the common object to set fire to the building. *AIR 1920 Pat 795.*

(3) All the members of the unlawful assembly except those who did not participate in the arson, would be liable for offence under this section. *AIR 1942 Oudh 60.*

6. Abetment.—Where A instigated B to commit an offence under S. 436 but such offence was committed not by B but C, A was held to be guilty under this section read with S. 115 and not this section read with S. 109 of the Code, inasmuch as the offence committed was not the consequence of the abetment. *AIR 1967 SC 553.*

(2) Where A, one of the members of an unlawful assembly, ordered the setting of fire to a building, and one of the other members of the assembly set fire to the building in consequence of the order, it was held that A could be convicted under S. 436 read with S. 109 of the Code. *AIR 1958 SC 813.*

7. Attempt to commit the offence under this section.—(1) Where incendiarism occurred in several places in a village and A, the accused was found carrying a concealed ball of rags with burning charcoal inside it, it was held that A was guilty under S. 436/511 of the Code. *(1869) 3 Beng LR (App Cas) 55.*

8. Evidence.—(1) A conviction of the accused on evidence of previous chain of fires which had occurred in the village is bad where it is not shown that the accused was connected with them in any way. *AIR 1917 Cal 807.*

(2) The mere fact that shortly before the property was lost by fire, the accused had effected a fire insurance, is not sufficient to suspect the accused of the offence under this section. *AIR 1941 Rang 324.*

(3) Arson took place at about 10 P.M.—F.I.R. lodged at 10.50 next morning at Police Station only six miles away—unreliable eye-witnesses—Prosecution witnesses had motive to falsely implicate the accused—Accused acquitted. *1974 All Cri R 21.*

(4) F.I.R. lodged after 4 hours—Prosecution case based on interested solitary witness—Defence evidence giving more probable version—No motive—Accused acquitted. *1973 Chand LR (Cri) 629.*

(5) Where charges u/ss. 304 Part II, 486 and 323 rend with S. 34 were proved against the accused beyond reasonable doubt their conviction was upheld. *1983 SCC (Cri) 129.*

9. Charge.—(1) A charge under this section must describe the offence, as nearly as possible, in the language of the section. A charge that the accused "intentionally committed mischief by fire and

thereby caused the destruction of a building" is not correct. The proper charge would be that the accused "committed mischief by fire with the intention of causing the destruction of a building." *(1865) 3 Suth WR (Cri Letters) 18.*

(2) 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 of—, at—, committed mischief by fire (or an explosive substance) namely intending to cause (or knowing it to be likely that you would thereby cause) the destruction of a building (specify) which was ordinarily used as a place of worship (or as a human dwelling house or as a place for custody of property) and that you have thereby committed an offence punishable under section 436 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

10. Punishment.—(1) Although setting fire to a residential building is a serious offence endangering the lives of the inmates, a light punishment may be awarded if there are extenuating circumstances. In this case imprisonment of 3 months was awarded in view of the fact that the accused was aged 78 and was suffering from paralysis. *AIR 1956 Bom 180.*

(2) Provisions of the Probation of Offenders Act are not applicable to case under S. 436 PC which is punishable with imprisonment for life. *1977 CriLJ 837 (Raj).*

11. Practice.—Evidence—Prove: (1) That the mischief as defined in section 425 was committed.

(2) That it was caused by fire or an explosive substance.

(3) That the accused intended to cause or knew that he was likely to cause destruction of a building.

(4) That the accused caused the destruction of a building which is ordinarily used—(a) as a place of worship, or (b) as a human dwelling house, or (c) as a place for the custody of property.

12. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional Distract Magistrate specially empowered.

Section 437

437. Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.—Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) The vessel must be a decked vessel or a vessel of a burden of twenty tons or upwards. This limitation is laid down to exclude small crafts of all kinds. The intention is to punish mischief committed on vessel which are likely to carry passengers.

(2) For cases relevant to this section, see under section 438 infra.

2. Practice.—Evidence—Prove: (1) That the accused committed mischief as defined in section 425.

(2) That the mischief was committed against a vessel.

(3)That vessel was decked on its gross weight was at least twenty tons.

(4) That by the mischief, the accused intended or know it to be likely that he will thereby destroy it or render it unsafe.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the First Class specially empowered.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at— committed mischief (specify the same) to a decked vessel or to a vessel of the burden of—tons (specify the gross weight intending to destroy it or render it unsafe and that you have thereby committed an offence punishable under section 437 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 438

438. Punishment for the mischief described in section 437 committed by fire or explosive substance.—Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with [6][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section merely extends to the principle laid down in the last section. It imposes higher penalty owing to the dangerous nature of the accused.

(2) A sailor on board a ship, bored a hole in a cask containing rum, for the purpose of stealing rum. He had a lighted match and accidentally it set fire to rum which exploded and destroyed the vessel, causing injuries to the sailor himself. It was held that in the absence of proof of the necessary intention, the sailor was not guilty of arson. *(1877) 13 Cox Cri C 550.*

2. Practice.—Evidence—Prove: (1) That the accused committed or attempted to commit mischief within the meaning of section 425.

(2) That the mischief was committed or attempted to be committed by fire or explosive substance.

(3) That it was committed or attempted to be committed to any vessel either decked or of a gross weight of twenty tons and more.

(4) That when committing the mischief the accused intended to destroy such vessel or render it unsafe or that he knew that he was likely to do so.

3. Procedure.—Cognizable—Warrant—Not bailable—Not Compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered.

4. 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 of—, at—, committed or attempted to commit mischief by fire (or an explosive substance) namely (specify it) intending to cause the destruction of a decked vessel or a vessel of the gross weight of twenty tons and upwards or rendering it unsafe and that you have thereby committed an offence punishable under section 438 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 439

439. Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc.—Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section may be read with sections 24/48/378 and 403 of the Penal Code. This section punishes an act which is akin to piracy. Under this section, it is sufficient theft of any property contained therein, where actual theft is committed or not is immaterial.

(2) Circumstance strongly indicated that there was a valid marriage between the respondent and the complainants because, it was otherwise inconceivable that the parents at least would not allow them to live together in their house for 4/5 months—Moreover, the respondent having himself argued in favour of a valid marriage at the trial and in appeal having now made a positive statement on oath in that behalf disclosing full facts. Appellate Division took the view that there does not exist any basis for an offence under this section. *The State Vs. Malekuddin Talukder, BCR 1986 AD 398.*

2. Practice.—Evidence—Prove: (1) That the property in question contained in a vessel.

(2) That the accused ran such vessel aground or ashore.

(3) That he did so intentionally.

(4) That he intended thereby (a) to commit theft of the property so contained therein or (b) to dishonestly misappropriate the same or (c) that such theft or misappropriation thereof might be committed.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—intentionally ran the vessel aground or ashore (specify the details) with the intention to commit theft of any property contained in the vessel or dishonestly misappropriate any such property or with intention that such theft or dishonest misappropriation may be committed and you have thereby committed an offence punishable under section 439 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said Charge.

Section 440

440. Mischief committed after preparation made for causing death or hurt.—Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death or of hurt or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section deals with an aggravated form of mischief, where mischief is committed having made preparations for causing to any person death, hurt or wrongful restraint or fear of death, hurt or wrongful restraint.

(2) The committing of 'mischief' as defined in S. 425 is an essential ingredient of the offence. If there is no allegation that mischief was committed in respect of property, no offence under this section is committed. *1968 CriLJ 398 (Andh Pra).*

(3) A destruction of property or such change in the property or in the situation thereof as destroys or diminishes its value or utility is necessary to constitute the offence of 'mischief'. The cutting of a crop which is ripe for harvest cannot be said to be destruction or such a change as destroys its value and consequently cannot be said to amount to mischief, and this section will not apply to such an act. *AIR 1934 Oudh 182.*

2. Practice.—Evidence—Prove: (1) That the mischief was committed as defined in section 425.

(2) That preparations for causing death, hurt or wrongful restraint, or fear of death, fear of hurt or fear of wrongful restraint had been made prior to the commission of the offence.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—, at—, committed mischief after having made preparations (specify the preparation) for causing to X death, hurt or wrongful restraint, or fear of death, hurt or wrongful restraint and you have thereby committed an offence punishable under section 440 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said Charge.

Of Criminal Trespass

Section 441

441. Criminal trespass.—Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

Cases

1. Scope.—(1) The group of sections commencing from 441 to 461 of the Penal Code deal with criminal trespass. These 20 (twenty) sections cover different aggravated types of offences arising out of an ordinary criminal trespass and different punishments are specified for each type of offence committed. Having defined this offence in section 441 of the Penal Code, the other group of sections deals with three aggravated types of the offence, namely (a) House trespass; (b) lurking house trespass; and (c) House breaking. This section defines "criminal trespass" punishment for which is provided in section 447. Section 441 consists of two parts, the first part relates to entry into or upon the property

in the possession of another with intent to commit an offence and the second part relates to remaining in the property having lawfully entered and remaining there unlawfully with intent to intimidate, insult or annoy any person in possession. Trespass is an offence only if it is committed with one of the intents specified in the section, and proof that a trespass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction. There is a distinction between the phrases "with intent" and "with knowledge". It must be proved that the accused has the intention to intimidate, insult or annoy when he made the entry, and it is not enough that the prosecution should ask the court to infer that the entry is bound to cause intimidation, insult or annoyance. Intention is stronger than knowledge *(PLD 1965 SC 640)*. A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intention to insult or annoy. The word "intimidate" must be understood in its ordinary sense to put in fear, by a show of force or threats or violence. The word "annoyance" must be taken to mean annoyance that would specially and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual. Writing of love letters by student to a girl and delivering the same at her residence will surely annoy an innocent girl. It will be criminal trespass if he enters her house to deliver such letter *(AIR 1963 Mad. 68)*. To constitute an offence under this section there must be an actual personal entry by the accused person. Constructive entry upon property by a servant is not an entry without the meaning of the section *(AIR 1960 Cal 189)*. Wrongful entry of strikers on employer's premises; entry by the striking worker into the factory at the commencement of the working hours, was lawful but their remaining after the working hours in the factory is unlawful and will amount to trespass. To bring the case within section it is necessary to prove that the striking workmen having remained unlawfully in the factory premises had the intention to commit an offence or to intimidate, insult or annoy their employer *(1976 CrLJ 1222)*. Entry upon land, made under a bonafide claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant *(PLD 1964 SC 117)*. Therefore where the accused take up defence of a bonafide claim of right, it is necessary for the complainant to establish by evidence the intention of the accused which amounted to intimidation, insult or annoyance to the complainant in consequence of this trespass *(PLD 1952 Dhaka 30)*. The mere assertion of a claim of right is not sufficient defence to a charge of criminal trespass. To be a good defence it must be a claim made in good faith. The word "property" means immovable property and does not include incorporeal property. In case of criminal trespass, the right of private defence continues so long as the trespass continues, and is controlled by section 99 Penal Code. Right of private defence of property extends to causing of grievous hurt in case of criminal trespass *(1969 CrLJ 533)*. It extends to causing death in case the act of trespass causes a reasonable apprehension that death or grievous hurt may result therefrom *(22 CrLJ 177 Pat)*.

(2) Criminal trespass—Ingredients laid down in the section are to be proved—The finding that the accused are guilty under section 448, Penal Code, because they took the law in their own hands with intent to dispossess the complainant from the room is not sufficient for a conviction under section 448, inasmuch as intention to dispossess is not one of the ingredients covered by section 441 of the Code. To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or insult, intimidate or annoy the occupant. *Rahmatullah Vs. State (1958) 10 DLR 143.*

(3) Intent to commit the offence to be proved—Every unlawful entry does not amount to criminal trespass. The essence of section 441, which defines criminal trespass is the intent with which the entry

is made and in every case the intent must be either to commit an offence or to intimidate, insult or annoy any person in possession of such property. The section does not penalise unlawful entry with any other intent, such as mere intent to take possession. The Court must come to a clear finding that the entry was with one or more of the intents mentioned in sec. 441. Failure to come to such a finding amounts to a failure to decide a vital point in the case. *Arjad Ali Vs. Crown (1951) 3 DLR 13.*

(4) Intention will have to be gathered from circumstances established. Intention which is a state of mind cannot ordinarily be proved as a fact; it can only be inferred from the facts and circumstances established in a particular case. *Gulam Nabi Vs. State (1959) 11 DLR (WP) 120.*

(5) Element which must be proved for conviction. to establish criminal trespass, the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent, or at any rate constituted no more than a subsidiary intent. *S. Selvanayagam Vs. King (1952) 4 DLR (PC) 74.*

(6) Intention—Section concerned not with possession but with occupation. Section 427 of the Ceylon Penal Code does not make any trespass a criminal offence. It is confined to cases in which the trespass is committed with a particular intention and the intention specified indicates that the class of trespass to be brought within the criminal law is one calculated to cause a breach of the peace. The section was not intended to provide a cheap and expeditious method for enforcing a civil right. It is to be noted that the section deals with occupation, which is a matter of fact, and not possession which may be actual or constructive and may involve matters of law. The first paragraph of the section comes into operation when a trespasser enters land in the occupation of another with the intent specified, and the second paragraph applies when the entry is lawful but becomes unlawful e.g. when the entry is made on the invitation of the occupier and there is a refusal to leave when the invitation is withdrawn. But in either case there must be an occupier whose occupation is interfered with, and whom it is intended to insult, intimidate or annoy (unless the intent is to commit an offence). The section has no application where the fact of occupation is constant, the only change being in its character as where a tenant holds over after the expiration of his tenancy. *S Selvanayagam Vs. King (1952) 4 DLR (PC) 74.*

(7) Intention, a state of the mind—Dominant intention must be proved. Intention which is state of mind can never be proved as a fact; it can only be inferred from facts which are proved. It may well be that in doing a particular act a man has more intentions than one and to bring a case within section 427 of the Ceylon Penal Code; the intention specified in the section must be the dominant intention. the mere fact that the accused did anticipate that the man in occupation of the premises would be annoyed would not make him liable to a conviction under section 427, if it is found that the dominant intention was to remain where he was. *S. Selvanayagam Vs. King (1952) 4 DLR (PC) 74.*

(8) Possession—Actual and constructive possession contemplated by the section. Section 441, P.C. does not contemplate a contraceptive possession. The reason is quite obvious, that a person who is not in actual possession of any property cannot possibly be intimidated, annoyed or insulted by the entry of somebody else into that property. *Md. Ghulam Vs. Ghulam Sarwar Khan PLD (1954) Peshawar 111.*

(9) Intent to commit the offence enumerated in the section is to be inferred from proved facts, the rule being that a person intentds the natural and inevitable consequences of his own acts. *Jane Alam Vs. State (1965) 17 DLR (SC) 455.*

(10) The contrast as to the ingredient of intent between section 441 and other sections of the Code. In respect of the ingredient of intent, section 441 in somewhat different from some of the other

sections of Penal Code, e.g., section 166, 167, 194, 297, 299, 350, 366, 367, 425, 499, 504, and 535, in all of which doing the act with intent and doing it with a knowledge of the consequences are both made punishable. The contrast in the language is not without significance. *Jane Alam Vs. State (1965) 17 DLR (SC) 455.*

(11) Mere knowledge that annoyance, etc., will be caused is not enough for conviction. *Jane Alam Vs. State (1965) 17 DLR (SC) 455.*

(12) Bonafide claim of right to land—Entry not criminal if only it annoys the occupant. Entry upon land, made under a bonafide claim of right however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. *S. Selvanayagam Vs. King (1952) 4 DLR (PC) 74.*

(13) Express finding regarding the intent. It is obligatory that there must be an express finding on the part of the Court regarding intent. Criminal trespass depends on the intent of the offender and not upon the nature of the act. It is one thing to entertain some intention and another to have the knowledge that one's act might lead to certain results. *Nitya Ranjan Vs. Jamini Kumar (1957)9DLR 446.*

(14) The attempt to prevent a person from using his land amounts to criminal trespass. The attempt on the part of Mohammad Khan to prevent Allah Ditta from using his land amounted to criminal trespass, and if he had collected several persons with a view to resisting cultivation of the land by Allah Ditta, he and the persons so collected constituted an unlawful assembly. *(1949) PLD (Lah) 421.*

(15) Conviction for criminal trespass—Ingredients. Criminal trespass depends on the intent of the offender and not upon the nature of the act and as such, conviction for criminal trespass without recording an express finding as to the real intent of the entry, not maintainable. *The State Vs. Habibur Rahman Khan, (1920) 22 DLR 511.*

(16) Criminal trespass—Intention of trespass though not mentioned in the charge—Conviction not bad if inference of criminal intent can be drawn from the facts and circumstances of the case. *Ruhul Amin Vs. Nagendra Nath, (1970) 22 DLR 66.*

(17) It provides that whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass". In the instant case the dominant intention of the appellant was to annoy the complainant who was in possession of the case land. The complainant might not be present at the time of the illegal entry but he came to the scene thereafter and opposed the appellant who, despite his protest, carried on the work of construction. So the ingredients of section 441/447 of the Penal Code have been well established. *Mohammad Ali Member Vs. Abdul Fazul Mia, Md. Mazedul Huq and another, 19 BLD (AD) 260.*

(18) Criminal trespass—Bonafide claim of right, plea of—Entry into disputed property in assertion of that right is not tenable against a charge of criminal trespass when civil court found title followed by possession in favour of the complainant. *Sukhamoya Dutta Gupta Vs. Abdul Gafur & others, 3 BSCR 427=31 DLR (AD) 262.*

(19) The dominant intention of the appellant was to annoy the complainant who was in possession of the case land even though the complainant might not be present at the time of the illegal entry but he came to the sense thereafter and opposed the appellant who, despite his protest, carried on the work of construction and hence the ingredients of sections 441/447 of the Penal Code have been well

established. *Mohammad Ali Vs. Abdul Fazul Mia, Md. Mazedul Huq and another (Criminal) 4 BLC (AD) 259.*

(20) "Leave was granted to consider whether the High Court division correctly interpreted the definition of "criminal trespass." Intention is the most material ingredient which is to be gathered from the facts and circumstances of a case. Accused respondents have also possession in the case land along with the appellant who is not in exclusive possession of the property on which a Partition Suit is pending in the Court between the appellant and his cosharers—Alleged acts done by the accused respondents do not contain ingredients of section 448 of the Penal Code—The words "criminal trespass" have been correctly interpreted by the High Court Division. *2 BCR 465 AD.*

(21) Criminal trespass depends on the intent of the offender and not upon the nature of the act and as such, conviction for criminal trespass without recording an express finding as to the real intention of the entry is not maintainable. *22 DLR 511.*

(22) Every unlawful entry does not amount to criminal trespass. The essence of section 441 Penal Code which defines criminal trespass is the intent with which the entry is made and in every case the intent must be either to commit an offence or to intimidate, insult or annoy any person's possession of such property. The section does not penalise unlawful entry with any other intent, such as mere intent to take possession. The court must come to a clear finding that the entry was with one or more of the intents mentioned in section 441 Penal Code. *5 DLR 13.*

2. For more cases relevant to this section, see under section 447 infra.

Section 442

442. House-trespass.—Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said commit "house-trespass".

Explanation.—The introduction of any part of the criminal trespasser's body [is entering][Sic] sufficient to constitute house-trespass.

Cases

1. Scope.—(1) 'House-trespass' is only an aggravated form of criminal trespass inasmuch as the legislature considered it proper to impose more severe penalty for house-trespass. Building is defined as a structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed therein for custody. A thatched hut built for purpose of residence is a building *(17 CrLJ 536),* but a courtyard having walls on three sides is not a building *(26 CrLJ 383).* In the light of the dictionary meaning of the word 'use', the section does not contemplate, the intended or the prospective use of the building. The shops which had been constructed may undoubtedly be intended to be used for the custody of the property, yet as the same had not been used for that purpose till the date of the occurrence, a criminal trespass committed in respect of them did not amount to a house trespass *(PLD 1958 WP 871).* Entry upon the roof of a house is not a trespass though it would be criminal trespass if it is with the requisite intent. Entry must be illegal. If a person enters The house of another by leave or licence he cannot be guilty of this offence. Bonafide claim of right which would prevent a trespasser into the house from being a criminal trespass must be a claim with regard to entry

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Sic. The words in square brackets are syntactically misarranged and thereby causing ambiguity. What was in the original publication of 1860 cannot be known now. Only the H. S. Gour's Penal Code carries the correct word order which is: "...body [entering is] sufficient...".

into the house *(1971 CrLJ 1401 Orissa)*. Where an entry is made under a bonafide claim of right and the dominant intention is not to commit any offence or to insult under section 448 Penal Code upheld. It is the duty of the Court to find out the real or dominant intent.

(2) "Building"—Walled courtyard if a building. Even a courtyard consisting of a walled enclosure with four rooms opening into it and an outer door to get into it will be a building for the purpose of section 442 of Penal Code. Similarly, a walled courtyard has also been held to be a building. Section 75 Penal Code cannot be made applicable to a mere attempt to commit the offence. *Umar Ali Vs. The State, (1968) 20 DLR 1102.*

(3) Trespass—Lurking house-trespass and house-trespass—intention, essence and gist of. In all "lurking house-trespass", there must be "house-trespass" and in all "house-trespass" there must be "criminal trespass." Unless, therefore, the intent necessary to prove the offence of "criminal trespass" is present, the offence of "lurking house-trespass" or "house-trespass" cannot be committed. In other words, "intention is the essence." Where intention is not proved, no office of "lurking house-trespass" can be said to have been committed. *Illahi Baksh Vs. State (1959) 11 DLR (WP) 131.*

2. For more cases relevant to this section, see under section 448 infra.

Section 443

443. Lurking house-trespass.—Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass is said to commit "lurking house-trespass".

Cases

1. Scope.—(1) In order to constitute lurking house-trespass the offender must take some active means to conceal his presence*(17 CrLJ 304)*. A man entered the courtyard of a building through a gate which had no door attached to it and he was caught in the courtyard his intention apparently being to commit theft of cattle. It was held that he was guilty under section 451 and not under section 457 as he had taken no steps to conceal the fact of his presence.

(2) "Lurking house-trespass" can be said to be committed when a person enters the premises of the nature described in S. 442 having taken precautions to conceal such house-trespass in the manner mentioned in S 443. *AIR 1971 SC 1254.*

(3) A person who gets on to and conceals himself on the roof of another's house can be said to "enter into the building" within the meaning of S. 442, so as to be guilty of "house-trespass" as defined by that section and consequently, of "lurking house-trespass", under this section. *1900 All WN 151.*

(4) The fact that a house-trespass was committed by night does not make the offence one of lurking house-trespass. *1953 Raj LW 243.*

(5) If there is no evidence to show that the accused took any precautions to conceal his act, he cannot be convicted under this section. *1953 Raj LW 243.*

Section 444

444. Lurking house-trespass by night.—Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night".

Cases

1. Scope.—(1) Under this section the time of the entry aggravates the offence. This section relates to lurking house-trespass by night the offence being considered more aggravated than the commission of the offence during day time.

(2) Taking of precautions by the accused for concealing his presence being a necessary element in 'lurking house-trespass", and accused cannot be convicted under this section if there is no evidence that he took any precautions to conceal his act of house-trespass by night. *1978 CriLJ 945.*

Section 445

445. House-breaking.—A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say :—

First.—If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.—If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.—If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.—Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations

(a) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand though the apperture. This is house-breaking.

(b) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.

(c) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(d) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(e) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(f) A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house having opened the door with that key. This is house-breaking

(g) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(h) Z, the door-keeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

Cases

1. Scope.—(1) This section prescribes six ways in which the offence of house-breaking may be committed. Clauses 1 to 3 deal with entry which is effected by means of a passage which is not ordinary. Clauses 3 to 6 deal with entry which is effected by force. This section deals with the offence of house-breaking. The term "house breaking" implies a forcible entry into a house. When a hole is made by burglars in the wall of a house but their way is blocked by the presence of beams on the other side of wall the offence committed is one of attempt to commit house-breaking and not actual house-breaking, and illustration (a) to this section does not apply. the breaking open of cattle shed amounts to house-breaking *(18 CrLJ 469)*. The word "fastened" shows that something more than being closed is implied, such as, locking or bolting the door *(23 CrLJ 278)*.

(2) House-breaking as defined in this section is an aggravated form of criminal trespass defined in Section 441 and of house-trespass as defined in Section 442. *AIR 1927 All 536.*

(3) Putting one's hand across the top of the railing of the enclosure of a factory would amount to an entrance into the house in view of the Explanation to S. 442. *AIR 1934 All 833.*

(4) Where a burglar made a hole in the wall of a building but he found the hole blocked on the other side of the wall and he could not put his hand through the hole it was held that he did not effect 'entrance' into the building. *AIR 1923 Lah 509.*

(5) House-breaking involves house-trespass which again involves criminal trespass as defined in Section 441 and hence requires an intention to commit an offence or to intimidate, insult or annoy any person in possession of the house. *AIR 1949 Cal 85.*

(6) The mere presence of a person inside house of another would not establish a case of house-breaking. It a person is charged of house breaking and theft and commission of theft is established it would not follow that commission of the other offence of house breaking has also been established. In absence of evidence as to whether the accused had made entry into house in any of six ways enumerated in Section 445 of Code, it cannot be said that offence of house breaking is established against him. *1984 Cri LJ 828.*

(7) The term "fastened" in this clause implies something more than being closed. It implies bolting or locking or chaining or tying with a rope. The entry by merely pushing the shutters of a door does not come under this section. *AIR 1922 Nag 26.*

(8) The mere presence of the accused at the sense of the house-breaking is not abetment. *AIR 1952 Hyd 25.*

(9) House breaking and dacoity—Conviction on testimony of solitary witness—Justified only when evidence is clear, cogent and convincing. *1983 CriLJ (NOC) 47.*

Section 446

446. House-breaking by night.—Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night".

Cases

1. Scope.—(1) The section deals with an aggravated form of house-breaking which is known as "burglary." The offence will fall under this section if house-breaking takes place after sunset and before sunrise.

(2) A house-breaking would amount to a house-breaking by night if entry is effected by an accused at night, (i.e., after sunset and before sunrise). Effecting entry at night by scaling over a wall or by breaking open the door of a shop would be an offence under this section. *(1865) 2 Suth WR 65.*

(3) For a conviction under S. 448 and this section, it is enough if the intention of the accused to commit any offence is proved against him. *(1911) 12 CriLJ 453.*

Section 447

447. Punishment for criminal trespass.—Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred [5][taka], or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *"Whoever enters".*
3. *Property.*
4. *"Property in the possession of another".*
5. *Partner of firm in possession dying.*
6. *Lock-out by employer.*
7. *"Intent".*
8. *"Intent to commit an offence".*
9. *"Intent to intimidate, insult or annoy".*
10. *Entry under bona fide claim of right.*
11. *Lawful entry and remaining unlawfully—Second para.*
12. *Complaint.*
13. *Charge.*
14. *Proof.*
15. *Trespass and private defence.*
16. *Procedure.*
17. *Conviction.*
18. *Acquittal of accused—Effect.*
19. *Sentence.*
20. *Revision.*
21. *Restoration of possession.*
22. *Refund of court-fee.*
23. *Practice.*

1. Scope.—(1) This section may be read with section 441 of the Penal Code. This section deals with the simple type of criminal trespass. In a prosecution for criminal trespass it is necessary to determine in whose possession the property was at the date of the alleged trespass *(18 CrLJ 761)*. Whether a party is in possession of immovable property or not is a question of fact to be ascertained by taking evidence in the usual way. A Magistrate ought not to decline to go into a case of criminal trespass because the complainant does not make out his title to the land. The accused, after having been convicted of criminal trespass committed by entering on certain land, were again prosecuted for a further trespass by remaining in the land in spite of the previous conviction. It was held that the person was not liable to be again convicted *(8 CrLJ 474)*. Where a person commits criminal trespass in respect of property in the possession of a tenant, his landlord can file a complaint *(23 CrLJ 699)*. A Magistrate while convicting an accused person of criminal trespass need not incorporate a finding of forcible dispossession in the order of conviction before passing an order under section 522 Cr. Procedure Code. Where an accused entered a building in the absence of its owner and on the return of the owner kept him out by show of force, it was a case of forcible dispossession. Restoration of possession under section 522 Cr. Procedure Code must be made to the person dispossessed from the date of dispossession. A person claiming to have purchased property from the accused after the accused had taken forcible possession of the property cannot challenge the order passed under section 522 Cr. Procedure Code *(1969 P CrLJ 603)*. Where the accused is acquitted of offences under sections 447, 427 they cannot be ordered to restore the property taken by commission of criminal trespass. A charge under section 447 Penal Code should specifically state the intent with which the entry is made, whether his intent to commit an offence or to intimidate, insult or annoy the person in possession of the property.

(2) Acquittal under section 427 does not lend support to the view that the accused cannot be tried and convicted for offence under section 447. Held: The trial Magistrate had jurisdiction to try the case and simply because he acquitted the accused on the charge under section 427 of the Penal Code cannot furnish an argument that he had no jurisdiction to try this case and convict the accused. *Jogesh Chandra Mondal Vs. Kanai Lal Mondal (1966) 18 DLR 79.*

(3) Conviction not necessarily bad, if there is a finding as to the intent, if evidence on record supports it. *Jane Alam Vs. State (1965) 17 DLR (SC) 466.*

(4) In the absence of an express finding about the intention, conviction under this section is bad. *Abdul Shaikh Vs. Johuruddin Shaikh (1959) 11 DLR 9 : 1959 PLD (Dr) 34.*

(5) Charge of criminal trespass when not sustainable—The accused had a bona fide expectation that land would be restored to him after harvest. The case for criminal trespass is bound to fail on the view that there was justification—Because the deceased had given his lessor impression that he would restore possession of the land when it was free from crop—Though not fully a legal justification, for the entry into the field, for then the intention to intimidate, insult or annoy or to commit an offence is absent. *Shihab Din Vs. State (1964) 16 DLR (SC) 269. (Kaikaus, J. Contra).*

(6) Charge under section 447 should specifically state the intent to commit the offence mentioned and name of the person. A charge under section 447 should specifically state the intent with which the entry is made, whether intent is to commit an offence or to intimidate, insult or annoy the person in possession of the property. When this is not done the charge is bad in law and vitiates the trial so far as the offence under section 447 of the Penal Code is concerned. *Abdul Gafur Vs. The State (1968) 20 DLR 428.*

(7) Conciliation Court's exclusive jurisdiction in a case referred to it without taking it to the Court for trial. Police investigated a case under section 447 P.C. (encroachment of State's land) but instead of referring it to the Criminal Court as required under section 18(1) of the Conciliation Courts Ordinance, they referred it to the Conciliation Court direct. Held: Where the case was not put in the Court, section 18 was not attracted and the case was exclusively triable by the Conciliation Court. *The State Vs. Sakhi Jan (1969) 21 DLR (WP) 245.*

(8) Conciliation Court passed an award—Part of the award being in excess of its jurisdiction does not render the order of acquittal invalid unless the same is vacated in appeal. Conciliation Court gave an award that the trespasser to Government land would pay compensation to the Government. On appeal the Controlling Authority, issuing notice to the respondent set aside the award and referred to the Magistrate for trial who found the respondent not guilty and acquitted him of the charge. Held: The fact that part of the award in regard to payment of compensation to the Government assessed by the Conciliation Court was in excess of its jurisdiction would not render the order of acquittal without lawful authority unless and until the same was properly vacated in appeal. *The State Vs. Sakhi Jan (1969) 21 DLR (WP) 245.*

(9) Controlling Authority's order setting aside Conciliation Court's award without notice to the respondent—Illegal. The order of the Controlling Authority in the present case in setting aside the order of the Conciliation Court is illegal inasmuch as the order was passed at the back of the respondent without issuing him a show cause notice. *The State Vs. Sakhi Jan (1969) 21 DLR (WP) 245.*

(10) Without a finding regarding the intention of the accused person, order of conviction under sections 379 & 447 cannot be sustained. *Karamat Ali Vs. Prabhat Ch. Majumder (1972) 24 DLR 73.*

(11) When growing of the case crops by the complainant and the cutting and taking away of the same dishonestly by the accused are proved, the accused is guilty of theft. When theft of the case crops by the accused by cutting and taking away of the same and damaging some crops in the process necessarily involves their entry into the case land and the accused are punished for theft and mischief, a separate conviction under section 447 Penal Code is unwarranted. *Motaleb Sardar (Md) and others Vs. State and another 51 DLR 278.*

(12) The appellate court set aside the order of conviction passed by the Magistrate and remitted the case for re-trial with an order to take additional evidence—The High Court Division in revision affirmed the judgment and order of the appellate Court—The Appellate Division held that the order of retrial merely furnishes an opportunity to the prosecution to plug the holes and to fill up the lacuna in its case and set aside the judgment and order of the High Court Division and that of the lower appellate Court—The appeal was remanded to the court of appeal below for re-hearing on the basis of the existing evidence on record and according to law. *Abdur Rahman Mondal and others Vs. The State 11 BLD (AD) 94.*

(13) In order to convict an accused under Section 447 of the Penal Code the court must arrive at a finding that each of the accused had the initial intention to commit an offence under Section 447 of the Penal Code. *Safiuddin and others Vs. Minhajuddin Chowdhury and another 12 BLD (HCD) 301.*

(14) In view of the fact that theft of the case crop by the accused by the cutting and taking away of the same out of the possession of the complainant and damaging some crops in the course of the same transaction necessarily involves their entry into the case land and the accused are punished for the said offences, a separate conviction under section 447 of the Penal Code is wholly unwarranted. Moreover,

in the absence of any finding by the trial Court on the intention or the object of the illegal trespass of the accused, conviction of the accused under sections 447 or 448 of the Penal Code is not maintainable in law. *Md. Motaleb Sardar and others Vs. State and another, 19 BLD (HCD) 407.*

(15) In order to be sustainable the conviction and sentence under section 447 of the Penal Code must satisfy the ingredients enumerated under section 441 and the intention of the accused must be there to cause annoyance or intimidation or insult to the person in possession of the land by the illegal trespass. *Mohammad Ali Member Vs. Abul Fazal Mia Md. Mazedul Huq and another—4, MLR (1999) (AD) 373.*

(16) A plain reading of the section 522 Cr.P.C. shows that the complainant can get restoration of possession of the property in case under this section where it is found that he has been illegally dispossessed by the accused party by the use of force. Restoration of possession u/s. 522 contemplates restoration to the complainant alone. The order of restoration in favour of the accused having been passed without jurisdiction and illegally, the High Court Division have rightly quashed that order. *Idris Ali Dewan Vs. Mohsena Khatun & ors. 8 BSCD 25.*

(17) No specific finding as to initial intention of the accused. Conviction under section 447 based on discrepant and contradictory statements of prosecution witnesses cannot be sustained. Conviction under section 379 is, however, maintained in the facts and circumstances of the case. Court to look into the quality of evidence but not to the number of witnesses. *10 BCR 53.*

(18) Section 442 is an aggravated form of the offence under this section and applies only when the unlawful entry is in a building. *1970 CriLJ 1199.*

(19) Section 441 and the succeeding sections in this chapter are designed to protect possession as distinguished from title, in the sense that the question in whom the title to the land or property vests is foreign to the consideration of an offence under the section. *AIR 1971 Tripura 24.*

(20) A trespass as an actionable wrong giving rise to a cause of action for a claim in a Civil Court must be distinguished from criminal trespass and it is only criminal trespass as defined in the Section 441 that is punishable under Section 447. *AIR 1952 Him Pra & B 27.*

(21) The essence of offence under this section consists in the intent of the accused as defined in this section coupled with the entry or remaining on property in possession of another person. *AIR 1924 Oudh 297.*

(22) The ingredients of an offence under section 441 are:—

(a) (i) Unauthorised or unlawful entry into or upon property in the possession of another, or

(ii) having lawfully entered unlawfully remaining there.

(b) With intent, in either case—

(i) to commit an offence or

(ii) to intimidate, insult or annoy any person in possession of such property. *1971 CriLJ 1013.*

(23) The word 'trespass' used in this section has not the same meaning as it has in Section 297 where it means any violent or injurious act committed in such place and with such knowledge or intention as are defined in that section. *AIR 1924 Rang 106.*

(24) The term does not merely mean entry on property in possession of another or remaining on such property (after such entry) with the intents specified in the section. Hence for purposes of Section

297 the accused need not be some person other than a person in possession (as under S. 441). Any person can commit trespass under that section including the trustee of the mosque where the offence is said to be committed. *AIR 1924 Rang 106.*

2. "Whoever enters".—(1) In order that a person may be found guilty of an offence under this section, he must have actually entered into or upon property in the possession of another. *1979 WLN (UC) 114.*

(2) Where a servant or an agent enters upon the property of another, the master or the principal will not be liable for criminal trespass. *AIR 1937 Rang 117.*

(3) The master or the principal can be made responsible and will be guilty only when it is proved that he instigated or incited the servant or the agent to enter. In such a case he would be liable for abetment of an offence under Section 441. *AIR 1953 Sau 81.*

3. Property.—(1) There could be a criminal trespass, within the meaning of this section to a motor car, an aeroplane or a boat. Thus, where an accused attacked the lessee of a boat, drove him away, took possession of the boat and plied it across a river and collected money, it was held that criminal trespass was committed. *AIR 1934 Cal 480 (482) = 35 CriLJ 949.*

(2) The word 'property' does not include incorporeal property, such as a right to collect tolls. Where the complainant had taken from a District Board a lease of tolls leviable from persons entering upon a certain public road for selling their wares and the accused used the road for selling his wares by exposing them for sale, it was held that the right to collect tolls could not be the subject of an offence of criminal trespass. *AIR 1920 All 20.*

4. "Property in the possession of another".—(1) Where a tenure-holder was in possession of a plot of land, a 30 feet wide strip of land running through the plot was acquired by the Government by a notification in the Gazette but the land acquired was not demarcated and the tenure-holder continued to be in possession in spite of notices served on him, it was held that he was never dispossessed from any portion of the plots and hence could not "enter into or upon property in possession of another" and be liable for trespass under this section. *1980 WLN (UC) 12 (Raj)*

(2) On the death of the owner of a shop which had been leased to a tenant, two persons laid claim to the shop. In a litigation one of them was held entitled to the shop. the tenant vacated the shop, intimating the same to the real owner. Immediately after his vacating and before the other could take possession, the rival claimant entered into the premises. On a complaint by the other, it was held that the rival claimant was not guilty, as the complainant was not in possession of the property. *AIR 1925 All 540.*

(3) It is not necessary that the person in possession of the property should always be present on his property; an entry with the requisite intent may amount to criminal trespass, even though the owner is not present at the time of the trespass. *AIR 1962 Him Pra 1.*

(4) Owner keeping house locked is in possession. *AIR 1951 Kutch 76(77) = 52 CriLJ 1477.*

(5) Premises deserted and unoccupied by tenant—Landlord breaking open lock and occupying—No one in possession and hence no offence. *AIR 1949 Cal 107*

(6) Where the owner of a property has leased the house or land to a tenant, the former cannot be said to be in actual possession. *AIR 1951 Kutch 76.*

(7) A mere power of control without actual possession, such as a trust-scheme vesting the legal title in a trustee, would not be possession within the meaning of this section. *AIR 1917 Low Bur 155.*

(8) Where a building or premises belonging to Government is allotted for an office and the officer is in charge of the premises an entry into the premises or remaining there unlawfully with the requisite intent would not amount to an offence of criminal trespass as no member of the public can be excluded from a public office. *AIR 1956 Cal 118.*

(9) If only symbolical possession is given to a decree-holder and not actual possession, the possession of the property would still continue to be with the judgment-debtor. *AIR 1935 Pat 355.*

(10) If possession is obtained by illegal means, the judgment-debtor by continuing to remain on the property or by re-entering upon it would not be guilty of an offence under this section. *AIR 1968 SC 702.*

(11) Where a property has been leased to a tenant and the tenant holds over after the expiry of the lease, the landlord re-entering upon the property, otherwise than by due course of law, would be liable under this section. *AIR 1954 Sau 110.*

(12) A rightful owner of land does not lose his possession, particularly in a vacant land, merely because of a single act of trespass. *AIR 1958 Raj 52.*

(13) A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself possession against the person whom he ejects. The owner may, if he does not acquiesce, reenter upon the land and re-instate himself provided he does not use more force than necessary. His entry will be viewed as a resistance to an intrusion upon a possession which he had never lost. *AIR 1924 Pat 124.*

(14) Persons entitled to rights of easement or other incorporeal rights, such as a right to graze cattle on another's land, cannot be said to be persons in possession within the meaning of this section. *AIR 1960 Manipur 17.*

5. Partner of firm in possession dying.—(1) Where a property was in the actual possession of one partner as manager and he died, it has been held that the firm or the remaining partners collectively must be considered to be in possession thereafter for the purposes of this section. *1935 Mad WN 48.*

6. Lock-out by employer.—(1) Where a lock-out has been declared by the employer, an entry on the premises by the employees will amount to an offence under this section. *1973 RajLW 183.*

7. "Intent".—(1) The word "intent" by its etymology, seems to have metaphorical allusion to archery, and implies "aim" and thus connotes not a casual or merely possible result—Foreseen perhaps as a not improbable incident, but not desired—but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken. *AIR 1964 SC 986.*

(2) The offence of criminal trespass is committed when it is proved that the accused entered into or upon property in the possession of another with the intent mentioned in this section. It is not necessary that the intention must have been actualy carried out into action. *AIR 1968 Manipur 73.*

8. "Intent to commit an offence".—(1) When a person enters upon property in the possession of another with intent to commit an offence it is not necessary that the offence intended should be committed upon that property or be directed against the person in possession of that property. It may be with intent to commit an offence on that property or another property or with respect to a person who is or is not in possession of the property entered upon. *AIR 1938 Lah 514.*

(2) An unlawful act is not necessarily an offence and an intention to commit an unlawful act without the intention to commit an offence, followed by a trespass upon property will not become criminal trespass. *AIR 1949 Cal 107.*

(3) The word 'offence' has been defined in Section 40. The following are some of the illustrations of entry 'with intent to commit an offence' within the meaning of this section:—

(a) Entering a cattle pound with intent to commit an offence under Section 24 of the Cattle Trespass Act. *AIR 1927 Lah 495.*

(b) Unlawful removal by judgment-debtor of attached cattle kept in house of the decree-holder. *AIR 1961 SC 803.*

(c) Cultivating village waste lands which was prohibited by Collector—an offence under S. 188 of this Code. *(1897) 2 Mys CCR 370.*

(d) Entry into complainant's house secretly at night and in the absence of the complainant with the intention of committing adultery with the complainant's wife. *AIR 1938 Lah 514.*

(e) Trespass into property of another with intent to commit theft. *(1960) 26 CutLT 566.*

(f) Entry at night into the apartment of respectable women with a view to commit an offence under Section 509 of this Code. *(1889) ILR 16 Cal 657.*

(g) A husband entering in the company of more than five persons, into the house of a third person and taking away his married wife against her will—an offence under S. 147 infra. *AIR 1918 Sind 69.*

(h) Trespass with the intention of committing mischief. *AIR 1956 NUC 5698 (Pat).*

(i) Trespass after eviction by Court proceedings with intent to cause hurt. *1967 BLJR 205.*

9. "Intent to intimidate, insult or annoy".—(1) "The unlawful entry or unlawful remaining must be with intent:

(a) to commit an offence;

(b) to intimidate;

(c) to insult; or

(d) to annoy;

any person in possession of the property. *(1878-1880) ILR 2 All 465.*

(2) If a person enters into property in the possession of another or remains there unlawfully with an intent other than to intimidate, insult or annoy, but with the knowledge that his act is likely to cause insult or annoyance to the person in possession, the facts are not sufficient to establish that the entry amounted to criminal trespass. *AIR 1970 SC 20.*

(3) The first accused's son, a young boy, having stolen some jewels belonging to his father, told him that he had given them to the Head-master of his school, the complainant. Thereupon, the first accused with the other four accused went to the complainant's house and in spite of the latter's protests, searched the house. But nothing was found. The complainant was naturally annoyed. On a complaint by him for criminal trespass, it was held that the dominant intention of the accused, was search and that they were, therefore, not guilty. *AIR 1918 Mad 136.*

(4) The accused entered at night the house of the complainant with intent to have sexual intercourse with his daughter who was sui juris. He went there on her invitation and had taken all possible precautions to keep his entry secret. It was held that the mere fact that if discovered, the accused's act would cause annoyance to the complainant was not, by itself, sufficient to bring the case within this section. *AIR 1938 Lah 534.*

(5) Workmen of a factory entered the factory premises and struck work. They remained there after the working hours, refused to receive the order of interim injunction granted by the Court restraining them from collecting in the factory premises, prevented the employer from closing the premises obstructing the female employees from leaving the premises, indulging in insulting the members of the staff and intimidating the non-striking workers by using provocative language likely to lead to breach of peace. It was held that the workers intended to intimidate, insult and annoy the employers and were therefore, guilty of an offence under this section. *AIR 1969 Mad 33.*

10. Entry under bona fide claim of right.—(1) If A enters, under a bona fide claim of right, upon land in the possession of B and there is no intention to intimidate, insult or annoy B, then although A's claim might be unfounded, he cannot be convicted of criminal trespass, because the entry is not made with any such intent as would make his entry an offence. *1980 SC Cri R 304.*

(2) The claim should not be a mere cloak to cover the real criminal intent. *(1980) 1 APLJ 74.*

(3) The use of force or violence will cause annoyance or insult to the complainant. *AIR 1934 Oudh 281.*

(4) Demolition of building by public authorities in bona fide exercise of their powers under the Municipalities Act—No offence. *1978 Cri LJ 715 (Bom).*

(5) Accused cutting branches overhanging his land and throwing them on the complainant's neighbouring land—Held no offence. *1978 Ker LT 441.*

11. Lawful entry and remaining unlawfully—Second para.—(1) If a person lawfully enters into or upon property in the possession of another and subsequently, unlawfully remains there with intent thereby to intimidate, insult or annoy any person in possession of such property or to commit an offence, he is guilty of the offence of criminal trespass under the second para of this section. *AIR 1969 Mad 33.*

(2) The accused, a vice-chairman of a school committee came into a school when the Headmaster was absent and beat two boys who had quarrelled with his nephew. the Headmaster returned to the school a little later and coming to know of the incident reprimanded the accused. The accused was enraged at this and abused the Headmaster and caught hold of his shirt and was about to use physical force. The Headmaster pushed back the accused who went away abusing him and threatening physical harm to him when he came out of school, the accused was held liable under the second para of this section. *AIR 1964 Bom 82.*

(3) Though the remaining may be unlawful, if there is no intention as provided in this section, there would be no offence. *AIR 1955 NUC (Assam) 4229.*

12. Complaint.—(1) The words "any person in possession" in this section do not mean only a complainant in possession; that there is no authority for taking the offence of criminal trespass out of the general rule which allows any person to complain of a criminal act, and that hence, a landlord could file the complaint although that property was in the possession of a tenant. *AIR 1934 All 1034.*

(2) Where a Magistrate passes an order under Section 145, Criminal P.C. maintaining the possession of one party and forbidding the other party from interfering with the property and the latter enters upon the property and takes away the harvest, the offence under this section cannot be tried except on a complaint by the Magistrate. *AIR 1958 Andh Pra 718.*

13. Charge.—(1) The charge should specifically state the intent with which the trespass was made and if that intent was to intimidate, insult or annoy any person in possession of the property, the name of that person should also be stated. *AIR 1953 Kutch 1.*

(2) Where the accused are charged for rioting under Section 147, their common object being to take forcible possession of complainant's land, in the absence of a charge under this section, the accused cannot be convicted of criminal trespass. *AIR 1914 Cal 631.*

(3) The charge should run as follows:

I (name and office of the Magistrate) hereby charge you (name of accused) as follows:

That you, on or about the—day of—, at—, committed criminal trespass by cutting into or upon the property (specify the property) in the possession of X with intent to commit an offence (or to intimidate or insult or annoy X) (specify the offence) and thereby committed an offence punishable under section 447 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

14. Proof.—(1) To sustain a conviction under this section, the prosecution must establish the intent with which the accused is alleged to have committed trespass. *1966 All WR (HC) 395.*

(2) In deciding a question of possession, a criminal Court is not entitled to disregard decree of a civil Court declaring the rights to the property which is the subject-matter of trespass. *AIR 1952 Sau 22.*

15. Trespass and private defence.—(1) Persons committing criminal trespass cannot convert their trespass into possession and force the person in possession to go to a civil Court. In such a case the person in possession has the right of private defence. *1960 Ker LJ 24.*

16. Procedure.—(1) An offence of criminal trespass can be compounded, but if the charge is that it was committed by five or more persons forming an unlawful assembly, it cannot be compounded. *AIR 1923 Mad 592.*

(2) Where the charge is against a public servant under this section, sanction under Section 197, Cr.P.C. is necessary. *(1971) 73 Bom LR 823.*

(3) Cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate, Village Court.

17. Conviction.—(1) Under this section, there must be an express finding regarding the requisite intention and a conviction is not sustainable in the absence of such finding. *AIR 1935 Sind 20.*

(2) Where the entry is lawful and the subsequent possession becomes unlawful, the offence is committed when the possession becomes unlawful and not at the time of the original entry. *AIR 1940 Nag 117.*

(3) Where an offence of criminal trespass is included in another offence the accused cannot be convicted of both the offences. *AIR 1968 Manipur 26.*

18. Acquittal of accused—Effect.—(1) Where the accused was tried under Sections 426 and 447 for cutting and removing bamboos from the complainant's bamboo clump and was acquitted but the Magistrate ordered that the complainant should retain the clump till ousted by a civil Court it was held that the order was illegal. *AIR 1917 Cal 591.*

19. Sentence.—(1) Where the accused were found to have been actuated by mala fides and to have abused the powers vested in them to discharge public functions, the Supreme Court refused to interfere with the enhanced sentences given by the High Court. *(1969) 2 SCWR 432.*

(2) In a case where the accused had spent a lot of money in the conduct of the case and was actuated by prestige, the Court took a lenient view and reduced the sentence of fine of Rs. 200 to fine of Rs. 10. *AIR 1955 NUC (Pat) 227.*

(3) See the following cases as to various sentences imposed on accused persons:—

(a) Accused students—Period of imprisonment reduced to period already undergone. *1979 Cri.LR (Mah) 87.*

(b) Accused poor agriculturists—Sentence of R.I. for one month and fine of Rs. 100/- each reduced to fine of Rs. 100/- each. *1978 Cri LJ (NOC) 291 (Gauhati).*

(c) Conviction under Section 447/376—Sentence reduced to period of detention already suffered—Set-off of period of detention as under-trial prisoner. *1978 WLN (UC) 124.*

(d) Very old occurrence simple marpit about 7.5 years back—Trial Magistrate having given accused benefit of Probation of Offenders Act. Held, no reason to interfere with his discretion. *1977 Raj Cri C 57.*

(e) Six years elapsed since the incident took place—Parties now reconciled to the position—No dispute likely to be raised regarding these fields—Sentence of imprisonment set aside and fine imposed. *1975 BBCJ 491.*

(f) Once the common intention to commit a criminal act is negatived all the more a lenient view in imposing sentence has to be taken. *1981 Raj Cri C 177.*

20. Revision.—(1) The High Court will not ordinarily interfere in revision against an order of acquittal. *(1966) 2 Mad LJ 149.*

(2) Where the acquittal is made on a mistaken view of the law, interference is proper and justifiable. *AIR 1950 All 653.*

21. Restoration of possession.—(1) If an accused person has been convicted under this section, an order for restoration of property to the person dispossessed as a result of the trespass can be made under Section 456, Criminal P. C. only if the accused used criminal force or show of force or criminal intimidation in the act of trespass. *1961 (1) CriLJ 627 (Assam).*

22. Refund of court-fees.—(1) The offence under this section being a cognizable offence, Section 31 of the Court-fees Act is inapplicable and as such a Magistrate cannot direct repayment of cost of stamps to the complainant. *(1901) 6 Mys CCR No. 96, P. 958.*

23. Practice.—Evidence—Prove: (1) That the complainant has possession of the property in question.

(2) That the accused entered into or upon the property; or after having lawfully entered unlawfully remained there.

(3) That he so entered or remained there with the intention (a) to commit an offence; or (b) intimidate, insult or annoy the person in possession.

Section 448

448. Punishment for house-trespass.—Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand [5][taka], or with both.

Case and Materials : Synopsis

1. *Scope.*
2. *"Building" used as a human dwelling.*
3. *Building used as place for custody of property.*
4. *"As a place of worship".*
5. *Public office.*
6. *Complainant must have been in actual possession.*

1. Scope.—(1) To establish a charge under section 448 Penal Code, there must be an unlawful entry and there must be proof of one or other of the intentions mentioned in section 441 of the Penal Code. It must be proved by evidence that the person concerned entered a place which was in possession of another and that the entry was made with a view to causing insult., annoyance or injury to the person concerned *(10 CrLJ 410)*. Where there is nothing to show that the accused entered the premises or remained there with any criminal intention specified in the section, there can be no conviction under this section. The intention of the trespasser is material for determining the guilt and not the consequences of the trespass *(PLD 1959 Lah 495)*. When a tenant vacates the premises, physical possession automatically reverts to the landlord. The possession of the landlord continues even after the property has been let on rent and its actual possession delivered to the tenant, for the possession of the tenant is the possession of the landlord. A sub-tenant charging the landlord with an offence of house-trespass has to show landlord entered upon property in his possession with intent to commit an offence or to intimidate, insult or annoy him. If the landlord was ignorant of existence of the subtenant and genuinely believed that in the death of the tenant there was no one in existence who could inhert the tenancy and entered under that belief, he certainly did not enter with intent to commit an offence or with intent to annoy the sub-tenant. A trespasser does not acquire possession the moment he enters a building. The trespasser secures possession only when his possession becomes peaceable. In order to sustain a conviction under this section, there must be an express finding that one or other of the intents mentioned in section 441 has been found *(PLD 1958 Dhaka 350)*. Where possession of a house is taken by means of criminal trespass with a show of force, the Court can direct the restoration of the house to the complainant under section 522 of the Code of Criminal Procedure.

(2) Forcible entry during the temporary absence of the owner.—A forcible entry into a house, during the temporary absence of the owner from the house, would constitute an offence of criminal trespass punishable under section 448. *Biswas Nukharji Vs. Haji Zahan Khan (1953) 5 DLR 139.*

(3) No offence under the section when there was no one in the house. In a charge under section 448, or house trespass with intent to cause wrongful loss and to intimidate the inmates, there should be a finding by the Court below that the entrance was effected with the intention of causing any wrongful loss. There could be no intimidation when there are no inmates in the room. *Madhushudan Shaha Vs. Jatindra Mohan (1950) 2 DLR 17.*

(4) Criminal trespass—Intention of trespass though not mentioned in the charge—Conviction not bad if inference of criminal intent can be drawn from the facts and circumstances. *Ruhul Amin Vs. Nagendra Nath Roy (1970) 22 DLR 66.*

(5) Even if the particular plot No. 197 was ejmali property the accused had no right to take law in their own hands and trespass into the complainant's hut and demolish it. Merely because of the plea that a civil suit is pending between the parties it cannot invalidate an order of conviction and sentence u/s 379 P.C. *Afel Khan Vs. State (1977) 29 DLR 3.*

(6) Defence that the entry into the disputed huts was bonafide basing its claim on C.S. Khatian and registered sale-deed—Such defence is untenable when civil court found the title in favour of the complainant coupled with possession. The defence was that they entered into disputed huts in assertion of their bonafide claim of right and hence they committed no offence. The Civil Court settled the question of ownership of the disputed properties in favour of the appellant (complainant). The learned judge of the High Court fell into an error in taking the view that the alleged forcible entry into the huts belonging to the appellant did not constitute criminal trespass, on consideration of the C.S. khatian which is in favour of the respondent overlooking the decrees of the civil suit in which the trial court as well as the lower appellate court found possession of the disputed huts in favour of the appellant. *Sukhamoya Dutta Vs. Abdul Gafur (1979) 31 DLR (AD) 262.*

(7-8) Civil suit pending—Trespass—bona fide claim of right—such claim would not justify respondent's taking law into their own hands if the proverty is found in exclusive possession of appellant—respondents having been found to be in possession in the case land along with the appellant and a partition suit being pending the alleged act does not constitute trespass as contemplated under this section. *Belayet Hossain Vs. Humayun & other 1983 BLD (AD) 60.*

(9) The offence of house-trespass—Effect of Civil Courts order of injunction in favour of the accused—In the face of such an order of injunction Criminal Court cannot accept the claim of possession made by a party who is obliged to get the order of injunction vacated in the civil Court—Had the Courts below been keen enough to take notice of the injunction the finding that the informant party were in possession of the disputed holding could not have been made—In any case the appellant could not be legally convicted for criminal trespass—Order of conviction and sentence as also that of restoration of possession are set aside. *BCR 1988 AD 25.=1988 BLD (AD) 157.*

(10) Non-consideration of the vital piece of evidence as to injunction granted by the Civil Court—In the face of such an order of injunction no criminal Court can accept beyond reasonable doubt the claim of possession made on oral and other evidence. *41 DLR 129 AD.*

(11) Section 448 relates to commission of house-trespass. In order to constitute the offence of house-trespass the allegation has to disclose that in spite of possession of the petitioner the servant quarter and garage were in the possession of the complainant and that the accused petitioner illegally entered into or upon the servant quarters and garage. The petition of complaint is not only vague but absolutely silent in the matter. Therefore, it has disclosed no offence under section 448 PC either. Allegation by the complainant that accused has no subsisting interest in the property in question thus raises a question of civil dispute, not a criminal issue—Court strongly disapproves resort to criminal proceeding for harassing a person with motive of settling civil dispute. *39 DLR 214.*

(12) One of the accused was charged with many others, under sections 147 and 448 of the Penal Code, with an additional charge under section 304 of the Code but when he was examined under section 342 Cr. Procedure Code he was not told that he was facing trial under section 304 in addition to common charge under sections 147 and 448. As such his conviction under section 304 is illegal. *37 DLR 113 SC.*

(13) Subsequent order in an application for restoration of possession directing eviction of the trespassers is illegal inasmuch as the Appellate Court after disposal of an appeal becomes functus officio and, as such, no jurisdiction to entertain an application for an order under section 522 Cr. Procedure Code. *22 DLR 734.*

(14) An offence under section 448 of the Penal Code is not a minor offence in relation to offence under section 395 and 412 of the Penal Code. *12 DLR 53 SC.*

(15) Intention is the most material ingredient, which is to be gathered from the facts and circumstances of a case. *2 BCR 465 SC.*

(16) A house-trespass must first be a "criminal trespass" as defined in S. 441 and such criminal trespass must be by entering into or remaining in any building, tent or vessel in the possession of another and used as a human dwelling or as a place of worship or as a place for the custody of property. *AIR 1956 Cal 118.*

(17) Where the entry into or remaining in the building, etc., is not a criminal trespass within the meaning of S. 441, no offence under this section is committed. *AIR 1968 Ker 21.*

(18) Where the entry into a house is not with one of the intents mentioned in S. 441 there will be no criminal trespass and consequently, no house-trespass. *AIR 1961 All 637.*

(19) Entry lawful—No evidence that accused remained in the building with intent to intimidate etc.—No Criminal trespass. *AIR 1955 NUC (Assam) 4239.*

(20) Accused taking possession of rooms belonging to complainant when the latter had left for another place for a short while—Refusal to vacate on complainant's return—Section 441 applied and accused was guilty under S. 448. *AIR 1950 Cal 410.*

2. "Building" used as a human dwelling.—(1) The ordinary and usual meaning of a building is a block of bricks or of stonework, etc. covered by a roof. *1970 CriLJ 1199 (Pat).*

(2) The determining factor is not the existence of doors or shutters or the fact that the door was shut or open at the time of the entry by the accused, but the nature of the structure as a whole and the purpose for which it was intended to be and was being used. *AIR 1930 Lah 414.*

(3) In this case, the place entered into was held to be a building. *AIR 1961 Pat 409.*

3. Building used as place for custody of property.—(1) A cattle-yard surrounded by walls or thorn fence is a building for the custody of property. *(1874) 6 NWPHCR 307.*

(2) Whether a particular structure or any part of it is intended to be used as a human dwelling or a place of worship or for custody of property must necessarily depend upon the particular facts of each case. *AIR 1929 Sind 17.*

4. "As a place of worship".—(1) Where complainants were pujaris performing pujas in a temple and accused defiantly entered into the temple, assaulted the pujaris and threw away the articles of worship it was held that they were rightly convicted of criminal trespass. *(1897) 2 Mys CCR 341.*

5. Public office.—(1) A person entering a public office e.g. the office of the Block Development Officer, is not guilty of an offence under this section. *(1973) 1 Cut WR 195.*

6. Complainant must have been in actual possession.—(1) Where the complainant is not in actual possession of the building there cannot be a criminal trespass and consequently a house-trespass. *ILR (1976) Cut 823.*

(4) A constructive possession e.g., through a tenant is not sufficient. *AIR 1951 Kutch 76.*

(5) It is not necessary that the complainant should be physically present at the time of the entry of the accused. *AIR 1964 Mys 11.*

(6) A Court record, recording delivery of possession to A though not conclusive should be given due weight by criminal courts in deciding whether possession has passed to. *AIR 1959 KerLT 444.*

7. Question of title not relevant.—(1) A Magistrate dealing with case of criminal trespass or house-trespass is concerned only with question of possession of complainant. It is not within his province to decide whether the complainant has title to the property in question. *AIR 1963 Manipur 15.*

8. By entering into a building, etc.—(1) A criminal trespass will become a house-trespass only when the accused enters into a house, tent or vessel. Thus, where A has locked the house in his possession and B puts another lock on the premise, B will be guilty of wrongful resistant under S. 341 but not house-trespass under this section. *(1963) 2 CriLJ 543 (All).*

(2) Going on to the roof of a house is not entering into the building. It may amount to a criminal trespass punishable under 447. *AIR 1933 Lah 433.*

9. Intention to commit offence, etc.—(1) One of the essential ingredients of the offence of criminal trespass and therefore also of an offence under S. 442, is the intention of the accused to intimidate, insult or annoy the inmates or to commit an offence. *AIR 1964 Mys 11.*

(2) The words of the Section 441 must be costly adhered to and it must be expressly found that the accused had the intention to intimidate, insult or annoy the inmates or to commit an offence. *AIR 1927 Sind 261*

(3) Mere knowledge of the accused that his act must cause insult or annoyance is not sufficient in the absence of proof of intention to cause it. *AIR 1918 Mad 136.*

(4) The intention to commit an offence, etc. must exist before the entry is made. The mere fact that after making the entry the accused formed the intention of committing an offence or of intimidating, etc., is not sufficient to convict him for criminal trespass or of an offence under this section. *AIR 1958 Raj 214.*

(5) In dealing with question of intention the principle that a man must be presumed to intend the natural consequences of his act must be taken into considered. *AIR 1938 Lah 848.*

10. Entry with intention to commit an offence.—(1) Where the intent alleged is not established it is not open to the Court to find that there was some sort of intent to commit some offence. *(1956) 60 Cal WN 440.*

(2) It is not necessary that the intended offence should be against the person. N was sitting on the pial of B's house. A entered the house and assaulted N. It was held that A was guilty of house-trespass within this section. *AIR 1959 Tripura 49.*

(3) An intent to have illicit intercourse with the complainant's wife would be an intent to commit an offence. *AIR 1935 Pesh 83.*

11. Entry under claim of right.—(1) Where the intention of the accused in making the entry is not to commit any offence or to intimidate, insult or annoy the inmates, but under a bona fide claim of right to the premises, he is not guilty of criminal trespass and, therefore, of house-trespass. *1875 Chand (Cri) 421.*

(2) Where the accused who claimed a title to a house in the possession of the complainant forcibly entered into the house by breaking open the lock, during the absence of the complainant, it was held that the accused was guilty under this section. *AIR 1934 Oudh 281.*

(3) Person in peaceful possession of property for long time—Resort to force by claimant even claiming title bona fide to eject such person is illegal. *AIR 1953 All 725.*

(4) Removal of cattle belonging to deceased by his heir and servant from the possession of the concubine of deceased—Conviction under Sections 379 and 448 is illegal. *AIR 1941 Mad 674.*

12. Entry for attachment of property.—(1) An entry for attaching property in execution of a decree obtained by the accused against the complainant is not a criminal trespass and consequently not a house-trespass. *AIR 1930 Cal 720.*

13. Accused, a public servant.—(1) A public servant entering a building for the purpose of execution a lawful warrant against the accused cannot be prosecuted under this section without the sanction of the Court under S. 197, Criminal P. C. So long as there is a reasonable connection between the impugned act and the performance of his official duties, he will be protected. *(1970) 36 Cut LT 873.*

(2) An Excise Officer entering a house for making a search for cocaine and with no such intention as is specified in S. 441 cannot be held to commit house-trespass, merely because he failed to record his reasons for the search as required by S. 53 of the Excise Act. *AIR 1925 Oudh 505.*

14. Explanation.—(1) The introduction of any part of the trespasser's body such as putting his hand inside a window is sufficient to constitute house-trespass. But the mere putting of a hand in the wall of a house without putting it through the hole is not entry into the house. *AIR 1923 Lah 509.*

(2) The mere pushing in of the shutters of a door which is not chained or locked will be a house-trespass. *AIR 1922 Nag 26.*

15. Remaining in the building.—(1) A person will be guilty of criminal trespass, if after entering lawfully into a house, he remains there with any of the intentions referred to in S.441. *1970 All Cri R 589.*

(2) Where A was convicted of house-trespass by making an unlawful entry into the house and was fined Rs. 50, and he paid the fine but continued to remain in the house, it was held that he could not be prosecuted against under S. 448 for remaining in the house unlawfully inasmuch as the second part of S. 441 cannot apply unless the entry was lawfully made but the remaining was unlawful. *AIR 1951 Mad 55.*

16. Attempt.—(1) The removing of a trap door with the intention of committing house-trespass amounts to an attempt to commit the offence under Section 442. *1983 Rat Cri C 188.*

17. Civil remedy.—(1) Where there is a dispute between the co-owners of a house who are occupying different portions of the house and one of them accuses the other of blocking the way to his portion, the proper forum for the decision of the dispute is the Civil Court and not the Criminal Court. *1970 All CriR 259.*

(2) One 'S' had gifted his property to a trust with condition that he would stay in the house till his death and the trust can take over the possession after that. During his lifetime he invited his brother's wife who was a widow to stay in the house with him. After the death of 'S' the widow continued to stay in the house and she was served with a notice to quit. On failure a report under S. 448 was filed and she was asked to vacate the premise within two months. Held, that the matter was essentially a civil matter could be adjudicated upon by the a competent civil court. *AIR 1983 SC 159.*

18. Servant acting under master's orders.—(1) A servant making an entry into a building under his master's orders, but who has himself, as such, no such intention as is necessary to constitute criminal trespass, cannot be convicted under this section. *AIR 1949 Cal 85.*

19. Evidence and proof.—(1) Where the accused is charged under S. 354 (outraging the modesty of a woman) and this section, statements made by her at the time of the occurrence will be corroborative evidence of her testimony. *AIR 1953 Cal 332.*

(2) In the absence of evidence to prove the intention referred to in S. 441, there can be no conviction under S. 448. *AIR 1935 Pat 523.*

20. Charge and conviction.—(1) A charge under S. 448 is superfluous where the accused is also, on the same facts, charged under S. 456. *1886 Rat Un Cr C 302.*

(2) An accused charged only under S. 441 cannot be convicted of an offence under S. 442, which is an aggravated form of the offence of S. 441. *AIR 1934 Cal 480 (482)=35 CriLJ 949.*

(3) A person charged under S. 395 of the Code cannot be convicted of the offence of S. 323 and Section 448. *AIR 1931 Cal 414.*

(4) A charge for an offence under S. 442 must state which one of the intentions specified in S. 441, the accused had, in effecting his entry into complainant's building. A charge which does not state it is defective and the whole proceeding will be vitiated thereby. *AIR 1957 Orissa 190.*

21. Sentence.—(1) An ex-tenant who quietly re-enters the premises with the intention of asserting his right does not deserve any indulgence in the matter of punishment. *AIR 1951 Kutch 76.*

22. Order under S. 456, Criminal P. C.—(1) Where a person is convicted under S. 448 for criminal trespass into a building with the intention committing an offence referred to in S. 106 of the Criminal P. C. an order under S. 106 for security to keep the peace can be made. *(1903) 7 Cal WN 25.*

24. Procedure.—(1) Where an offence under this section was tried as a warrant case and the accused was discharged under S. 253(2) of the Criminal P. C., the discharge is not an acquittal and does not bar a trial on a fresh complaint. *1968 All WR (HC) 703.*

(2) In a trial for an offence under this section, as in other trials also the accused should, under S. 246 of the Criminal P. C., be called upon to enter upon his defence and produce his evidence. A conviction, in the absence of such procedure being adopted would be vitiated. *AIR 1927 Sind 261.*

(3) Persons charged under S. 147 of the Code with rioting, the common object mentioned being to enforce a right to a shop, cannot be convicted under Ss. 447 and 323 of the Code, the common object of causing hurt or of committing criminal trespass not being charged against them. *AIR 1918 Mad 496.*

(4) Cases like criminal trespass ought not to be transferred to Honorary Presidency Magistrates for trial as they cannot be expected to clearly understand the distinction between civil and criminal trespass. *AIR 1966 Mad 441.*

(5) Cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

25. Sanction where offence intended is adultery.—(1) A charge of house-trespass with intent to commit adultery, may be enquired into without the husband's complaint. *1 Weir 531.*

26. Sanction in other cases.—(1) When under Section 20 Electricity Act (1910) a person was duly authorised by the Electricity Board and was competent to enter the premises and remove fittings etc. under provisions of Section 56 of that Act, no suit, prosecution or other proceeding will lie against him for anything done in good faith and no Court can take cognizance of any offence under Section 448 without sanction from proper authority. *1976 BBCJ 572.*

27. Abetment of house-trespass.—(1) Where the accused did not himself enter into the house, it was held that the accused would not be guilty of the substantive offence of house trespass but would be guilty of abetment of house-trespass. *1947 Rang LR 137.*

28. Practice.—Evidence—Prove: (1) That the accused committed criminal trespass.

(2) That such criminal trespass was committed by entering into or remaining in a building, tent or vessel.

(3) That such building, tent, or vessel, was used as a human dwelling or as a place for worship or as a place for the custody of property.

29. Charge.—(1) 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 of—, at—, committed house-trespass by entering into (or remaining in) the building (or tent or vessel) of X used a human dwelling (or as a place of worship, or for the custody of property with intent (specify) the motive for entering into (or remaining in), and that you thereby committed an offence punishable under section 448 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 449

449. House-trespass in order to commit offence punishable with death.—Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with [6][imprisonment] for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section provides punishment for house-trespass committed with intent to commit an offence punishable with death. It is not made necessary under this section that the offender should do any further act than house trespass towards the commission of the offence punishable with death. There can be no doubt that the words "in order to" have been used to mean "with the purpose of." If the purpose in committing house-trespass is the commission of an offence punishable with the house-trespass becomes punishable under section 449 of the Penal Code.

(2) A house-trespass for the purpose of committing any offence punishable with death is an offence under this section. It is immaterial whether the purpose is actually accomplished or not. The words "in order to" mean 'with the purpose of', and so, if the purpose of the house trespass is to commit any offence punishable with death, this section becomes applicable, irrespective of the question whether the principal offence has or has not been actually committed. *AIR 1965 SC 132.*

(3) The intention of the accused must be judged by taking note of all the circumstances of the case. If the circumstances lead to the inference that the accused only intended to commit an offence not punishable with death, his conviction under this section cannot be maintained. *AIR 1951 Raj 42.*

(4) Where the accused are charged under S. 449 and S. 396, it is not competent for the Sessions Judge to quash the commitment, but he can stay the trial of some charges and allow them to be withdrawn on conviction being had on the other charges. *AIR 1939 Pat 35.*

(5) Sections 302/34, 449/148 motive for crime—Evidence of recognition from a hanging lantern from ceiling not believed—Conviction set aside. *Hossain Ali Vs. The State, 7 BCR AD 78.*

2. Practice.—Evidence—Prove: (1) That the accused committed house-trespass.

(2) That the same was committed in order to commit an offence punishable with death.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

4. Charge.—(1) The charge should run as follows:

I, (name and office of the Judge etc.) hereby charge you (name of the accused) as follows:

That you on or about the— day of—, at—, committed house-trespass by entering into (or remaining in) the building of X used as a human dwelling in order to the commission of an offence punishable with death, to wit—, and that you thereby committed an offence punishable under section 449 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 450

450. House-trespass in order to commit offence punishable with [6][imprisonment] for life.—Whoever commits house-trespass in order to the committing of any offence punishable with [6][imprisonment] for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section deals with punishment for house-trespass, where the accused enters into any building, tent or vessel thereby committing an offence of house-trespass in order to commit an offence punishable within imprisonment for life.

(2) This section deals with the offence of house-trespass committed in order to commit an offence punishable with imprisonment for life. *1980 Cri R LR (Guj) 187.*

(3) Mens rea must be present in the mind of the accused when he entered the property as it as a necessary ingredient to constitute an offence of criminal trespass. *1980 Cri LR 187.*

(4) A and B coming to C's house to cause death of C's son D—On his son D being caught by A, C raised alarm and then only B give several knife blows to C (deceased) —Held, A would be guilty under S. 307 P. C. and B under Ss. 307, 34, 302 PC—A and B both would also be guilty u/s. 450. *1982 All LJ 140.*

(5) Where the conviction of the two accused was based entirely on the alleged confessional statement made by one of the accused and material witness were not examined by prosecution leading to drawing of adverse inference, the convictions were set aside. *(1984) 1 Crimes 367.*

2. Practice.—Evidence—Prove: (1) That the accused committed house-trespass.

(2) That the same was committed in order to commit an offence punishable with imprisonment for life.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

4. Charge.—(1) The charge should run as follows:

I, (name and office of the Judge, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, committed house-trespass by entering into (or remaining in) the building of X, and used as a human dwelling in order to the commission of an offence punishable under section 450 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 451

451. House-trespass in order to commit offence punishable with imprisonment.—Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

Cases and Materials : Synopsis

1. *Scope and applicability.*
2. *Intention to commit offence.*
3. *Offence.*
4. *Intention to annoy.*
5. *House-trespass.*
6. *Evidence and proof.*
7. *Charge.*
8. *Charge against two or more persons.*
9. *Procedure.*
10. *Jurisdiction.*
11. *Sentence*
12. *Practice.*

1. Scope and applicability.—(1) In order to constitute an offence under this section the prosecution must first establish that an offence of simple house-trespass has been committed and then satisfy the court, in the particular case before it, that the house trespass was committed with the object of committing a future offence punishable with imprisonment. It is not necessary that the court should be in a position to say which specific offence the accused intended to commit. It is sufficient if the evidence leaves no room for reasonable doubt that the accused intended to commit an offence. It is only an offence which is punishable under a special or a local law that must be punishable with imprisonment of six months or more before it can be considered to be an offence within meaning of the section *(32 CrLJ 732)*. Where an accused was found at night inside the complaint's house with the intention of visiting the daughter-in-law of the complainant, who was a woman of loose character and there was every reason to suppose that he entered the room with her knowledge and consent, it was held that his conviction under section 451 could not be sustained *(AIR 1914 Oudh 182)*.

(2) In order that the section may apply:

(a) there must be a 'house-trespass' as defined in S. 442, and

(b) such house-trespass must have been made in order to commit an offence punishable with imprisonment. *AIR 1919 All 258.*

(3) The mere fact that the accused puts forward a bona fide claim to property will not save him from the consequences of an entry into a house in possession of another, if his intention was to commit an act which is an offence punishable under the Code. *AIR 1950 All 653.*

2. Intention to commit offence.—(1) An intent to commit an offence punishable with imprisonment must be proved before an accused can be convicted under this section. *1 Weir 524.*

(2) The offence intended need not be actually committed or even attempted. Where A enters B's house with intent to commit adultery, the offence is complete. It is not necessary that the adultery should have been committed or attempted. *AIR 1917 Nag 90.*

(3) If the accused who had committed house trespass, without concealing his presence had committed the offence as intended by him, he will be guilty under this section and not under Section 454. *AIR 1954 All 249.*

3. Offence.—(1) The offence under this section would include an offence under a special or local law, only if under that law, the offence is punishable with imprisonment for more than 6 months. *AIR 1959 Pat 376.*

(2) Where the offence intended to be committed by the accused is not one under any special or local law, it is not necessary that it should be punishable with imprisonment for 6 months. If it is punishable with any term of imprisonment, it will be an 'offence' for the purposes of this section. *AIR 1931 Lah 405.*

(3) An entry made with consent of the owner of a house is no an offence. *AIR 1914 Oudh 182.*

4. Intention to annoy.—(1) Where the intention alleged was to have illicit intercourse with the complainant's unmarried sister, which is not an offence, the Court cannot convict the accused under S. 448 on the ground that the act of the accused caused annoyance to the complainant. *1 Weir 537.*

5. House-trespass.—(1) This section will not apply where the original entry is lawful. *1954 Madh BLR (Cri) 301.*

(2) The question where the property trespassed into is a building used for human dwelling depends upon the nature of the structure as a whole and the purpose for which it was intended to be, or was being, used. *AIR 1930 Lah 414.*

(3) A courtyard partly surrounded on the front by a mud wall with no roof over it or door gateway was held not to be a building for the purpose of this section. *AIR 1919 Lah 333.*

(4) Where a person is charged with the offence under Ss. 454 and 457, but there is no evidence of 'lurking', he may be punished under this section. *AIR 1940 All 259.*

6. Evidence and proof.—(1) Where the accused makes an entry into the house of the complainant when he was absent from the house, a presumption that the accused intended to annoy the complainant is not justified. *AIR 1924 Bom 486.*

(2) Where the accused is charged with having entered the house of the complainant in order to commit the offence of adultery with the complainant's wife, the prosecution must prove that there was no connivance on the part of the complainant or his consent to the act of the accused. *AIR 1956 Madh B 69.*

7. Charge.—(1) A charge under this section must charge the accused with committing house-trespass with intent to commit some specific offence punishable with imprisonment. *(1871) 16 Suth WR Cr 53.*

(2) Where the accused is charged with an intention to commit a particular offence punishable with imprisonment but it is found on evidence that the intention was to commit another offence punishable with imprisonment, he can be convicted under this section provided he has not been prejudiced. *AIR 1960 MP 375.*

(3) 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—, committed house-trespass by entering into (or remaining in) the building of X, used as a human dwelling (or for the custody of property), in order to commit the offence of—(or theft), and that you thereby committed an offence punishable under section 451 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

8. Charge against two or more persons.—(1) Where A and his son B were charged with offences under Sections 451/34 and A was given the benefit of doubt and acquitted, the acquittal will not automatically and as a matter of law entail an acquittal of B also. *(1968) 70 Punj LR 344 (D).*

9. Procedure.—(1) Where A laid a complaint against B for entering into his house with the intention of committing theft, and the accused admitting the entry pleaded that his intention was to commit adultery with A's wife, but A refuses to lay a complaint on that basis, the accused was acquitted of the offence under this section. *(1869) 5 Mad HCR (Appl) v.*

(2) Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate. But if the offence is theft, then it is triable by Metropolitan Magistrate or Magistrate of the first class.

10. Jurisdiction.—(1) Section 198, Criminal P. C., provides that no Court shall take cognizance of an offence under S. 497 or 498 of the Penal Code in the absence of a complaint by the husband or some persons who had care of the woman on his behalf in his absence and who made the complaint with the leave of the Court. But this does not bar the jurisdiction of the Court to take cognizance of the offence of house-trespass with the intention of committing an offence under S. 497 or 498. *1899 All WN 212.*

11. Sentence.—(1) Where the accused entered the complainant's house and committed assault and was convicted under Sections 325 and 451 of the Code the punishment given for the substantive offence under Section 325 is sufficient. It is not necessary to pass a separate sentence for the house-trespass also. *(1865) 2 Suth WR CR 29.*

(2) This section applies where the accused commits house-trespass with the intention to commit theft. The accused if he commits theft may be guilty of both the offences under Section 380 and under this section. *1962 SCD 593.*

12. Practice.—Evidence—Prove: (1) That the accused committed house-trespass.

(2) That the same was committed in order to commit theft, or an offence punishable with imprisonment.

Section 452

452. House-trespass after preparation for hurt, assault or wrongful restraint.—Whoever commits house-trespass, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases Materials : Synopsis

1. *Scope.*
2. *House-trespass.*
3. *Preparation for causing hurt, etc.*
4. *Procedure.*
5. *Sentence.*
6. *Practice*
7. *Charge.*

1. Scope.—(1) This section may be read with sections 319, 339, 351 and 451 of the Penal Code. This section deals with the commission of house-trespass after the accused makes preparations for causing hurt to any person or for assaulting any person or for wrongful confinement of any person or putting any person in fear of hurt or assault or of wrongful confinement. There must be clear evidence of preparation being made for causing hurt. Where the accused trespassed into a shop for assaulting the complainant, no offence under this section is committed *(2 CrLJ 168).*

2. House-trespass.—(1) A courtyard of a house where a person lives and tethers his cattle is a 'building' and an entry into such a place after preparation for causing hurt or for doing any of the other things mentioned in the section is an offence under this section. *AIR 1956 Punj 122.*

(2) A place which has no roof and which is open except for a few thorny bushes indicating merely the extent of the courtyard without door or gateway is not a building and a trespass therein is not a "house-trespass" within this section. *AIR 1928 All 607.*

3. Preparation for causing hurt, etc.—(1) The mere fact that a man enters another man's house and commits assault or causes hurt does not necessarily presuppose preparation. There must be clear proof of a preparation for causing hurt etc. *1966 CriLJ 236 (Raj).*

(2) Where A enters B's house to carry away his (A's) wife, the fact that he also intended to cause hurt to any person who stood in his way would not render his guilty under this section. *AIR 1960 Madh Pra 24.*

(3) Accused came with lathis, entered the house of the Zilander of the Court of Wards and assaulted him; it was held that the accused were guilty under this section. *AIR 1920 All 164.*

(4) The accused who were Muslims arming themselves with sticks went into a hotel in the month of Ramzan and asked the Muslims who were eating there to stop eating and when they refused, beat them. It was held that they committed an offence under this section. *AIR 1950 Pesh 22.*

4. Procedure.—(1) An accused charged under this section and S. 504 cannot be punished for both these offences separately. *(1900-1902) 1 Low Bur Rul 279.*

(2) An accused charged with having committed dacoity should not be convicted under this section and S. 323 because these offences are not cognate offences, and in dacoity one need not necessarily commit either house-trespass or cause simple hurt. *AIR 1945 All 87.*

(3) Separate sentences in each case can be given if the offences under this section and Section 323 were committed on the same occasion. *AIR 1938 Rang 114.*

(4) An accused convicted under this section for an offence committed at a particular time and place cannot be convicted on that evidence, for an offence committed at a different time and place. *AIR 1924 Lah 616.*

(5) An offence under this section, not being one involving breach of the peace, no security can be demanded for keeping the peace under Section 106. Criminal P. C. *AIR 1926 Lah 675.*

(6) If house-trespass was committed for causing injury as this offence involves breach of the peace, an order under Section 106, Criminal P. C., can be properly passed when the accused is convicted under this section. *AIR 1925 Lah 621.*

(7) An accused charged under this section with preparation to cause hurt cannot be convicted under Section 19(e), Arms Act, without a specific charge therefor and without an opportunity being given to the accused to meet the charge. *AIR 1927 Rang 32.*

(8) Cognizable—Warrant—Not bailable—Not Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

5. Sentence.—(1) Where the accused is convicted under this section a sentence of imprisonment must be given. The Court would be committing an error in giving merely a sentence of fine. *AIR 1972 Pat 50.*

(2) A sentence of 2 years' R.I. was not considered excessive where the accused were found to have carried pistols and spears. *AIR 1956 Punj 122.*

(3) In a case under Section 452 and Section 325 during appeal charge under Section 325 was compounded and as such accused was acquitted of that charge. But as offence under Section 452 was not compoundable the Supreme Court released accused on term already undergone. *AIR 1980 SC 1200.*

(4) Accused, 77 years old, was convicted under S. 452 PC and sentenced to 4 years' R.I.—On Appeal to SC by special leave, sentence of accused reduced to 6 months in view of his old age and the peculiar circumstances of the cases. *AIR 1981 SC 2008.*

(5) Where the accused who was 16 years of age on the date of offence was convicted under Ss. 307 and 452, it was held that having regard to the age of the accused and other circumstances of the case reduction of sentence to the one already undergone would meet the ends of justice. *AIR 1982 SC 1465.*

(6) Accused 20 years age, was convicted under Ss. 452 & 397 PC and sentenced to 7 years' imprisonment—Report of Probation Officer showed that the accused belonged to good family but fell into undesirable company which accentuated the dormant criminal propensity in him—Held that the accused was entitled to benefit of the Probation of Offenders Act and his sentence was suspended. *AIR 1983 SC 654.*

6. Practice.—Evidence—Prove: (1) That the accused committed house-trespass.

(2) That before committing the said offence he made preparation for—(a) causing hurt to any person; or (b) assaulting any person; or (c) wrongfully restraining any person; or (d) putting any person—(i) in fear of hurt, or (ii) in fear of assault, or (iii) in fear of wrongful restraint.

7. 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—, committed house-trespass by entering into (or remaining in) the building of X, used as a human dwelling having made preparation for causing hurt, etc. to X; and that you thereby committed an offence punishable under section 452 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 453

453. Punishment for lurking house-trespass or house-breaking.—Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section prescribed punishment for lurking house-trespass or house-breaking as proved under sections 443 and 445. In all "house-breaking" there must be "house-trespass" and in all

"house-trespass" there must be "criminal trespass." Unless, therefore, the intent necessary to prove the offence of criminal trespass is present the offence of house-breaking or house-trespass cannot be committed.

(2) The offence under this section is an aggravated form of the offence under Section 441. *1971 All LJ 4.*

(3) In order to constitute 'lurking' house-trespass (S. 443), the accused must have taken some active step to conceal his presence form a person with a right to exclude him. Mere trespass by night is not enough. *AIR 1916 Lah 425.*

(4) The prosecution must prove in a charge under this section and Sec. 456 that the house-trespass has been committed with one of the guilty intentions specified in Section 441. *1971 AllLJ 4.*

(5) The intention to commit the offence of criminal trespass can be inferred from the acts of the offender and direct evidence is not necessary. *1961 KerLT 513.*

(6) The accused can be convicted for house-breaking with intent to steal from the house, even if the servant of the house has agreed to and allowed the entry. *(1913) 1 KB 125.*

(7) Though ordinarily an accused cannot plead in his defence that he committed the offence under the order of his master, his position will be different, when the offence involves a special intent. In the absence of any of the intents necessary to constitute the offence of house-breaking, he cannot be convicted under this section. *AIR 1949 Cal 85.*

(8) In a case where ingredients of S. 475 are not proved there could still be a case under S. 453. However when there was no evidence that the accused had entered the house even an offence under S. 453 was committed by the accused. *1981 Cri LJ (NOC) 209.*

(9) The accused cannot be convicted under S. 453, if a proceeding under S. 145, Criminal P. C. has been started and dropped against him and if he has also been acquitted under S. 147 and S. 380. *(1960) 26 Cut LT 70.*

(10) Accused was a first offender. He had already undergone 1 month and 20 days during custody Court while maintaining conviction reduced the sentence to period already in custody. *1980 Raj CriC 144.*

2. Practice.—Evidence—Prove: (1) That the accused committed house-trespass.

(2) That the accused took precaution to conceal the same. For house breaking prove that the accused committed house-trespass.

(3) That he effected his entrance into the house or any part of it in any of the six ways mentioned in section 445; of if he was in the house or any part of it for the purpose of committing an offence, he quitted it in any of those six ways.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by any Magistrate.

4. 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 of—, at—, committed lurking house-trespass (or house-breaking) by entering into a building belonging to X and used as a human dwelling, and that you thereby committed an offence punishable under section 453 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 454

454. Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.—Whoever commits lurking house-trespass or house-breaking in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

Cases and Materials

1. Scope.—(1) Intention is the gist of the offence under this section. Where intention is not proved, no conviction under this section can take place. The latter portion of this section is framed to include the cases of house trespassers and house-breakers who have not only intended to commit, but have actually committed theft. For conviction under the section it is necessary to prove that the accused made an attempt to take precautions to conceal their presence. Where the accused entered the premises in exercise of a bonafide claim of right, he could not be convicted under section 454.

(2) This section deals with simple lurking house trespass and house-breaking with the intention of committing an offence punishable with imprisonment. Section 457 infra deals with lurking house-trespass by night or house-breaking by night committed with a similar intention. Under both sections, a higher punishment is laid down where the lurking house-trespass or house-breaking is committed with the intention of committing theft. The two offences are distinct offences not falling within the scope of Section 71. *AIR 1962 SC 1116.*

(3) Accused below 12 years of age and not of sufficient maturity of understanding that it was improper to be in another person's room when he was not there—He was given benefit of S. 83 and S. 454 held wholly inapplicable. *1971 All Cri R 284.*

(4) An owner of cattle rescuing cattle from a cattle pound by opening the door was held not to be guilty under this section. *AIR 1927 Mad 343.*

(5) Offences under Ss. 454 and 455 are aggravated forms of Criminal Trespass—In cases under these sections it is necessary to show that causing of annoyance, intimidation or insult to the complainant was the aim of the entry in or upon property. *(1983) 23 Delhi LT 121.*

(6) The allegation that the entry was effected by unfastening the inside hasp of the door by inserting a baton from an opposite window which was 20 feet away without waking up two inmates who were sleeping is a story too good to be true and an offence under S. 454 PC could not be held as established. *1981 CriLR (SC) 218.*

(7) A colourable pretence of right to the property stolen is not a bona fide claim of right. Where the accused broke open the lock and removed the ornaments of B, his sister-in-law, and his plea that he believed the ornaments to be joint family property where in he had a share was found a colourable pretence, it was held that he was properly convicted under Sections 380 and 454. *AIR 1950 Nag 92.*

(8) An accused under this section for committing house-trespass, with the intention of committing theft, can be convicted for an offence under S. 441. *AIR 1935 Pat 129.*

(9) The accused violating the order of the Magistrate made under S. 145, Criminal P. C., by taking illegal possession of the attached house, can be convicted under this section and S. 188. *AIR 1967 All 579.*

2. Practice.—Evidence—Prove: (1) That the accused committed lurking house-trespass or house-breaking.

(2) That he did so in order to commit an offence punishable with imprisonment.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first and second class.

If the offence is theft, then it is triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, committed lurking house-trespass, by entering into (or remaining in) a building belonging to X, and used as a human dwelling, in order to the commission of an offence punishable with imprisonment, to wit—, and that you thereby committed an offence punishable under section 454 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 455

455. Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.—Whoever commits lurking house-trespass or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section is similar to section 458. The only difference is that this section deals with trespass committed by day; whereas section 458 deals with trespass committed during night.

(2) Accused variously armed entering police wireless station after breaking open doors and windows and assaulting inmates must be held to have shared the common object of committing lurking house-trespass punishable under S. 455. But they cannot be held responsible for an assault committed by an unknown person. *AIR 1979 SC 1761.*

(3) Offences under Ss. 455 and 454 are aggravated forms of Criminal Trespass and it must be shown that the aim of the trespass was to annoy, intimidate or to insult the complainant. *(1983) 23 Delhi LT 121.*

(4) The intention being a question of fact, the concurrent findings of the lower Courts on the question of intention cannot be disturbed in revision, unless grave reason exists for interference. *1962 MPLJ (Notes) 337.*

2. Practice.—Evidence—Prove: (1) That the accused committed lurking house-trespass or house-breaking.

(2) That he did so after making preparation for causing hurt, or assaulting or wrongfully restraining some person, or for putting some person in fear of hurt, assault or wrongful restraint.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session, Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—(1) The charge should run as follows:

I, (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, committed lurking house-trespass (or house-breaking) by entering into (or unlawfully remaining in) the building in the possession of X and used as a human dwelling (or for the custody of property) having made preparation for causing hurt to the said X (or for assaulting any person or for wrongfully restraining any **person** or for putting any person in fear of hurt or assault or wrongful restraint), and that you thereby committed an offence punishable under section 455 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 456

456. Punishment for lurking house-trespass or house-breaking by night.—Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) Lurking house-trespass or house breaking is punishable under section 453, but when it is committed at night this section is applicable. Unless the intent necessary to prove the offence of criminal trespass is present, the offence under this section cannot be committed. Therefore the court must come to a definite inference as to what was the particular intention with which the entry was effected. A vague statement that the accused must have intended to annoy or insult the inmates would not suffice *(1957) CrLJ 286).* The intention may be determined as well from direct evidence as from the conduct of the accused and attendant circumstances. Where person is found lurking at night inside another's house a perfect stranger to him, without any apparent business, the court can infer a guilty intention under section 441 of the Penal Code. To sustain a conviction for house-trespass with intent to commit adultery, the ingredients of section 497 of the Penal Code in regard to the intended act of sexual intercourse must be established *(43 CrLJ 96).* The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her necklace. The evidence of the complainant clearly showed that the accused was not there with consent or at the invitation or for the pleasure of the complainant. It was held that the accused was properly convicted under this section, it being for him to show that his intention was under the circumstances innocent *(10 CrLJ 410).* A conviction under this section is not bad for want of the specification of the intention in the charge, but one under section 457 cannot be sustained without such specification.

(2) A person cannot be said to commit lurking house-trespass if he has not taken precautions to conceal his presence from any one having the right to exclude him from the building, tent or vessel. *1954 Madh BLJ (HCR) 1636.*

(3) The offence under this section necessarily involves a criminal trespass (as defined in S. 441). *AIR 1914 Oudh 182.,*

(4) An entry into a house to commit adultery with a married woman in the house without her husband's consent or connivance will be an offence under this section. *AIR 1938 Lah 514.*

(5) An entry into a house merely to carry on an intrigue with an unmarried woman in the house is not a criminal trespass and is not an offence under this section. *AIR 1941 Pesh 79.*

(6) A Court can, either from direct evidence or from the circumstances of the case come to a conclusion that the entry was with the intent referred to in Sec. 441. *AIR 1962 Ker 81.*

(7) Where the accused, a stranger, is found in the complainant's house at night, and the accused pleads that he went there in connection with an illegal intimacy with a woman inmate, the burden of proof will be upon the accused to show that his intention was not to commit any offence or to annoy or intimidate any one in the house. *AIR 1915 All 178.*

(8) Where the accused is charged with house-trespass with intent to commit adultery the prosecution must prove that the accused had knowledge or had reason to believe that the woman was the wife of another man and the intended intercourse was without the consent or connivance of the husband. *AIR 1956 Madh B 69.*

(9) Where the evidence was not clear as to what offence was actually intended by the accused and it was also doubtful whether it was the accused or some other person that entered into the compound, the accused was given the benefit of doubt and acquitted. *AIR 1955 NUC (Assam) 3643.*

(10) To sustain a conviction under this section, it is enough to prove a guilty intention such as is contemplated by S. 441. The criminal intention in the charge need not be specified, as it should be in a charge under S. 457. *AIR 1962 Ker 81.*

(11) A conviction by the Appellate Court for an offence under this section, for which the accused was not tried is illegal. *AIR 1920 Pat 590.*

2. Practice.—Evidence—Prove: (1) That the accused committed lurking house-trespass by night, or house-breaking by night.

(2) That the same was committed to commit theft, or an offence punishable with imprisonment.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

4. Charge.—(1) 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—, committed lurking house-trespass by night (or house-breaking by night) by entering into the building belonging to X, and used as a human dwelling, after the hour of sunset and before the hour of sunrise, and that you thereby committed an offence punishable under section 456 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 457

457. Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment.—Whoever commits lurking house-trespass by night, or house breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

Cases and Materials : Synopsis

1. Scope.—(1) This section deals with lurking house-trespass or house-breaking in order to commit an offence punishable with imprisonment. Burglary is a serious crime and whenever it is detected the person concerned must be given a deterrent punishment *(AIR 1931 Lah 258).* To bring a case within the mischief of section 457 of the Penal Code the prosecution must prove positively that the accused entered into a hut or remained there after the hour of sunset and before hour of sunrise to commit an offence or to intimidate, insult or annoy any person in terms of section 441 of the Penal Code taking precaution to conceal such house-trespass. The offence under this section is committed as soon as lurking house-trespass or house-breaking takes place with the intention to commit an offence punishable with imprisonment. Actual commission of the offence is not necessary. All that is required to complete an offence under section 457 is that the burglar or house breaker by night should have an intention to commit theft. It matters not for the purpose of that offence whether or not a burglar, or house breaker by night does actually carry out his intention and commit theft. A person who enters a house when the door is open and removes certain article but is caught, before getting out of the house does not commit an offence under section 457 of the Penal Code *(19 CrLJ 609).* In order to establish the offence under this section the prosecution will have to prove that the accused entered the house of the complainant during night and that his intention was criminal and that all the relevant circumstances may be taken into account so that an inference of criminality could be drawn *(AIR 1940 Pat. 14).* When an accused arrested on charges under sections 457 and 380 of the Penal Code makes a statement indicating a tank from which vessels, corresponding to the description of articles stolen, are recovered but where the tank is neither his property, nor within the sole control of the accused, but accessible to the public in general and it is doubtful whether the accused or some other person concealed the stolen articles, such evidence itself is not sufficient for his conviction *(31 CrLJ 449).* In the absence of any proof of entry inside a building an offence under this section is not complete The offence of theft is no part of an offence under section 457, and hence where an accused after breaking into the house at night, commits theft therein, he can be convicted under section 457 and under section 380 *(PLD 1949 Balu 11).*

(2) Intention must be set out in the charge. The trial Magistrate framed charged under section 457 in the following manner: "That you, on or about the 15.9.52, committed house-trespass at night in the dwelling hut of Hazera Khatun. Held: The charge is defective in that it does not state with what intention the accused committed house-trespass in the dwelling-hut of Hazera Khatun. *Safiuddin Vs. Crown (1953) 5 DLR 519 (296).*

(3) No conviction legal unless entry into the hut after sun set and before sunrise by the accused to commit offences of insult, etc. is positively established. To bring a case within the mischief of section

457 P.C. the prosecution must prove positively that the accused entered into the hut or remained thereafter the hour of sun set and before the hour of sun-rise to commit an offence or to intimidate , insult or annoy any person in terms of section 441. P. C. taking precaution to conceal such house-trespass. In the absence of any proof of entry inside the building the offence will not be complete. *Shakhinuddin Vs. The State, (1969) 21 DLR 312.*

(4) Principal ingredients of the offence under section 457 may broadly be divided inter alia into two heads: (1) the accused committed lurking house-trespass by night, and (2) the same was committed with intent to commit theft. The clause "if the offence intended to be committed is theft" in section 457 of the Penal Code refers to a state of mind of the accused at the time of his entry. When an accused is charged with both offences under sections 457 and 380 Penal Code, one cannot be treated as the part of the other. They are distinct and separate and not independent offences. Failure of one does not necessarily mean the failure of the other. A person may enter innocently somebody's house, as invited guest, but thereafter may commit theft in the dwelling house of his host. Another significant distinction between the two, is regarding time. The offence under section 457 Penal Code may be committed only at night but the offence under section 380 Penal Code may be committed at any time, day or night. The distinction between the two is one of substance and not of form or detail, and cannot be treated as one offence. It is true there may be cases where facts might be so inextricably linked up that one act might be dependent on the other, but that is a question of fact governed by the peculiar facts and circumstances of its own. *28 DLR 162 SC.*

(5) It is true that there is no direct evidence of his digging the hole. But the chain of circumstantial evidence is so complete that no other conclusion can be reasonably arrived at. All these facts conclusively lead to the conclusion that the accused had advanced beyond the stage of preparation and was making an attempt to commit the offence under section 457 Penal Code. Therefore the conviction under sections 457/511 Penal Code has been correctly made. *20 DLR 1102.*

(6) The essential ingredients of the offence punishable under this section are:—

(a) Lurking house-trespass by night or housebreaking by night; and

(b) Intent to commit an offence punishable with imprisonment. *AIR 1971 SC 1254.*

2. Lurking house-trespass by night or house-breaking by night.—(1) In order to constitute a lurking house-trespass, the offender must take some active means to conceal his presence from someone who has a right to exclude him. The mere fact that a house-trespass is committed by night does not make the offence one of lurking house-trespass. *1979 BLJR 11.*

(2) Lurking house-trespass is committed when a person enters premises of the nature described in S. 442, after taking precautions to conceal such house-trespass from some person who is entitled to exclude him. *AIR 1940 All 259.*

(3) A person who enters the house when the door is open and removes certain articles but before getting out of the house is caught, does not commit an offence under S. 457 inasmuch as the element of taking precautions to conceal the trespass is absent. *AIR 1918 All 130.*

(4) Even a servant or employee belonging to an establishment or office located in a building can be guilty of a lurking house-trespass or house-breaking in such a building and of an offence under this section if he is not resident of the premises. *AIR 1957 Assam 168.*

3. "In order to the committing of any offence punishable with imprisonment."—(1) A lurking house-trespass by night or house-breaking by night must have been committed in order to the

committing of any offence punishable with imprisonment, i.e., there must be an intention on the part of the accused to commit an offence punishable with imprisonment. This is an essential ingredient of the offence under this section and an express finding on the point is, therefore, necessary. *AIR 1955 NUC (Sau) 1651.*

(2) A theft frequently follows a lurking house-trespass at night or house-breaking at night but it cannot be said on that account that an offence of theft is an essential ingredient of the offence under this section. *AIR 1936 All 337.*

(3) An intention to commit criminal assault on a girl with a view to outage her modesty (offence punishable under S. 354) or with a view to commit the offence of abduction is enough for the purpose of this section. *AIR 1971 SC 1254.*

(4) This section looks merely to the object with which the lurking house-trespass at night or house-breaking at night is committed; it does not take into consideration the offence, it any, committed thereafter. *AIR 1942 Oudh 214.*

(5) Where the accused broke open temple and removed the idols in it for the performance of a festival and were charged with an offence under this section and S. 380 it was held that the accused's intention was not dishonest and so, they were not guilty under the above sections but they were guilty under S. 147, as their common object was to enforce a right by means of criminal force and violence was used in the prosecution of their common object. *AIR 1941 Mad 71.*

4. "If the offence intended to be committed is theft."—(1) It is not necessary under the section that the lurking house-trespass by night or house-breaking by night should be for the purpose of committing theft: it may be for the purpose of committing any offence punishable with imprisonment. *AIR 1936 All 337.*

5. This section and S. 460.—(1) Where at the time of committing lurking house-trespass by night or house-breaking by night the offender causes grievous hurt to the house-owner the offence will fall under S. 460 and not under S. 457 read with S. 424. *(1865) 2 Suth WR (Cri) 52 (1).*

6. This section and S. 459.—(1) Where the accused has already effected his entry into the house and thereafter causes grievous hurt to an inmate of the house, his offence will not fall under S. 459 but under this section read with S. 325. *(1963) 65 Pun LR 17.*

7. This section and S. 456.—(1) Where the accused is guilty of lurking house-trespass by night but his intention to commit any offence punishable with imprisonment is not proved, he will be guilty only under S. 456 and not under this section. *1969 CriLJ 578 (Orissa).*

8. This section and S. 380.—(1) Where a person commits lurking house-trespass at night or house-breaking at night with the intention of committing theft in the building and then commits theft in pursuance of his intention his crime will fall under this section read with S. 380. In such a case, he will be committing two distinct offences in the course of the same transaction within the meaning of the Criminal P. C., Section 220 and not one compound offence. Separate sentences can be passed on the accused for the two offences involved in his crime and the aggregate of the sentences need not conform to the limit imposed by S. 71. *AIR 1962 SC 1116.*

9. Attempt.—(1) Where the accused with the intention of committing theft in a building attempts to enter into the building but fails in the attempt, he will only be guilty of an attempt to commit an offence under this section and not of a completed offence under this section. Hence, he will only be punishable under this section read with S. 511 and not purely under this section. *(1928) 29 CriLJ 4.*

(2) A person makes the movement towards the committing of an offence under S. 457 at the time when he begins to move up the wall by climbing it. *AIR 1934 All 833.*

10. Charge.—(1) An accused person who was being tried on a charge under S. 457 for house-breaking with intent to commit theft, cannot be convicted under S. 456, (Lurking house-trespass or house-breaking by night) for an unspecified object, without amendment of the original charge. *(1979) 48 CutLT 135.*

(2) Where an accused is charged with an offence under this section with lurking house-trespass at night or house-breaking at night with the intention of committing a certain offence (e.g., theft) but is found on the evidence to have committed the trespass or house-breaking with a different intent (e.g. intent to commit adultery with a woman in the house) there is no bar to the accused being convicted under this section and such conviction can be recorded where the accused is not prejudiced thereby. *AIR 1962 Ker 81.*

(3) Where an accused person has been charged and convicted by the trial Court for an offence under this section (which involves an intent to commit an offence) it is not open to the appellate Court to convert the conviction to one under Section 456 for lurking house-trespass or house-breaking committed with intent to annoy or insult the inmates, as this would amount to altering the conviction to one for a totally different offence for which the accused has not been tried at all and of which he has had no notice. *AIR 1920 Pat 590.*

(4) Under S. 441 criminal trespass may be committed with an intent to commit an offence or with an intent to insult or annoy the inmates. In some cases (e.g. an offence under Section 395), an offence under Section 457 is really a minor offence and there can be no reason why there should not be alternative charges for these two offences. *AIR 1930 Cal 139.*

(5) Even where the accused are charged with dacoity under Section 395, they can be convicted under S. 457 if from the circumstances it appears that they are guilty under S. 457. *AIR 1927 Oudh 196.*

(6) As theft does not form an essential ingredient of the offence under this section, the above provision does not apply to offences under this section, so that where theft is committed in course of an offence under this section, a joint trial of the thieves with persons who receive the property stolen at such theft is not legal unless the receipt of the stolen property forms part of the same transaction as the offence under this section. *AIR 1936 All 337.*

(7) 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—, committed lurking house-trespass by night (or house-breaking by night) by entering into the building belonging to X, and used as a human dwelling, after the hour of sunset and before the hour of sunrise, in order to the commission of a certain offence punishable with the imprisonment, namely, the offence of—, and that you thereby committed an offence punishable under section 457 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

11. Evidence.—(1) Where A and B being jointly tried for offences under S. 457/380 and B alone for an offence under S. 411 (receiving stolen property), Section 30 of the Evidence Act will not apply and the confession of one of the co-accused cannot be taken into consideration against the other accused. *AIR 1948 Sind 65.*

(2) The presumption under S. 114, Illustration (a) of Evidence Act may be drawn in proper cases where a person is tried for offences under S. 457 read with S. 380. *AIR 1972 SC 2501.*

(3) The presumption under S. 114, Ill. (a) of the Evidence Act only applies to the offence of the theft and not a lurking house-trespass at night or house-breaking at night with the intent of committing theft. *AIR 1960 Punj 286.*

(4) Under the well established principles of criminal jurisprudence, in case of doubt, the benefit of doubt must be given to the accused. *AIR 1929 Mad 846.*

(5) Where the intent alleged in a charge under this section is the commission of adultery with a married woman in the house, it must be proved that the husband had not consented to or connived at the intended adultery. *AIR 1956 Madh Bha 69.*

12. Procedure.—(1) Where the previous conviction of the accused is under S. 511 for attempting to commit an offence under S. 457, the Court has no power to proceed and pass an order against him under S. 356, Criminal P. C. *(1907) 6 CriLJ 378.*

(2) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

13. Complaint.—(1) A charge of house-trespass by night with intent to commit adultery can be entertained without a complaint by the husband or by person having care of the woman. *1877 Pun Re (Cri) No. 2, p. 3.*

14. Sentence.—(1) A sentence of imprisonment is obligatory in every case under this section. *ILR (1966) Cut 363.*

(2) Where a boy below 12 years of age is accused of an offence under this section, the Magistrate should under S. 83 consider whether the boy is of sufficient maturity of understanding to judge of the nature and consequences of his conduct and acquit him if he considers him not to be of sufficient maturity of understanding to judge of the nature and consequences of his conduct. *AIR 1955 NUC (Punj) 1330.*

(3) If the house-trespass or house-breaking is committed with the intent of committing theft in the house and thereafter, the intent is carried into execution by the commission of the theft, the accused commits two distinct offences in the course of the same transaction within the meaning of the Criminal P. C. S. 220. In such a case S. 71 has no application and hence the aggregate of the sentences passed on the accused may exceed the limits laid down under that section. *AIR 1962 SC 1116.*

(4) Conviction under Ss. 365 and 457 P.C. Sentenced to three years rigorous imprisonment and a fine of Rs. 100/—Accused taking active part in abducting and torturing the complainant and also demanding ransom like his confederates—No ground for reducing sentence. *AIR 1979 SC 1493.*

15. First offenders.—(1) An offence of lurking house-trespass or house-breaking under this section though committed with the intent of committing theft is not the same as "theft" and so will not fall within the scope of Section 360(3) of the Criminal P. C. *AIR 1949 Lah 51.*

16. Practice.—Evidence—Prove: (1) That the accused committed lurking house-trespass by night, or house-breaking by night.

(2) That the same was committed to commit theft, or an offence punishable with imprisonment.

Section 458

458. Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.—Whoever commits lurking house-trespass by night or house-breaking by night, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for

putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. Scope.—(1) This section may be read with sections 319, 339 and 351 of the Penal Code. This section only applies to house-breaker who actually has himself made preparation for causing hurt to any person, etc. and not to his companions as well as those who themselves have not made such preparation.

(2) A person will be guilty under this section if:

(i) he commits lurking house-trespass at night or house-breaking at night;

(ii) after having made preparation—

(a) for causing hurt to any person, or

(b) for assaulting any person, or

(c) for wrongfully restraining any person, or

(d) for putting any person in fear of hurt, assault or wrongful restraint. *1968 All Cri R 417.*

2. Preparation.—(1) The house-breaker must have himself made the preparation for causing hurt, etc., the section does not apply to his companions who have not themselves made such preparation. *AIR 1923 Lah 509.*

(2) Where the accused was caught in another man's house at night and it was found that he had made the entry by scaling the wall and removing the door chain, and was armed with a fire-arm, it was held that he was guilty under this section. *AIR 1959 Madh Pra 6.*

(3) Where a house-breaker stabs an inmate of the house inside the house, while effecting his escape from the house, he will not be guilty under S. 460 but may be held guilty under this section. *AIR 1917 Lah 319.*

3. "For assaulting any person."—(1) Even if the assault takes place outside the house this section would apply provided the entry into the house after making preparation for the assault is established. *AIR 1955 NUC (Assam) 5536 (BB).*

4. Wrongfully restraining any person.—(1) Where a person is deprived of his will power by sleep or otherwise he cannot, while in that condition, be subjected to any restraint. Hence, in such a case there cannot be "robbery" as defined in S. 390 and the accused who enter the premises and make good their escape with property cannot be convicted of "robbery" but can be convicted under this section although they locked up the chowkidar and another person who were sleeping in a certain room. *AIR 1928 Lah 445.*

5. Hurt, etc. need not be actually caused.—(1) The offence is complete as soon as a man breaks into the house after making the necessary preparation as specified in the section. It is not necessary that any offence for which the preparation was made should have been actually committed. *AIR 1923 Lah 291.*

6. Lurking house-trespass.—(1) There must be a roof in order that a place may be called a building. However, such a roof is not necessary, provided that the place is surrounded by walls and has a door. *1955 Madh BLJ (HCR) 75.*

7. Charge.—(1) It is not necessary to alter the charge and the conviction under this section will be legal, if the offence of which the accused was found guilty did not differ in nature from that with which he had been charged. *AIR 1935 All 458.*

(2) The charge should run as follows:

I, (name and office of the Judge) hereby charge you (name of accused) as follows:

That you, on or about the—, day of— at—, committed the offence of house-breaking by night, by entering into the building, tent or vessel in the possession of X used as a human dwelling or used as a place of worship or for custody of property by any of the six ways mentioned in section 445 and remaining in possession, having made preparations for causing hurt or assaulting any person and quitted the house in any one of the six ways mentioned in section 445, and that you thereby committed an offence punishable under section 458 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

8. Evidence.—(1) Charge was under Ss. 302, 149 and 458 P.C.—On appreciation of evidence the Court came to the conclusion that the prosecution had not proved its case beyond reasonable doubt. *1978 WLN (UC) 447.*

9. Procedure.—(1) Where two accused are charged under this section and the Magistrate finds that this section is not applicable to one of them, he should try the two men separately and not jointly. *(1906) 3 CriLJ 76.*

(2) Separate sentences may be given to the accused charged under this section for house-breaking by night and rape, if the facts proved that rape was the object of the entry. *AIR 1923 Lah 291.*

(3) Accused charged merely in general terms of "having committed dacoity" should not be convicted under this section and S. 323, because these two offences are not cognate offences. But under S. 465, Criminal P. C. the court can convict him under S. 458 only, if the language of the charge and other material make it clear that the accused had notice of the offence of which he was going to be convicted and not otherwise. *AIR 1945 All 81.*

(4) If an accused is charged under S. 395 and S. 398, but the evidence shows that he has committed an offence under this section, the case comes under S. 221, Criminal P. C. and the conviction under S. 458 will also be saved by S. 464, Criminal P. C. *AIR 1959 Madh Pra 6.*

(5) Cognizable—Warrant—Bailable—Not compoundable—Triable by the Court of Sessions.

10. Practice—Evidence—Prove: (1) That the accused committed lurking house-trespass by night or house-breaking by night.

(2) That he did as above after having made preparation for causing hurt, or for assaulting, or for wrongfully restraining some person, or for putting someone in fear of hurt, assault or wrongful restraint.

Section 459

459. Grievous hurt caused whilst committing lurking house-trespass or house-breaking.—Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous

hurt to any person, shall be punished with [6][imprisonment] for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) The offence of house-breaking is complete when entry into the house is effected and any grievous hurt subsequently caused by the persons breaking into a house cannot be said to be grievous hurt caused while they were committing the house-breaking. The intention of the legislature is that from the point of time lurking house-trespass or house-breaking by night commences to the time it concludes if any grievous hurt is caused or any attempt to cause death or grievous hurt is made, then the trespasser shall be punished as provided under section 459 of the Penal Code. Where the accused committed lurking house-trespass and also caused grievous hurt in a courtyard but it was not proved that the courtyard was a part of the house, it was held that the accused could not be convicted under section 459 *(38 CWN 446).*

(2) This section deals with the offence of causing grievous hurt or attempting to cause death or grievous hurt "whist committing" lurking-house trespass or house-breaking. Section 460 deals with similar acts done "at the time" of committing house-trespass by night, or house-breaking by night. the words "whist committing" and the words "at the time of committing" import the same thing. *1876 Punj Re Cr 17, p. 25.*

(3) A court-yard which is not a part of the house is not a building and the accused causing grievous hurt in such a court-yard cannot be convicted under this section. *AIR 1934 Cal 557.*

(4) This section does not apply to a mere attempt to commit lurking house trespass or house-breaking even though the attempt may be accompanied by causing grievous hurt to any person. *(1886) ILR 8 All 649.*

(5) The intention of the Legislature is that if during the time from the point of time at which the lurking house-trespass or house-breaking begins to the time when it concludes, any grievous hurt is caused or any attempt to cause death or grievous hurt is made, then the trespasser shall be punished under this section. *1968 CriLJ 130 (Raj).*

(6) The offence of house-breaking is complete when the entry into the house is effected, and a grievous hurt caused subsequently cannot be said to be caused "whilst committing" the trespass. *AIR 1927 All 536.*

(7) Where the burglars used lathis in trying to escape it was held that they were guilty under this section. *(1929) 30 CriLJ 838.*

(8) Enmity between accused and complainant—Improvements in version given in F. I. R.—Witnesses conduct in not chasing accused even though he had seen him jumping from roof of complainant's house not normal—His evidence is unreliable—Accused entitled to acquittal. *1982 WLN (UC) 336 (Raj).*

(9) Where the accused were poor men it was held that it was not necessary to impose a fine in addition to substantive imprisonment. *(1929) 30 CriLJ 838.*

2. Practice.—Evidence—Prove: (1) That the accused committed lurking house-trespass, or house-breaking.

(2) That he caused grievous hurt, or attempted to cause death or grievous hurt, to some person.

(3) That he did as above whilst engaged in committing lurking house-trespass or house-breaking.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered.

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—, while committing lurking house-trespass by night (or house-breaking caused grievous hurt to X (or attempted to cause the death of X or grievous hurt to X), and that you thereby committed an offence punishable under section 459 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 460

460. All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them.—If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with [6][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *"Every person."*
3. *"Jointly concerned in committing such lurking house-trespass etc."*
4. *Liability of person actually causing death.*
5. *"At the time of committing".*
6. *Voluntarily causes or attempts to cause death or grievous hurt.*
7. *Evidence and proof.*
8. *Procedure.*
9. *Sentence.*
10. *Practice.*
11. *Charge.*

1. Scope of the section.—(1) This offence under this section creates constructive liability. This section applies to those persons who have actually committed lurking house-trespass at night and not to those who may have accompanied their associates but did not commit the offence. It applies to the actual doers and not to others. The act of causing death or grievous hurt by any one of the murders would certainly make others, who do not themselves cause death or grievous hurt, equally liable. Where a murder was committed in the course of lurking house-trespass by night and one of the accomplices who had not entered the house but stood outside the house in order to receive the goods which his companious passed on to him was also convicted under section 460. It was held that the latter was not jointly concerned in house-breaking by night which his confederates committed and section 460 will have no application to his case. The expression "at the time of the committing of house-breaking by night" must be limited to the time during which the criminal trespass continues which forms an element in house-trespass which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time if the offender causes grievous hurt while

running away, he will not be punished under this section. This section will not apply to the case of a single individual who alone commit the offence. for the purpose of this section, it is not necessary to identify the person who caused or attempted to cause the death or grievous hurt *(AIR 1954 Pat. 37).* If person committing house breaking by night also commits an offence of murder, the proper section under which he should be convicted will be section 302 and not section 460 *(AIR 1954 Punjab 130).*

(2) Lurking house-trespass together with murder—Some not guilty of lurking house-trespass—Offence Section 460 prescribes punishment for lurking house-trespass or house breaking by night in the course of which murder or grievous hurt is committed and not for the latter offences, for which the offender shall also be punishable under sec. 302 or 325 also. A confederate of the lurking-house trespass or house-breaker who commits additional offence under section 460 is not guilty of committing house-trespass or house-breaking and, therefore, not liable to be punished under section 460. *Nihala Vs. Crown (1954) 6 DLR (WPC) 209.*

(3) One of the accused not directly responsible for causing death—Accused still guilty under section 460—Common intention or common object not necessary. *1952 PLD (Lah) 11.*

(4) Murder committed after termination of offence of house-breaking—Section inapplicable. *8 DLR 54 WP.*

(5) Before section 460 of the Penal Code can be applied to the case of any person all the ingredients of the section must be satisfied in the case. One of the essential ingredients of the offence dealt with by section 460 of the Penal Code is that the persons sought to be liable under this section must be proved to have been "jointly concerned in committing the house-trespass by night or house-breaking by night" i.e. he must have committed the offence of lurking house-trespass or house-breaking by night and not be merely liable for that offence on account of vicarious liability for acts done by another. The legislature has used the expression "jointly concerned in committing such lurking house-trespass by night or house-breaking by night" and the object was to lay down that the person to be made liable must have in fact committed lurking house-trespass or house-breaking by night and not be merely liable for those offences by the application of provisions of law making persons vicariously liable for acts of others. A person who has merely abetted an offence of lurking house-trespass by night or house-breaking by night but is himself not present at the time of the commission of that offence will be liable for the offence abetted by him, but he will not be liable to be punished under section 460 of the Penal Code for house-breaking or lurking house-trespass in the course of which murder or grievous hurt is committed because he was not jointly concerned in committing such lurking house-trespass or house breaking though he may be labile for additional offence committed if he had abetted it or is, for the purpose of Penal Code, to be deemed to have abetted. Where the evidence shows that the accused stood outside the house in order to receive the goods which his companions passed on to him and that he himself did not enter the house it cannot be held he was jointly concerned in the house-breaking by night which his confederates committed and section 460 of the Penal Code will therefore have no application to his case. But he will, however, be guilty of an offence under section 457 of the Penal Code. *6 DLR (WP) 209.*

(6) To substantiate a charge under section 460, Penal Code the prosecution has to prove: (1) that the accused committed lurking house-trespass by night or house-breaking by night; (2) that he caused or attempted to cause death or grievous hurt; and (3) that he did so whilst engaged in committing lurking house-trespass by night or house-breaking by night. If death or grievous hurt were caused after the lurking house trespass by night or house-breaking by night had been completed then the case would not come within the mischief of section 460 of the Penal Code. *1968 PCrLJ 145.*

(7) This section provides for the constructive liability of all persons jointly concerned in lurking house-trespass by night or house-breaking by night where one or more of them voluntarily cause or attempt to cause death or grievous hurt. *1959 AllLJ 694.*

(8) The section envisages the commission of the offence of lurking house-trespass by night or house-breaking by night in which more than one person is concerned. It does not apply where the offence is committed by only one person. *AIR 1954 All 99.*

(9) The section does not apply to persons who have merely accompanied the persons who committed the offence. *AIR 1947 Lah 188.*

(10) It is not necessary for a conviction of any of the persons jointly concerned in the trespass, to ascertain the identity of the person who actually caused or attempted to cause death or grievous hurt. *AIR 1954 Pat 37.*

2. "Every person."—(1) The words "every person" cover even those persons who have voluntarily caused or attempted to cause death or grievous hurt. These words should not be taken to mean "every other person." *(1974) 1 Andh WR 358 (DB).*

3. "Jointly concerned in committing such lurking house-trespass etc.—(1) It is only where several persons are jointly concerned in committing the particular offence of lurking house-trespass by night or house-breaking by night that this section will apply and make them liable for the act of one of them causing or attempting to cause death or grievous hurt. It will not apply where the common intention before the trespass was committed, was to commit any offence other than lurking house-trespass or house-breaking such as murder. *AIR 1954 Mad 152.*

4. Liability of person actually causing death.—(i) The person who actually causes death will be guilty under Sec. 302. He cannot escape the punishment provided for murder merely because the murder was committed by him while he was committing the lurking house-trespass by night or house-breaking by night. *AIR 1964 Punj 130.*

5. "At the time of committing."—(1) This section will not apply where the accused, while running away after committing house-breaking, cause or attempt to cause death or grievous hurt. *AIR 1921 Lah 94.*

6. Voluntarily causes or attempts to cause death or grievous hurt.—(1) This section will not apply where other offences are committed or attempted to be committed, such as theft. *AIR 1936 All 337.*

7. Evidence and proof.—(1) The recovery of property stolen at the house-breaking would be a corroboration of the approver's evidence. *(1886) ILR 8 All 509.*

8. Procedure.—(1) The accused were charged under Ss. 395, 148 and 460 of the Code. The charges under Ss. 148 and 460 were not based on any facts other than acts which were necessary to prove an offence under S. 395. It was held that the framing of the charge under Ss. 148 and 460, under such circumstances, though within the law, was against the spirit of law inasmuch as it had the effect of depriving the accused of their privilege of being tried by a jury. *AIR 1942 Pat 199.*

(2) Where the accused was charged under S. 460 that he committed house-breaking by night and death was caused at the time, and he was convicted under S. 460, a separate conviction under S. 302 read with S. 34 was not justifiable. *AIR 1951 Assam 60.*

(3) Persons charged under this section and S. 457 cannot be tried along with persons charged with receiving stolen property. *AIR 1936 All 337.*

(4) Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

9. Sentence.—(1) The accused was aged 30, and committed house-breaking by night and abducted a girl. No harm was done to the girl though grievous hurt was caused to one of the inmates of the house. It was held that the case did not call for a heavy sentence. *AIR 1936 Lah 15.*

10. Practice.—Evidence—Prove: (1) That the accused committed lurking house-trespass by night, or house-breaking by night.

(2) That he caused, or attempted to cause, death or grievous hurt.

(3) That he did as above whilst engaged in committing lurking house-trespass by night or house-breaking by night.

11. Charge.—(1) The charge should run as follows:

I, (name and office of the Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, jointly with certain other person, to wit—, committed lurking house-trespass by night (or house-breaking by night) by entering into the building belonging to X, and used as a human dwelling and that one of the said persons, to wit—, at the time of committing such offence voluntarily caused (or attempted to cause) death (or grievous hurt) to—, and that you thereby committed an offence punishable under section 460 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 461

461. Dishonestly breaking open receptacle containing property.—Whoever dishonestly or with intent to commit mischief breaks open or unfastens any closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Materials

1. Scope.—(1) The word "Receptacle" includes not only a room, a part of a room, or closet etc. but a box or closed package. This section deals with opening of any container used as a strong place. It includes safes, boxes etc. which are closed. The offence consists in breaking open the locks and unfastening the cover.

2. Practice.—Evidence—Prove: (1) That the receptacle was closed or fastened.

(2) That it contained property, or that the accused believed that it contained property.

(3) That the accused broke open or unfastened it.

(4) That he did so dishonestly or with intent to commit mischief.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

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—, dishonestly (or with intent to commit mischief) broke open (or unfastened) a certain closed receptacle, to wit—, which contained (or which you believed to contain) certain property, to wit—, and that you thereby committed an offence punishable under section 461 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 462

462. Punishment for same offence when committed by person entrusted with custody.—Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Materials

1. Scope.—(1) This section is an aggravated form of the offence under section 461. The punishment under it is higher as there is a breach of trust on the part of the person to whom the receptacle is entrusted.

2. Practice.—Evidence—Prove: (1) That the receptacle was closed or fastened.

(2) That it contained property, or that the accused believed that it contained property.

(3) That the accused broke open or unfastened it.

(4) That he did so dishonestly or with intent to commit mischief.

(5) That the accused was entrusted with such receptacle.

(6) That he was so entrusted with it, in a closed or fastened manner.

(7) That he had no authority to open the same.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate, Magistrate of the first class or second class.

4. Charge.—The charge should run as follows:

I, (name and office and the Magistrate, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, being entrusted with a certain closed receptacle, to wit—, which contained (or which you believed to contain) certain property, to wit—dishonestly (or with intent to commit mischief) broke open (or unfastened) the said receptacle, without having authority to open the same, and thereby you have committed an offence punishable under section 462 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

[13][*Of the Loss of Property of Banking Company*

Section 462A

462A. Penalty for negligent conduct of bank officers and employees.—Whoever, being an officer or employee of a banking company, by his negligent conduct in dealing with a banking transaction allows any customer of the company or any other person to cause loss of property to the company, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

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13. The heading and sections 462A and 462B were inserted by Act XV of 1991 (w. e. f. 4-3-91).

Explanation.—An officer or employee of a banking company shall be guilty of negligent conduct if in discharging his duties he fails, either wilfully or negligently, to follow any direction of law prescribing the mode in which such duties are to be discharged.

Section 462B

462B. Penalty for defrauding banking company.—Whoever fraudulently receives any benefit from a banking company in the course of any banking transaction shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.—In section 462A and in this section "banking company" means—

(a) banking company as defined in section 5(c) of [the Banking [Companies] Ordinance, 1962 (LVII of 1962)][Sic];

(b) a bank constituted under the Bangladesh Banks (Nationalisation) Order, 1972 (P.O. No. 26 of 1972);

(c) a financial institution as defined in section 50(c) of the Bangladesh Bank Order, 1972 (P. O. No. 127 of 1972);

(d) Bangladesh Shilpa Rin Sangstha established under the Bangladesh Shilpa Rin Sangstha Order, 1972 (P. O. No. 128 of 1972);

(e) Bangladesh Shilpa Bank established under the Bangladesh Shilpa Bank Order, 1972 (P. O. No. 129 of 1972);

(f) Bangladesh House Building Finance Corporation established under the Bangladesh House Building Finance Corporation Order, 1973 (P. O. No. 7 of 1973);

(g) Bangladesh Krishi Bank established under the Bangladesh Krishi Bank Order, 1973, (P. O. No. 27 of 1973);

(h) Investment Corporation of Bangladesh established under the Investment Corporation of Bangladesh Ordinance, 1976 (XL of 1976);

(i) Grameen Bank established under the Grameen Bank Ordinance, 1983 (XLVI of 1983);

(j) Rajshahi Krishi Unnayan Bank established under the Rajshahi Krishi Unnayan Bank Ordinance, 1986 (LVIII of 1986);

(k) a bank conducted in accordance with Islamic Shariah.]

Sic. Read 'the Bank/Banking Company Act, 1991 (Act No. XIV of 1991) in place of 'the Banking Company Ordinance, 1962 (Ord. No. LVII of (1962)' in this clause (a).

CHAPTER XVIII
Of Offences relating to Documents and to Trade or Property Marks

Chapter introduction.—*Forgery is necessarily an offence which originated with the invention of writing and the custom of preserving written memorials of title. The earliest trace of this offence is to be found in the writings of Bracton who gives only one instance of it which he classes as treason. This was the forging of the seals of State. It was, however, the offence of crimon falsi of the civil law punishable with deportation or banishment and sometimes with death.*

This Chapter is headed "Of offences relating to Documents and to Trade or Property Marks." This Chapter contains sections 463 to 489E (33 sections) comprised under three sub-groups—

(a) Sections 463 to 477A dealing with forgery;

(b) Sections 478 to 489 dealing with offences in respect of trade property and other marks; and

(c) Sections 489A to 489E dealing with currency notes and bank notes.

The definition of forgery is contained in sections 463 and 464 and punishment for the offence is in section 465.

Section 463

463. Forgery.—Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Cases

1. Scope.—(1) Sections 463 to 477A deal with forgery. The word "forgery" is used as a general term under this section. To establish 'forgery' the prosecution must prove not only that the document is a false document under section 464 of the Penal Code but also that it was forged by the accused with one of the intents mentioned in section 463 of the Penal Code. A person may commit forgery even though he signs his own name when his name is the same as that of another person and he signs his name with the intent that the writing shall be received as writing by the other person or when he impersonates the other person signing an instrument, which was to be signed or endorsed by the other person. Forgery is committed by using an assumed or fictitious name in signing an instrument, when it is done with the intent to defraud. It is also forgery to sign the name of nonexistent person of corporation, when the purpose is to defraud. Merely antedating a document is not forgery, unless there is dishonesty or fraud on the part of the alleged forgery *(27 CrLJ 1263)*. The case of the offence under section 463 is the intention to cause damage, or injury and it is immaterial whether damage, injury or

fraud is actually caused or not. Even if a man has illegal claim or title to property, he is guilty of forgery, if he counterfeits it *(AIR 1953 Nag. 165)*.

(2) Where the claim to be admitted to the first year class of M.B.B.S. Course on the basis of false mark-sheet is a "claim" within the meaning of section 463—Whether expression "claim" occurring in section 463 is limited to claim to property. *Jahangir Hussain Vs. The State (1988) 40 DLR 545.*

(3) The circumstances, provisions of law and evidence on record show that the prosecution has failed to prove by evidence that the accused petitioners had committed the alleged offence. Forged document—When a document can be called forged ?—To call it a forged document must be executed with dishonest and fraudulent intention to defraud others—Such a finding is absent in lower Court judgments. The prosecution could not prove the elements of a forged document in the present case and as such the provisions of section 467 of the Penal Code cannot be invoked against the accused petitioners. *Manu Mia & Sayedur Rahman Vs. State 42 DLR 191.*

(4) Applicability of section 179 CrPC to the offences defined in section 463 Penal Code—Provisions of section 463 analysed—Two essential ingredients of section 463 PC pointed out—both the competent criminal Courts at Noakhali and Comilla have jurisdiction to try the offence. *Sree Jagenath Chandra Bakshi Vs. State 42 DLR 238.*

(5) When the bainapatra in question was given in evidence in court no court can take cognizance of any offence under section 467 of the Penal Code without a complaint in writing by the court concerned or by a court to which the said court is subordinate. *Sona Miah Vs. Md Zakaria 41 DLR 433.*

(6) Ante-dating of a document with any of the intentions such as causing damage or injury to a person by way of depriving him of his right already acquired by a kabala constitutes forgery. Amatunnessa transferred her entire interest to the appellant by the kabala executed and registered by herself of 18-7-75 (Ext. 1) and was thereafter left with nothing for subsequent transfer to anybody but she executed the subsequent kabala (Ext. 4) in favour of her brother accused Syeduzzaman conveying the same and land by ante-dating the kabala showing that it had been executed earlier than the appellant's kabala. Execution of the subsequent kabala shows her intention to deprive the appellant of his right already acquired by his kabala which was found to be genuine. "Forgery" means making of a false document with certain intentions, such as to cause damage or injury to a person, to support any claim or title, to commit fraud. *Amjad Molla Vs. Syeduzzaman Molla and others, 46 DLR (AD) 17.*

(7) To find one guilty of forgery there must be an original document first. In the absence of the resolution by the Bar Association dated in question is an forged resolution. *S. A. Alim Vs. Dr. Md. Golam Nabi and another 48 DLR 98.*

(8) Forgery of mark-sheets and using the same for securing admission—Mark-sheets submitted by the accused student for securing admission in a Medical College have been found to be false and the accused did not obtain the marked data shown in the mark-sheets submitted by him to the Medical College authority—The appellant by presenting false mark-sheets not only intended to defraud the college authority but also intended to obtain an undue advantage of admission and thereby to deprive other deserving students of the benefit of admission—Although there is no evidence that the appellant himself forged the mark-sheets, still he is guilty of using as genuine the forged mark-sheets and as such he is liable for punishment for using the forged and false mark-sheets although no charge was framed against him under Section 471 of the Penal Code. *Jahangir Hossain Vs. The State 7 BLD (HCD) 366.*

(9) Ingredients of forgery—The essential ingredients of the offence are making of a false document and doing it with fraudulent intention—By its very definition the offence consists of an act and its consequence and these together constitute the offence of forgery. *Sree Jagannath Chandra Bakashi and others Vs. the State 9 BLD (HCD) 246.*

(10) Forgery of valuable security—Parties claiming conflicting title—In this case the contending parties are claiming conflicting title on the basis of registered sale deeds—In a case of forgery of valuable security, title and rights of the parties cannot be adjudicated upon and it is only a civil court which is competent to decide as to who is the real owners—The present dispute is of a civil nature which can be decided only by the competent civil court—The accused having title on the basis of their registered document and standing in the category of the accused will not get reasonable opportunity to defend their title and prove its genuineness by examining themselves as witnesses and also by examining other witness—In such a situation the charge of forgery cannot be invoked against the accused petitioners and they are acquitted. *Manu Mia alias Malu Ma and others Vs. The State 10 BLD (HCD) 229.*

(11) Offences u/s. 467 and 468 fall within the description of an offence u/s. 463—Clause (c), Sec. 195 of the Criminal Procedure Code will apply to offence u/s. 467 and 468 PC as these are both offences described in Sec. 463 PC. *Nur Ahmed Vs. Kalimuddin Ahmed and anr. 5 BSCD 47.*

(12) Embargo on taking cognizance of offence u/s. 467 and 468 PC in the absence of a complaint from the Court concerned—Complaint is respect of the offence of forgery as defined in S. 463 PC when not made by the Court concerned, the proceeding whether hit by Sec. 195, Cr. P. C—Whether the objection officer disposing of an objection under rule 30 of the Tenancy Rules, 1954. *Nur Ahmed Vs. Kalimuddin Ahmed and anr. 5 BSCD 47.*

(13) Mere marking of false or untrue statement in a document does not constitute an offence of forgery within the meaning these sections where the document is executed by a person who purports to execute it and there is no intention of causing a belief that it was executed by some other person or by his authority. *Radha Ballav Sarker Vs. Pijush Kanti Chokraborty & another, BCR 1986 AD 178=1987 BLD (AD) 32.*

(14) To find one guilty of forgery there must be an original document first. In absence of the original one, it cannot be said that the resolution by the Bar Association dated in question is a forged resolution. *8 DLR 98.*

(15) Prosecution for forging document—When it is to be quashed. The bainapatra in question having been given in evidence in the suit, no court can take cognizance of any offence covered by section 463 Penal Code without complaint by the court. The criminal procedure against the accused in connection with forgery thereof has to be quashed. But this will not debar the competent court to make any complaint in accordance with law. *9 BLD 209.*

(16) Whether the offences (forgery and allied offences) alleged to have been committed in a Revenue Court in respect of a document produced in a proceeding under Rule 30 of the Tenancy Rules, 1954 can be taken cognizance of by any Court without complaint by the Revenue Court concerned or by any Court to which such Court is subordinate. *7 BCR 152 AD.*

2. For more cases, relevant to this section, see under section 465 infra.

Section 464

464. Making a false document.—A person is said to make a false document—

First.—Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person

by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or

Secondly.—Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly—Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him he does not, know the contents of the document or the nature of the alteration.

Illustrations

(a) A has a letter of credit upon B for [1][taka]10,000, written by Z. A, in order to defraud B, adds a cipher to the 10,000, and makes the sum 1,00,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(b) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B and thereby of obtaining from B the purchase-money. A has committed forgery.

(c) A picks up cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand [1][taka]. A commits forgery.

(d) A leaves with B, his agent, a cheque on a banker, signed by A without inserting the sum payable and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand [1][taka] for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand [1][taka]. B commits forgery.

(e) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

(f) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B and C." A dishonestly scratches out B's name intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(g) A endorses a Government promissory note and makes it payable to Z or his order by writing on the bill the words "pay to Z or his order" and signing the endorsement. B dishonestly erases the words "pay to Z or his order" and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(h) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of

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1. The word "taka" was substituted for the word "rupees" by Act VIII of 1973, 2nd Sch. w.e.f. 26-3-71.

the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(i) Z dictates his will to A, A intentionally writes down a different legatee from the legatee named by Z, and by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(j) A writes a letter and signs it with B's name without B's authority, certifying that A is man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here as A made a false document in order to induce Z to part with property, A has committed forgery.

(k) A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery inasmuch as he intended to deceive Z by the forged certificate, and thereby to induct Z to enter into an express or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery.

Illustrations

(a) A signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(b) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a bill of exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is guilty of forgery; and if B, knowing the fact, draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(c) A picks up a bill of exchange payable to the order of a different person of the same name. A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable, here A has committed forgery.

(d) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate, to Z at a nominal rent and for a long period and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(e) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors, and in order to give a colour to the transaction, writes a promissory note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2.—The making of a false document in the name of a fictions person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

Cases : Synopsis

1. Scope.—(1) Forged document—Mere false entries in a document unless the dates were fictitious or the person who had made these entries had no authority to do so will not render the document a false document. *Ali Akbar Vs. State (1958) 10 DLR 354.*

(2) Making of a false document—What it means—The essential ingredient of an offence of forgery is the making of a false document or part of it; the making of a document or part of a document does not mean 'writing or printing' it but by signing or otherwise executing it. *Shamsul Huq Khan Vs. Aminul Islam (1951) 3 DLR 201.*

(3) Mere making of false statement in a document does not render it a false one within the meaning of section 464 where the document is executed by a person who purports to execute it and there is no intention of causing a belief that it was executed by some other person or by his authority. *Shamsul Huda Khan Vs. Aminul Islam (1951) 3 DLR 201.*

(4) Kabuliyat, making certain false statement in itself not forgery. Where the accused executed a kabuliyat in favour of certain persons writing therein that he was executing the kabuliyat with the approval and consent of those persons, which statement, however, was found to be false. Held: The accused could not be held guilty of an offence of forgery. *Shamsul Huda Khan Vs. Aminul Islam (1951) 3 DLR 201.*

(5) Making a false document–X dishonestly wrote out and executed a document in which a different plot of land (other than the one stipulated to be conveyed) was inserted by X and thereby he received a sum of money from the complainant. This action of X does not fall within the meaning of the expression "making any false document" in section 464. *Abdul Jalil Bepari Vs. State (1965) 17 DLR 70.*

(6) Third Clause of S. 464 'he does not know the contents of the document'—The criterion is whether victim had ability to know the contents of the document. Third clause of section 465 of the Penal Code implies that the victim may not know the contents of the document for three alternative reasons, namely (1) unsoundness of mind, (2) intoxication and (3) by reason of deception practised upon him. When the victim is of unsound mind or intoxicated or a deception is practised upon him, it is immaterial whether the forged document contains any contents or not, because the victim will not be able to understand those circumstances whether there were at all any contents or whether the contents have been interpolated. It is for this reason that the legislature has described the result of unsoundness of mind or intoxication or deception practised upon the victim in a particular manner, namely, that "he does not know the contents of the document." The ingredient here is as to the ability of the victim to

know the contents of the document. The ingredient is not as to whether there were at all any contents in the document or not. The yardstick is, whether, the victim was capable of knowing the contents of the document. If he was, the third clause will not apply, but if he was not, for three different reasons stated, then the third clause will apply. It is not the presence or absence of any contents in the document that will determine the applicability of the third clause. It is the fact as to whether the victim had the ability to know the contents of the document that will be the determining factor. *Subal Chandra Das Vs. State (1985) 37 DLR 255.*

(7) The disputed mark-sheets were false documents within the meaning of section 464. *Jahangir Hussain Vs. The State (1988) 40 DLR 545.*

(8) In a charge under this section, the intention of the accused, either to obtain wrongful advantage for himself or to cause an injury or a possible injury to somebody else must be specifically established by the prosecution and where that has not been done the conviction under the section is illegal. *M. A. Motaleb Vs. State (1961) 13 DLR 436: 1960 PLR 1113.*

(9) "Which purports to be"—the expression "which purports to be" means that the document on the face of it (though not in law it is so) appears to be a valuable security. *Bishu Shaikh Vs. State (1957) 9 DLR 626.*

(10) Offences under section 467 and under S. 193 are offences of the same kind. Offences under section 467 and under section 193 are offences of the same kind and when committed within a space of 12 months they are triable together under section 234, Cr.P.C. *Abdus Soban Vs. Crown (1955) 7 DLR 566.*

(11) Where a copy of a forged document was produced in evidence earlier in point of time in a different Court at L and the original forged document was subsequently produced in another Court at S, the fact that the court at L did not make a complaint under section 195(1)(e) Cr. P. C., does not bar the prosecution and trial under sections 467 and 471, on complaint made by the Court at S under section 197(1)(c), Cr.P.C., inasmuch as the Court at L with a mere copy of the forged document was not really in a position to express any opinion upon the genuineness of the original and the section 195, Cr.P.C., only refers to a document alleged to be forged, not to a copy of it. *Sammukh Singh Vs. King (1951) 3 DLR (PC) 3.*

(12) Body of document (receipt) written by the accused but no evidence that he wrote the signature on the receipt—Conviction set aside. *1 PLD (Dac) 35.*

(13) Kind of valuable security that is intended by S. 470. Section 467 of the Code provides punishment for forgery when the forgery is of an aggravated kind. The kind of document which is forged under section 467 is not any and every kind of document. A document which purports to be a valuable security, or will, or any authority to adopt a son, etc. falls within the purview of section 467. *Subal Chandra Das Vs. State (1985) 37 DLR 255.*

(14) Left-hand thumb impression on a piece of blank paper not a valuable security. *Subal Chandra Das Vs. State (1985) 37 DLR 255.*

(15) The accused was entrusted with a number of Postal Orders with forwarding memos by a Bank for encashment of the same at the GPO—Accused mixed up some extra POs with those sent by the Bank at the same time altered the original figure of rupees in the memos for higher figures to equal the total of the POs sent by Bank as well as POs added by him—Accused received the entire amount due on the POs and keeping the money which is payable on the extra POs inserted by him deposited the

amount due on the POs despatched by the Bank—On a charge of forgery the accused as acquitted on the ground that he neither defrauded the Bank to which he deposited the amount that is payable on the POs despatched by it nor the GPO which has received all the POs for which payment was made. *Asrafur Rahman Khan Vs. The State, (1970) 22 DLR 466.*

(16) To sustain a charge under section 467 document in question must be proved to be valuable security and that accused must be identified to be author of forgery. *Lalit Mohan Nath Vs. State, (1987) 39 DLR 398.*

(17) Version put forward by defence side if found to be probable, will re-act on the whole prosecution case and would render it to be doubtful one. *Lalit Mohan Nath Vs. State, (1987) 39 DLR 398.*

(18) Unless there is an element of fraud or intention to cause damage or injury to the public or any person the document or part thereof cannot be called as forged document. Mere signing of the petitioner in another's name who did not give authority to sign without any intention to cause damage or injury to the public or any person and actually causing no injury or damage does not come within the definition of forgery. *Abul Kashem Bhuiyan Vs. State 50 DLR 631.*

(19) Forgery—antedating of a kabala to show that it was executed earlier for defrauding the holder of the earlier kabala amounts to forgery. *Md Amjad Molla Vs. Syeduzzaman Molla and other 1 BLD (AD) 448.*

(20) Forgery—anti-dating of a sale deed (kabala). In order to show that it was effected earlier, to defraud the holder of an earlier sale deed amounts to forgery. *Md. Amjad Molla Vs. Syeduzzaman Molla & Others 1981 BLD (AD) 448=2 BCR 1982 AD 84.*

(21) Forged document—When a document can be called forged ?—To call it forged a document must be executed with dishonest and fraudulent intention to defraud others—Such a finding is absent in lower Court judgments. The circumstances, provisions of law and evidence on record show that prosecution has failed to prove by evidence that the accused petitioners had committed the alleged offence *(Ref: 10 BLD 299) 42 DLR 191.*

(22) A document can be said to be falsely made if the signature, sale or the date is false. In other words the signature (in case of forgery of signature) must be affixed by a person other than the person whose signature it purports to be. *AIR 1979 SC 1072.*

(23) The fact that a document contains false recitals or statements will not make it a false document. *AIR 1961 Guj 117.*

(24) Making of false entries or recitals in a document under one's own authority is not making a false document unless the case comes within clause (2) of this section or it has been antedated. *AIR 1965 Raj 9.*

(25) It is not necessary that a document should be legally effective and valid for its alteration to constitute the making of a false document. *AIR 1918 Mad 150.*

(26) Charge of forgery Nikah form—Circumstances in which document was forged not mentioned in charge—No evidence produced at trial to prove charge—Conviction unsustainable. *AIR 1983 SC 352.*

(27) Where the two documents alleged to be forged bore the signatures of one of the executants thereof at five places and those of the other executants at four places besides two thumb impressions of each of them on each of the two documents, the allegation of forgery in respect of documents would be unacceptable. *AIR 1982 All 323.*

2. Copy of document.—(1) A copy of document alleged to be false does not come within this section. *(1910) 11 Cri LJ 401 (Mad).*

(2) Where a person deliberately prepared Embarkation Froms in contravention of statutory requirements by merely copying false entries from forged passport, it was held that he was guilty of forgery. *AIR 1969 Punj 225.*

(3) Where a person authorised to make copies makes a false copy of a document the false copy will be a false document. If not so authorised, the preparation of a false copy will not be an offence under this section. *AIR 1919 Pat 407.*

3. Document.—(1) A writing is a document. *AIR 1949 All 353.*

(2) The definition of a document does not necessarily require that it should be, in every case, in writing or contain the signature or facsimile of any person but includes what is done by way of printing. *AIR 1954 Mys 119.*

4. Makes.—(1) The word 'makes' means to create or bring into existence. *AIR 1928 Lah 681.*

(2) A person cannot be said to make a document where he has not signed or sealed it. *1968 CriLJ 1378.*

(3) A person who merely writes out the body of the false document can be said to have prepared a false document within the meaning of this section. *AIR 1967 Mys 86.*

5. Dishonestly.—(1) The most important ingredient of the act of making a false document is that it must be made dishonestly or fraudulently. *1976 Chand LR Cri 322.*

6. "Fraudulently."—(1) A person who deceives another and drives a benefit or advantage possibly causing injury to the deceived person in body, mind or reputation commits fraud and even if no corresponding loss or disadvantage to the deceived is established, it could be inferred that if one gets benefit or advantage the other will incur loss or disadvantage to some extent. *AIR 1968 Mad 349.*

(2) The expression "defraud" involves two elements namely deceit and injury to the person deceived. Injury may be a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Non-economic advantage to the deceiver or non-economic loss to the deceived need not co-exist. The injury or risk need no be intended to any particular person. *AIR 1963 SC 1572.*

(3) Where fraud was held to have been committed. *AIR 1963 SC 1577.*

(4) Where fraud was not held to have been committed . *AIR 1956 Pat 154.*

7. Person.—(1) The word 'person' has been defined in S. 11 of the Code. The definition is not exhaustive and must be taken to include artificial or juridical persons as well. An idol is a juridical person and therefore a 'person' as defined in S. 11. *AIR 1944 Mad 77.*

8. Clause I.—(1) A person to be guilty of forgery under the first clause of Section 464 must make a false document or part of a false document and not merely cause it to be made. *AIR 1953 Cal 798.*

(2) Mere proof of making of such document without establishing "intention" is not sufficient to constitute offence. *AIR 1970 Mys 254.*

(3) A person making a document constraining false statement on his own authority or seal is not making a false document. In every case of forgery where the question of authority is raised it is essential to prove not only lack of authority but also dishonest intention with probably more than usual case. It is not forgery when the act is done under the honest belief that the party doing it had a right to do it, although in point of fact he had really no such authority. *AIR 1951 Cal 581.*

(4) A series of similar transactions in which forgeries were committed by the accused can be used to ascertain the intention of the accused. *AIR 1917 Cal 676.*

(5) Where a document bearing a certain date is brought into existence on a later date, it is a false document. *AIR 1954 SC 322.*

9. Clause II.—(1) The test to be applied to determine whether a document has been materially altered within the meaning of this clause is not different from the test to be applied to determine whether the alteration is material from the point of view of rights of the contracting parties. *(1910) 11 CriLJ 505 (511) (DB).*

(2) The reason of the thumb impression in the account books the effect of which is to destroy altogether the evidence of the receipt of money or of the acknowledgment thereof is not a mere alternation in the document. Therefore the offence does not fall under S. 463 read with this section but under S. 477. *1936 Mad WN 489.*

(3) A plaint is a record or proceeding of the Court of justice in which it is filed. Alteration or addition of parties' names without permission of Court amounts to an offence under S. 466. *(1912) 13 CriLJ 588.*

(4) The accused obtained a prescription from a doctor for one tube of morphia. He altered the words 'one tube' to 'four tubes' and obtained 4 tubes from the chemist. It was held that accused was guilty under Ss. 465 and 471 of the Code. *(1921) 22 CriLJ 681 (Lah).*

10. Interpolation of name of attestors.—(1) Where a document is not required by law to be attested, the interpolation of the name of a person as an attesting witness is not a material alteration. *(1910) 11 CriLJ 505 (Cal).*

11. Attesting a forged document.—(1) Where the accused attested a forged document, knowing it to be forged it was held that he was guilty of fabricating false evidence, and further, that as the document was not complete before the accused attested it, the accused was also guilty of abetment of making a false document. *AIR 1942 Mad 92(1).*

(2) Where the accused attested a forged document, it was held that the accused could not be held guilty of forgery. *AIR 1961 Guj 117.*

12. Clause III.—(1) Where the charge against the accused is that by means of deception practised upon another, he got the latter to sign, sell execute or alter a document, it must be shown that the person signing, selling or executing or altering the document did not know the contents of the document, or the nature of the alteration on account of the deception practised upon him by the accused. *(1873) 20 Suth WR 49.*

13. Explanation 1.—(1) Accused executing bond and instead of affixing his proper signature signing in English—Held that signing with fictitious name did not amount to forgery. *(1912) 17 Mys CCR No. 58 P. 50.*

14. Explanation 2.—(1) Signing a document in an assumed name is forgery under the English law relating to forgery. *(1805) 168 ER 699.*

(2) A mere false description would not make the document a forgery unless it can be shown that the accused by giving the false description intended to make out or wanted it to be believed that it was not he that was executing the document but a fictitious person. *(1909) 9 CriLJ 85.*

15. Evidence and proof.—(1) Merely because account-books are not regularly kept in the ordinary course of business, the entries therein cannot be said to be forgeries. *AIR 1927 Pat 47.*

(2) Where the body of the document forged is entirely in the handwriting of a person, it is evident that he forged it. The initials of one of the accused at the bottom of the forged document are not enough to prove forgery against him. *AIR 1914 Mad 323.*

Section 465

465. Punishment for forgery.—Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials : Synopsis

1. *Scope.*
2. *Intention to cause damage or injury, etc.*
3. *Part of a document.*
4. *Copy of document.*
5. *Writing body of cheque but not signing it.*
6. *Damage or injury.*
7. *Claim or title.*
8. *Property—"To part with property".*
9. *To enter into any express or implied contract.*
10. *To commit fraud.*
11. *This section and Section 192.*
12. *This section and S. 468.*
13. *Section 171-F and this section.*
14. *Preparation and attempt.*
15. *Abetment.*
16. *Charge.*
17. *Evidence and proof.*
18. *Comparison of handwriting and expert's evidence.*
19. *Sentence.*
20. *Procedure.*
21. *Practice.*

1. Scope.—(1) This section provides punishment for forgery. A charge of forgery cannot be laid against a person who was not the writer of the forged document or who did not sign the forged name *(14 CrLJ 129).* But where the body of the document forged is entirely in the hand writing of a person it is evident that he forged it. Where a document is relied on by the accused, it is duty of defence only to prove it; but when the prosecution alleges it to be forged and asks for conviction on that ground, it is duty of the prosecution to prove the forgery beyond all reasonable doubt (*AIR 1950 Lah. 199).* Proof of fraud by positive and express evidence cannot be expected in a large majority of cases and in such cases circumstantial evidence is the only means available. But such evidence must not fall short of proof because no conviction can rest on mere suspicion and conjecture, however strong may be *(AIR 1933 Lah. 308).* In order that a document should be a false document within the meaning of section 464 it must appear that it was made with the intention of inducing the belief that such document was made by, or by the authority of one who did make it or give such authority. In other works, the document must purport to have been made, signed or sealed by a person who did not, in fact, make it. A conviction cannot be sustained on the uncorroborated testimony of the finger-print expert alone. Further, the practice of taking the thumb-impression of the accused during the trial and using it against him is severely condemnable *(51 Cr. LJ 569).* The correct principle of law is that the testimony of the handwriting expert and with its assistance the court should apply its own observation on the disputed writing and reach the conclusion whether the signature which is denied, is or is not the signature of the person denying it *(1952 Cr. LJ 1225).* Human knowledge is limited and imperfect *(AIR 1921 Lah. 126).* In a case of forgery the only chief evidence being an expert's examination of the forged document as compared with the other documents alleged to be in the handwriting of the accused, the other documents must strictly prove to be in his handwriting. A mere statement, therefore, by a witness that

it is the handwriting of the accused is no evidence if he is not able to say how long ago they were written. The opinion of a handwriting expert carry little weight unless it is supported by a clear statement of what he noticed and on what he based his opinion. An opinion of a handwriting expert cannot in law be taken as conclusive proof. At best it can only be taken as inconclusive and in conjunction with other evidence (50 CrLJ 964). The offence of using a forged document as genuine is committed at a place where such user has taken place and not where it is posted *(AIR 1949 Mad. 833).* If the prosecution is confined to offences connected with the document committed prior to its production in court, such production is within the law and requires no sanction as required under section 195(1)(c) CrPC. But where such offence has been committed by a party to any proceedings in court in respect of a document, no court shall take cognizance except on the complaint in writing by such court.

(2) Accused charged u/ss. 209/34 and 420/34—Further charge u/s 5(2) of Act II of 1947—Acquitted of the charge u/ss. 209/34 and 420/34 but convicted and sentenced u/s 465—There was allegation of fabrication of document for establishing false claim before a law court—question as to validity of conviction and sentence u/s 465—irregularity, whether curable. The petitioner and 2 others faced trial u/s 209/34 and 420/34. The petitioner was further charged u/s 5(2) of Act II of 1947. Each of them was found not guilty u/s 204/34 and was acquitted. They were, however, convicted u/s 465/34. On appeal, the High Court upheld the conviction with modification of the sentence. On the contention that since the petitioner faced trial on the charge u/ss. 209 & 420 of the Penal Code and was acquitted of them and since the offence u/s 465 is neither a cognate nor a minor offence, conviction and sentence of the petitioner u/s. 465 was illegal and that he was highly prejudiced. Observed: It was clear that there was allegation of fabrication of documents with a view to establish a false claim in a proceeding before a Court of Law. The petitioner had, therefore, the notice of allegation and fabrication of document. Held: The ingredients of the offence punishable u/s 209 and those of an offence punishable u/s 465 are almost similar. In this view of the matter, there is no reason to think that the petitioner was prejudiced due to his conviction u/s 465 after his acquittal from the charge u/ss. 209 & 420. In convicting the petitioner u/s 465 the trial Judge did not commit any illegality and that the High Court did not commit any error in law in maintaining the conviction u/s 465. It was at best an irregularity curable u/s 537 of the Criminal Procedure Code. *Mr. Abdullah @ Abdullah Mia Vs. The State. 1 BSCD 248.*

(3) Petitioner did not disclose the nature of document created no offence. *49 DLR 16.*

(4) The point is whether the obtaining of Left Thumb Impression (LTI) of the victim on a blank stamp will attract the mischief of section 467 of the Penal Code. Held: An LTI affixed on a blank stamp paper simpliciter cannot signify acknowledgment of legal liability nor can it signify that the person who put his LTI has not a legal right. It is, therefore, difficult to hold that a mere LTI on a blank paper is either a valuable security itself or purports 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.*

(5) Prosecution for forging document— When it is to be quashed—The bainapatra in question having been given in evidence in the suit, no court can take cognizance of any offence covered by section 463 PC without complaint by the Court—The criminal proceeding against the accused in connection with forgery thereof has to be quashed—But this will not debar the competent court to make any complaint in accordance with law. *9 BLD 209.*

(6) So far as offences under sections 465 and 471 of the Penal Code are concerned, such offences are non-cognizable by the police since the accused could not be arrested being charged under the aforesaid sections without any warrant from any appropriate criminal court. *35 DLR 76.*

(7) In order to constitute forgery, the first essential ingredient is that the accused should have made a false document, or a part of such document. In the absence of proof of this ingredient, a person cannot be made liable for an offence under Section 463. *1980 All Cri R 22.*

(8) Certificates, forged to get admission in College, cannot be described as a valuable security. Accused can be convicted under S. 465 read with Section 471. *AIR 1981 SC 297.*

(9) The definition of forgery in Section 463 is wide and includes any document forged with one or other of the intentions mentioned in the section. *AIR 1962 All 582.*

2. Intention to cause damage or injury, etc.—(1) Mere knowledge that the document might injure another is not sufficient. It must be established that the accused had the intention, referred to in Section 463. *(1882) 10 Cal LR 184.*

(2) Intent to cause injury is not necessary in every case. *AIR 1944 Lah 380 = 46 CriLJ 341.*

(3) Where both injury and dishonesty are relied upon, proof of injury may be necessary. Where, fraud is the element relied upon it is sufficient to prove that the accused wanted to secure an advantage to himself and not also that he intended to cause injury to another. *AIR 1959 All 149.*

(4) If a person, with intent to defraud or deceive forges any document which if made and tendered in evidence in accordance with the terms and conditions of the relevant statute relating thereto will become a document made evidence by law, he commits an offence of the forgery. *(1981) 1 WLR 148.*

3. Part of a document.—(1) The 'making of a part of a document' must be the making of a part of a false document and in the making of a part of a document, not only the intention or purpose must be proved, but the fact that the document was false should also be proved. *AIR 1929 All 396.*

(2) As the making of a part of a false document is also an offence, it is immaterial, if the person who makes a part of the forged document was present or not at the time when it was completed. *AIR 1933 Sind 37.*

4. Copy of Document.—(1) The forgery of a copy of an original document falls within the terms of the section. *1970 SCD 471.*

5. Writing body of cheque but not signing it.—(1) The mere forgery of the body of a cheque belonging to another does not by itself make it available for being used for the purpose of cheating any one. The prosecution must prove that the signature thereon was made by the accused himself. *1971 Cri LJ 1335.*

6. Damage or injury.—(1) The gist of the offence is the intention to cause damage or injury; it is immaterial whether damage or injury is actually caused or not. *AIR 1953 Nag 165.*

(2) Making a false document without the intention referred to in S. 463 is not an offence. *AIR 1915 Cal 786.*

(3) The proper administration of justice is so vital to the ordered existence of a civilized community that an intent to defraud justice is something very closely affecting the public and hence can be said to cause damage or injury to the public and to the party concerned in the particular case. *AIR 943 Sind 46.*

(4) Tampering with the electoral rolls amounts to causing injury to the public and persons whose voting rights are affected by such tampering. *AIR 1934 Cal 838.*

(5) The accused pretending to be a certain candidate for an examination forged answer papers purporting to be answered by such candidate—Held that he was guilty of both cheating and forgery under Secs. 419 and 468 respectively. *AIR 1936 Cal 403.*

7. Claim or title.—(1) The words claim or title are not limited to a claim to property only. The claim may be to anything, as, for instance, a claim to a woman as the claimant's wife, a claim to the custody of a child as being the claimant's child, or a claim to be admitted to attendance in a college or to be admitted to a University or other examination or a claim to possession of immovable or any other kind of property. *AIR 1929 Lah 152.*

(2) Even if a man has legal claim or title to property, he would be guilty of forgery if he counterfeits documents in order to support it. *AIR 1953 Nag 165.*

8. Property—"To part with property".—(1) The word 'property' is used in the Code in a much wider sense than the expression movable property. Whether the offence defined in a certain section of the Code can be committed in respect of any particular kind of Property will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by the section. *AIR 1962 SC 1821.*

9. To enter inter any express or implied contract.—(1) The accused applied to the Police Superintendent for employment in the Police Force and in support of his application, he produced two certificates, one of which was a wholly fabricated document and the other was altered in some places. It was held that the document was made and used with intent to cause a person to enter into a contract for service, namely, to engage the accused as a Police Officer. *(1898) ILR 22 Bom 768.*

10. To commit fraud.—(1) An act done clandestinely in order to conceal a fraudulent or dishonest act already committed or to avoid detection of one's own negligence in the performance of his duties will amount to an act done with an intent to commit fraud. *AIR 1940 All 551.*

(2) It was held that the accused had no intent to commit fraud. *AIR 1939 Rang 156.*

(3) A forged endorsement of discharge on a mortgage deed showing that the debt had been discharged shows an intent to commit fraud. *AIR 1914 All 337.*

(4) Unless there is an element of fraud the making of a false document does not amount to a forgery because one of the intents contemplated by Section 463 is that the false documents must be made with intent to commit fraud or that fraud may be committed. *AIR 1957 Cal 222.*

11. This section and Section 192.—(1) Some of the ingredients of the offence of fabricating false evidence defined in Section 192 and of the offences of making a false document and thereby committing the offence of forgery under this section and Section 464, are common. But the difference lies in the fact that in order to come within Section 192, it is necessary that it should be intended that the fabricated evidence may appear in evidence in a judicial proceeding and lead the presiding officer to form an erroneous opinion touching any point material to the result of such proceeding. *AIR 1966 SC 523.*

(2) Where a party to a civil suit forges a document for the purpose of that suit and then produces it in support of his claim, he has committed an offence punishable under Section 193, Penal Code, and hence cannot be prosecuted without a complaint of the Court under Section 195, Criminal P. C. *AIR 1916 All 299.*

(3) Where the intention of the accused is to discredit the evidence of witnesses that might be produced against him by the complainant in a criminal case, the offence committed by him would be one of attempting to fabricate false evidence and not forgery. *AIR 1925 Lah 327.*

12. This section and S. 468.—(1) Section 468 deals with the offence of forgery when the forged document is intended to be used for cheating. It cannot be said to be a distinct offence from an offence under this section. *1969 All WR (HC) 777.*

13. Section 171-F and this section.—(1) The offence of false preparation of a signature sheet at an election is specifically provided for under Section 171-F of the Code (personation at an election). Such an offence may also involve the element of forgery. In such cases, the offender will have to be tried for an offence under Section 171-F of the Code and it is not correct to say that it is open to the Court to try the offender for an offence either under Section 171-F or under this section. *AIR 1925 All 230.*

14. Preparation and attempt.—(1) Accused gave orders to a press to print one hundred receipt forms similar to those used by the Bengal Coal Company. He corrected one proof of those forms and was suggesting further corrections in a second proof, when he was arrested by the Police. It was held that the accused had only made preparations to commit forgery and his act had not reached the stage of an attempt. *(1881) ILR 7 Cal 352.*

(2) Obtaining signature of a person on chargesheet of paper by itself is not an offence of forgery or the like. It becomes an offence when the paper is fabricated into a document of the kind which attract the relevant provisions of the Penal Code making it an offence or when such a document is used as a genuine document. *AIR 1979 SC 850.*

15. Abetment.—(1) Where there was no proof that the accused actually made the material alterations, but there was sufficient material to show that the accused must have been a privy to it, he was held liable for abetment of the offence of forgery. *(1894) ILR 22 Cal 313.*

16. Charge.—(1) Since there can be no forgery unless there is a dishonest or fraudulent making of a false document, it is necessary for the charge to state that the document concerned was made dishonestly or fraudulently as the case may be. If the prosecution case is that the document was made dishonestly, the charge should state that the intention was to cause wrongful gain to some one or wrongful loss to another. *AIR 1967 Mys 86.*

(2) In a case where the charge of forgery is brought for the first time against the accused in the course of proceedings for other offences, every opportunity should be given to him to meet that charge. *AIR 1939 Sind 222.*

(3) On a charge for the offence of forgery, the accused can be convicted under Section 471 of the Code for fraudulently or dishonestly using the document as genuine with knowledge that it was a forged document. *AIR 1931 All 258.*

(4) Section 468 is an aggravated form of forgery and where the accused is charged for an offence under Section 465, his conviction under Section 468 is illegal. *AIR 1921 LB 36.*

(5) The charge should run as follows:

I (name and office of the Magistrate/Judge, etc.), hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, forged a certain document, to wit—, (describe it) with intent to cause damage or injury to X, or to support a certain claim or title to wit—, or to cause X to part with certain property, to wit—, or to enter into a certain contract with X with regard to (mention the object), or with intent to commit fraud (state the fraud), and that you thereby committed an offence punishable under section 465 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

17. Evidence and proof.—(1) In a charge of forgery, the burden is on the prosecution to prove that the document is a forged one and that it was the accused who forged it. It is not for the accused to prove that the document is a genuine one. *AIR 1932 Bom 406.*

(2) A person to be guilty of forgery under the first clause of Section 464 should himself have made a false document or part of a document and not merely have caused it to be made. *AIR 1953 Cal 798.*

(3) Admission in a civil suit that a document was executed cannot, in the forgery case, be regarded as a confession for the purpose of excluding it as evidence against the accused. *AIR 1929 Cal 539.*

(4) In the trial of an accused person for giving false evidence in respect of an alleged forged document, evidence of the opinions of other Judges on other documents written or attested by the accused in suits and proceedings to which he was not a party is not admissible to prove his intention and knowledge. *AIR 1916 Nag 73.*

(5) Held that the alterations made in the carbon copies of sale notes did not show the commission of forgery or other offence. *AIR 1979 SC 1206.*

(6) Charge of forgery based on mere suspicion or doubt—Not maintainable. *AIR 1984 Orissa 71.*

18. Comparison of handwriting and expert's evidence.—(1) In determining whether a document is forged or genuine, a comparison of handwriting is a valuable aid. *AIR 1933 Pat 481.*

(2) It is dangerous to come to any conclusion as to forgery on a mere comparison of handwriting. *AIR 1922 Pat 619.*

(3) A conviction can be based solely on the testimony of the expert. *AIR 1969 Punj 225.*

(4) The Court must not accept the expert's opinion as being necessarily conclusive, but must examine his evidence in order to satisfy itself that there is no mistake and the responsibility of the Court is all the greater when there is no other evidence to corroborate the expert. *AIR 1931 Cal 441.*

19. Sentence.—(1) Offences under this section are indeed serious and difficult to detect and consequently call for deterrent punishment. The gravity of the offence of forgery does not depend upon the amount for which forgery is committed. *AIR 1926 Bom 555.*

(2) The law takes a serious view of these offences however small the amount involved may be. *AIR 1955 NUC 2010 (All).*

(3) Where the accused has a good claim except for the technical bar of limitation and in order to overcome that bar, commits forgery, the court should not view his action with the same severity as if he had attempted to make out a claim for which he had no basis at all. *AIR 1937 Nag 89.*

20. Procedure.—(1) Registrar's nominee is not a 'Court' within Section 195, Cr. P. Code—Commission of offences under Sections 465 and 471, Penal Code by party before Registrar's nominee—Magistrate can take cognizance thereof on private complaint. *AIR 1969 SC 724.*

(2) Once it is accepted that S. 463 defines forgery and S. 467 punishes forgery of a particular category, the provision in S. 195(1)(b)(ii) Cr. P. C. would immediately be attracted and on the basis that the offence punishable under S. 467 P. C. is an offence described in S. 463, in absence of a complaint by the Court, the prosecution would not be maintainable. *AIR 1983 SC 1053.*

(3) The offence of fabricating false evidence, punishable under Section 193 of the Code requires a complaint in writing of the Court before which it is alleged to have been committed in view of Section 195(1)(b)(i), Criminal P. C. Where the facts alleged disclose the specific offence of fabricating false evidence, the provisions of Section 195(1)(b)(i), Criminal P. C. cannot be by-passed by asking the Court to treat it as a complaint of forgery, for which a complaint of the Court may not be necessary in certain cases. *AIR 1950 All 465.*

(4) Where a document alleged to be forged is produced in Court, not in connection with any other case, but in a prosecution founded upon it for the purpose of convicting an accused of an offence in

relation to it, it is open to the Sessions Judge to take cognizance of the offence of forgery without a complaint of the committing Magistrate. *AIR 1932 Bom 545.*

(5) As to joint trial of charges and persons. *AIR 1950 Lah 199.*

(6) Where a person accused of forging a document is charged with an offence under Section 465 and is acquitted by a Magistrate of the first class under Section 248, Criminal P. C. the Sessions Judge has no power to direct his committal or order a further enquiry under Section 398, Criminal P. C., on the ground that the offence alleged falls under Section 467 of the Code relating to a document which is a valuable security. *AIR 1918 Cal 943.*

(7) A complainant who alleges forgery in respect of a document by antedating it is not obliged to confine himself to the evidence of the witnesses named in the petition of complaint. *AIR 1936 Pat 531.*

(8) The words "produced or given in evidence" in Section 195(1)(c), Cr. P. C. do not include production of the document in pursuance of an order of Court for inspection in the sanction proceedings or for translation. *AIR 1923 Mad 136.*

(9) Not cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate. In case of public servant, it is triable by Special Judge under Act XL of 1958, and in that case it is cognizable, not bailable and not compoundable.

21. Practice.—Evidence—Prove (1) That the accused made, signed, sealed, or executed the document, or any part of it, or made a mark denoting execution.

(2) That the accused did so with the intention of causing it to be believed that such document or part of the document—

(a) was made, signed, sealed or executed by the authority of a person; or

(b) was executed at the time (or that after has been made or executed the accused altered it by cancellation or otherwise or that such person did not know the contents of the document or the nature of the alteration).

(3) That such person did not make, sign, or seal or execute the document or authorise the making, signing or sealing or execution at the said time or at any other time (or that such alteration was of a material part of the document or that other person not knowing the contents of the document or the nature of the alteration was due to his unsoundness of mind or intoxication or the deception practised upon him).

(4) That the accused knew that the document was not made, signed, sealed or executed by or by the authority of that other person or at a time at which he knew that it was not made, signed, sealed or executed (or that the accused had no lawful authority to make the alteration), or that the accused knew that the other person not knowing the contents of the document and the reasons thereof (unsoundness of mind, intoxication or deception).

(5) That the accused did as above dishonestly or fraudulently with the intention of causing damage or injury to the public or to any person or to support any claim or title or to cause any person to part with property or enter into any express or implied contract or with intent to commit fraud or that fraud may be committed.

Section 466

466. Forgery of record of Court or of public register, etc.—Whoever forges a document purporting to be a record or proceeding of or in a Court of Justice, or a register of birth, baptism, marriage or burial, or a register kept by a public servant as

such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *"Whoever".*
3. *"Forges".*
4. *Forging Court records and proceedings.*
5. *Forgery of a public record.*
6. *Register of births, deaths, baptisms or marriages.*
7. *Authority to institute suits or defend suits, etc.*
8. *Abetment.*
9. *Procedure and punishment.*
10. *Sanction.*
11. *Charge and conviction.*
12. *Practice.*
13. *Charge.*

1. Scope of the section.—(1) This section may be read with section 20, 21 and 29 of the Penal Code. This section applies to cases where a certificate or a document is forged by a person with a view to make it appear that it was duly issued by a public office, eg forging a marriage certificate. A plaint is a record of a proceeding of the Court of Justice in which it is filed. It is a document which once filed cannot be altered or amended without the special sanction of the court *(13 CrLJ 588)*. Therefore, if the accused obtains access to the record of the court and interpolates it to secure a decision in his favour, he is guilty of an offence under this section *(AIR 1943 Pat. 393)*. Certificates issued by the private institutions or aided school cannot be said to be forged one as they do not come in any of the kinds mentioned in section 466. Alteration of name and age in an education certificate and using it as a genuine one by the person so altering it to obtain an official appointment on its basis constitute the making of a false document within the meaning of section 466 and in the absence of satisfactory explanation his motive may be presumed to be fraudulent and dishonest and can be convicted under sections 466 and 471 *(1 CrLJ 1124)*. Where a person who is bound to give a true copy of any document gives a true copy of such document, he cannot be convicted of forgery punishable under this section, merely because the original of which he gives a true copy contains a statement which is false, and is known or believed by him to be such. In a word, this section deals with the offence of forgery in relation to certain important documents, such as—(1) Records of proceedings in a Court of Justice, (2) Register of births, baptisms, marriages or burials, etc. Where an offence is committed in a matter before, a complaint by the court is necessary *(1971 PCrLJ 799)*. A person can be convicted of abetment of forgery committed by a person or persons unknown.

(2) Comparing disputed handwritings by the judges themselves— When permissible— In a case of forgery where the opinion of the Handwriting Expert is not clear and specific as to the disputed handwritings, the judges are entitled under section 73 of the Evidence Act, to compare the handwritings themselves and on such comparison together with other relevant circumstantial evidence conviction of the accused can well be secured. *Raisuddin Mondal (MD) and another Vs. The State—3. MLR (1998) (AD) 30.*

(3) Sentence under sections 466 and 471.—An accused found guilty of the offence under section 466 of the Penal Code can be convicted and sentenced under section 466 but he cannot be sentenced under both sections 466 and 471 of the Penal Code. A public servant making forgery in preparing false order can well be sentenced under section 466 of Penal Code as well as under section 5(1) of the Prevention of Corporation Act, 1947. *Azizul Haque (MD) Vs. The State— 4. MLR (1999) (AD) 215.*

(4) Offence of forgeoy—Necessary evidence—When not brought on record—Retrial ordered—When the vital documents are not brought on record and marked exhibits and the vital witness are not examined in the face of the offence involving great public importance retrial of the case is directed to comply with the necessary requirements of law. *Sirajuddin Sheikh (Md.) Vs. The State 6 MLR (HC) 171.*

(5) For laying a false claim upon about 40 acres of Khas land the accused-appellant and his brother created a false and fictitious attested copy of judgment of a suit and used the said document in a mutation proceeding but it will be unsafe to sustain the order of conviction and sentence without giving a chance to the accused to cross-examine the witnesses in whose presence the material exibits were seized and hence the case was sent back on remand to the trial Court for a trial afresh in accordance with law. *Sirajuddin Sheikh (Md.) Vs. State (Criminal) 6 BLC 667.*

(6) The words "forges a document" would cover not only the forgery of the whole document but also a forgery of a part of a document. *1970 Pat LJR 309.*

(7) The essential ingredients of the offence under this section are:—

(i) that the accused forged a document; and

(ii) that such document is one of the kinds specified in the section. *1971 All WR (HC) 345.*

(8) Charge under sections 466 and 477A—Sustainable even if accused be found not guilty of criminal breach of trust. *17 DLR 90 WP.*

(9) Section 195 of the Code bars the taking of cognizance except on complaint filed by certain specified public servants or Courts. It is sub-section (1) of section 195 which is relevant to the instant case. The first question is whether the provision of sub-section (1)(c) of section 195 of the Code has been dispensed with by the Criminal Law Amendment Act. There is no dispute that if an offence falls within the meaning of sub-section (1)(c) no Court shall take cognizance of it except on a complaint from the Court concerned. This section provides that the Special Judge will take cognizance either on a complaint or on a police report. It appears that the learned Judge overlooked the other provisions of this Act, particularly section 6 of the Criminal Law Amendment Act, 1958.

Circumstances when cognizance is to be taken under section 195(1)(c) of the Code of Criminal Procedure. When an offence within the meaning of sub-section (1)(c) of section 195 of the Code is committed in a proceeding before a Court then the complaints shall have to be filed by the Court or by any other Court to whom that Court is subordinate. Therefore, in view of section 6 of the Act the provision as to taking cognizance on a complaint from court has remained unaffected and as such, if an offence falls within the ambit of clause (c) of section 195(1) then cognizance cannot be taken except on a complaint from the court. Clause C of sub-section (1) of section 195 CrPC: Each and every offence of forgery committed in connection with a proceeding of a Court is not covered by this clause. To bring a case within its fold, the offence must be an offence of forgery in respect of a document which is "produced or given in evidence" in that very proceeding; secondly, the offence in respect of that document must have been committed by "a party to that proceeding". These two all important ingredients are palpably lacking in this case.

Even if the proceeding for sale is taken as continuation of the Certificate proceeding, still the offence committed does not come within the purview of clause (c), for these two documents were not "produced or given in evidence" in the Certificate proceeding before Certificate Officer because the Certificate proceeding was disposed of already. The document in respect of which an offence of forgery is committed shall have to be produced in evidence in that proceeding. The Agent-name and the Bid-sheet are not certainly documents which were filed as evidence in that Certificate proceeding. The

forged documents, it is clearly found, were neither produced as evidence in the Certificate case nor the offence in respect thereof as committed by any party to the Certificate case namely, the Certificate holder and the Certificate debtor, and as such, the offence committed by the accused appellants is not an offence within the meaning of clause (c) of section 195(1). The provision for complaint by Court is not applicable to the trial of the appellants. We, therefore, answer the second question in the negative and find that the cognizance taken by the Special Judge is perfectly lawful. *6 BCR 34 AD.*

2. "Whoever".—(1) The section is not intended to apply to cases where a public servant himself makes a false document. It applies to unauthorised persons forging a certificate or document purporting to be made by a public servant in his official capacity for making it appear to have been duly issued by such public servant. *(1881) 7 Cal LR 356.*

3. "Forges".—(1) The accused must have 'forged' the document. This implies fraud or dishonesty on the part of the accused. *1977 CriLJ (NOC) 103 (Goa).*

(2) Document bearing a certain date brought into existence on a later date—Accused held guilty of forgery. *AIR 1954 SC 322.*

4. Forging Court records and proceedings.—(1) Tampering with the records of a Court with a view to obtain the decision of a Court is a fraudulent act and is an offence within this section. *AIR 1943 Pat 393.*

(2) Where the accused No. 1 handed over a Government file to the accused Nos. 2 and 3 and it was discovered subsequently that, during the interval when the file had been with the accused No. 2 and No. 3, certain documents had been removed or had been mutilated, it was held that all of them would be guilty under this section and Section 193, on the presumption that the offence had been committed by one of them in the presence of the others, in furtherance of the common intention of all of them. *AIR 1926 Bom 122.*

5. Forgery of a public record.—(1) Forging an education certificate and using it as genuine for obtaining an official appointment, is making a false document under Section 464 and so in the absence of a satisfactory explanation, the conviction of the person would be proper under this section, on the presumption that his motive was dishonest and fraudulent. *(1904) 1 CriLJ 1124 (Low Bur).*

(2) Where the accused was charged under this section, for having entered Junagadh State from Pakistan using a permit which was in a book stolen and on which the rubber stamp of the High Commissioner's Office was alleged to be forged, it was held that the accused could neither be held privy to the theft nor to have knowingly used a forged document, because, the rubber stamp mark on the alleged forged permit was found to be genuine and so, he could not be held guilty under this section. *AIR 1950 Sau 9.*

(3) Where a legal practitioner puts his signature to a document, which contains statements which he knows are dishonest and untruthful, for the purpose of misleading the Court, he must bear personal responsibility and he will be bound by all the implications arising from it. On proof of his misconduct, he might be held liable for it, under this section. *AIR 1927 All 45.*

6. Register of births, deaths, baptisms or marriages.—(1) It is not necessary that the register of marriages by Mohammadans should be kept by a public servant. The section would apply to a forgery even of a marriage register maintained by Kazis under the Mohammadan law. *1 Weir 541.*

7. Authority to institute suits or defend suits, etc.—(1) The expression "to institute or defend suits or any proceedings therein or to confess judgment", must be associated with the word 'authority' preceding the expression and not with the other documents indicated in the section. *AIR 1965 Raj 9.*

(2) The forgery of an entry in a public register need not be for the purpose of "instituting or defending a suit" etc., in order to constitute an offence under this section. *AIR 1965 Raj 9.*

8. Abetment.—(1) There can be an abetment of an offence under this section. *(1905) 2 CriLJ 8.*

2. Procedure and punishment.—(1) Accused charged with offences of criminal misconduct and forgery—Application for withdrawal on ground of lack of prospect of successful prosecution in the light of evidence—Permission to withdraw granted and confirmed by High Court—Held on facts that no prima facie case was made out—No interference by Supreme Court. *AIR 1983 SC 194.*

(2) Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class. If the offence is committed by a public servant, it becomes, triable by Special Judge under Act XL of 1958 and Act II/47 and in that case it is cognizable.

10. Sanction.—(1) A prosecution for an offence under this section requires sanction under S. 195 (1)(c). Criminal P. C. *1975 CriLJ 1939.*

(2) Where the question was whether a prosecution for offences under Sections 120B and 466 and 477 required the sanction of the Government their Lordships of the Supreme Court left the question open. *AIR 1961 SC 1241.*

(3) Debt Settlement Boards under the Bengal Agricultural Debtors Act (7 of 1936) are not Courts and no sanction is necessary under Section 54 of that Act. *AIR 1940 Cal 286.*

11. Charge and conviction.—(1) A person cannot be convicted and sentenced under this section read with Section 471, when a charge is laid against him under Section 465 read with Section 471. *(1912) 13 CriLJ 449 (Cal).*

(2) A person cannot be convicted both under this section and Section 467. After convicting him under one of these two sections, whichever is most suitable, it will be unnecessary to add a charge under Section 468. *AIR 1925 Oudh 413.*

(3) If a person commits an offence under this section and another offence of using as genuine a forged document, which are both separate offences, he can be convicted under both the sections. *AIR 1924 Nag 162.*

(4) Where the accused was charged with conspiracy to forge passports and other travel documents, and was convicted only for forging the travel documents relating to the passport, the conviction was held proper under this section, because, the omission to frame a distinct charge with regard to the related documents was but a mere irregularity which could be covered by Section 221, Criminal P. C. and also because no prejudice was shown to have been caused to the accused, who had been afforded a full opportunity to know the charge and defend himself. *AIR 1969 Punj 225.*

(5) The High Court under Section 423(1)(d) of the Cr. P. C. was held to have power to amend the charge in appeal against the conviction of the accused under this section combined with Section 109, from one of abetment by a named person into a charge of abetting an abetment. *AIR 1943 PC 192.*

(6) In a complaint under Section 193 of the Code, the accused can be convicted under S. 466 of the Code. *AIR 1962 All 132.*

12. Practice.—Evidence—Prove: (1) That the accused forged the document.

(2) That the document forged is one of the kinds specified in this section.

13. Charge.—The charge should run as follows:

I (name and office of the Magistrate/Judge) hereby charge you (name of the accused) as follows:

That you, on or about the—day of—, at—, forged a certain document, to wit—, which purported to be a record (or proceeding of a Court of Justice, etc.), and that you thereby committed an offence punishable under section 466 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 467

467. Forgery of valuable security, will, etc.—Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, moveable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with [2][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Forges a document.*
3. *Alteration of a document.*
4. *Purports to be a valuable security.*
5. *Purporting to be a receipt.*
6. *Copy of a document.*
7. *Abetment—Conviction.*
8. *Attempt.*
9. *Attesting witness.*
10. *Identifying witness before Sub-Registrar.*
11. *Evidence and burden of proof.*
12. *Procedure.*
13. *Jurisdiction.*
14. *Applicability of Sec. 452, Criminal P. C., to money seized in investigation.*
15. *Separate offences under this section and another section.*
16. *Estoppel.*
17. *Complaint.*
18. *This section and Ss. 409, 420, 466, 471 and 477A of the Code.*
19. *Charge.*
20. *Joint or separate trial.*
21. *Sentence.*
22. *Practice.*

1. Scope of the section.—(1) This section may be read with sections 22, 29, 30, 31, 463 and 464 of the Penal Code. To support a conviction under this section, the forged document must be one of those mentioned in the text. It must be shown that the document is a false document within the meaning of section 464 and it was forged by the accused with some intent mentioned in section 463 of the Penal Code. A "Hundi" being a valuable security, the offence of forging a hundi for the purpose of cheating falls under section 467 of the Penal Code. There can be no conviction under section 467 for forging a copy of a document which is not a valuable security. It is the original document which is a valuable security within the meaning of the section and not a copy of it *(AIR 1962 Cal 174)*. Where no copy of the original document was in existence and therefore none was produced in court, the question of loss or destruction thereof does not arise and no offence of forgery in respect thereof could be committed *(1974 P CrLJ 516)*. If a person falsely puts his name down as an attesting witness to the signature of somebody who he knows has never signed at all he is guilty of forgery just as well as the

2. Substituted by Ordinance No. XLI of 1985, for "transportation".

scribe. Before an attesting document can amount to forgery one of the essential requirements is that it must be made or signed by a person by whom it does not purport to be made or signed *(AIR 1961 Gujrat 117)*. In the absence of any evidence to show that the accused wrote the signature on the forged document, the admission by the accused that he wrote the body of the document would not be sufficient to support a charge under section 467 of the Penal Code *(PLD 199 Dhaka 435)*. Where several accused persons join hands to create and fabricate false documents and commit specific acts of forgery individually independent of each other, an offence under section 467 is brought home to all the accused. Where a public servant entrusted with money to procure paddy, suppressed voucher for payment received and fabricated another voucher to a lesser amount and forged the signature of the party, the accused was held guilty under this section *(1995 CrLJ 1539)*. Where a person received the amount under a money order from the postman by causing the signature of the payee to be made falsely on it and did not inform the payee, held, he has committed an offence *(23 CrLJ 264)*. An offence under section 167 is included in an offence under sections 467 and 471 and therefore conviction both under sections 167, 467 and 471 is not maintainable *(46 CrLJ 744)*. The word "forgery" is used as a general term in section 463, and that section is referred to in a comprehensive sense in section 195 of the Criminal Procedure Code so as to embrace all the species of forgery afterwards provided for as to punishment and this includes case falling under this section *(14 CWN 479)*. The charge must set out the intention of the accused *(17 CWN 354)*.

(2) Where the intention of the wrongdoer either to obtain wrongful advantage for himself or to cause injury to somebody has not been specifically established, conviction under section 467 Penal Code cannot be maintained. *Abdul Hakim Vs. State 45 DLR 352.*

(3) Accused claiming title on the basis of registered document which they assert to be genuine—In such a criminal proceeding they will not get reasonable opportunity to prove genuineness of their title deed which they will get in a civil proceeding—Section 467 Penal Code is not attracted to the case. *Monu Mia & Sayedur Rahman Vs. State 42 DLR 191.*

(4) Making a false document—The maker must dishonestly execute the document with the intention of causing it to be believed that such document was executed by or by the authority of a person by whom or by whose authority he knows that it was not executed. *Al-haj Md. Serajuddowlah Vs. State 43 DLR (AD) 198.*

(5) To secure a conviction for forgery in this case it must be specifically proved that the executant by reason of unsoundness of mind or intoxication or by reason of deception practised upon him did not know the contents of the document and in such state he was made to execute the document by the accused. *Showkat Hossain Akanda Chowdhury Vs. State 50 DLR (AD) 128.*

(6) Proof of forgery—To sustain a charge of forgery the accused must be identified to be the author of forgery—The petitioner's name appears in the impugned sale deed in the category of vendee but unless it is proved by convincing evidence that he is the author of the signature purported to be in the hand writings of Niranjan and Kalidas, the charge of forgery cannot stand against them—When the alleged forged document was never used by the accused petitioner any where, the charge of using the false document as genuine falls through. *Lalit Mohan Nath Vs. The State 8 BLD (HCD) 48.*

(7) In a charge under Section 467 of the Penal Code—The intention of the wrong-doer, either to obtain wrongful advantage for himself or to cause injury or a possible injury to somebody else must be specifically established by the prosecution and when that has not been done the conviction under Section 467, Penal Code cannot be maintained. *Md. Abdul Hakim Vs. The State 12 BLD (HCD) 400.*

(8) Criminal Proceeding is maintainable when the allegations are obviously criminal in nature—Criminal Proceedings are not precluded merely on the allegations that the dispute is of civil nature

when the dispute apparently appears to be criminal in nature. *Ibrahim Bepari and another Vs. The State & another—5, MLR (2000) (AD) 204.*

(9) Reduction of sentence on ground of old age—Point not raised before trial court and appellate court cannot be allowed to be raised for the first time before Appellate Division—The appellate court is competent to reduce the substantive sentence of imprisonment on ground of old age of the convict-appellant. Once the sentence is reduced by the appellate court on ground of old age of the Convict-Appellant the Appellate Division declined to further reduce the sentence on the same ground. Point not raised before the trial court as well as the appellate court, cannot be raised for the first time before the Appellate Division. *Abdul Hye (Moulana) Vs. The State—3, MLR (1998) (AD) 262.*

(10) Sustainability of the sentence—When evidences are consistent—Conviction and sentence based on unbroken chain of events supported by consistent evidence on record which are confirmed by the appellate and revisional courts cannot be interfered with by the Appellate Division when the same does not suffer from any legal infirmity or perversity. *Zaidul Hque Vs. The State—3, MLR (1998) (AD) 260.*

(11) The instant case readily attracts the ingredients of an offence under section 468 of the Penal Code, as the accused petitioners fabricated certified copy of a fictitious deed to cheat the land owner. There is no law that an accused charged with offences under sections 467/468 of the Penal Code cannot be convicted for an offence under section 468 in case he is acquitted of the charge under section 467 of the Penal Code. *Hannan Gazi & Anr. V. The State, 23 BLD (HCD) 409.*

(12) It is well settled principle of law that opinion of handwriting expert is not conclusive evidence but it helps the court to come to satisfactory conclusion. Section 73 empowers the court to compare itself the disputed signature with the admitted signature of the executant, when such comparison is fairly made by the court committing no wrong it calls no interference with the conviction and sentence based on consistent and reliable evidence on record. *Azahar Ali & others Vs. State (Criminal), 5 BLC 262.*

(13) Whether the circumstancial evidence upon which his (Appellant) conviction was based, namely, that the kabala was in his possession and that it would not have gone into the possession of the other two accused unless he made over the same, was not incompatible with his innocence. Held: In the absence of any opportunity given to the appellant to explain the circumstances under which the kabala went out of his possession, it is highly unsafe to draw on interference that he made over the same to the co-accused for the purpose of registration and to determine his guilt upon such interference. *Jobad Ali Khan Vs. The State. 1 BSCD 249.*

(14) Conviction Under Sec. 467/107 is legally sustainable (even if there is no direct evidence of forgery and abetment thereof) when the expert opinions have been corroborated by other evidence including circumstances. *Suruz Mia & others Vs. The State & another. 3 BSCD 14.*

(15) Conviction and sentence under this Section—allegation of forged kabala—real owner of the disputed land died before execution of the impugned document whose thumb-impressions were not taken—non-production of forged kabala—no conviction under this section is maintainable in the absence of the forged document. *Sufia Bogum Vs. Kanchan Matbar & another. 4 BSCD 27.*

(16) Allegation that share-holder of the firm created some forged document of transfer of share with dishonest intention to cheat the complainant by using them for receiving payment of pending bills of the firm which were lying with certain authorities—"Chronic dispute as to claim of the parties upon the disputed firm"—Claim of share-holder is to be determined with reference to the Article of

Association—If any share transfer has been made by committing forgery, the court can take cognizance of the offence but before that it will have to adjudicate on the title and interest of each of the share-holders and then on reference a criminal court can take cognizance of a criminal offence, such procedure is available u/s. 195 Cr. P.C. read with Sec. 476—When there is a dispute which contains both the civil and criminal matters, the foundation for determination of title and interest must be laid first and offences punishable under the criminal and penal law can be adjudicated thereafter. The complainant-petitioner filed complain-petition in the Chief Metropolitan Magistrate's Court, Dhaka alleging that the Opposite Parties who were share-holders of the firm created forged document of transfer of share with dishonest intention to cheat the complainant by using the said forged document for receiving payment of pending bills of the firm which were lying with certain authorities for payment and thus committed offence u/s. 467/468 and 109 PC. The Magistrate concerned filed the report recommending that the parties should seek relief from the competent Civil Court whereupon the Chief Metropolitan Magistrate dismissed the complaint petition u/s. 203, Cr. P.C. The petitioner then moved the Sessions Judge for further inquiry u/s. 439 Cr. P.C. but in vain. Then the High Court Division on being moved by the petitioner held that there is a "Chronic dispute as to claim of the parties upon the disputed firm" and this allegation can only be adjudicated by a competent Civil Court. At leave stage, it was contended on behalf of the petitioner that forgery is a criminal offence and expert examination shows a prima facie case of forgery of share certificates which are cognizable by a criminal Court. Held:—As claim of the share-holder is to be determined with reference to the Articles of Association and if any share transfer has been made illegally or by committing forgery, the Court can take congnizance of the offence but before that it will have to adjudicate on the title and interest of each of the share-holders. Thereafter on reference a criminal Court can take cognizance of a criminal offence. Such procedure is available u/s. 195 Cr. P.C. read with Sec. 476. When there is a dispute which contain both the civil and criminal matters, the foundation for determination of title and interest must be laid first and offences punishable under the criminal and penal law can be adjudicated thereafter. To hold to the contrary is to put the cart before the horse. *Md. Amirul Islam Vs. Hassanuzzaman and ors. 5 BSCD 47.*

(17) Charge sheet against five persons including the appellant under various sections including this section—Forged Sale-deeds—A disputed questions as to complicity of an accused (the appellant) in the crime who is receipient of the forged Sale-Deeds cannot be determined except on evidence during the trial—Quashing the proceeding against the appellant refused. *Chand Rani Saha Vs. The State, BCR 1947 AD 148.*

(18) Offences of "Forgery" and "Abetment"—Nature of the offences. Forgery is a substantive offence and so is abetment under the Penal Code. The ingredients of the two offences are entirely different. Where there is allegation of Forgery against a particular person and of abetment against some others (i.e. appellant). a court is required to scrutinize the facts of the case carefully in order to see whether both the offences have been proved by sufficient evidence. *Joy Chandra Sarker & others Vs. The State 6 BSCD 38.*

(19) Dishonest misappropriation or criminal breach of trust is an offence which is committed by a person who not only himself misappropriates the property or converts it to his own use, but is also committed by a person, who, being entrusted with the property, dishonestly disposes of it in violation of any direction of law of any contract, express or implied, made touching the discharge of such trust or "if he wilfully suffers any person as to do." *Md. Fazlur Rashid Vs. The State, 6 BSCD 38.*

(20) Read with section 464: Offence of Forgery—Alleged false document whether comes within the definition of 'false documents' under this section of the Code since it was only a certified copy and

not the original—There was no direct evidence for making of any forged document—Conviction and sentence, whether when sustainable. It was contended that the certified copy of the heba deed which was produced at the trial was not sufficient in the absence of the original to prove the same as a false document. Observed: Neither any provision of law nor any authority has been cited. Since the original was with the accused and they failed to produce the same inspite of notice certified copy of the document was legally proved. Held: The question as to whether the document was a forged one depended not upon any examination of the document itself as is generally required in a case of forgery but the decision in the instant case turned on the findings to the date of death of "H" who is said to be the executant of the disputed documents. It having been conclusively and concurrently found that "H" died before the date of execution and registration of the documents on 21-12-76 there can be no manner of doubt that the document in question are forged documents. That the documents were not executed by "H" needs no further proof and consequently they are false documents within the meaning of Sec. 464 Penal Code which was dishonestly created to support the claim/till the appellant No. 1 and his mother in respect of certain property left behind by 'H'—The fact that there was no evidence as to who actually executed the document in the name of and on behalf of 'H' makes no difference for the documents are in any case forged documents having come into the existence after the death of 'H'—For the reasons we are of the view that there was no lacuna as to proof of a false document on the ground that certified copy of the document were produced and not the original—Further, the accused themselves having withheld the original documents, upon general principle they cannot take advantage of their own wrong and raise objection for their non-production. In any case neither direct evidence of forgery nor original documents were necessary for the purpose of proving forgery in the instant case. *Haji Fazlul Hoque & and Vs. The State & anr. BCR 1986 AD 305.*

(21) Making a false document—The maker must dishonestly executed the document with the intention of causing it to be believed that such document was executed by or by the authority of a person by whom or by whose authority he knows that it was not executed. *Al-haj Md. Serjuddowlah Vs. The State, 43 DLR (AD) 198=11 BLD (AD) 51.*

(22) The petitioner by showing false documents induced the purchaser to enter into an agreement to purchase the house on receipt of Taka 12 lac on a plea that he would refund Taka 14 lac in the event of failure to execute sale document. The contention of the petitioner to the effect that it was a civil dispute and that the Court of Settlement had given a final decision over all the disputes including the question of criminal liability is not sustainable. The criminal proceeding cannot be liable to be quashed. *43 DLR 95.*

(23) To sustain a charge under section 467 document in question must be proved to be valuable security and that accused must be identified to be author of forgery. *39 DLR 398.*

(24) Petitioners acting in collusion with each other caused fabrication of the documents, demand draft, and by using it co-accused dealer lifted goods without paying a single farthing. No interference is called for. Petition dismissed. *7 BCR 146 AD.*

(25) When the bainapatra in question was given in evidence in court no court can take cognizance of any offence under section 467 of the Penal Code without a complaint in writing by the court concerned or by a court to which the said court is subordinate. *41 DLR 433.*

(26) When forged documents are filed in Court, on a complaint thereon the Supreme Court may act. As to the authenticity of these certified copies, the respondent did not apply to the Court to lodge a complaint under section 195 CrPC against the appellant on a charge of forgery who produced or filed

in evidence these documents in a judicial proceeding. Such a complaint may be filed under section 195(1)(c) CrPC even now if the respondent dares to move the Court for that purpose. These documents issued and certified to be true copy by an authorised officer of the Government are admissible in evidence. *38 DLR 99 AD.*

(27) Penal Code sections 29, 30, 463, 464, 465/34, 467/34 and 474. The point is whether the obtaining of Left Thumbed Impression LTI of the victim on a blank stamp paper will attract the mischief of section 467 of the Penal Code. Held: An LTI affixed on a blank stamp paper simplicter cannot signify acknowledgment of legal liability nor can it signify that the person who put his LTI has not a legal right. It is, therefore difficult to hold that a mere LTI on a blank paper is either a valuable security itself or purports to be a valuable security. Even though 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.*

(28) A disputed question as to complicity of the appellant in the crime who is the recipient in the forged sale-deed cannot be determined except on evidence in the trial. Proceedings against the appellant cannot be quashed. Appeal dismissed. *7 BCR 148 AD.*

(29) Circumstantial evidence—Other evidence adduced does not make the court believe and hold that appellants dishonestly made insertion in the sale-deeds as alleged—Low consideration money by itself would not show that the accused persons dishonestly inserted excess area of land in two documents—Appeal allowed. *7 BCR 128 AD.*

(30) Sections 406, 467, 471 and 109 Penal Code. The prosecution case was that the accused in collusion with each other have illegally erased by chemical application the words in the document which were filed in Title Suit No. 173 of 1974. The document in question is an unregistered Masohara deed dated 18/8/73 by Rabia Khatun wife of the accused Syed Ebadat Ali in favour of her mother Khirobala Dasi. Suit for specific performance of contract filed by the appellant on the basis of the allegedly forged document must be concluded by the trial Court and if on evidence the trial Court was satisfied that tampering had been made certainly, the Court could take cognizance of the offence under section 195 read with section 476 CrPC. *5 BCR 218 AD.*

(31) The accused was entrusted within a number of Postal Orders with forwarding memos, by a Bank for encashment of the same at the GPO—Accused mixed up some extra POs with those sent by the Bank at the same time altered the original figure of rupees in the memos, for higher figures to equal the total of the POs sent by Bank as well as POs by him—Accused received the entries amount due on the POs and Keeping the money which are payable on the extra POs inserted by him deposited the amount due on the POs despatched by the Bank—On a charge of forgery the accused is acquitted on the ground that he neither defrauded the Bank to which he deposited the amount that is a payable on the POs despatched by it not the GPO which has received all the POs for which payment was made. *22 DLR 466.*

(32) Nikah Registar's of Muslim marriages on the strength of licence issued to them by Union Council and that does not clothe them with the character of a public servant. Anisur Rahman was at the root of the foul game of procuring forms as well as two registers from the railway station where on Abdus Sattar practised the signature of the girl and forged the signature of Afroza. He actively aided and abetted the other accused to commit acts of forgery, accordingly the accused was found guilty under sections 467/109 Penal Code instead of section 467/34 Penal Code inasmuch as there is no specific act of forgery to his credit. but the documents in question were actually forged in consequence of his abetment. *19 DLR 862.*

(33) In a charge under section 467 Penal Code the intention of the accused, either to obtain wrongful advantage for himself or to cause an injury or a possible injury to somebody also must be specifically established by the prosecution and where that has not been done the conviction under section 467 Penal Code is illegal. *13 DLR 36.*

(34) The expression "which purports to be" means that the document on the face of it (though not in law it is so) appears to be a valuable security. By the words "which purports to be" what is meant is that the document should on the fact of it, appear to be a valuable security and not that it should, in fact, be a valid and enforceable valuable security. For that purposes of the Penal Code it is sufficient if the document on its face purports to create, extend, transfer, restrict or extinguish a right for that brings it within the definition of a valuable security. *9 DLR 626.*

(35) Antedating a kabala with intention to defraud holder of an earlier kabala is forgery. "Forgery"; means making of a false document with certain intentions, such as to cause damage or injury to a person certain intentions, such as to cause damage or injury to a person, to support any claim or title, to commit fraud. A person is said to make a "false document" within the meaning of section 464 when he dishonestly executes document with the intention of causing it to be believed that such document was executed by a person by whom he knows that it was not executed or "at a time at which he knows that it was executed." It, therefore, clearly appears from the language of section 464 that antedating of a document with any of the intentions as mentioned above constitutes forgery. *5 BSCR 355.*

(36) Like S. 466, this section deals with an aggravated form of the offence defined in S. 463 of the Code. *AIR 1933 Pat 488.*

(37) It is not sufficient that some possible intent may be inferred from facts but it is necessary that such intent should be established by evidence. *AIR 1961 Guj 117.*

2. Forges a document.—(1) When an accused is not shown to have put his thumb impression on a sale deed in place of another person neither is there any sign or seal of the accused found placed on the sale deed, accused cannot be said to have forged it and hence cannot be punished under S. 467. *1980 All Cri R 22.*

(2) Where a postman entrusted with V. P. article for delivery on payment, to the addressee paid the money himself and retained the property for himself and signed receipts for delivery of V. P. parcels making it appear that they were received by some person for and on behalf of the addresses such retention was held to be wrongful gain though there was no wrongful loss to the sender of the article within the meaning of S. 23 of the Code. *AIR 1959 Mys 185.*

(3) The accused, a post-master on receipt of a money order addressed to B forged his thumb impression on the money order and the acknowledgment receipt indicating thereby that the amount had been received by the payee on a particular date. He then kept the amount with him but subsequently the amount was paid to B on his making a complaint. The accused was held guilty under this section as the intention was to deceive the Head Office and to gain an advantage by making it appear that he had done his duty, covering up the temporary misappropriation. *AIR 1955 NUC (Mad) 3172.*

(4) One D had two sisters G and B, D and G conspired and G held herself out as B and executed a sale deed in D's favour of land belonging to B. It was held that D and G had conspired and acted fraudulently, intending to deceive the Sub-Registrar and to deceive and also injure the reversioners of B and were therefore guilty under this section. *AIR 1943 Pat 227.*

(5) The accused were held not guilty under this section as the essential elements of fraud or dishonesty were not present. *AIR 1967 All 123.*

(6) The fact that some persons aided and abetted the detaching of the used stamps from the old files and re-using them in the other cases does not involve any possess of forgery or use of a forged document. *AIR 1984 SC 1108.*

(7) The accused V purchased a car with her own money in the name of her minor daughter N, had the insurance policy in the name of N, and also received compensation for accidents to the car. On facts it was held that the accused certainly was guilty of deceit for though her name was V 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 which dealt with her in the name of N. It was held that the accused was not guilty of the offence under this section and S. 468 of the Code. *AIR 1963 1572.*

3. Alteration of a document.—(1) An alteration of a document (mentioned in this section), done with the intention of causing injury or damage, dishonestly or fraudulently is an offence under this section. *1931 Mad WN 361.*

4. Purports to be a valuable security.—(1) A document which is a valuable security within the meaning of the S. 30 of the Code falls within the scope of this section and a forgery of such a document will be an offence under this section. *AIR 1916 Lah 137.*

(2) The following documents are held to be "valuable securities" :—

(a) A British passport forged and used as genuine by a person to get entry into India. *AIR 1968 Mad 349.*

(b) Counterfoil of a pay-in-slip purporting to be acknowledgment of receipt of a sum of money by the Bank. *AIR 1926 Cal 425.*

(c) A discharge receipt purporting to have been signed by a fictitious nominee in an Insurance Policy. *AIR 1956 Vindh Pra 30.*

(d) A sale-deed. *AIR 1955 NUC (Assam) 2829.*

(e) A deed of divorce which extinguishes a legal right or the parties. *(1869) 11 Suth WR (Cri) 15.*

(f) Deed of transfer of shares purporting to be document whereby a legal right is transferred. *ILR (1962) 1 All 451.*

(g) Document whereby a person acknowledges that he lies under a legal liability are valuable securities. *AIR 1918 Pat 274.*

(h) A document conferring or crediting rights even though all the signatures which it is intended to obtain or is necessary to obtain have not been affixed. *AIR 1918 Mad 150.*

(i) Certificate in form prescribed under the Sales Tax Act. *AIR 1960 Bom 146.*

(j) The original transit pass under the Forest Regulation. *AIR 1932 Cal 390.*

(3) Certificates forged by the accused to get admission in a college cannot be said to be valuable property. *AIR 1981 SC 297.*

5. Purporting to be a receipt.—(1) Where a Bench clerk received a sum of money paid in as fine and mis-appropriated it and to cover up the misappropriation forged a false receipt, it was held that an offence under this section and S. 471 of the Code were committed especially since the false receipt was made for the purpose of enabling him to misappropriate the money. *AIR 1924 Rang 331.*

(2) The writer of a forged receipt is not guilty under this section where there is no evidence that he was present at the execution of the receipt or that he helped any one to make use of it in which case he might have been charged under this section read with S. 109 as an abettor. *AIR 1925 Cal 192.*

(3) Where the accused obtained payment of certain money-orders payable to X by pretending to be X and signing the money receipts as X, it was held that the accused was guilty of cheating and forgery. *AIR 1972 Delhi 13.*

6. Copy of a document.—(1) A copy of a lease is not a valuable security within the meaning of S. 30 of the Code and this section. *AIR 1962 Cal 174 (175) = 1962 (1) CriLJ 316 (DB).*

(2) The operative document is the 'original' and the carbon copies are merely evidence of the existence of the original. *AIR 1932 Cal 390.*

(3) A "decree" does not come within the definition of valuable security. When the Court passes a decree, it does not deliver any property because the original decree remains in Court and the term valuable security, assuming that it is wide enough to include a decree, can only apply to the original document and not to any copy of the decree which may be supplied to the parties. *AIR 1924 Cal 502.*

7. Abetment—Conviction.—(1) A person taking an active part in the preparation of a document, but no part in the forgery does not commit forgery, but simply abets the offence. *(1898) ILR 25 Cal 207.*

(2) A mere assistant in the preparation for an offence which led to nothing cannot be construed as abetment. *AIR 1925 Oudh 158.*

(3) A person who did not make, sign or execute a document, but was instrumental in getting the false document dishonestly or fraudulently made, should be convicted under this section read with S. 109 of the Code and not under this section alone. *AIR 1957 Mad 47.*

(4) An accused 'A' executed and got registered a sale deed in respect of certain mortgage property by impersonating the real owner. Another accused 'B' the mortgage in whose favour the sale deed was registered abetted the offence. The mortgagor filed a suit for redemption and subsequently filed a criminal complaint against both the accused. The fabricated sale deed was never filed in the civil suit. held, (i) the accused 'A' was liable to be convicted under S. 467, (ii) the accused 'B' was liable to be convicted only under S. 467 read with S. 114. *AIR 1981 SC 1417.*

8. Attempt.—(1) One C representing himself as K went to a stamp-vendor accompanied by X, purchased stamps in the name of K and asked a petition-writer to write a bond for Rs. 50/- payable by K to X (C representing himself as K to the petition-writer). The petition-writer commenced writing, but his suspicion being aroused, he handed over C and X to the police, held that X was guilty of an attempt to commit the offence under this section and C, of abetment of such attempt. *1984 All WN 150.*

9. Attesting witness.—(1) If a person falsely puts his name down as an attesting witness to the signature of somebody else who, he knows, has never signed at all, he is guilty of forgery just as well as the scribe. Such persons must be put on their trial on a charge under this section (in the case of documents covered by it) read with S. 120B. *AIR 1929 Cal 539.*

10. Identifying witness before Sub-Register.—(1) A person affixing his signature before the Sub-Registrar as a witness identifying a wrong person as the executant of the document would be guilty under this section. *AIR 1973 SC 1413.*

11. Evidence and burden of proof.—(1) For sustaining a conviction under this section, the prosecution must prove—

(i) that the document in question was a forgery.

(ii) that the accused forged it, and

(iii) the document is one of the kinds mentioned in the section. *1980 CriLJ (NOC) 1504 (Delhi).*

(2) In a charge u/s. 471 of the Code read with this section it must be shown affirmatively that the accused either knew or had reason to believe that the document was a forged one. *AIR 1916 Oudh 112.*

(3) Where the accused admits that he wrote the body of the rent-receipt but it is stated by him that it was signed by the person who received the rent, he cannot be convicted under this section in the absence of any evidence to show that he wrote the signature of the landlord on the receipt. *AIR 1949 Dacca 9.*

(4) An admission in a prior civil litigation that the document in question was broken into existence by the accused coupled with a statement that it was true, is not a confession of the document being a forgery and cannot be adduced in evidence in the subsequent prosecution for forgery of such document as a confession by the accused. *AIR 1929 Cal 539.*

(5) Ordinarily, in determining whether a document is forged or genuine, comparison of handwriting is a valuable aid. *AIR 1933 Pat 481.*

(A) Evidence of handwriting expert, finger-print expert, etc.—(1) In a charge of forgery the opinion of a handwriting expert should not, ordinarily, be accepted as conclusive to prove the facts deposed to by him and a conviction for forgery cannot be sustained merely on the evidence of an expert. *AIR 1932 Lah 490.*

(2) Where the executant denies having made the signature on the document, the expert's evidence can afford reliable corroboration of the executant's evidence. *AIR 1936 Oudh 381.*

(3) The mere fact that the expert has not compared the entire writing with any other writing of the accused but gives his opinion merely on the comparison of the signature on the document, makes no difference when the expert has given scientific reasons with regard to the signature and nothing has been shown why his opinion should not be accepted. *AIR 1936 Oudh 381.*

(B) Statements by accused.—(1) An accused cannot be convicted only on the basis of a foolish statement made by him before the Court. It is for the prosecution to prove the offence against the accused. *1962 Raj LW 263.*

(2) An accused should not be convicted merely because he had told lies in his defence. *AIR 1916 All 63.*

(C) Alibi.—(1) Where, in a prosecution for forgery for having signed a money order receipt as payee, the accused alibi that he was not in the village on the date of signature, the burden of proving who signed the receipt cannot be thrown on the accused. *AIR 1967 Mys 210.*

(D) Evidence of alleged accomplice.—(1) It was contended that a witness X was an accomplice and that his evidence could not corroborate the evidence of the approver in the case, held that the degree of suspicion which would attach to the evidence of an accomplice must vary according to the nature of the complicity of the accomplice, that on the evidence let in in that case, the nature and extent of the complicity of X was small, bordering almost on nothing, and that it would be open to the Court to act merely on his evidence alone without any further corroboration. *AIR 1957 Mad 796.*

(E) Appreciation of evidence.—(1) Mere suspicion arising from the evidence is not enough for conviction; there must be certainty of accused's guilt beyond reasonable doubt. *AIR 1979 SC 1236.*

(2) Fact that certain lottery ticket was forged and that it was presented by the accused before officer concerned of claiming special prize will not by itself show that the accused was concerned in forging it and that he had requisite knowledge of its forged character. Fact that he subsequently learnt that it was forged is immaterial. *AIR 1979 SC 1890.*

(3) Where money was drawn in the name of a chowkidar whose name was absent form the attendance register, but such was the case with two others who though actually working were not mentioned in the attendance register, absence by itself will not lead to any inference of forgery. *AIR 1979 SC 1080.*

12. Procedure.—(1) An offence under S. 467 being a non-cognizable offence it cannot be investigated without previous permission from a Magistrate, however if police does investigate such an offence without previous permission and prosecutes the accused, if no prejudice is caused the case will not be affected. Any objections to procedure adopted must be taken at an early stage. *1980 MadLJ (Cri) 656.*

(2) In a case of forgery under Ss. 420, 465 to 468, 471, 474, 120-B of Penal Code and under Prevention of Corruption Act, it could not be said that the bar under S. 195 Cr.P.C. was not applicable on the ground that case contained so many offences not mentioned in S. 195. All the aforesaid offences are connected offences. *1982 CriLJ 2177.*

(3) Opportunity to cross-examine material prosecution witnesses not given to accused—Accused seriously prejudiced in the trial. *1984 CriLJ 593.*

(4) Not cognizable—Warrant—Not bailable—Not compoudable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered. If the offence is committed by the public servant, it is cognizable and becomes triable by Special Judge under Act XL of 1958 and II of 1947.

13. Jurisdiction.—(1) A Special Judge under the Criminal Law Amendment Act, can try an accused under Section 120B read with this section and Ss. 466 and 420 of the Code. *AIR 1961 SC 1241.*

(2) In a proceeding relating to an offence under this section, the order passed by a civil Court sitting as an appellate Court under S. 341(1), Criminal P. C., is revisable under S. 401, Criminal P. C., and not under S. 115, Civil P. C. *AIR 1968 Pat 100.*

(A) Territorial jurisdiction.—(1) Where the accused a subject of Cambay State and residing at Cambay, conspiring with A, sent A to a professional forger B living at Umreth in British Territory, with instructions to instigate B to forge a valuable security. B committed the forgery in pursuance of A's instructions. The accused was charged before the Session Judge of Ahmedabad. It was held that the accused was triable by the British Court at Ahmedabad. *(1912) 13 CriLJ 426.*

14. Applicability of S. 452, Criminal P. C. to money seized in investigation.—(1) Where during the police investigation of a case under S. 420 and this section, it appeared that the accused had delivered over a sum of Rupees 1168/- to his creditors, this money being part of the proceeds of cheating and the police recovered it from the creditors, it was held that the creditors were entitled to the money which must be returned to them, because title to money which is current coin passes by mere delivery to a person who receives it in satisfaction of a lawful debt due to him. *AIR 1914 Lah 567.*

15. Separate offences under this section and another section.—(1) When a person is convicted under this section for having forged a promissory note, a further conviction and sentence under S. 471, for using that note as genuine is not illegal in the course of the same trial. *AIR 1917 Mad 147.*

(2) Section 471 covers not only some person other than a forger but also who forges the document and then makes use of it. So if a person, who is found guilty under this section, makes use of the forged document, then he can be punished also under S. 471. *AIR 1967 Mys 59.*

(3) The offence under S. 167, is included in the offence under Ss. 467 and 471, and therefore, conviction both under S. 167 and Ss. 467 and 471 is not maintainable. *AIR 1926 Oudh 615.*

(4) Where the accused are charged under S. 120-B and this section, with the offence of conspiring to forge a valuable security and subsequently an additional charge is framed of abetment under this section read with S. 109 of the Code, and after recording all the prosecution evidence the charge under S. 120-B and this section is cancelled for want of consent required by S. 196(2), Criminal P. C., the Court can convict the accused under this section read with S. 109 of the Code. *AIR 1940 Cal 277.*

(5) An acquittal under this section read with S. 109 of the Code does not bar a conviction under this section and S. 471 of the Code. *AIR 1932 Cal 545.*

(6) Where the accused was charged under this section and S. 420 and the Assistant Sessions Judge acquitted the accused of cheating but convicted him of forgery, it was held that the appellate Court could come to its own conclusion with regard to the appeal against the conviction under this section, quite untrammelled by the fact of the acquittal under S. 420. *AIR 1945 Mad 240.*

(7) Where the accused forged two withdrawal cheques on two different dates and withdraw money from the bank; it was held that the forgery of each cheque was a distinct offence and that there ought to have been two charges or one charge with two heads. The conviction was, therefore, set aside and a retrial ordered. *AIR 1933 Pat 488.*

(8) Where the accused were charged for two distinct offences on the same evidence and they were acquitted of one of the offences, conviction in respect of other offence on the same evidence has been held to be valid. *1964 (1) CriLJ 733 (SC)*

(9) In a trail for offences under this section. 471 and S. 420 of the Code the verdict of the jury that the accused was not guilty under this section and S. 471 was held to be inconsistent with its verdict that he was guilty under S. 420 of the Code. *AIR 1955 Cal 175.*

16. Estoppel.—(1) There is no estoppel which bars an accused person in any case from pleading that he had no dishonest or criminal intention. Attestors to a forged valuable security can plead that they signed believing in the representation of others and consequently, had no criminal intention. In other words there is nothing to prevent the attestors from pleading that they were foolish and not criminal in what they did. *AIR 1939 Mad 730.*

17. Complaint.—(1) Section 195(1)(c) of the Cr. P. C. applied only to forgery when committed or alleged to have been committed by a party to the proceedings before a Court. *AIR 1929 Cal 539.*

(2) The offence of forgery was held wide enough to include any document produced or given in evidence in the course of a proceeding whether produced or given in evidence by the party who is alleged to have committed the offence or by anyone else. *AIR 1925 Bom 433.*

(3) Section 463 of the Code is used in S. 195(1)(b)(ii), Criminal P. C. in a comprehensive sense so as to embrace all species of forgery including a case under this section. *AIR 1927 All 571.*

(4) A complaint is, therefore, necessary for prosecution under this section, although this section is not mentioned in Section 195(1)(b)(ii), Criminal P. C. *AIR 1966 All 124.*

(5) A complaint by the Court is required where the offence is of forgery or of using as genuine any document which is known or believed to be a forged document when such document is produced or given in evidence in Court. *1963 (2) CriLJ 698 (SC).*

(6) The offence in respect of the document already produced in the Court must have been committed while it remained in custody of the Court and that S. 195(1)(b)(ii), Criminal P. C., does not refer to any offence already committed in respect of the document outside the Court and later on produced in Court in a proceeding between the same parties. *AIR 1969 Guj 195.*

(7) Once a forged document is brought into Court, a private complaint under this section, subsequently is barred by S. 195, Criminal P. C. even in respect of anterior forgeries, that is, anterior to the litigation. *AIR 1943 Nag 327.*

(8) Mere tacking of the offence under this section to Section 471 of the Code would not take the case out of the scope and ambit of Section 195(1)(b)ii), Criminal P. C. *AIR 1969 All 189.*

(9) Where, on the facts disclosed in the complaint, two offences are made out, one under S. 193 for which complaint by Court is necessary, and the other under this section and S. 471 for which a complaint is not necessary, the party should not be allowed to evade the provisions relating to a complaint by Court. In such a case the Court should not take cognizance of the complaint unless there is a complaint by Court as required by S. 195(1)(b)(ii), Criminal P.C. An order of committal passed on a private complaint is illegal and must be quashed. *AIR 1955 Mad 237.*

(10) Complaint under the Imports and Exports (Control) Act and also under Ss. 120-B, 420 , 467, 468 and 471, Penal Code—Offences under Penal Code graver—Absence of complaint as envisaged under the 1947 Act will not be sufficient to discharge accused—Prosecution for lesser offence should not be launched when facts alleged constitute graver offence. *1982 CriLJ 64.*

(11) Where a complaint against an accused person was lodged under S. 193 of the Code only, but he was convicted also of an offence under this section, it was held that the conviction of the accused under this section was irregular and made without jurisdiction in view of S. 195, Criminal, P. C. *AIR 1937 Pesh 67.*

(12) Where on the facts alleged offences under S. 193 as well as those under this section and S. 471 read with S. 463 of the Code could be said to have been committed, then the procedure for filing a complaint under S. 340, Criminal P. C. instead of the proceeding provided under S. 344, Criminal P. C. is not illegal. *AIR 1962 Pat 282.*

(13) No complaint is necessary when the forged document itself was not produced before the Court but only a copy thereof. *1963 (2) CriLJ 698.*

(14) No sanction or complaint was held necessary under other provisions of Criminal P. C. or other enactments. *AIR 1968 Bom 124.*

(15) In a case transferred from one Court to another it is not only the Court which originally received the forged document but the transferee Court also can make a complain under Section 340, Criminal P.C. It is a continuing offence and any Court seized of the case can make the complaint. *AIR 1930 Mad 192.*

(16) An appeal from a complaint made by a judge of the Court of Small Causes. (who describes himself as a Munsif because he was a Munsif invested with small cause powers) for prosecution of a person under Section 471 and this section lies to the District Judge and not to the Court of the Sessions Judge. *AIR 1925 Oudh 713.*

18. This section and Ss. 409, 420, 466, 471 and 477A of the Code.—(1) A Court should not convict an accused both under S. 466 and this section but should choose which of the two sections appears to be most suitable. After convicting under one of these two sections it will be quite unnecessary to add a charge under Section 468 of the Code. *AIR 1925 Oudh 413.*

(2) Where a Government servant was charged under this section for making false entries in transport permits with intent to defraud the Government of its revenue, it was held that even if there should be some doubt as to whether the permits in question amounted to falsification of accounts, there was a case to be tried on the question whether the entries made therein were false and whether, thereby the latter part of S. 477A was contravened. *AIR 1960 SC 400.*

19. Charge.—(1) A charge under this section is bad if the intention is not set out. *(1913) 14 CriLJ 129.*

(2) Where an accused was charged under this section but it appeared in evidence that he had committed an offence under S. 471 for which he might have been charged under S. 222, Criminal P. C. it was held that although the accused was not charged with it, he could be convicted of an offence under S. 471. *AIR 1920 All 72.*

(3) Where in respect of serious defalcation of properties of a cooperative society, entering into conspiracy by the accused defalcation was one of the charges and that charge failed, conviction of the chairman of the Managing Committee of the Society under Ss. 409, 467, 471 on the basis of vicarious liability was improper when he was not charged under S. 120-B. *AIR 1984 SC 151.*

(4) Where the charge was for abetment of forgery—an offence which is complete when the document is written and signed—but the conviction was for a subsequent act namely, that the document was presented for registration and used it was held that the user was a distinct and different offence for which the accused was entitled to be separately charged. *AIR 1926 Cal 581.*

(5) The charge should run as follows:

I, (name and office of the Magistrate/Judge, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, forged a certain document purporting to be a valuable security, to wit—, or a will made by—, or an authority to adopt given by—, to—, or (an authority given to—make or transfer a certain valuable security, to wit—,) with intent—; and that you thereby committed an offence punishable under section 467 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

20. Joint or separate trial.—(1) Where the forgery and cheating are committed in the same transaction, the accused can be tried jointly for those offences under the provisions of S. 223, Criminal P. C. *AIR 1917 Lah 78.*

21. Sentence.—(1) The punishment by imprisonment is compulsory for an offence under this section. A sentence of fine alone is, therefore, not in accordance with law. *AIR 1939 Mad 730.*

(2) For offence of deliberate forgery of a Will a sentence of five years' rigorous imprisonment is not too severe. *AIR 1936 Oudh 381.*

(3) The accused was convicted of an offence under this section read with S. 471. The embezzlement charge which was levelled against him in regard to Rs. 11, 579-8-0, however failed. The High Court in appeal confirmed the sentence of 4.5 years' rigorous imprisonment awarded by the trial Court and also imposed a fine of Rs. 11, 579-8-0 on the accused. On appeal by the accused the Supreme Court held that the High Court should not have imposed the additional fine when the embezzlement charge had failed. *AIR 1955 SC 322.*

(4) The nature of the offence under this section does not depend on the use to which the document was put. If it was used fraudulently or dishonestly and if it purported to be a valuable security, the

punishment provided by this section and not that provided by S. 465, would be that to which the accused would be liable under S. 471. *AIR 1924 Cal 960.*

22. Practice.—Evidence—Prove: (1) That the accused committed forgery.

(2) That the document forged is one of the kinds mentioned in this section.

Section 468

468. Forgery for purpose of cheating.—Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials : Synopsis

1. *Scope.*
2. *Accused must have forged the document.*
3. *Partner.*
4. *Evidence and proof.*
5. *Procedure.*
6. *Joint trial for this and other offences.*
7. *Charge.*
8. *Bail.*
9. *Jurisdiction.*
10. *Sentence.*
11. *Practice.*

1. Scope.—(1) This is another types of an aggravated form of forgery. Here forgery is committed with a view to cheat a person. Actual commission of the offence is not necessary. It is sufficient if he has the intention to commit the offence. A document can be said to be forged only if it purports to be signed or sealed by a person who, in fact, never signed or sealed it. What is material is the intention or purpose of the offender in committing forgery. The expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it includes any harm whatever caused to any person in body, mind, reputation or such others. If the cheating is complete and the subsequent forgery is for the purpose of concealing that offence, this section does not apply. Forgery of a school attendance register for the purpose of obtaining a Government grant is punishable under this section. The entry of an excess payment in a muster roll will not make the muster roll a forged document *(30 CrLJ 408)*. A complaint in writing of the court, before which the offence is committed or of some other court to which such court is subordinate, is necessary. An offence under section 463 mentioned in clause (c) of section 195 CrPC covers an offence under this section, the object of mentioning section 463 in section 195(1)(c) CrPC being to include all cases of forgery whatever the nature of fraudulent intention may be.

(2) Alteration of conviction from Ss. 468 to 471. In view of the law—Alteration of the conviction passed by the trial judge on the appellant Jahangir Hossain from section 468 to section 471 of the Penal Code maintaining the sentence passed upon him. *Jahangir Hossain Vs. State, 40 DLR 545.*

(3) Evidence—Reasonable doubt—Assessment of evidence. Accepting the prosecution case, the trial Court convicted and sentenced the petitioner under sections 468/109 as also under sections 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. Held:—That the High Court Division having given due weight to the attending circumstances in coming to the necessary finding, the points raised were questions of facts. Leave petition was dismissed. *Abdul Jabber Vs. The State, 1 BSCD 249.*

(4) Unless the allegation falls within the definition of forgery as defined under section 463, there is no offence constituted as punishable under section 468—In order to be punishable under section 468 of the Penal Code, the allegation must the definition of forgery under section 463. Merely executing a document containing false statements without false personation does not constitute offence punishable under section 468 of the Penal Code. *Ibrahim Ali (Hazi) Vs. The State, 7 MLR (AD) 235.*

(5) Sentence to be proportionate to the gravity of the offence—The settled principle of law is that the sentence must be proportionate to the gravity of the offence and is within the judicial discretion of the Court. Long pendency of the case may be considered mitigating factor for reducing the sentence. Conviction and sentence awarded on the basis of overwhelming consistent evidence cannot be interfered with on any other hypothesis. *Abdur Rouf (Md.) and two others Vs. The State,—3 MLR (1998) (HC) 297.*

(6) Where the offences (forgery and allied offences) alleged to have been committed in a Revenue Court in respect of a document produced in a proceeding under Rule 30 of the Tenancy Rules, 1954 can be taken cognizance of, by any Court without complaint by the Revenue Court concerned or by court to which such court is subordinate ? The Objection Officer under the Rules 30 and 31 of the Tenancy Rules, 1954, who is to decide summarily objection petition regarding the ownership or possession of land or of any interest in land and also to record a brief summary of evidence taken and an abstract of the reason for the decision as functioning as a Revenue Court while the alleged forged document was placed before him in connection with proceeding under Rule 30 of the said Tenancy Rules, 1954 and as such section 195(c) of the Code of Criminal Procedure is clearly attracted which put an embargo on taking cognizance of offences under sections 467 and 468 of the Penal Code in the absence of a complaint from the Court concerned. *7 BCR 152 AD.*

(7) Whether Government servants can be tried in the ordinary Criminal Court for offence under sections 417 and 468 with private persons. Offences of forgery under section 468 and cheating under section 417 PC are to be tried by the Special Judge appointed under the Criminal Law Amendment Act and not by ordinary Criminal Court. The proceeding is hereby quashed and the Rule is made absolute *7 BLD 137.*

(8) Sections 468, 471, 419, 420, 109 Penal Code: (a) When a competent court to the view that a prima facie case is disclosed and framed a charge in view of the said prima facie case that an offence was disclosed, the Court would be extremely reluctant to interfere in quashing a proceeding at the interlocutory stage or at the early stage of the proceeding. (b) Offence must be one which has been committed by a party to a proceeding. If an offence has already been committed by a person who does not become a party to a proceeding till some period or some years after the commission of the offence, the offence cannot be said to have been committed "by a party" within the meaning of clause (c) to section 195 CrPC. *5 BCR 150.*

(9) When the offence is committed—Section 368 can be brought into operation only after the offence of kidnapping or abduction has been committed, irrespective of whether it has reached its final stage or not though the act of wrongful confinement or concealment can sometimes form part of the same transaction as the act of kidnapping or abduction. *1954 PLD (Lah) 84.*

(10) Forgery with the intention of thereby committing cheating is the offence dealt with under this section. *(1966) 1 Mys LJ 500 (505); (1906) 4 CriLJ 355.*

(11) Where there is no intention to "cheat" no offence under section is committed. *AIR 1931 Lah 337.*

(12) Where forgery and cheating are committed there will be distinct offences. *AIR 1936 Cal 403.*

(13) Where the forged document is used by the accused, he may be guilty also under S. 471 of the Code. *AIR 1919 Mad 654.*

(14) Since under Ss. 420, 468 and the like provisions of the Penal Code the substantive sentence of imprisonment should also be awarded, the provision could not be pressed as against a company. *1983 AllLJ 753.*

(15) Accused persons including Railway authorities were alleged to have conspired to get coal booked under wrong nomenclature as "smalls"—Main accused who were Railway authorities were acquitted on the ground that mere despatches of coals by Railway official against the existing circulars could not attract their prosecution—Held, consequences ensuing from such despatches could not be branded as offences against other accused. *1984 Bihar LJ 116.*

2. Accused must have forged the document.—(1) Where though a forged document is found in the possession of the accused it is not proved that he forged it, a conviction under this section is not sustainable. *AIR 1925 Nag 294.*

(2) Obtaining signature of a person on blank paper by itself is not an offence of forgery or the like. It becomes an offence when the paper is fabricated into a document of the kind which attracts the relevant provisions of the Penal Code making it an offence or when such document is used as a genuine document. *AIR 1979 SC 850.*

3. Partner.—(1) A partner forging a document in the name of the firm with intent to cheat the firm would be guilty under this section, as the intent would be to cheat the other partners. *(1904) 1 CriLJ 757 (Bom).*

4. Evidence and proof.—(1) When the work was done departmentally but accused person showed it as done through contractor whose tender was rejected though the method adopted by the accused was highly irregular and not following any norms, yet the onus of proof that the accused brought about forged document with a view to cheat would remain on the prosecution. Highly suspicious conduct would not replace need of positive proof. The accused in instant case were acquitted. *AIR 1980 SC 499.*

(2) Complainant and A were running partnership business and after some time A along with his wife and two minor children got a new firm registered and transferred the money of the old firm to the accounts of new firm. Hence the complainant filed a complaint against A and his wife under Ss. 418, 420, 468, 120 etc. Held, complaint against wife of A is not maintainable merely because she was residing in the same house with A when no case of cheating or forgery is made out against her. *1984 All Ind Cri Rul 18.*

(3) Where the specimen writings and specimen signatures of the accused were taken by a Magistrate who neither knew the accused personally nor got the accused person identified before taking the specimen writings, the specimen writings and signatures so taken could not be said to be of the accused persons and their comparison with the disputed writings done by the expert would not connect the accused persons with the crime. *1983 CriLJ 858.*

5. Procedure.—(1) Where the offence under this section is committed in relation to any proceedings in Courts, a complaint of the Court would be necessary for a prosecution under this section. *AIR 1933 Cal 431.*

(2) Where criminal complaint was filed under Ss. 120B, 465, 466, 468 and 471 PC alleging that certified copy of compromise before Nyaya panchayat filed by opposite party was forged and fabricated and it was claimed that the entire record of the proceedings before the Nayaya Panchayat was fabricated and forged and no such compromise was arrived at before it, it was held that bar under S. 195 Cr.P.C was not attracted because when the copy of a document is filed, the original of document cannot be said to have been produced or given in evidence. *1983 All (Cri) R 537.*

(3) The lapse on the part of the accused, an Administrator of Municipality, for which he was charge-sheeted cannot be treated to have been committed by him in the discharge of his official duties. Hence for prosecuting him for the offence under Ss. 420, 467, 468 PC sanction under S. 197 Cr. P. C. is not necessary. *(1984) 11 Cri LT 15 (P & H)*

(4) In a case prosecuted under S. 468 if a trial court had failed to consider some aspects of the case and came to the wrong conclusion that accused was not guilty, the High Court would be entitled to reappraise the evidence and come to a conclusion contrary to that arrived at by the trial court. *AIR 1978 SC 434.*

(5) Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate of the first class, and by Special Judge, if the offence comes under Act XL of 1958.

6. Joint trial for this and other offences.—(1) Offences under this section and Section 477A are distinct offences not being of the same kind and cannot be tried at one trial. *(1902) 4 Bom LR 440.*

(2) Distinct offences forming part of the same transaction can be charged at the same trial; though under Section 300 of the Criminal P. C. an acquittal or conviction for one of such offences is not a bar to a subsequent trial for other offences. *AIR 1931 Sind 116.*

7. Charge.—(1) A person cannot be convicted under this section, where he is charged under S. 465, because a person cannot be convicted of a more serious offence than that with which he is charged, whether on appeal or in the original Court. *(1922) 23 CriLJ 740.*

(2) As to illustrative cases on point of charge. *1976 CriLJ 392 (Him Pra).*

(3) 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—, forged a certain document, to wit—, intending that it shall be used for the purpose of cheating and that you thereby committed an offence punishable under section 468 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

8. Bail.—(1) Accused charged under Ss. 3 and 7 of Essential Commodities Act and Ss. 467, 468, 409 of P. C. Having regards to the circumstances of the case anticipatory bail was granted. *1982 Rajasthan Cri C 404.*

9. Jurisdiction.—(1) Where a document was forged at coonoor, the accused abetting it, and attempt to cheat thereby was made at Tanjore by sending a telegram from Tanjore, it was held that the Court at Tanjore had jurisdiction to try the accused for an offence under S. 468/109 and S. 511. *AIR 1927 Mad 77.*

(2) Where the accused is charged with several offences including one under this section, the Court by which the offences are triable is the Court of Session. The Magistrate cannot choose those sections which are triable by him and give himself jurisdiction. *AIR 1945 Sind 125.*

10. Sentence.—(1) A deterrent sentence was called for where a postman entrusted with delivery of money orders, forged acknowledgments and misappropriated the amounts. *AIR 1949 Kutch 12.*

(2) Where an accused a Reader in a University with M. Sc. and Ph. D. degrees was convicted for offences of attempting to issue counterfeit University degrees, it was held that an award of sentence by the Sessions Court was too lenient. Sentence enhanced to three years by the High Court was held just and reasonable. *AIR 1978 SC 1548.*

11. Practice.—Evidence—Prove: (1) That the document is a forgery.

(2) That the accused forged the document.

(3) That he did as above intending that the forged document would be used for the purpose of cheating.

Section 469

469. Forgery for purpose of harming reputation.—Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) The making of a false document for the purpose of injuring the reputation of any person is punishable under this section. This section may be read with sections 29 and 499 of the Penal Code.

(2) The word "harm", in its dictionary meaning, connotes hurt, injury, damage, impairment, moral wrong or evil. The 'harm' in this section and S. 499 is to the reputation of the aggrieved party. *AIR 1966 SC 1773.*

(3) An abettor of an offence under S. 467 cannot be convicted under S. 471 of the offence of using it as genuine. *AIR 1914 Mad 144.*

(4) This section defines an aggravated form of forgery and, therefore, taking cognizance of such an offence by the Court at the instance of a private complainant will be hit by the provisions of S. 195 (1)(b)(ii) of the Criminal P. C. *1980 CriLJ 1361.*

2. Practice.—Evidence—Prove: (1) That the document in question is a forgery.

(2) That the accused forged it.

(3) That he did so intending that the document forged would harm the reputation of someone, or knew that it was likely to be used for that purpose.

3. Procedure—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Court of Metropolitan Magistrate or Magistrate of the first or second class.

4. 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 of—, at—, forged a certain document to wit—, intending that it shall be used for harming the repnation of—, or knew that it was likely to be used for that purpose, and that you thereby committed an offence punishable under section 469 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 470

470. Forged document—A false document made wholly or in part by forgery is designated "a forged document".

Cases

1. Scope.—(1) This section defines a "forged document." A false document defined in section 464 made wholly or in part by forgery is called a forged document *7 BCR 10; 37 DLR 255; 6 BLD 52.*

(2) A mere alteration of the number or the land wrongly described in the sale deed into the right number, by the vendees, was held to be neither forgery nor a forged document after such an alteration, because the intention to defraud or to cause wrongful loss or gain was absent. *(1883) ILR 5 All 217.*

(3) Where the accused, who was the Secretary and Manager of a Company whose collapse was imminent, made out a false record to make it appear that his resignation had been accepted, it was held that his act constituted neither forgery nor cheating because his act was not dishonest but was done only to escape some inconvenience and annoyance and also because no harm was likely to arise from his act. *(1902) 4 Bom LR 440.*

(4) This section defines an aggravated form of forgery. Hence, taking cognizance of such an offence at the instance of a private complainant will be illegal. *1980 CriLJ 1361 (Andh Pra).*

Section 471

471. Using as genuine a forged document—Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

Cases and Materials : Synopsis

1. Scope.—(1) Under this section the dishonest user of a forged document is made punishable. It punished a person for making use of a forged document. The use of a forged document which is contemplated by this section is such use as causes wrongful gain or wrongful loss. To constitute a use as contemplated by this section it is not necessary that the forged document should be used as evidence in court. It is sufficient that it is used in order that it may ultimately appear in evidence or used dishonestly or fraudulently. The nature of the user is not material. There is, therefore, no doubt that in order to bring a person within the purview of section 471, it is enough if he files a forged document which he knows or has reason to believe to be a forged document *(AIR 1956 Pat 354, 5 CrLJ 351).* The use of a document contemplated by this section must be voluntary one and not the mere production of the document in compliance with an order of the court which must be obeyed *(AIR 1935*

All 718, 37 CrLJ 46). Filing of a forged document along with plaint amounts to a "user" of the document *(18 CrLJ 709).* It is also a user by a party to a suit to file receipt and place them before the other side for admission or denial *(36 CrLJ 1199).* Using a forged cheque as genuine with the intention of gaining time for repayment of loan, amounts to an offence under this section even though loan was repaid and the cheque returned by the creditor and it was not known who the forger was. The handing over of forged document to the advocate and their production in court in support of the defence amounts to using the forged document as genuine *(37 CrLJ 421).* A forger could be convicted both for forgery and use of the forged document as genuine *(25 CrLJ 473).* Whether there has been user or not must depend upon the circumstances of each case *(27 CrLJ 177).* Where the intention is not fraudulent and no wrongful loss or gain is caused to any person no offence under this section is committed *(27 CrLJ 1263).* If, however, document filed required proof then filing of documents merely will not be sufficient to base conviction on it. A document may mean an original or its copy. If the original is a false document and a copy of it or if it is a false copy of a true original the filing of such document with knowledge that it is not a true document is sufficient to attract this section *(AIR 1956 Pat 354).* The copy of a document alleged to be false does not come within the definition of a false document and therefore conviction for use of such copy is bad *(11 CrLJ 401).* All that section 471 requires is that there must be fraudulent or dishonest user of a document as genuine and knowledge or reasonable belief on the part of the person using the document that it is a forged one. An offence committed by a public servant in the discharge of his duty requires sanction under Act XL of 1958. This section does not specify the punishment but declares that using a forged document shall be punished like forgery and a charge for using a forged document should make mention of it coupled with one or other of section 465, 466 or 467 according to the nature of the document forged. The definition of forgery should be entered in the charge simply describing the offence as one of using a forged document is sufficient. Complaint in writing of the court before which the offence is committed or some other court to which such court is subordinate is necessary (section 195 CrPC). No such complaint is required for prosecution of a person in respect of a forged document when he is not a party to the proceeding in which the forged document is produced *(15 CrLJ 242).* If a complaint is filed under this section and it appears that some other offence has also been committed it is not necessary to have a fresh complaint *(36 CrLJ 26).*

(2) Ingredients to be established in an offence of forged document. The mere proof that a certain document is a forged one is not sufficient to establish an offence under the said section, because no conclusion can be drawn from the document itself that was also used and that too fraudulently or dishonestly. *Md. Tinkari Vs. State (1962) 14 DLR 281.*

(3) Making of complaint regarding commission of offences under sections 196 and 471 P.C.—In finding that a complaint should be filed, the court is not required to decide the merit of the case—A complaint may be lodged if it appears that a prima facie case has been made out relating to the commission of offence. *Prafulla Chandra Roy Vs. A. Y. Md. Idris, (1971) 23 DLR 145.*

(4) Charge falls through because of total absence of evidence that the accused used the document in question as a genuine document knowing it to be a forged one. *Lalit Mohan Nath Vs. State (1987) 39 DLR 398.*

(5) Mark-sheets of S.S.C examination were forged documents rendering the appellant guilty under section 471. *Jahangir Hossain Vs. The State 40 DLR 545.*

(6) Mark-sheets of S.S.C examination were forged documents rendering the appellant guilty under section 471. *Jahangir Hossain Vs. State 40 DLR 545.*

(7) For the offence under section 471 of the Penal Code and accused can be punished as provided in section 465 of the Penal Code upto 2 years' rigorous imprisonment or with fine or with both. The imposition of 4 years rigorous imprisonment under section 471 of the Penal Code is not sustainable in law. *Abul Hossain Mollah alias Abu Mollah Vs. State, 50 DLR (AD) 96.*

(8) The High Court Division is palpably wrong in holding that when an accused is convicted and sentenced under section 466 he cannot again be convicted and sentenced under section 471 of the Penal Code. In the present case it has been proved that the recall order was used by Nurunnahar Begum in getting Khijiruddin released from the Thana. The accused-petitioner was certainly and abetor in so far as section 471 of the Penal Code is concerned. *Azizul Hoque (Md.) Vs. State 51 DLR (AD) 216.*

(9) In order to hold a person liable under Section 471 of the Penal Code it must be proved and found that the accused has fraudulently or dishonestly used as genuine any document which he knew or had reason to believe to be forged—Mere knowledge or belief that a particular document is forged will not bring a man within the mischief of the section unless it is further found that the forged document has been used as a genuine one fraudulently or dishonestly—Mens rea is a necessary constituent of the offence—Mere realisation of rent on the basis of a register which is forged without finding that it was done with some ulterior purpose will not make the collector liable under Section 471 of the Penal Code. *Shamsul Alam Vs. The State, 6 BLD (AD) 242.*

(10) For the offence under section 471 of the Penal Code an accused can be punished, as provided in section 465 of the Penal Code, upto 2 years' rigorous imprisonment or with fine or with both. The imposition of 4 years' rigorous imprisonment under section 471 of the Penal Code is not sustainable in law. *Abdul Hossain Mollah alias Abu Mollah Vs. The State. 17 BLD (AD) 170.*

(11) No independent sentence can be passed under section 471—No sentence in excess of the limit prescribed—Section 471 does not prescribe any sentence independently. It is dependent upon section 465 which prescribes sentence of either description for a term which may extend to two years or with fine. No sentence in excess of the limit as provided under section 465 can be awarded under section 471 of the Penal Code. *Abul Hossain Mollah alias Abu Mollah Vs. The State—2 MLR (1997) (AD) 332.*

(12) The Courts below rightly convicted and sentenced the accused persons under sections 471/34 of the Penal Code as while exercising judicial powers the Court or Tribunal as a part of the judicial machinery of the country determines the rights of the subjects according to established judicial norms and procedure laid down in the statutes but an officer dealing with a miscellaneous case regarding exchange of properties merely acts as an executive authority and does not act as a judicial machinery nor is he invested with any judicial power attracting the provisions of section 195(1)(c) of the Cr. P.C. *Maniruzzaman alias Md. Maniruzzaman Vs. State (Criminal) 4 BLC 552.*

(13) In order to hold a person liable under this section it must be proved and found that he has fraudulently or dishonestly used as genuine any document which he knows or has reason to believe to be forged—Mere knowledge or belief that a particular document is forged will not bring a person within the mischief of this section unless it is further found that the forged document has been used as genuine fraudulently or dishonestly—Mens rea is a necessary constituent of the offences—Mere relegation of rent on the basis of a register which is forged without finding that it was done with some ulterior purpose will not make the Collector liable. *Shamsul Alam Vs. The State, 1986 BLD (AD) 242 = BCR 1986 AD 371.*

(14) The petitioner having induced the purchaser to enter into an agreement by showing false documents and received Taka 12 lac on plea of refunding Taka 14 lac in the event of his failure to execute sale document, his contention that it is a civil dispute is not sustainable. *43 DLR 95.*

(15) Prosecution for forging document—When it is to be quashed—The Bainapatra in question having been given in evidence in the suit, no court can take cognizance of any offence covered by section 463 Penal Code without complaint by the Court—The criminal proceeding against the accused in connection with forgery thereof has to be quashed—But this will not debar the competent court to make any complaint in accordance with law. The Rule is made absolute. *9 BLD 209.*

(16) Whether Government servants be tried in the ordinary Criminal Court for offence under sections 417 and 471 with private persons. Those offences are to be tried by the Special Judge appointed under the Criminal Law Amendment Act and not by ADM Proceeding hereby quashed and Rule is made absolute. *7 BLD 137.*

(17) Charge under sections 465 and 471 Penal Code read with section 82 of Registration Act. Criminal Proceeding initiated against accused petitioners upon a general diary entry at a Police Station. Charge-sheet submitted, after investigation, for commission of offences under sections 465 and 471 Penal Code read with section 82 of the Registration Act. Offences being of non-cognizable nature petitioners' arrest without warrant from appropriate Criminal Court is unlawful. The prosecution of petitioners without prior permission from lawful authority contemplated under section 83 of Registration Act is illegal. Proceeding quashed. *3 BCR 30.*

(18) The essential ingredients of this section are:

(i) knowledge or reasonable belief on the part of the person using the document that the document is a forged one; and

(ii) fraudulent or dishonest use of a document as genuine. *1971 CriLJ 1799.*

(19) Burden is on the prosecution to prove the ingredients. *(1888) 11 Mys LR No. 385 P. 187.*

(20) Section 474 refers to an offence with regard to possession of forged documents, while this section refers to an offence with regard to the use of such documents. Both are distinct and different offences. *1979 CriLR (Guj) 229.*

(21) In order to punish a person under this section, it is not necessary that he himself should have made or created the forged documents. *(1972) 38 Cut LT 870.*

(22) The forger is not excluded from the operation of this section. *AIR 1966 Mad 349.*

(23) S. 471 is intended to apply to persons other than the forger himself. *AIR 1926 Nag 137.*

2. "Fraudulently or dishonestly."—(1) In order to sustain a conviction under this section the accused must have not only used the forged document as genuine but must have also used the document fraudulently or dishonestly. The use of the document must, however, be a voluntary one. Production of a document alleged to be forged at the insistence of the Court cannot be a fraudulent or dishonest use of the document within the meaning of the section as in such a case, the accused cannot be credited with the requisite mens rea. *AIR 1935 All 940.*

(2) A person can use a document fraudulently even though it is used for the purpose of supporting a good title. *AIR 1924 Cal 718.*

(3) If a party to a suit sets up two different titles and supports one of them with a false document he would commit an offence under this section even if it be found that the other title is good. *AIR 1926 Mad 1072.*

(4) It is sufficient for the purpose of this section to show that there was a criminal intention on the part of the accused to cause wrongful gain to one or wrongful loss to another person. It is not necessary that the wrongful gain or wrongful loss should be actually caused. *AIR 1931 All 258.*

(5) Wrongful gain is one to which the person gaining is not legally entitled. Thus when A although entitled to possession of his house from B sues B for arrears of rent basing his claim on a rent note which is found to be not genuine. A not being entitled to rent at a rate fixed by the rent note, clearly intends to cause wrongful gain. *AIR 1953 Nag 165.*

(6) Section 471 does not necessarily contemplate user for producing material loss. A user of a forged document for the purpose of securing an acquittal will bring the case within the definition of "dishonestly." *AIR 1929 Pat 60.*

(A) Illustrations of fraudulent or dishonest user.—(1) The accused, a postman, signed postal receipts for V.P. parcels himself, paid the money payable for the parcel and retained them instead of delivering them to the addresses. It was held that his act was a dishonest one causing wrongful gain to him though he had paid the money and so no wrongful loss was caused to the sender. *AIR 1959 Mys 185.*

(2) Where execution is sought on the basis of a copy a decree in which the dates are altered under the wrong impression that the decree was time-barred a sufficient intent to defraud is involved in the advantage directly aimed at by the accused on the basis of the altered dates and it is immaterial that the alterations were brought about under the wrong impression that the decree was time-barred. In such a case, it is not necessary to show an intent to cause loss or risk of loss. *AIR 1940 Pat 486.*

(3) For other instances of fraudulent or dishonest user of forged documents. *AIR 1971 SC 2593.*

(B) Illustrations of user, not dishonest or fraudulent.—(1) The accused altered the date of a document for getting it received in evidence but the alteration was not helpful. On the other hand it ruined his case. It was held for want of the elements of dishonesty and fraud the conviction under this section could not be sustained. *AIR 1919 All 387.*

3. Use of forged document.—(1) To sustain a conviction under this section one of the essential requirements is that there should be a use of a forged document. Whether there has been a 'use' within the meaning of the section depends on the circumstances of each case. *AIR 1926 Cal 89.*

(2) The expression "whoever fraudulently or dishonestly used as genuine any document" implies that the use of a document as contemplated by the section must be a voluntary one. Thus, a mere production of a document in compliance with an order of the Court which has to be obeyed cannot be a 'user' within the meaning of the section. *AIR 1935 All 940.*

(3) The accused had filed a suit in which he was required under Order 11, Rules 12 and 13 Civil P.C. to file an affidavit of documents which were in his possession relating to some matter in question in the suit and in the affidavit, mention was made about a certain delivery order. Nevertheless the accused did not produce it in Court nor made any use of it. It was the defendant who in cross-examining the accused required the production of the delivery order. It was held that no charge under S. 471 could be established against the accused as the accused was forged by the defendant to produce the document in evidence. *AIR 1938 Rang 194.*

(4) The accused put in a written statement in which he referred to an istafanama which was, however, neither filed nor put in evidence by the accused or on his behalf. It was produced by one of the witnesses for the prosecution in cross-examination. It was held that this could not be held to be a 'user' within the meaning of the section. *AIR 1935 Cal 687.*

(5) The accused was told to produce copies of the revenue records in support of his complaint of trespass and he knowingly produced forged copies as genuine. The accused was held guilty under this

section. It was observed that the case was different from one where a person has a forged document in his possession which he does not intend to use as genuine but which a Court forces him to produce. *AIR 1925 Lah 333.*

(6) It is not necessary that the forged document should have been presented by the accused himself. It is sufficient even if the document is produced by his agent expressly authorised in that behalf. *AIR 1932 Cal 545.*

(A) Illustrative cases.—(1) Mere reference to the forged document in other exhibits as conferring title on the executant of those exhibits does not constitute 'user' within the meaning of the section. *AIR 1960 Ker 29.*

4. Use of copies of forged documents.—(1) The mere filing of a copy of a forged document may not amount to the user of the original document. But the filing of the copy with the knowledge that it is a copy of a forged document would amount to the user of the document because when a person files a copy he is using, in substance, the original itself if the filing is with the knowledge that the copy is the copy of the forged document. *1970 SCD 471.*

(2) The use of the copy of the forged document must, no doubt, be dishonest or fraudulent. *AIR 1926 Oudh 255.*

5. "Which he knows or has reason to believe to be a forged document".—(1) One of the essential requirements of S. 471 is the knowledge or reasonable belief on the part of the person making use of a document that it is a forged one. *(1872) 17 Suth WR 32.*

(2) The prosecution must establish that the accused knew or had reason to believe that the document is a forgery. *AIR 1950 Sau 9.*

(3) It is not sufficient for the prosecution to show that the document is not genuine. It must be shown affirmatively that the accused either knew or had reason to believe that the document was forged. *AIR 1960 Madh Pra 269.*

(4) The mere fact that the accused was found to be in possession of forged documents would not show in the absence of any other material, that he knew or had reason to believe that they were forged documents. *AIR 1963 SC 822.*

(5) When there was no evidence to show that the accused knew or had reason to believe that the cheque was a forged document and with this knowledge he used the cheque, the accused could not be convicted under S. 471 P. C. *AIR 1979 SC 1506.*

(6) Accused not forged certain receipts and collected donation with the help of accused No. 2. Accused No. 2 did not know that the receipts were forged. Accused No. 2 merely accompanied accused No. 1. Trial Court acquitted the accused No. 2 because there was no evidence that he knew that the receipts were forged. Supreme court upheld this decision in preference to that of High Court. *AIR 1979 SC 1342.*

(7) The mere fact that suspicion of a pleader ought to have been aroused by the sight of the document is not prima facie evidence that he knew or had reason to believe the document to be a forged one. *AIR 1960 Madh Pra 269.*

6. Abetment.—(1) Where A forges an endorsement on a passport which would enable B to travel to certain foreign countries, and B uses it, B would be guilty of an offence under this section and A would be guilty of abetment under S. 471 read with S. 109 of the Code. *AIR 1971 SC 2593.*

7. Evidence and onus of proof.—(1) To sustain a conviction under the section, the onus is on the prosecution to establish that the accused used the document fraudulently or dishonestly knowing or

having reason to believe it to be forged. The onus is not on the accused to prove his innocence. *(1888) 11 Mys LR No. 385 p. 187.*

(2) The onus of proof of the existence of every ingredient of the charge always rests on the prosecution and never shifts. *AIR 1980 SC 499.*

(3) To base a conviction solely on the opinion of an expert in handwriting is, as a general rule, very unsafe. *AIR 1923 Lah 622.*

(4) When the witnesses testified on oath that they had signed the register in question and the signatures shown to them were their own, the statement of the handwriting expert that the signatures were forged cannot be said to be reliable. Conviction of accused merely on testimony of the expert in such a case is not sustainable. *AIR 1979 SC 1011.*

(5) Similarity of handwriting affords some assistance in determining whether the evidence adduced to convict a person of forgery can be believed or not but the test is by no means safe or certain. The prosecution must prove that the accused was the only person who could have written the forged document. *AIR 1914 Oudh 275.*

(6) The mere fact that a purchaser of a property is in possession of document which is shown to be forged would be no evidence of the guilt of the purchaser. *AIR 1952 Hyd 7.*

(7) The mere fact that the document bears a suspicious appearance on the face of it cannot be regarded as prima facie evidence of guilty knowledge of the accused that it is not a genuine document but a forged one. *AIR 1952 Hyd 7.*

(8) A mere suspicion that the thumb impression on the will in question was not genuine cannot take the place of proof. *AIR 1979 SC 1236.*

(9) The case for the prosecution that the two accused conspired to dispose of unauthorised stocks of tobacco or that after transporting first quality tobacco they created records to show that only second quality tobacco was transported and only the lower duty was payable was not borne out from any of the records and as such could not be said to have been proved against both the accused. *AIR 1979 SC 1266.*

(10) As to illustrative cases on point of appreciation of evidence. *AIR 1978 SC 443.*

8. Procedure.—(1) The nature of the imprisonment awarded, whether rigorous or simple, must be specified in the judgment itself and cannot be specified for the first time in the warrant under S. 418 Cri. P. C. *(1971) 73 Bom LR 215.*

(2) Where the High Court under S. 482 Cr. P. C. quashed the proceedings against the accused under Ss. 467, 471 and 120B P. C., not because they were covered by S. 195 Cr. P. C. but because allegations contained in the complaint did not constitute these offences, and the High Court further directed that other offences i.e. Ss. 262, 263 and 420 P. C. did not require a complaint under S. 195 Cr. P. C. and would have to be tried, on appeal by special leave it was held that the order of High Court was legal and fully justified. *AIR 1984 SC 1108.*

(3) Not cognizable—Warrant—Not bailable—Compoundable—Triable by the same Court as that by which the forgery is triable. If the offence has been committed by a public servant in the discharge of official duty, it becomes triable by Special Judge under Act XL of 1958. In that case it becomes cognizable—Not bailable. If the forged document is a promissory note of Government, it is triable by Sessions Judge.

9. Sanction for prosecution.—(1) The statutory power of the police to investigate cognizable offences under S. 471, 475, or 476 P. C. is in no way barred by virtue of provisions of S. 195(1)(b)(ii) Cr. P. C. S. 195(1)(b)(ii) Criminal P. C. confines to forgeries committed in respect of a document during its custody by the court of its fabrication in the course of the proceedings itself. *1983 CriLJ 713.*

(2) Prosecution for offences under Ss. 467, 471 r. w. S. 34—No complaint by court in which fraudulent money receipt is produced—Prosecution not maintainable. *AIR 1983 SC 1053.*

(3) The Rent Control Act does not specify that a Controller's Court is a court within the meaning of S. 195 Cr. P. C. Therefore the provisions of S. 195(1)(b)(ii) cannot restrain a Magistrate from taking cognizance of an offence of forgery committed in a rent control proceeding, in the absence of any complaint in writing of the court of the Rent Controller. *1982 CriLJ 817.*

(4) Prosecution under Ss. 420, 467, 468 and 471 P. C. of Administrator of Municipality for lapses committed in purchase of fluorescent tubes—Lapses cannot be treated to have been committed in discharge of official duties—Prosecution cannot be dropped for want of sanction under S. 197 Cr. P. C. *(1984) 11 Cri LT 15.*

10. Section 471 and other offences.—(1) An offence under the Cooperative Societies Act is distinct from offences under Section 463 P.C. Where a private complaint is made to a Magistrate that a party before the Registrar's nominee has committed an offence under Sections 465 and 471, Penal Code, prior sanction of the Registrar under the Cooperative Societies Act is not necessary. *AIR 1969 SC 725.*

(2) As the offence under Section 167 is included in the offence under Sections 467/471, a conviction under Section 167 and Sections 467/471 is not maintainable. *AIR 1926 Oudh 615.*

(3) Where the certificates which the accused was found to have forged for getting admission in a college could not be described as valuable security, the conviction of the accused should be under Section 471 read with S. 465 instead of under S. 471 read with S. 467. *AIR 1981 SC 297.*

(4) Where on the Court's asking a witness to produce the diploma which he claimed to possess, he produced one which was found to be not genuine, it was held that his intention in producing it was to support his statement and not to cause wrongful gain to himself or wrongful loss to another. His conviction under S. 465/471 therefore could not stand. *AIR 1966 SC 523.*

(5) Where entering into conspiracy to cause defalcation was one of the charges against the Chairman of the Management Committee of the society and that charge failed, his conviction under Ss. 408, 409 467 and 471 P. C. on the basis of vicarious liability was improper in absence of charge under S. 120-B P. C. and direct evidence connecting him with the acts of commission and omission for which he was convicted. *AIR 1984 SC 151.*

11. Punishment.—(1) A person committing an offence under this section is liable to be punished in the same manner as if he had forged such document. Hence it will not be correct to charge or commit a person under this section only any more than it will be to charge a person under Section 109 only. The section must be coupled with one or other of the sections which provide a punishment according to the nature of the document used. *AIR 1927 Oudh 630.*

(2) Even if the accused did not use the forged document relying on it as a valuable security, it will still be an offence if it was used fraudulently or dishonestly; and if it purported to be valuable security, the punishment provided by Section 467 and not that provided by Section 465 would be that to which the accused would be liable under S. 471: *AIR 1924 Cal 960.*

(3) The offence under this section is punishable with the same punishment as if the accused had himself forged the document. The extent of the punishment depends on the circumstance of the case, character and previous record of the accused. *AIR 1955 NUC (All) 1268.*

(4) Where an accused, a Reader holding M. Sc. and Ph. D. degrees was convicted for offences of attempting to issue counterfeit university degrees, it was held that the award of sentence by the Sessions Court till rising of the Court was too lenient. Award of sentence by the High Court for three years was just and reasonable. *AIR 1978 SC 1548.*

(5) Where one S was convicted under this section and one P for having abetted the offence, it was held that the sentence of 4 years' rigorous imprisonment awarded to S and of 2 years' rigorous imprisonment awarded to P was not severe. *AIR 1929 Cal 203.*

(6) Accused trying to use forged Bank Guarantee Bond by filing it before Public Works Department—Forgery discovered—Accused immediately withd awing the bond and paying the amount in cash—No loss caused to anyone. The sentence of one year R. O. reduced to the period already suffered. *AIR 1979 SC 1343.*

12. Practice.—Evidence—Prove: (1) That the document was a forged one.

(2) That the accused used such document.

(3) That he used it as a genuine one.

(4) That he knew, or had reason to believe, that it was a forged one.

(5) That he used it dishonestly or fraudulently.

13. Charge.—The charge should run as follows:

I, (name and office of the Magistrate/Judge, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, fraudulently (or dishonestly) used as genuine certain document, to wit—, which you knew or had reason to believe, at the time you used it to be a forged document, or Government Promissory note that you thereby committed an offence punishable under sections 465 and 471 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 472

472. Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.—Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punishable with [2][imprisonment] for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section may be read with sections 27 and 28 of the Penal Code. In the Chapter of offences relating to Coins and Government Stamps, there are similar provisions. This

section and the section following are akin to sections 235, 255 and 256 of the Penal Code. This section deals with aggravated form of forgery by making or counterfeiting, and possession of any seal, plate or instrument for forging valuable securities etc., specified in section 467, is made punishable under this section.

(2) The prosecution must prove at the outset that the seal etc., is a counterfeit one. *AIR 1925 Oudh 158.*

(3) The counterfeiting envisaged by this section is of an existing seal. If the seal of a person has become useless by reason of his death, a counterfeiting of such seal cannot be an offence under this section. *AIR 1925 Oudh 158.*

(4) The words "other instruments" mean instruments similar to a plate or seal such as a die frame, or tool but cannot include a bottle of oil, or parcel of powder. *(1891) 14 Mys LR No. 285, P. 880.*

(5) A joint trial for an offence under this section along with those under Ss. 420 and 467 of the Code where they do not form part of the same transaction is bad for misjoinder of charges. *AIR 1917 Lah 78.*

(6) Where entering into conspiracy by the accused a chairman of the managing committee of the cooperative societies for defalcation of properties of the Cooperative Society was one of the charges and that charge failed, conviction of the chairman of the managing committee of the Society under Ss. 467, 471, 408, 409 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.*

(7) Offence under S. 472 read with S. 34 should be punished deterrently. *1969 Mad LW (Cri) 68.*

2. Practice.—Evidence—Prove: (1) That the accused made or counterfeited the seal, plate, etc. or that he had such seal, etc., in his possession, and that he knew it to be counterfeit.

(2) That such seal, etc., was made in order to produce impression.

(3) That he intended to use such seal, etc., for the purpose of committing forgery.

(4) That such forgery was punishable under section 467.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered.

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—, made (or counterfeited) a seal, (or plate, instrument) for making an impression, intending that the same shall be used for the purpose of committing any offence punishable under section 467 of the Penal Code, (or had in your possession the seal) (or plate, or instrument intending that the same shall be used for the purpose of committing any forgery), and that you thereby committed an offence punishable under section 472 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 473

473. Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise.—Whoever makes or counterfeits any seal, plate or

other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this Chapter other than section 467, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section is almost similar to section 472. It differs only in that, forgery herein is not of the serious type of forgery punishable under section 467. The punishment is less. Where counterfeit seals and forged documents are found in the accused's possession, and he can give no satisfactory information as to how he became possessed of them, it can be inferred that he is keeping them with the intention of using them fraudulently.

(2) The term 'forgery' implies the creation of a false document. Letters imprinted on trees for distinction and identification are 'documents' within the meaning of S. 29 and a person possessing an instrument for counterfeiting such letters would be guilty under this section. *AIR 1925 Bom 327.*

2. Practice.—Evidence—Prove: (1) That the accused made or counterfeited the seal, plate etc. or that he had such seal etc. in his possession, and that he knew it to be, counterfeit.

(2) That such seal, etc. was made in order to produce impressions.

(3) That he intended to use such seal, etc. for the purpose of committing forgery.

(4) That such forgery was punishable under any section of this Chapter.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

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—, made (or counterfeited) a seal, (or plate, instrument) for making an impression, intending that the same shall be used for the purpose of committing any forgery punishable under section 467 of the Penal Code, and that you have thereby committed an offence punishable under section 473 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 474

474. Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.—Whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of description[s] mentioned in section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description[s] mentioned in section 467, shall be punished with [2][imprisonment] for life, or with imprisonment of either description, for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section may be read with sections 24, 25, 27 and 29 of the Penal Code. This section resembles 242, 243 and 259. Persons who have in their possession forged documents of any description knowing that they are forged, are guilty of this offence if they intend that the document shall be used for a fraudulent or dishonest purpose. A person cannot be convicted under this section when the document fabricated by him does not fall within the description given in S. 466 or 467. Nor can he be convicted of forgery when he does not make it with any of the intents mentioned in section 463. In the absence of a complaint by the court the offence of attempting to fabricate evidence cannot be proceeded with when the offence is committed in relation to a proceeding in court *(26 CrLJ 847).*

(2) The ingredients of the offence under this section are:

(a) that the document in respect of which the charge is brought is forged,

(b) that the accused must have known that it was a forged document,

(c) that he was in possession of that document,

(d) that he intended that the document should be fraudulently or dishonestly used as genuine,

(e) that the document, or where there are several documents, each of the documents, is of the description mentioned in S. 466 or 467 of the Code. *1971 All WR (HC) 345.*

(3) The ingredeints of Section 471 and this section are different and so merely on the commission of an offence an offence under S. 471 by a person by producing a forged document in a Court, the offence under S. 474 committed before by the same person in respect of the same document is not obliterate. *1979 CriLR (Guj) 229.*

(4) The document in the accused's possession must be a forged one. If the document in possession of the accused is not proved to be forged document within the meaning of S. 463, he cannot be convicted under this section. *(1902) 6 Cal WN 382.*

(5) The possession of forged document must be exclusive. *(1972) 1 Cut WR 69.*

(6) The possess of the forged document must be with the intention to use it as genuine. *1971 All WR (HC) 345.*

(7) Where in a prosecution under this section, (for possession of a forged document for being used as genuine) the alleged executant of the document is examined as a witness for the prosecution and he denies the signature on the document to be his, and his denial is corroborated by the evidence of a handwriting expert, the accused can be convicted on such evidence as such a conviction will not be one based on the mere uncorroborated testimony of a handwriting expert. *AIR 1916 All 179.*

(8) Conduct is the principal criterion of guilty knowledge. The mere fact that a man who files a document is interested in establishing its contents does not raise a presumption that he filed it knowing it to be forged. But where a document was filed on which he relied and when it was discovered that it had been forged he fled away, the conduct cannot be held to be consistent with his innocence. *(1912) 13 CriLJ 449 (Cal).*

(9) The filing of a document as the basis of a plaint or as a necessary sequl to the pleas in the plaint is itself the user of the document. *(1912) 13 CriLJ 449.*

(10) The negotiation of a forged hundi will be a user of the document. *AIR 1916 Lah 275.*

(11) Guilty intention must be proved. A mere suspicion is not sufficient. *1864 Suth WR Cr. 12.*

(12) Where the accused produced a forged certificate of efficiency before a public officer and got an employment on the strength thereof, it was held that the forged document was intended to be used fraudulently within the meaning of this section. *1895 Punj Re (Cr) 2 P. 6.*

(13) A tribunal appointed under the Black Marketing Act was held to have no jurisdiction to try an offence under this section. *AIR 1950 Cal 125.*

(14) Convictions under this section and S. 471 cannot stand together. *(1912) 13 CriLJ 449.*

(15) This section is not one of the sections referred to in S. 195(1)(b)(ii) of the Criminal P. C. and no complaint by the Court is necessary to a proscution under this section where the offence is committed in relation to any proceedings in any Court. *AIR 1915 Cal 596.*

(16) Where a case exactly falls under S. 471 which requires the Court's complaint for prosecution and the accused is prosecuted under that section, but without such complaint, the Court has no jurisdiction to alter the charge into a charge under this section and convict the accused. *(1928) 29 CriLJ 849.*

(17) Where a public servant is charged with committing an offence under this section, S. 197 of the Criminal P. C. will apply and his prosecution requires the sanction of the Government as the case may be. *AIR 1929 Mad 172.*

(18) Case against public servant falling under S. 465—Mere fact that S. 474 is mentioned in the charge cannot make sanction under S. 197 Cr. P. C. unnecessary. *AIR 1925 Lah 266.*

(19) Where the accused was alleged to have forged an endorsement on a pronote and the pronote was produced in the Court in relation to some civil suit, then, the Court dealing with the civil suit alone held to be competent to file a complaint in respect of the alleged offences. A private complaint for offences under S. 467 and S. 474 *inter alia* against the accused would not be maintainable. *(1982) 1 Chand LR (Cri) 543 (P & H).*

(20) Case of forgery against two consolidation officers under Ss. 420, 465, 466, 467, 468 471, 120B P. C. and S. 5(3) of Prevention of Corruption Act—Contention that bar of S. 195 was not applicable since case contained so many offences not mentioned in S. 195 could not be accepted as they were connected offences. *1982 CriLJ 2177.*

(21) A prosecution under this section can be stayed pending the decision in a civil suit to have the document declared to have been validly executed by the persons by whom it purports to have been executed. *(1907) 5 CriLJ 199.*

2. Practice.—Evidence—Prove: (1) That the document was a forged one.

(2) That the accused had it in his possession.

(3) That he knew it to be forged when he had it in his possession.

(4) That he intended that it should be used as a genuine document.

(5) That he intended as above dishonestly or fraudulently.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class. If the case falls for punishment for life, it is triable by Chief Metropolitan Magistrate or District Magistrate or Additional District Magistrate.

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—, had in your possession a document (describe the name) which you fraudulently or dishonestly intended to use as genuine and that the said document falls under one of the descriptions mentioned in section 466 of the Penal Code (mentioned in section 467 of the Penal Code) and that you have thereby committed offence punishable under section 474 of the Penal code and within my cognizance.

And I hereby direct that you be tried by this Court on the siad charge.

Section 475

475. Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material.—Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon, or in the substance of, which any such device or mark has been counterfeited, shall be punished with [2][imprisonment] for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) The commencement of the forgery of bank notes and others similar securities where it has proceeded to the length which is described in this section is treated as a substantive offence and punished. This section supplements the provision of section 472. It is not enough if the document found in the possession of the accused was forged. It must further be established that the said document should be fraudulently or dishonestly used as genuine. No sanction is necessary for a prosecution under this section. A complaint in writing of the court before which the offence is committed, or some other court to which such court is subordinate, is necessary. In the trial of an accused person on a charge under this section, the charge should be so framed as to specify distinctly that part of the section which is applicable to the case, and should distinctly specify the particular papers bearing a counterfeit mark or device which the accused was alleged to have had in his possession with the intent mentioned in the section.

(2) To support a charge under the second part of the section , it must be shown:

(i) that the accused was in possession of the papers referred to the charge,

(ii) that the devices or marks were counterfeited on them,

(iii) that the marks are such as are used for authenticating any document described in S. 467, and

(iv) that the accused intended that the marks should be used for the purpose of giving the appearance of authenticity to documents either then forged or thereafter to be forged. *(1871) 15 Suth WR Cr 19.*

(3) Making a reasonably fair copy or imitation of a mark or device found upon a genuine currency note is within this section. But a very poor photographic imitation which cannot deceive any one cannot be said to be counterfeiting or imitation within the meaning of this section. *(1891) 14 Mys LR No. 285.*

(4) The fabrication of a false document with intent to confirm an already existing title amounts to forgery. *(1909) 10 Cri C LJ 367.*

(5) Intention to use the device or mark in order to give it the appearance of authenticity is an essential ingredient of the offence. *(1871) 15 Suth WR Cr 19.*

(6) Possession by the accused of a number of documents suspected to be forged is no evidence to prove that he has forged the particular document with the forgery of which he is charged. *(1874) 11 Bom HCR 90.*

(7) The statutory power of the police to investigate cognizable offences u/ss. 471, 475 or 476 P. C. is in no way barred by virtue of the provisions of S. 195(1)(b)(ii) Cr. P. C. *1983 CriLJ 713.*

(8) A charge under this section must be so framed as to specify distinctly that part of the section which is applicable to the case and should distinctly specify the particular paper bearing a counterfeit mark or device which the accused is alleged to have had in his procession with the intent mentioned in the section. *(1891) ILR 15 Bom 189.*

2. Practice.—Evidence—Prove: (1) That the accused was in possession of the papers referred to in the charge.

(2) That the device or mark was counterfeited on them.

(3) That the marks bore such as are used for the purpose of authenticating any document described in section 467, and

(4) That the accused intended that the marks should be used for the purpose of giving the appearance of authenticity to documents, either then forged or thereafter to be forged.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered.

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—, counterfeited upon (or in the substance of any material), to wit—, a device (or mark) to wit—, used for the purpose of authenticating any document, which device (or mark) was used for the purpose of authenticating a document, intending that such device (or mark) shall be used for the purpose of giving the appearance of authenticity to some document then forged (or thereafter to be forged on such material), and that you thereby committed an offence punishable under section 475 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 476

476. Counterfeiting device or mark used for authenticating documents other than those described in section 467, or possessing counterfeit marked material.—Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon, or in the substance of, which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section may be read with section 27, 28 and 29 of the Penal Code. This section is similar to section 475, but as the document, the counterfeit of which is made punishable, is not of so much importance as in the last, the punishment is not so severe. Complaint in writing of the

court before which the offence is committed, or some other court to which such court is subordinate, is necessary.

(2) The counterfeiting, etc., must be for the purpose of giving the appearance of authenticity to a document then forged or thereafter to be forged. Where the accused cannot be said to have made a "false document" within the meaning of Section 464 for want of proof of a dishonest or fraudulent intention and therefore cannot be said to have 'forged' a document within the meaning of Section 463, this section will not apply. *AIR 1933 Rang 114.*

(3) The accused cannot be convicted on the basis of the testimony of the handwriting expert alone but there should be corroborative circumstances to support his evidence. *1948 Jaipur LR 355.*

(4) The evidence of the alleged executant of a document that the signature on the document is not his may be used for corroborating the testimony of the handwriting expert who says that such signature is a forgery. *AIR 1916 All 197.*

(5) The statutory power of the police to investigate cognizable offences under Ss. 471, 475 or 476 P. C., is in no way barred by virtue of the provisions of S. 195(1)(b)(ii) of the Cr. P. C. *1983 CriLJ 713.*

2. Practice.—Evidence—Prove: (1) That the accused counterfeited a device or mark upon or in the substance of any material.

(2) That such device or mark was used for the purpose of authenticating any document, described in section 467.

(3) That the accused intended to use it for giving the appearance of authenticity of such document.

(4) That such document was then forged or thereafter to be forged.

3. Procedure.—Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

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—, counterfeited upon (or in the substance of) any material namely (specify) a device (or mark) namely—(any document) other than those falling under section 467 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 477

477. Fraudulent cancellation, destruction, etc. of will, authority to adopt, or valuable security.—Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secretes or attempts to secrete any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with [2][imprisonment] for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section applies when the document tampered with or destroyed is either a will or an authority to adopt, or a valuable security. Owing to the great importance of a document of this kind the punishment provided is severe. To constitute an offence under section 477 Penal Code, the destruction, etc. must be done fraudulently or dishonestly or with intent to cause damage or injury to the public or any person. An act done with intent to save oneself from criminal prosecution or conviction but not with intent to cause wrongful gain to oneself or wrongful loss to another cannot be said to be done dishonestly. The offence under this section cannot be committed in respect of a document which is forgery. The document must be a genuine one. Secretion implies concealment, and there are various modes of secreting a document, as by falsely giving out that it is lost, stolen or destroyed, or by otherwise causing its disappearance from the custody of a person who was interested in upholding it.

(2) Account books are not "valuable securities" and an entry in them cannot be the basis of charging a person with liability to what is noted therein. *12 DLR 72.*

(3) Mere endorsement calling a person for an interview in respect of a post is not a valuable security inasmuch as it creates no right. Hence its defacement does not amount to an offence under this section., *1973 CriLJ 1640 (Raj).*

(4) These words "or purports to be" show that the document need not be a valid will or authority to adopt. *AIR 1926 Rang 202.*

(5) In deciding whether the action of the accused was fraudulent or dishonest, it is essential to decide whether the document in question is a genuine one or forged one. If it was a forgery it was of no value to anybody and no wrongful loss would be caused by its destruction. Similarly, if it was a forgery, no fraud could be committed upon any body by doing away with it. *(1939) 43 Cal WN 222.*

(6) In the absence of intention to cause damage or injury to any person, the charge under S. 477 cannot be sustained. *AIR 1926 All 57.*

(7) An act done with intent to save oneself from criminal prosecution or conviction and not with intent to cause wrongful gain to oneself or wrongful loss to another cannot be said to be done "dishonestly". *AIR 1963 All 131.*

(8) It any person tears any document belonging to any other, intending thereby to cause wrongful loss he commits mischief in respect of the said document. *ILR (1976) Cut 121.*

(9) Where the accused obtained possession of a will in the custody of a solicitor with his knowledge, it was held that it could not be said that there was secretion of the will. *AIR 1934 Cal 217.*

(10) The accused cannot be convicted under S. 467 or 477 in the alternative merely on the evidence of an expert or of a person supposed to be acquainted with the handwriting of a person. *(1912) 13 CriLJ 563.*

(11) Where the person whose signature is alleged to have been forged is examined as a witness for the prosecution and he denies, while giving evidence, that the signature on the document in question is his, testimony may be taken as corroborative of the evidence of the handwriting expert who testifies that the signature on the document is a forgery and the accused can be convicted on such evidence. *AIR 1916 All 197.*

(12) Where the non-tractability of a file was not due to any action on the part of the accused as the accused had been transferred long back from the concerned department to another he could not be held guilty under S. 477. *(1983) 23 Delhi LT 499.*

(13) Magistrate trying offences under Ss. 477 and 409 P.C.—Former offence triable by Sessions Judge—Proceedings relating to offence under S. 477 are void. *AIR 1960 Mys 86.*

(14) Where the case under this section is dismissed under S. 203 without the facts being sufficiently enquired into, a fresh investigation of facts can be ordered. *AIR 1921 Cal 552.*

(15) Where the act of the accused which constitutes forgery is the same as the act which amounts to fraudulent destruction or defacement or cancellation of the document, he cannot be convicted of separate offences under Ss. 467, 471 and 477 of the Code. *(1913) 14 CriLJ 183.*

(16) The grant of Letters of Administration to the accused is no bar to proceedings against the accused under this section. *AIR 1926 Rang 202.*

(17) Where in prosecution of Honorary Accountant of a Co-operative Housing Society for offence under S. 471 read with S. 468, S. 408 and S. 477, P.C. certain important aspects of the case were overlooked by the trial Judge, in appeal against acquittal the High Court was justified in having a reappraisal of evidence and coming to its own conclusions on these points contrary to those of the trial Court. *AIR 1978 SC 434.*

(18) Mortgage bond partly satisfied torn into pieces—However, mortgage dues satisfied by execution of document—Offence committed, not grave in nature—Imprisonment of one month and 19 days as suffered by revision petitioner—Held would meet ends of justice. *ILR (1976) Cut 121.*

(19) Section 477 is not one of the offences specified in S. 195, Criminal P.C., and therefore the complaint under S. 476, Criminal P.C. is incompetent. *1936 Mad WN 489.*

(20) No sanction is necessary for the prosecution of a public servant under Ss. 409, 465 and 477. *AIR 1955 NUC (All) 2727.*

(21) Where a document was presented for registration but obtained back on some pretext or other and torn and the Registrar did not complain but the complainant complained and filed a suit for specific performance, it was held that it was inadvisable that a charge under S. 420 or 477 should be inquired into by a criminal Court. *AIR 1920 Cal 47.*

(22) Where in a charge to the jury the circumstances bearing upon the question of secreting a document by the accused were not marshalled fully and the case was overladen with controversy and contradictions as regards the essential facts, the charge amounted to a misdirection vitiating the trial. *AIR 1931 Cal 184.*

2. Practice.—Evidence—Prove: (1) That the document in question is, or purports to be, a will, or an authority to adopt, or a valuable security.

(2) That the accused has cancelled, destroyed, defaced, or secreted the same or has attempted to do so, or that he has committed mischief in respect of it.

(3) That he did as above fraudulently or dishonestly or to cause damage or injury to the public, or to some person.

3. Procedure.—(1) Not cognizable—Warrant—Not bailable—Not compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate or Additional District Magistrate specially empowered.

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 or—, at—, fraudulently (or dishonestly), or with intent to cause damage or injury to—(specify it) (or to the public) destroyed, or defaced, or attempted to cancel,

destroy, deface or attempted to secret, or committed mischief in respect of, a document, to wit—, which is (or purports to be) a will (or any authority to adopt a son, or any valuable security) and that you thereby committed an offence punishable under section 477 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 477A

[3][**477A. Falsification of accounts.**—Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, willfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or willfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alternation of any material particular from or in any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.—It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.

Cases and Materials : Synopsis

1. Scope of the section.—(1) All that is necessary to bring a person within the purview of this is that he should have altered or falsified any book or paper, etc. wilfully and with intent to defraud. If the intention with which a false document is made is to conceal a fraudulent or dishonest act which

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3. 477A was inserted by the Criminal Law Amendment Act, 1895 (III of 1895), s. 4.

had been previously committed, the intention cannot be other than an intention to defraud. The concealment of an already committed fraud is a fraud. Making a false document with a view to prevent persons already defrauded from ascertaining that misappropriations had been committed, and, thus to enable the person who committed the misappropriations to retain the wrongful gain which he had secured, amounts to the commission of a fraud and brings the case under this section. An offence under the section must be by a clerk, officer or servant or employee in such a capacity and it is a necessary ingredient that the person charged must hold such an office. Where the exact nature of the relationship of the accused with the firm is not established, he cannot be convicted under this section. The complaint under this section can be made only by a person with whom the accused is connected in any of the capacities mentioned in the section. In order to sustain a conviction under section 477A of the Penal Code, the prosecution is not required to show at what point of time the falsification of accounts had been made. In the absence of proof that the alterations are in the handwriting of the accused, the accused cannot be convicted of an offence under this section. *(AIR 1957 Orissa 268).* When a person is charged with falsification of accounts any number of false entries or omission of entries may be proved in order to prove falsification *(34 CWN 925).* A conviction under the section cannot be sustained where the prosecution has failed to show in what way the accounts were falsified or altered by the accused. The terms of section 477A, indicate that a certain elasticity is permissible in framing a charge under it and it is not necessary to confine the charge to one particular false entry, and a general falsification of specified books, papers or accounts may be alleged in combination with an allegation of fraudulent intent, no details of the person affected by the fraud or the amount involved or the date or dates on which the offence was committed, being required. A number of falsification can be included in a single charge provided they are connected with the same fraud; that is to say, although it is possible to regard them as separate offences, the law provides that they may also be regarded as one offence *(AIR 1944 Oudh 122).* Criminal breach of trust and falsification of accounts can be tried together if the latter is made to conceal the act of misappropriation *(22 CrLJ 230).* The provisions of this section are not covered by the provisions of section 195(1)(c) CrPC and consequently, no sanction is required for institution of a prosecution under this section with regard to document produced in court *(33 CrLJ 328).*

(2) This appeal by special leave questions the propriety of conviction of the two appellants under sections 477A/109 PC by the Special Judge, Faridpur confirmed in appeal by a learned Single Judge of the High Court Division. Criminal Trial—Defence plea, when not acceptable—Plea of inadvertence, liable to be rejected if not taken during the trial but argued subsequently. That plea was not taken during examination under section 342 CrPC. In the circumstances the court was justified in rejecting the plea of inadvertence due to pressure of work. Conviction of both the appellants is found to be justified based on correct appreciation of evidence and circumstances of the case. The appeal is dismissed. *Atiqur Rahman Vs. State. 42 DLR (AD) 176.*

(3) Petitionres acting in collusion with each other caused fabrication of the documents. Demand Draft and by using it, co-accused dealer lifted goods without paying a single farthing. All these five persons were put on trial together on common charges under sections 467/477A PC for committing forgery. No interference is called for. Petition dismissed. *Md Insan Ali Vs. The State. 7 BCR (AD) 146.*

(4) Sections 218, 266, 302 and 477A Penal Code. Petitioner, an MBBS, was a demonstrator in the Dhaka Medical College. He held a post mortem examination on the dead body of one Nurjahan Begum. In the first report he opined that the death was caused by drowning and suicidal in nature.

Subsequently he prepared another post mortem report stating that death was caused by strangulation and was homicidal in nature. He pleaded that he was an inexperienced doctor. He contended that he carried out the order of the superior officer who asked him to prepare the second post mortem report finding the first one to be incorrect. He was sentenced to one year's rigorous imprisonment. Held: Explanation that he carried out the order of the superior officer who found the first report incorrect is unacceptable in that when the second report was going directly opposed to the first report the petitioner should have taken due care to get the order of the superior officer in writing stating the circumstances in which a fresh report was being called for, stating the reasons justifying a raical departure from what was stated in the first report. He was endangering the neck of someone under section 302 Penal Code. In discharging his professional duties, a doctor must strictly observe the rules of medical ethics and jurisprudence as well as have regard to the laws of the country which do not spare the kind of conduct for which he now stands convicted. *Dr Azizul Haque Khan Vs. The State. 5 BCR (AD) 61.*

(5) Charge under sections 466 and 477A—Sustainable even if accused be found not guilty of criminal breach of trust. *Additional Advocate General, West Pakistan and another Vs. Tahir Beg. 17 DLR 90 WP.*

(6) Acquitted in the first trial on a charge under section 409 Penal Code on the finding that signatures in question were made in good faith. Second trial started under section 477A Penal Code for falsification of accounts not maintainable as the same question was in issue as in the second trial. *Abdul Majid Vs. State. 14 DLR 550.*

(7) Joint trial under section 5(7) of the Criminal Law (Amendment) Act to be valid must conform to the provisions regarding joinder of charges under the CrPC. Offences under section 409 and 477A Penal Code cannot be tried together. *Abdul Latif Bhuiyan Vs. State. 14 DLR 398.*

(8) This section is enacted to punish the falsification of accounts by a clerk, officer or servant or one acting as such. The falsification made punishable is stated to be of any 'book, paper, writing, valuable security or account'. These must belong to the employer, though it is then immaterial in whose custody they were at the time of their falsification. Whatever the nature and extent of the falsification, it must not have been due to mere carelessness or negligence, but must be made both wilfully and fraudulently. *1953 Mad WN 772.*

(9) In order to bring home an offence under this provision, the prosecution has to establish: (i) that at the relevant time, the accused was a clerk, officer or servant; (ii) that acting in that capacity he destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account which belonged to or is in the possession of his employer or has been received by him for and on behalf of his employer etc.; and (iii) that he did so wilfully and with intent to defraud. *AIR 1976 SC 2140.*

(10) The section consists of two parts each of which creates a distinct offence independent of the offence created by the other part, the first offence consisting in the falsification of accounts, etc., and the second one, consisting in the making of false entries or omission or alteration or abetment of the omission or alteration of any material particular from, or in any such book, etc. *AIR 1931 Cal 8.*

(11) The latter clause of the section contemplates an offence which, apart from the falsification of an account book, etc., may be committed by a person by simply making false entries or omitting to make true entries. *AIR 1931 Cal 8.*

(12) A mere omission to make an entry in a cash book is not an offence under this section. *(1970) 35 Cut LT 1256: ILR (1969) Cut 1071.*

(13) It is not necessary to prove misappropriation of any specific sum on any particular occasion. *AIR 1955 NUC (MAD) 3922.*

(14) It is not necessary to prove that anybody was deprived of any property. *AIR 1951 Mad 894.*

2. Clerk, officer or servant or employed or acting in such capacity.—(1) The section applies to offences by a certain class of persons, namely, clerks, officers or servants or persons who are employed or act in the capacity of a clerk, officer or servant. *AIR 1953 All 660.*

(2) Merely performing the work of a clerk in a firm does not make the person liable under this section unless he has been appointed by the persons who were in charge of the management of the firm. *AIR 1953 All 660.*

(3) A person can be a servant of one company, and yet be guilty of an offence under this section, with respect to the accounts of another company, if he acts in the capacity of a clerk or servant in the latter company. *AIR 1962 SC 1821.*

(4) An offence under this section can only be committed in respect of the books of account etc. of the employer and not of the accused himself. *AIR 1959 Cal 498.*

3. Partner when liable.—(1) A partner as such can be regarded as a clerk or servant of the firm and can be guilty of an offence under this section. *(1975) 16 Guj LR 661.*

4. Employer's liability.—(1) This section is not applicable where the falsification of accounts is made by the employer himself, the very object of the section being the protection of employers from unscrupulous employees. But the section has been held applicable where an employee falsifies the accounts of his employer with the intention of defrauding a third party like, for instance, taxing or other public authorities and where, in such a case, the employee is acting under the abetment of his employer, the employer will be criminally liable for such abetment though he himself is incapable, under the section of committing an offence under this section. *1953 Mad WN 772.*

(2) Where the manager of a company pays bribe to a public official for securing the favour of the official for the company, and falsifies the records and accounts of the company to conceal the payment of the bribe, such falsification will not fall under this section as it is not intended to defraud the company (the accused's employer) but to promote its interests. *AIR 1937 Rang 280.*

5. Applicability of S. 34.—(1) Although one of the accused is charged with having committed the whole offence alone, it is open to the Court to convict him for an offence under this section with the help of S. 34, for having done one of the acts which make up the offence committed in furtherance of the common intention of himself and his co-actors. *AIR 1944 Pat 67.*

6. "Wilfully".—(1) It is necessary in order to establish an offence under this section to show that the accused falsified the accounts wilfully and with intent to defraud. The word 'wilfully' connotes doing a thing freely and by one's own determination. A clerk or servant who falsifies an account by the direction of his employer cannot be said not to act wilfully. *AIR 1951 Mad 894.*

(2) The expression "wilfully" as used in this section means "intentionally" or "deliberately". But from the mere fact that certain entries were made "wilfully" by an accused, it does not necessarily follow that he did so "with intent to defraud" within the meaning of this section. *AIR 1976 SC 2140.*

7. Intention to defraud.—(1) In order to establish an offence under this section, it is necessary to show not only that false entries were made in the book, but also that they were made with intent to defraud. *AIR 1967 Mys 86.*

(2) The Code does not contain any precise and specific definition of the words "intent to defraud". However, the said expression contains two elements viz. deceit and injury. *AIR 1976 SC 2140.*

(3) The meaning of the words "with intent to defraud" is not restricted to cases of deceit and injury to the person deceived. The words mean either an intention to deceive and by means of such deceit to obtain an advantage or an intention that injury should befall some person or persons. *AIR 1939 Rang 156.*

(4) A person is said to deceive another when by practising "suggestio falsi" or "suppressio veri" or both, he intentionally induces another to believe a thing to be true, which he knows to be false or does not believe to be true. *AIR 1976 SC 2140.*

(A) Illustrative cases.—(1) The accused, a Postal clerk, received the proceeds of a V.P.P. sale and kept it himself, instead of immediately remitting the amount to the vendor of the article. He also made a false entry in the Register of V.P.P. articles received, to the effect that the pracel in question had been refused by the addressee and returned to the vendor. It was held that the above facts, if proved, would constitute an offence under this section. *AIR 1926 Bom 231.*

(2) The accused was an Accountant in a bank. He noticed that the bank might fail any day and that it might become difficult for him to recover the money deposited by him as security which was going to be justly payable back to him shortly. He obtained securities worth his deposit by falsification of accounts and without the higher authorities of the bank being aware of the fact. It was held that the accused acted with intent to defraud. *AIR 1925 All 654.*

(3) The accused whose duty it was to prepare estimates of repair work to buildings, measure and certify the amount of work done, entered in his book, an amount which was more than the actual amount of work done, without actually measureing the work done. It was held that the accused acted with intent to defraud. *AIR 1938 Pat 165.*

(4) An act done to conceal a past act which itself should have been done dishonestly or fraudulently is done with intent to commit fraud. *AIR 1962 SC 1821.*

(5) Entering two bogus bills in the society's account, as if they were true, is undoubtedly done with intent to defraud. *AIR 1951 Mad 894.*

8. Falsifies.—(1) The term 'falsify' in this section is wide enough to include the preparation of an entirely new book or new set of books of account or documents containing false entries and does not refer merely to the alteration or addition of entries in existing books of account or documents. *1976 All Cri C 270.*

(2) An entry in the accounts which is of significance merely as showing that the accused had formed a criminal intention cannot by itself amount to an offence under this section. *AIR 1949 Pat 326.*

(3) A supervisor of a society who got affixed to the debt entry a false thumb impression of a sweeper and misappropriated the money was held to have committed an offence under this section. *AIR 1935 Bom 30.*

(4) Where the managing director and the manager of the head office of a bank falsified the books of the bank, so as to show a sham profit of Rs. 3,000.00 and completed the falsification by first manufacturing pronotes in order to give to the falsified balance sheet and account books an appearance of correctness, it was held that both of them were guilty of an offence under this section. *AIR 1915 Lah 471.*

9. Falsification of accounts and false entry.—(1) When a person is charged with falsification of accounts, any number of false entries or omissions of entries may be proved in order to prove the principal charge of falsification of the account. But if a person is charged with making false entries only, each false entry is a distinct offence and Section 219, Criminal P.C. may apply. *AIR 1931 Cal 8.*

10. False receipt.—(1) Where the counterfoil of a receipt issued by an accountant of an office mentioned an amount different from what was stated in the receipt granted, the accountant was held guilty under this section. *(1971) 37 Cut LT 659.*

11. Falsification of accounts and forgery.—(1) Falsification of accounts as such is not forgery, but it may assume such a form as to amount to forgery. *1953 Mad WN 772.*

(2) Counterfoil of a receipt of an amount prepared on a certain date—It was alleged that the date was not the one on which payment was made—Such document is not a false document within S. 464—Prosecution under S. 467 is unwarranted—Appropriate action is to frame charge under S. 477A of the Code. *1967 CriLJ 1717 (Guj).*

12. This section and Section 409.—(1) The ingredients of an offence under this section are different from those of an offence under S. 409. But there is one common feature in both, namely, that the accused in both cases must fill the capacity of an employee. *AIR 1963 Raj 14.*

(2) This section makes the falsification of books and accounts punishable, even though there is no evidence to prove misappropriation of any specific sum on any particular occasion. *AIR 1955 NUC (Mad) 3922.*

13. "Paper or writing, etc."—(1) A bank's balance sheet is a paper or writing, belonging to the bank within the meaning of this section. *AIR 1915 Lah 471.*

(2) The question whether a diary in judicial proceedings falls within the category of "book, paper, writing, valuable security or account" within the meaning of this section is highly debatable. *AIR 1939 Rang 159.*

14. Account.—(1) The word 'account' has been interpreted to include also a mechanical means or contrivance to record an account, e.g., a meter in a taxi cab. *(1909) 25 TLR 747.*

(2) It was doubted as to whether a transfer permit will come within the ambit of the word 'account' as used in this section. *AIR 1960 SC 400.*

15. "Which belongs to or is in the possession of his employer, etc."—(1) Where documents containing accounts in respect of which falsifications were alleged to have been made were prepared by an agent, but were never made over to the employer who was many thousands of miles away in another country and there was no falsification after they reached the hands of the complainant, it was held that it did not amount to an offence under this section, as the documents could not be said to belong to or be in the possession of the employer. *AIR 1936 Rang 299.*

16. 'Employer'.—(1) The word "employer" does not necessarily connote the relationship of master and servant. A person who is entrusted under the law, with the management of a Co-operative Society can be said to be an officer who is employed by the Society. If, therefore, the officer falsifies any book of account of the Society it can be said that the falsification relates to the books belonging to his employer. *(1972) 13 Guj LR 198.*

17 Alters.—(1) Under the latter part of the section, alteration or abetting the alteration of any material particular in any account, book or paper, etc., of the employer is an offence. A mere omission

to make an entry in a collection register is not altering, mutilating or falsifying the register. *ILR (1970) Cut 187.*

(2) Where a clerk removed the stamps from certain requisitions and accompanying vakalatnamas and replaced on them stamps taken from other papers, it was held that the act did not come within the mischief of this section. *AIR 1920 Cal 86.*

18. "Abets the making of a false entry".(1) Where the Secretary of a Co-operative Society, entrusted with its funds and responsible to keep cash and accounts, causes false entries to be made in the accounts of sham payments on certain days, he will be liable under this section even though he was absent on the dates of false entries and of the sham payments. *AIR 1969 Tripura 31.*

19. Charge and conviction.—(1) Falsification of accounts effected on a particular date, unless it is part of another transaction, is undoubtedly a distinct offence and, therefore, a separate charge should be framed in respect of the same. *AIR 1965 Mys 128.*

(2) The making of each entry is a distinct offence. *AIR 1931 Cal 8.*

(3) A number of falsifications can be included in a single charge provided they are connected with the same fraud; that is to say, although it is possible to regard them as separate offences, the law provides that they may also be regarded as one offence. *AIR 1950 All 639.*

(4) A series of falsifications of accounts made to cover a single act of defalcation may be laid in one single charge. *AIR 1950 All 639.*

(5) Where there were four distinct acts on different dates relating to four different documents, it was held that they could not be tried together. Section 212(2), Criminal P.C. is not applicable to an offence under this section. *AIR 1926 Lah 193.*

(6) A series of charges under this section, even though committed in the course of one year or less, are not permitted to be lumped together in one charge. *AIR 1965 Mys 128.*

(7) A joinder of charges under Ss. 409, 467/471 and two charges under this section is permissible by virtue of the combined effect of Ss. 212(2), 219(1) and 220(1), Criminal P.C. *AIR 1953 Orissa 258.*

(8) Joinder of two or more charges under S. 408 or S. 409 with two or more charges under this section would vitiate the trial. These conclusions more or less proceed on the basis that the offences of misappropriation and breach of trust are not of the same kind as an offence under this section. *AIR 1956 All 466.*

(9) If the offences under S. 408 and this section are so connected together as to come within the purview of S. 235, Criminal P.C., then they can be tried together at one trial. *AIR 1956 SC 149.*

20. Evidence and proof.—(1) In order to establish an offence under this section, it must be proved that the accused who is an officer, clerk or servant or employed or acting in such capacity wilfully and with intent to defraud, falsified any book or account. *AIR 1939 FC 43.*

(2) The prosecution must further show in what way the book or account was falsified. In the absence of such proof, a conviction under this section cannot be sustained. *1970 SC Cri R 275.*

(3) Where the manager of a company offers bribe out of the funds of the company his intention being not to cause any injury to the company, but on the contrary to promote its interests, his act though punishable under another section of the Code, does not amount to an offence under this section. *AIR 1937 Rang 280.*

(4) It is not necessary for the prosecution to prove that any person or persons were actually deceived by the false document. *AIR 1926 Lah 385.*

(5) It is not necessary to prove that there was any deprivation of property. *AIR 1951 Mad 894.*

(6) The mere fact that the accused as assistant secretary of a co-operative society opened a current deposit account could not be said to amount to falsification of accounts, when the offending entries have been made by another clerk of the society. *AIR 1967 Mys 86.*

(7) Where the case for the prosecution was that the accused falsified the account books with a view to cover up his own embezzlements and not somebody else's embezzlements, but the charge of breach of trust against him was not proved, then the prosecution case that he intentionally falsified the account books to cover up his embezzlement must also fail for want of proof. *AIR 1965 Mys 128.*

(8) Where the accused is charged with embezzling amounts from Government Treasury and falsifying the accounts to cover up these defalcations during a particular period, evidence relating to similar entries or falsification of the accounts made previous to the charge period are clearly admissible under Section 15 of the Evidence Act. *AIR 1965 Mys 128.*

(9) A, a special accountant, was entrusted with certain amount for procuring paddy. He purchased sixty paras of paddy from B but credited only 14 paras in the Government account and misappropriated the rest. In the receipt given to B, the quantity of paddy purchased and amount paid therefore was shown correctly, but in the counterfoil A entered only 14 paras, and its price. In the place of the voucher given by B as per rules, A fabricated a false voucher for the lesser amount and forged on it B's signature. On the above facts it was held that A was guilty of criminal breach of trust, as well as an offence under this section and Section 467 in respect of the counterfoil and voucher respectively. *AIR 1955 Trav-Co 271.*

(10) Where the accused, a Sub-Post Master, handed over a V.P. letter to the addressee without getting payment on it before 20th October and then altered his accounts so as to make it appear that he only handed over the letter on 24th October, it was held that the accused was guilty of the offence of criminal breach of trust and falsification of accounts. *AIR 1927 Mad 626.*

(11) As to illustrative cases on points of appreciation of evidence. *AIR 1981 SC 721.*

21. Alleged false document missing.—(1) Where the clerk of an office withdrew an amount from the Treasury for payment of rent of the office building and was alleged to have misappropriated the same and sent a false receipt for such payment alleged to have been executed by the landlord, but the alleged receipt was missing from the office record, it was held that the accused could not be convicted under this section and S. 409. *AIR 1972 SC 521.*

22. Procedure.—(1) Public servant embezzling property entrusted to him and thereby committing breach of trust under S. 409, P.C. and also committing offence under S. 477-A by falsifying book or account—Consent under S. 270G, P.C. to prosecution is necessary though not to prosecution under S. 409. *AIR 1939 PC 43.*

(2) Charge under Sections 409 and 477A, P.C. read with Section 120-B P.C.—Sanction not obtained for complaint under Section 120B—Trial under substantive charge under Section 409, not vitiated. *AIR 1967 SC 1590.*

(3) The provisions of this section are not covered by the provisions of S. 195(1)(b)(ii), Criminal P.C. and consequently no sanction is required for institution of prosecution under this section with regard to a document produced in Court. *AIR 1932 Sind 53.*

(4) Sanction of the company Court is not necessary for prosecution of the promoter and Managing Agent for offences alleged to have been committed by them under S. 409 and this section. *AIR 1961 Andh Pra 493.*

(5) An acquittal, in respect of offences under this section does not bar the prosecution of the accused under Section 409 of the Code. *AIR 1956 Mad 130.*

(6) The trial of the accused for offences under this section cannot be held to be barred by his previous conviction for an offence under S. 409 in respect of the same transaction. *AIR 1963 Raj 14.*

(7) Where in a case in which accused were charged under S. 477-A and also under S. 420 it was found that the gate passes alleged to have been wilfully made with intention to defraud were in fact made inadvertently and negligently and the acquittal of accused under S. 477-A had become final, such acquittal would operate for the benefit of the accused and would also lead to his acquittal under S. 420. *AIR 1980 SC 301.*

(8) Material circumstance appearing against accused not put to him during examination of accused under S. 342 of the Cr. P.C.—Serious irregularity—Non-production of material witnesses—Prejudice to accused—Held, trial was vitiated. *AIR 1976 SC 2140.*

(9) Falsified accounts written in Rangoon and sent to Bombay—No allegation in complaint that they were sent to Bombay with the intention that the Bombay accounts may be falsified with the help of former accounts—Bombay Court has no jurisdiction. *AIR 1930 Bom 490.*

(10) Not cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class and by Special Judge if the offence comes under the purview of Act XL of 1958 and in that case it is cognizable—Not bailable.

23. Sentence.—(1) Where the object of the accused in falsifying the accounts is evasion of tax, there should be a deterrent sentence of fine. *1953 Mad WN 772.*

(2) Where the trial Court acquitted the accused on a charge of an offence under this section but the High Court on appeal convicted the accused, and in the meanwhile the accused had secured another job, the Supreme Court reduced the sentence to the period of imprisonment already undergone after the conviction by the High Court. *AIR 1972 SC 1618*

(3) Accused convicted under Section 477-A for falsification of accounts of agricultural department—One accused young and immature at the time of commission of offence—Offence taking place 10 years ago—Sentence of one year's rigorous imprisonment was held sufficient in place of 2 years' rigorous imprisonment. *AIR 1981 SC 721.*

(4) Plea of accused to enhance the substantive sentence passed upon him so that he may get remission of sentence under jail rules is untenable. *AIR 1956 Bom 671.*

24. Practice.—Evidence—Prove: (1) That the accused destroyed, altered, mutilated, or falsified the book, paper, writing, valuable security, or account in question.

(2) That the accused was a clerk, officer, or servant, or acted in any such capacity.

(3) That the book, paper, etc. belonged to, or was in the possession of, his employer, or had been received by him for or on behalf of his employer.

(4) That the accused did as in (1) wilfully and with intent to defraud.

25. Charge.—The charge should run as follows:

I (name and office of the Magistrate/Judge, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—day or—, at—, being a clerk (or officer, etc.) to X, wilfully, and with intent to defraud, destroyed (or altered, mutilated, etc.) a certain book (or which was in the possession

of) the said X, your employer, and thereby committed an offence punishable under section 477A of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Of Trade, Property and other Marks

Section 478

[4][**478. Trade mark.**—A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark,

and for the purpose of this Code the expression "trade mark" includes any trade mark which is registered in the register of trade marks kept under the [5][Patents, Designs and Trade Marks Act, 1883] and any trade mark, which, either with or without registration, is protected by law in any British possession or Foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade Marks Act, 1883, are under Order-in-Council, for the time being applicable.]

Materials

1. Scope.—(1) A trade mark is some symbol, conssisting in general of a picture, level, word, or words, which is applied or attached to a trader's goods, so as to distinguish them from similar goods of other traders, and to identify them as his goods, or as those of his successors in the business in which they are produced or put forward for sale. The Trade Marks Act has been framed to provide for the registration and more effective protection of trade marks. Property in a trade mark is the right to the exclusive use of same mark, name, or symbol in connection with a particular manufacture, or vendible commodity; consequently, the use of the same mark in connection with a different article is not an infringement of such right of property.

Section 479

[4][**479. Property mark.**—A mark used for denoting that moveable property belongs to a particular person is called a property mark.]

Cases and Materials

1. Scope.—(1) A property mark is a mark denoting that a property impressed with that mark belongs to a particular person, and that it indicates a right of property and to differentiate such property from the property of others.

(2) The distinction between a trade mark and a property mark is that whereas the former denotes the manufacture or quality of the goods to which it is attached, the latter denotes the ownership in them. In other words a trade mark concerns the goods themselves while a property mark concerns the proprietor. A property mark attached to the movable property of a person remains even if part of such property goes out of his hands and ceases to be his. *AIR 1972 SC 2488.*

(3) If a person uses a certain mark to indicate to customers that they will thus have benefit of his skill in selection, such mark is property mark and not trade mark. *AIR 1971 Pat 124.*

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4. Ss. 478 to 489 were substituted by the Indian Merchandise Marks Act, 1889 (IV of 1889), s. 3 for the original sections.

5. Since rep : *see* now the Patents and Designs Act, 1907 (7 Edw. 70 29).

(4) "Property mark" under this section must relate to movable property. It does not include incorporeal property. It is intended to denote ownership over all movable property belonging to a single person, whether the property is all of one kind or of different kinds. So long as he owns the property, his property mark impressed on it is also his property, even if any particular article out of it, after such impression, may pass out of his hands. *(1904) 1 CriLJ 581 (DB) (Bom).*

(5) The term 'movable property' in this section is wide enough to include a class or category of properties, falling under one ownership. The class is stable, though the units are ambulatory. *(1904) 1 CriLJ 581 (Bom).*

(6) The owner of the property mark on his movable property acquires all the essential attributes of property, so as to entitle him to transfer or assign it and to protection in respect of the right. *(1900) ILR 27 Cal 776.*

(7) It will be only a trade mark and not a property mark if that mark is intended merely to assure the public that the goods imported and sold are guaranteed by it. *AIR 1914 Sind 163.*

Section 480

[4][**480. Using a false trade mark.**—Whoever marks any goods or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade mark.]

Materials

1. Scope.—(1) This section defines the expression "using a false property mark". Property in trade mark is the right to the exclusive use of same mark, name, or symbol. In connection with a particular manufacture, or vendible commodity; consequently, the use of the same mark in connection with a different article is not an infringement of such right of property. There can be no right to the exclusive ownership of any symbols or marks universally in the abstract. A person aggrieved by the infringement of his trade mark has two remedies open to him: (a) he can institute criminal proceedings under the Penal Code or (b) he can bring an action for an injunction in view of the peculiar circumstances of a particular case to stay its own hands and direct the complainant to establish his rights in a civil Court. It is nowhere laid down by the Legislature that an aggrieved person should seek his remedy in civil Court and not in a criminal Court. The general resemblance or get-up, irrespective of the circumstance that the registered trade mark is different, does amount to counterfeiting a trade mark. It is the totality of impression which is likely to be left by the trade marks in the mind of a probable purchaser that has to be considered, the differences on non-essential or essential points are not important *AIR 1969) All 132.*

Section 481

[4][**481. Using a false property mark.**—Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner

reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.]

Cases and Materials

1. Scope.—(1) This section defines the offence of using a false property marks. A property mark is intended to denote ownership over all movable property belonging to a person whether it is all of one kind or of different kinds. So long as the person owns movable properties his property mark impressed upon them remains his, though any particular article out of it may after such impression pass out of his hand, and cease to be his.

(2) A property mark is a mark used for denoting that goods (movable property) belong to a particular person whereas a trade mark is a mark used for denoting that goods are the manufacture or merchandise of a particular person. *AIR 1914 Sind 163.*

(3) If the object of impressing the mark on the goods, no matter to whom it may belong for the time being, was only to assure the public that it was imported and guaranteed by its owner, the mark will be a trade-mark and not a property mark. *AIR 1914 Sind 163.*

(4) The false property mark must, in order to make the use of such mark an offence, be made on any movable property or goods or on any receptacle or case or such case, etc. must be used by the accused in a manner likely to mislead or deceive a purchaser. The intentional counterfeiting of the mark may be inferred from the circumstances leading to this conclusion. *(1904) 1 Cri LJ 581 (Bom).*

Section 482

[4][**482. Punishment for using a false trade mark or property mark.**—Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

Cases and Materials : Synopsis

1. Scope.—(1) This section prescribes punishment for using a false property mark. The using of false property mark will be punishable if it is done with the intention to defraud. Under section 462 Penal Code, the complainant must prove that the goods sold under his label and get-up were goods which had a reputation in the market as being goods manufactured or sold by him or which the label and get-up were distinctive and well known in the particular market *(40 CrLJ 546).* Where there is a genuine dispute relating to the use of a trade mark, the aggrieved party should seek his remedy in a civil Court *(AIR 1939 Rang 145).* Where the offence is committed inadvertently, a small fine may be justified. An important alteration of principle has been made in regard to offences under this section. Ordinarily, it is incumbent on the prosecution to prove that the person charged had acted with intent to defraud; under this section it is incumbent on the person charged to prove that he acted innocently or that he acted without intent to defraud.

(2) Lump sentence improper—Finding the accused guilty under sections 482 and 486 and awarding of lump sentence for both offences are improper and not sustainable in law and as such the sentence impugned is modified. *Hazi Oziullah and another Vs. State—1, MLR (1996) (AD) 139.*

(3) The original section included also the user of a false trade mark as an offence punishable under the section. *AIR 1914 Sind 163.*

(4) Where a trade mark in question is a distinctive mark which the firm has been using for over ten years, the firm using it acquires property in that mark as indicating that all goods which bear it have been manufactured by the firm. *AIR 1930 Oudh 360.*

(5) Ingredients of this section and those of the Copyright Act are same and, hence, if the accused had been convicted and sentenced under this section, he could not again be punished under the Copyright Act. *1979 Raj CriC 280.*

2. "Whoever".—(1) The word "whoever" will include a body corporate. *AIR 1914 Low Bur 15.*

(2) For an offence under this section a sentence of imprisonment is not obligatory as, for instance, in the case of an offence under S. 420 in regard to which it has been held that a prosecution will not lie against a corporation. *AIR 1964 Bom 195.*

3. "Uses".—(1) The making of the mark is also a user of the mark within the meaning of this section. *AIR 1932 Sind 94.*

(2) Mere possession or stocking of goods bearing marks which are colourable imitations of the genuine mark, is not 'user' within the meaning of this section. *AIR 1958 All 643.*

4. Intention to defraud.—(1) The state of mind of the person responsible for the introduction of the false mark is a most relevant fact which can be established by evidence. In the absence of such evidence the accused cannot be said to have discharged the onus of proving want of intention. *AIR 1929 Rang 322.*

(2) The onus of proving the absence of such intention is on the accused. Whether this burden has been duly discharged, must be decided only on the whole of the evidence in the case. *AIR 1929 Rang 345=30 Cri LR 882.*

(3) Where the accused uses a false trade mark but has no fraudulent intention, he cannot be convicted under this section. *AIR 1918 All 109.*

(4) Containers bearing complainant's trade mark recovered from accused—Complainant's product removed and spurious substituted offence under Ss. 482, 485 held established. *AIR 1961 Cal 240.*

5. Evidence, presumption and proof.—(1) As a general rule the burden of proof is on the prosecution to establish all the ingredients of the offence against the accused. This section and S. 486 make an exception to the above rule in that the burden is cast on the accused to prove that he acted without a fraudulent intent. *AIR 1914 Low Bur 15.*

(2) Where the mark used by the accused is likely to deceive the public, evidence of actual deception is not necessary. *AIR 1925 Cal 149.*

(3) If the facts disclosed in the complaint show that the infringement complained of is of a property mark, the mere fact that the complainant used the words "trade mark" is not of much importance in deciding the question of guilt of the accused. *AIR 1972 SC 2488.*

6. Procedure.—(1) A Magistrate must frame the charge, not guided by the sections stated in the complaint, but on the allegations in the complaint and the statements of the witnesses. *AIR 1967 All 346.*

(2) If the false trade mark made by the accused had misled the unwary buyers, the dissimilarity of the rival marks cannot be pleaded in defence. *AIR 1917 Low Bur 149.*

(3) Not cognizable—Warrant—Bailable—Not compoundable—Triable by any Magistrate.

7. Punishment.—(1) The measure of punishment for an offence under this section should be the damage caused to the complainant. *AIR 1936 Pat 579.*

(2) Deterrent punishment is necessary where a false place of manufacture of the goods is indicated by the description of the goods. *AIR 1951 Bom 45.*

(3) Deterrent punishment is necessary, where there is a systematic policy adopted by the accused of pursuing another in using his trade mark. *AIR 1962 Bom 29.*

8. Practice.—Evidence—For using a false trade mark Prove: (1) That the accused marked the goods in question, or some case, package or receptacle containing goods; or that he used some case, package or receptacle bearing some mark.

(2) That the accused did as above in manner reasonably calculated to cause it to be believed that the goods so marked, or the goods contained in the receptacle so marked, were the manufacture or merchandise of some persons.

(3) That such goods are not the manufacture or merchandise of that person.

9. 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—, counterfeited a trade-mark (or property-mark), to wit—, to denote that certain goods were the manufacture of X, whose manufacture they were not (or were the property of X, whose property they were not) in a manner reasonably calculated to cause it to be believed that such goods were the manufacture (or property) of X; and that you thereby committed an offence punishable under section 482 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 483

[4][483. Counterfeiting a trade mark or property mark used by another.—Whoever counterfeits any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

Cases and Materials

1. Scope.—(1) This section deals with counterfeiting of property mark of another person.

(2) The object of a property mark is to inform the public that a certain property belongs to a certain person, whereas the object of a trade mark is to give the assurance that the property was imported, sold and guaranteed by a certain person. *AIR 1914 Sind 163.*

(3) A 'counterfeit' is strictly an exact imitation but, for the purposes of this Code, it is not essential that the imitation should be exact. *AIR 1914 Sind 163.*

(4) A general resemblance is sufficient. *AIR 1932 Sind 94.*

(5) The fact that one mark may be known in the market in the same name as another, is not necessarily a violation of the rights of the owner of the first mark. There must be some inherent

similarity in the marks themselves which justified the use of the same name for both. *AIR 1936 Rang 96.*

(6) It is the duty of the Court to find out whether the mark is counterfeit or not by paying due regard to the similarity or otherwise of the marks and the circumstances connected with the case. The test is whether the use of the mark would deceive an unwary purchaser. *AIR 1962 Bom 29.*

(7) The matter must be looked at from the point of view of the unwary purchaser and the totality of the impression gained on seeing the goods in question exposed for sale. *AIR 1962 Orissa 52.*

(8) If the similarity is not such as would deceive a literate or even an illiterate person, the accused cannot be convicted under this section. *AIR 1931 Oudh 277.*

(9) Where there is a bona fide dispute as to the right to the property mark a Magistrate has no jurisdiction to try a charge against the accused of counterfeiting the mark, as in such a case, the question involved must be held to be essentially one of a civil nature. *(1905) 2 CriLJ 326.*

2. Practice.—Evidence—Prove: (1) That the accused counterfeited the mark in question.

(2) That such mark is the trade mark or property mark of some persons.

(3) That it was so used by that person.

3. Procedure.—Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

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—, counterfeited a trade-mark or property-mark to wit—, used by X, and that you hereby committed an offence punishable under section 483 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 484

[4][**484. Counterfeiting a mark used by a public servant.**—Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.]

Cases and Materials

1. Scope.—(1) The offence under this section is an aggravated form of the offence of counterfeiting of property mark. Two offences are dealt with in this section namely: (a) Counterfeiting a mark used by Government servant; and (b) Using as genuine any such mark knowing the same to be counterfeit. What is protected under this section are property marks or any mark used by a public servant to denote that: (i) any property is manufactured by a particular person or at a particular time or place or (ii) a property is of a particular quality; or (iii) the property is entitled to exemption.

(2) An Agmark label showing the grade designation of articles, under the Agricultural Produce Grading and Marketing Act, 1937 cannot be said to be a mark used by a public servant, as it is a label prescribed by the Government. Therefore, if the accused had used a counterfeit Agmark label, he cannot be deemed to be guilty under this section. *AIR 1959 Cal 32.*

2. Practice.—Evidence—Prove: (1) That the accused counterfeited the property mark used by some public servant.

(2) That it was used to denote that the property had been manufactured by a particular person, or at a particular time or place, or that the property was of a particular quality, or had passed through a particular office, or was entitled to some exemption.

3. Procedure.—Not cognizable—Summons—Bailable—Not compoundasble—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

4. 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 of—, at—, counterfeited any mark (or property mark) to wit—, used by public servant—to wit—, to denote that some property was manufactured by (or at a particular time or place, to wit—, or that the property is of a particular quality, to wit,— or has passed through a particular office, to wit—) (or used as genuine a mark to wit knowing the same to be counterfeit), and that you thereby committed an offence punishable under section 484 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 485

[4][**485. Making or possession of any instrument for counterfeiting a trade mark or property mark.**—Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

Cases and Materials

1. Scope.—(1) The making or possession of instruments for counterfeiting a trade mark or property mark is hereby made punishable under this section.

(2) The possession of the blocks and of a huge quantity of counterfeit cartons, in the circumstances of the case gave rise to the inference that such possession was either for the purpose of counterfeiting a trade-mark or for the purpose of passing of. *AIR 1954 Cal 277.*

(3) Under the section the possession of instruments for counterfeiting was, under the circumstances mentioned in the section, punishable. *AIR 1930 Cal 664.*

(4) Where a person possesses different sets of instruments on different occasions at different places he will be deemed to have committed distinct offences. A prosecution for possession of certain

instruments at one place will not bar a subsequent trial for possession of a different set of instruments at a different place. *AIR 1960 Madh Pra 149.*

(5) The possession, by itself, is an offence. It is not necessary that the property with the counterfeit mark should be sold to any one. *AIR 1961 Cal 240.*

(6) Offences of counterfeiting trade mark should be punished severely. *AIR 1962 Bom 29.*

2. Practice.—Evidence—Prove: (1) That the accused made or had in his possession the trade mark or property mark in question.

(2) That he possessed such trade mark or property mark for the purpose of denoting that goods bearing such mark were the manufacture or merchandise of some person or that they belonged to some person.

(3) That such goods were not the manufacture or merchandise of that person or that they did not belong to that person.

3. Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

4. 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 of—, at—, had in your possession a die, plate or other instrument (specify them) for the perpose of counterfeiting a property mark of X and that you had in your possession a property mark for the purpose of denoting that certain goods namely (specify) belonged to the said X while they did not belong to him and that you have thereby committed an offence punishable under section 485 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 486

[4][**486. Selling goods marked with a counterfeit trade mark or property mark.**—Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or thing[s] with a counterfeit trade mark or property mark affixed to or impressed upon the same, or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently,

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *Clause (a)—Reasonable precautions.*
3. *Clauses (a) and (b) together form one defence.*
4. *Clause (c)—"Otherwise acted innocently".*
5. *Possession.*
6. *"Any goods or things".*
7. *Counterfeit mark.*
8. *Evidence and proof.*
9. *Procedure.*
10. *Jurisdiction.*
11. *Limitation.*
12. *Practice.*
13. *Charge.*

1. Scope of the section.—(1) This section punishes those who sell or have in possession for sale of goods marked with a counterfeit trade mark or property mark. In order to prove that a trade mark is an imitation of another, it is not necessary that there should be a resemblance in every detail. It is sufficient if resemblances are of such a nature as to be calculated to mislead an unwary purchaser. The question is really one of fact. This section saves from punishment persons dealing with goods bearing false trade marks if they are able to prove that, after taking resonable precautions they had no ground to suspect the genuineness of the mark. A general resemblance constitutes infringement. A person who employs a label which in general resembles the label used by another manufacturer is guilty of counterfeiting the trade mark. In trade mark cases the test of comparison of the mark side by side is not a sound one since a purchaser will seldom have the two marks actually before him when he makes his purchase *(43 CrLJ 927).*

(2) One of the essential ingredients of the offence is the sale or exposure for sale or possession for sale of goods with a counterfeit mark. *AIR 1972 SC 2488.*

(3) The offence is complete as soon as the various acts mentioned in the section as forming the ingredients of the offence have been established. The language of the section rules out mens rea as a necessary ingredient of the offence. *AIR 1961 Bom 203.*

(4) The prosecution is not bound to prove mens rea on the part of the accused. As soon as the ingredients referred to above are established, the burden of proof shifts to the accused to show that his case falls within clauses (a) and (b) or (c) of the section. *AIR 1961 Bom 203.*

(5) This section aims at a retailer who combines with a fraudulent wholesaler or manufacturer in palming off spurious goods on the unsuspecting public. But if a retailer makes no attempt at substitution of spurious goods for the genuine ones, he cannot be held liable under this section. Such a case will be governed by cl. (c) of the section. *AIR 1937 Nag 341.*

(6) This section and Ss. 479, 481 and 482 will not apply, unless the case is one of using a false property mark or of selling goods marked with a counterfeit property mark or of counterfeiting a property mark. *AIR 1967 All 346.*

(7) It is not necessary that the trade mark in question should be the exclusive property of anybody. It is enough that the mark has become so identified with the goods of the person using the mark, as to be regarded in the market as a distinctive mark, denoting that particular merchandise alone. *AIR 1940 Cal 351.*

(8) It is not necessary that there should be actual physical resemblance between the marks. The similarity between the marks must be likely to mislead or deceive the purchaser acquainted with the get-up of the complainant. *(1936) 15 Mys LJ 272.*

2. Clause (a)—Reasonable precautions.—(1) The words "having taken all reasonable precautions" must be read in conjunction with the concluding words of that clause, namely, "had no reason to suspect the genuineness of the mark". *AIR 1961 Bom 203.*

(2) The precautions which the accused is expected to take, have relation to the examination of the mark and his coming to the conclusion that, after having taken all reasonable precautions he had no reason to suspect that the mark was a false or a counterfeit mark. *AIR 1961 Bom 203.*

(3) Where A had engaged B to manage his business and had given B instructions not to expose for sale counterfeit or objectionable goods, it was held that this was not sufficient to constitute a "taking of reasonable precautions". *AIR 1961 Bom 203.*

3. Clauses (a) and (b) together form one defence.—(1) The conjunction connecting clauses (a) and (b) is "and" while the conjunction used between clause (b) and clause (c) is "or". Clause (a) and cl. (b) together form one defence. In other words if clause (a) does not apply it is not necessary to consider clause (b) at all. *AIR 1961 Bom 203.*

4. Clause (c)—"Otherwise acted innocently".—(1) The words "acted innocently" do not apply to cases of infringement of a statute. It can only apply where the infraction is committed by inadvertence or mistake of fact. *AIR 1961 Bom 203.*

(2) If the accused has failed to make reasonable inquiries and if there is reason to suspect the genuineness of the mark, his act will not fall under clause (c). *AIR 1961 Bom 203.*

5. Possession.—(1) The possession contemplated by the section must be actual and not constructive possession. *1902 Pun Re (Cri) No. 32 p. 84.*

6. "Any goods or things".—(1) Books will be covered by the words "any goods" in this section. *1899 ILR 26 Cal 232.*

7. Counterfeit mark.—(1) The word 'counterfeit' is defined in S. 28 of the Code. It is causing one thing to resemble another with the intention, by means of the resemblance, of practising deception or with the knowledge that it is likely that deception will thereby be practised. In the absence of counterfeiting as so defined this section will not apply. *AIR 1926 Rang 134.*

(2) A counterfeit trade mark would be a mark which purports to be a genuine trade mark when it is not really so and it would so purport only where it is a copy of the other though not an absolutely exact copy in every detail. *AIR 1958 All 643.*

(3) A counterfeit trade mark is one by means of which resemblance to genuine article is intended to deceive or to lead a purchaser to imagine that the counterfeit is in reality the genuine article. *AIR 1963 All 133.*

8. Evidence and proof.—(1) Where it is proved that an accused person has sold or exposed or had in his possession for sale or for any purpose of trade or manufacture, any goods bearing counterfeit trade marks, the onus will lie on him to show that he acted honestly and did not commit the offence. *AIR 1971 Pat 124.*

(2) The accused must prove that he had taken all reasonable precautions against committing the offence. If there is a breach of duty to take proper care, it is immaterial how gross or how small that breach is. *AIR 1953 Bom 85.*

(3) The accused can escape conviction if he shows that he falls within the exceptions (a) and (b) or (c) of this section. Exception (c) permits the accused to offer any evidence to prove his innocence. *AIR 1937 Nag 341 =39 CriLJ 109 (DB); AIR 1928 Cal 873.*

(4) The complainant must prove that he had been using his trade mark for many years. He can do so by means of his agreements with other persons who have recognised his right to the trade mark. *AIR 1955 NUC (All) 1996.*

(5) If the right to the trade mark is proved, a resemblance between the genuine and counterfeit marks can also be proved. *AIR 1956 Bom 700.*

(6) If there is no likelihood of the marks used by the accused, deceiving the purchasers, there can be no conviction for infringement of trade mark by the accused. *AIR 1960 Cal 119.*

(7) The test by comparison of marks side by side is not a sound test. *AIR 1962 Orissa 52.*

9. Procedure.—(1) A body corporate can be lawfully prosecuted and punished for an offence under this section or S. 482, as imprisonment is not the only punishment that can be imposed under this section and fine also can be imposed. *AIR 1919 Low Bur 15.*

(2) There is nothing illegal in convicting an accused under both Section 482 and this section where the mark on the goods is both false and counterfeit. *AIR 1941 All 87.*

(3) Though the offences under Ss. 420 and 486 are distinct offences, there can be a trial of these two charges in one trial if they are shown to have been committed in the course of the same transaction. *AIR 1956 Cal 260.*

(4) Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate.

10. Jurisdiction.—(1) Provided that the accused is found to be in possession of counterfeit goods within the jurisdiction of the court trying the case, it is immaterial that the sale was intended to take place outside the jurisdiction of the Court. *(1898) ILR 25 Cal 639.*

11. Limitation.—(1) The period of limitation prescribed in other statutes does not apply to offences under Penal Code. That provision concerns prosecutions for offences under that special law. *AIR 1970 Mys 218.*

12. Practice.—Evidence—Prove: (1) That the accused sold, or exposed for sale or possessed for sale the goods and the things in question.

(2) That the said goods or things bore the property mark.

(3) That such goods were also packed in cases, packages or other receptacles, such cases, packages and receptacles being impressed with property marks also.

(4) That the said property mark was counterfeit.

13. 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—, sold (or exposed or had in his possession for sale, etc.) certain goods to wit—, with a counterfeit trade mark (or property mark) to wit—, affixed to (or impressed upon) the said goods, and that you thereby committed an offence punishable under section 486 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 487

[4][**487. Making a false mark upon any receptacle containing goods.**—Whoever marks any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does

not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

Cases and Materials

1. Scope.—(1) This section is directed against smuggling of contraband goods (without payment of duty). The accused who makes a false statement on a label about the country of origin of the goods is guilty of an offence under this section. The section is worded generally. The criminality of the act arises from the nature of the mark and the purpose for which it was put on the case, package or receptacle containing the goods.

(2) In order to hold a person guilty of affixing a counterfeit mark or of fixing a false mark on a case containing goods of a quality or nature different from the real nature, there must be proof of the existence of some genuine mark or goods of the true nature. *(1959) 61 Bom LR 603 (SC).*

(3) Where a false mark in its position, nature and design is likely to deceive, it is not necessary that any person should have been actually deceived. *AIR 1962 Bom 29.*

(4) The accused will be guilty if he has practised deliberate deception in indicating a false place of manufacture of goods. *AIR 1951 Bom 45.*

(5) The accused will be guilty if he has practised deception in indicating a false place of manufacture of goods and has acted with intent to defraud. *(1908) 7 CriLJ 113 (Low Bur).*

(6) As in the case of offences under S. 486, mens rea is not a necessary ingredient of an offence under this section also. It will be presumed from the nature of the mark and the manner of using it. If the accused fails to prove that he acted without any intention to defraud he will be guilty under this section. *AIR 1959 Cal 32.*

(7) Before the repeal of Ss. 61 and 62 of the Code the Court could order forfeiture of goods on a conviction under this section. *1 Weir 557.*

2. Practice.—Evidence—Prove: (1) That the accused made some mark upon some case, package or other receptacle containing goods.

(2) That such mark was a false mark.

(3) That he did so in a manner reasonably calculated to cause some public servant or some other person to believe (a) that such receptacle contained goods which it did not contain; or (b) that it did not contain goods which it did contain, or (c) that the goods contained in such receptacle were of a nature or quality different from the real nature or quality thereof.

3. Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first or second class.

4. Charge.—The charged 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 of—, at—, made a false mark, to wit—, upon a case to wit—, (or package or other receptacle containing goods) in a manner reasonably calculated to cause a public servant, to wit—, (or X) to believe that such case contained goods to wit—, which it did not contain (or that it did not contain goods which it did contain (or that the goods contained in such receptacle

were of a nature or quality different from the real nature or quality thereof) and that you have thereby committed an offence punishable under section 487 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 488

[4][**488. Punishment for making use of any such false mark.**—Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.]

Cases and Materials

1. Scope.—(1) This section punishes the making use of false mark. It is sufficient if the user reasonably calculated to cause any person to believe that the goods so marked or any goods contained in a receptacle were of a nature and quality different from its real nature. The foregoing section punishes the making of such a mark.

(2) Cosharer out of possession cannot enter by breaking lock—The accused has no legal right to enter into the room breaking the lock under occupation of the informant even though he is a cosharer of their ancestral property. When the conviction and sentence is well-based on consistent evidence, the same does not call for any interference. *Abu Md. Sayem @ Taslim Vs. The State 4 MLR (1999) (AD) 191.*

(3) If a person makes a false mark on a case or receptacle and also makes use of the false mark, he will be liable under this section read with the last section. *AIR 1959 Cal 32.*

(4) Mere general or vague allegations in a complaint or in evidence will not be enough to make out a case under S. 488. *(1982) 1 Bom Cr 545.*

2. Practice.—Evidence—Prove: (1) That the accused made use of some mark upon some case, package or receptacle containing goods.

(2) That such mark was a false mark.

(3) That he did so in a manner reasonably calculated to cause some public servant or some other person to believe: (a) that such receptacle contained goods which it did not contain; or (b) that it did not contain goods which it did contain; or (c) that the goods contained in such receptacle were of a nature or quality different from the real nature or quality thereof.

3. Procedure.—Not cognizable—Summons—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

4. 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 of—, at—, made use of a false mark namely—upon a case namely—(or package or receptacle) containing goods in a manner reasonably calculated to cause a public servant namely—, (or any other person namely) to believe that such case contains goods which it does not contain, or does not contain goods which it does contain (or that the goods contained in a receptacle are of a nature or quality different from its real nature or quality) and that you have thereby committed an offence punishable under section 488 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 489

[4][**489. Tampering with property mark with intent to cause injury.**—Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

Cases and Materials

1. Scope.—(1) This section punishes the tampering with of a property mark. Criminal intention or knowledge on the part of the accused is necessary. The section relates to movable property only. Where an author of a book assigns his copyright to the publisher removed the name of the author form the title page, it was held that the name of the author cannot be said to be a property mark and section 489 is not attracted.

(2) The word 'property' in this section refers to corporeal property. The name of a person as author on the title page of a book was held, not to be a property mark. *AIR 1955 Pat 228.*

(3) As the case is a summons case, the Magistrate must follow the provisions of Section 251, Criminal P. C. and when the accused appears before him, he must act, keeping in mind the further provisions of Ss. 252 and 254 of the Criminal P. C. and only when the accused does not admit the offence, the Magistrate must order the complainant to produce the witness and examine them. *AIR 1961 Tripura 41.*

Of Currency-Notes and Bank-Notes

Section 489A

[6][**489A. Counterfeiting currency-notes or bank-notes.**—Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with [2][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—For the purposes of this section and of sections 489B, 489C and 489D, the expression "bank-note" means a promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as a substitute for, money.]

Cases and Materials

1. Scope.—(1) On a combined reading of section 489A-489D of the Penal Code and section 25A of the Special Powers Act it manifests that the offence of counterfeiting currency-notes as defined in sections 489A-489D of the Penal Code is alike as in section 25A of the Special Powers Act when the alleged allegations of the prosecution clearly attract the definition of counterfeiting. *Ayub Ali alias Md. Ayub Ali and another VS. State (Criminal) 5 BLC 345.*

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6. Ss. 489A to 489D were inserted by the Currency-Notes Forgery Act, 1899 (XII of 1899), s. 2.

(2) There can be counterfeit even though the imitation is not exact and though 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. *(1971) 1 MysLJ 508.*

(3) One important element necessary to constitute counterfeiting is the intention to practise deception. In the absence of such an intention there will be no counterfeiting. For instance, if the intention of a person who counterfeits coins is to use them in order to commit some other offence such as giving false information against an enemy that intention prima facie is not to practise deception. *AIR 1937 Mad 711.*

(4) Made-up note—Act of making it resembles as if retaining its original character is counterfeiting within Ss. 489A to 489D.*1982 CriLJ 32.*

(5) A traveller cheque is also not a bank note inasmuch as it is not "an engagement for the payment of money to bearer on demand." The identity of the person seeking to withdraw money has to be confirmed by comparison of his signature on the traveller cheque with that at the time of the withdrawal before any payment is made to the person. *(1973) 75 Punj LR 351.*

(6) For counterfeiting currency notes, both ability and materials of a particular kind are required. If those materials and ability are not present, it cannot be said that an act performed without the ability to counterfeit and without materials which may help to a useful counterfeiting would be an attempt. *AIR 1928 All 754.*

(7) Where, without any intention of counterfeiting at all, but with the object of cheating a person, the accused pretended that he could forge currency notes and went through a process in order to cheat a person, and at the end of the process, produced before the person the original note itself, as if it was the forged note, it was held that the offence would fall under S. 420 and not under this section. *AIR 1917 Low Bur 105.*

(8) Where a Court considers that the accused had committed either an offence under this section or under S. 420/511, a conviction should be recorded in the alternative under those sections. *AIR 1917 All 29.*

(9) In case of forgery of currency notes, it may be extremely difficult to get really clever criminals convicted by honest investigation. The administration of criminal justice requires that every act done by the agency responsible for the investigation of crime must be fair, upright and free from any fault of any sort. *1963 (1) CriLJ 669 (Ker).*

2. Practice.—Evidence—Prove: (1) That the note in question is a currency-note or bank note.

(2) That the accused counterfeited it, or knowingly performed any part of the possess of the counterfeiting it.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by Court of Session.

4. 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 of—, at—, counterfeited (or knowingly performed a part of the possess of counterfeiting to wit), a currency-note (or a bank-note) state the value of note) and thereby committed an offence punishable under section 489A of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 489B

[6][**489B. Using as genuine forged or counterfeit currency-notes or bank-notes.**—Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with [2][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.]

Cases and Materials

1. Scope.—(1) Mere possession or use of a forged or counterfeit note does not ipso facto prove the charge under the section against one unless he had used it with the knowledge or belief that it was forged or counterfeit. *Almas Miah Vs. State (Criminal) 55 DLR 403.*

(2) The joint trial for both the charges under sections 489B and 489C was illegal inasmuch as the offences charged formed two distinct and separate offences. *Gopal Chandra Ghose Vs. The Crown, 6 DLR 336.*

(3) The object of the Legislature in enacting the section is to stop the circulation of forged notes by punishing all persons, who knowing or having reason to believe them to be forged, do any act which would lead to their circulation. *AIR 1926 Lah 72.*

(4) A person, who knowingly sells a forged note to another is guilty under this section, whether the purchaser knows it to be forged or not. *AIR 1926 Lah 72.*

(5) Made-up note—Not a forged note since no mechanical process is involved as is known to Ss. 463 and 464 P. C. *1982 CriLJ 32.*

(6) Where uneducated rustic persons, in the usual course of business, get a currency note which they find to be suspicious and try to get rid of it, they are not guilty under S. 489B or 489C. *1970 MPLJ (Notes 86 (page 51).*

(7) Where in prosecution for offences under Ss. 489B and 489C there was no evidence to show that the currency notes in possession of the accused were of such a nature or description that a mere look at them would convince any person of average intelligence that they counterfeit notes, nor was any such question put to the accused in his examination during trial, the accused in such a case would not be convicted for the offences charged. *AIR 1979 SC 1705.*

(8) The words "as genuine" govern only the verb "uses" and not any other verb. The offence under this section is committed only when the false currency is distributed as if it is genuine currency. *AIR 1926 Lah 72.*

(9) Where the Police Officer laying out an illegitimate trap represented to the accused that he wanted to exchange genuine notes for counterfeit notes which he wanted to be distributed among his labourers it was held that the intention if at all was to pass on counterfeit notes as counterfeit only and not as genuine and that therefore there was no offence under this section. *1972 CriLJ 292.*

(10) Where the accused, a box-shop owner gave the victim in need of change for a ten rupee currency note which included one counterfeit two rupee note and when the police came to investigate he produced 13 such notes form his pocket and saying that he had one more note of that kind at his house, took the party to his house and produced one note from a shaving box, it was held that the accused was guilty of offences under Ss. 489B and 489C. *1976 CriLJ 228.*

(11) Mere possession of a counterfeit currency note is not sufficient to convict a person under this section unless the prosecution proves that the accused had the requisite knowledge or intention. *1974 Chand LR (Cri) 335.*

(12) Where the accused was in possession of a forged currency note and a genuine note of the same number was found in the accused's house and a paper containing green honey-comb pattern resembling the one in the forged note was also found in the house of the accused, (wherein he was living with his father and brother), when the accused disposed of the copy of the genuine note to a shop-keeper, it was held that no other inference was possible but that it was done with the knowledge that it was forged. *AIR 1929 Bom 128.*

(13) Where the accused was found to be in prosecution of a large number of a counterfeit currency notes it was held that it gave rise to a presumption that the possession of such notes was for the purpose of trafficking in currency notes. *(1971) 1 Mys LJ 508.*

(14) With a view to prove consciousness or guilty knowledge of the utterer of a forged bank note evidence of his having previously uttered other forged notes with guilty knowledge can be given. *(1804) 168 ER 589.*

(15) The guilty intention contemplated by this section can be proved by collateral circumstances that the accused had palmed off such notes before or that he/she was in possession of such notes in such large number that his/her possession for any other purpose is inexplicable. *1982 CriLJ 32.*

(16) It cannot be said that if the specific charge of the uttering of particular forged notes fails, the charge of conspiracy for the passing of the forged notes as genuine must also fail. *AIR 1936 Oudh 164.*

(17) Where the charge is that the accused in pursuance of a conspiracy indulged in trafficking in counterfeit currency notes, it is irrelevant to consider the different parts played by different conspirators as each one is responsible for the acts of the other conspirators also. The Court should not therefore separate the several incidents and consider them in isolation. *AIR 1962 Mys 275.*

(18) Where the facts are doubtful as to whether the accused could be charged under S. 489B or 489C and the accused is charged under S. 489B he can be validly convicted under S. 489C if he is shown to have committed that offence and he is not prejudiced, as the offence under S. 489C is minor compared with offence under S. 489B. *1964 Raj LW 404.*

(19) Conviction of the accused under S 489C is redundant when he is convicted under S. 489B. *AIR 1962 Mys 275.*

2. Practice.—Evidence—Prove: (1) That the currency note or bank-note in question was forged or counterfeited.

(2) That the accused sold to or bought or received from some person or trafficked in, or used as genuine, such currency-note or bank-note.

(3) That when he did so he knew or had reason to believe that it was forged or counterfeited.

3. Procedure.—Cognizable—Warrant—Not Bailable—Not compoundable—Triable by Court of Session.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, sold to X (or bought from X etc.) a forged (or counterfeit) currency-note to wit—, knowing (or having reason to believe) the same to be forged (or

counterfeit) and that you thereby committed an offence punishable under section 489B of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 489C

[6][**489C. Possession of forged or counterfeit currency-notes or bank-notes.**—Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.]

Cases and Materials

1. Scope.—(1) This section makes the possession of forged or counterfeit currency notes or bank notes an offence under the circumstances mentioned in the section. The essential ingredients of this offence are:

(i) There must be a forged or counterfeit currency-note or bank-note;

(ii) The accused must be in possession of it;

(iii) The accused must know or has reason to believe that such note is a forged or counterfeit one.

(iv) The accused must intend to use it as genuine or that it may be used as genuine. *(1966) 1 Andh WR 161.*

(2) All the ingredients of the offence must exist. The mere possession of forged notes is not sufficient to constitute the offence. The other ingredients also must exist. *1960 BLJR 242.*

(3) When the possession of faked currency notes along with other circumstances make it clear that the accused had the intention to foist the currency notes on the public all the while knowing them to be counterfeit, an offence under this section is established. *1972 MadLJ (Cri) 321 (Mys).*

(4) The section in its application is not restricted to the forged Bd. currency notes only but applies to the possession of forged foreign currency notes also. *1975 Rajdhani LR 223 (Delhi).*

(5) A made-up note is not a forged note since no mechanical process is involved. *1982 CriLJ 32.*

(6) For a conviction under this section, it must be proved that the accused had knowledge of the forged or counterfeit nature of the note. *1875 Rajdhani LR 223 (226) (Delhi).*

(7) The fact that he had suspicion that the note is either forged or counterfeit is not proof that he had such knowledge or reason to believe. Suspicion cannot be raised to the level of 'reason to believe'. *AIR 1961 Tripura 46.*

(8) For an offence under this section, it is essential to establish that the accused intended to use the forged notes as genuine or that they might be used as genuine. *1976 CriLJ 228.*

(9) Where the prosecution failed to prove that the box from which the counterfeit notes were recovered belonged to the accused and that he intended to use them as genuine knowing them to be counterfeit, held that the offence under S. 489C was not established. *(1966) 1 Andh WR 161.*

(10) It is for the prosecution to call relevant evidence to lay the foundation for the necessary presumption from the possession of the counterfeit notes by the accused. The number of counterfeit

notes, found in a person's possession and the circumstances in which they were so found may be themselves, constitute sufficient ground for drawing the inference that the intention was to use the documents as genuine. *1972 CriLJ 1141 (Mad).*

(11) Where, the currency notes in possession of the accused are found to be of such a nature that a mere look at them would not convince any person of average intelligence that they were counterfeit notes, the presumption that the notes in his possession were counterfeit cannot be drawn. *AIR 1979 SC 1705.*

(12) Where the accused was living in his house with his other family members at the time the bag containing the packed currency notes was recovered from the house it was held that in the absence of proof that the bag belonged to the accused, and was kept in his exclusive possession it cannot be said that the accused was in actual or conscious possession of the notes. *1972 CriLJ 1441 (Mad).*

(13) Accused producing four counterfeit currency notes from under a radio in his tea shop—Offence held proved. *1976 CriLJ 228 (Kant).*

(14) The offence of criminal conspiracy is complete as soon as there is an agreement between the different persons to commit an unlawful act or a lawful act by illegal means and the persons who enter into such an agreement can be tried for criminal conspiracy irrespective of the fact whether any substantive offence has been committed or not. Where, however, substantive offences have also been committed in pursuance of the conspiracy, they can also be charged with the substantive offences along with the offence of criminal conspiracy. A conviction for an offence under Ss. 120-B and 489-C is therefore not illegal. *AIR 1955 NUC (All) 3583.*

(15) The fact that in pursuance of a criminal conspiracy, several conspirators played different roles is wholly irrelevant in considering charge under this section and S. 120-B. *AIR 1962 Mys 275.*

(16) Offences under Ss. 489-C and 441 are distinct offences and therefore should be separately tried. *(1902) ILR 29 Cal 387.*

(17) In a search conducted by the police for an offence under S. 489-C, the police are bound to prepare a list of all articles found in the container. *(1966) 1 Andh LR 154.*

(18) The burden is on the prosecution to prove the existence of all the ingredients of the offence. In the absence of such proof a conviction under this section is not sustainable. It is not necessary, however, that such proof should be by direct evidence. *AIR 1961 Andh Pra 213.*

(19) The number of the forged or counterfeit notes in the prosecution of the accused and the circumstances in which they were found with him may give rise to an inference that he had the intention referred to in the section. *AIR 1951 Mys 34.*

(20) Mere possession of forged currency notes, no offence—Knowledge that they were forged ones as well as intention to use them necessary—Onus of proving such intention lies on prosecution. *1961 PLD 342.*

2. Practice.—Evidence—Prove: (1) That the currency note or bank-note in question was forged or counterfeited.

(2) That the accused was in possession of it.

(3) That the at the time of his possession knew, or had reason to believe, that it was forged or counterfeited.

(4) That he intended to use it as genuine or that it might be used as genuine.

3. Procedure.—Cognizable—Warrant—Bailable—Not compoudable—Triable by Metropolitan Magistrate or Magistrate of the first class.

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—, had in your possession a forged (or counterfeit) currency-note (or bank-note), to wit—, knowing (or having reason to believe) the same to be forged (or counterfeit) and intending to use the same as genuine, or that it may be used as genuine, and that you thereby committed an offence punishable under section 489C of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 489D

[6][**489D. Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes.**—Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession, any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, shall be punished with [2][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.]

Cases and Materials

1. Scope.—(1) No offence is committed where all that is proved is that the accused was studying the art of counterfeiting and equipping himself with objects suitable for the purpose. *(1911) 12 Cri LJ 377.*

(2) Any act which makes a note resembles with the characters of a genuine currency note in counterfeiting and comes within the mischief of S. 489D. *1982 CriLJ 32.*

(3) A successful counterfeiting with the materials recovered is not a sine qua non for conviction under this section. All that is necessary is that the materials found must be part of the outfit for counterfeiting. The cumulative usefulness of all the materials found should be the guiding factor in determining the usefulness for counterfeiting. *1960 Ker LJ 1343.*

(4) The wording of S. 489-D is very wide and clearly covers a case where a person is found in possession of machinery, instruments or materials for the purpose of being used for counterfeiting currency notes, even though the machinery, instruments or materials so found were not all the articles required for the purpose of counterfeiting. *AIR 1939 Sind 190.*

(5) Where there was no link between the possession of the machinery and the preparation of the currency notes it was held that the accused could not be convicted under the section. *1970 CriLJ 1206.*

(6) Possession of blocks for counterfeiting currency notes (where such possession is unaccounted for) may itself lead to an inference of guilty knowledge or intention. *1976 CriLJ 228.*

(7) Where the machinery or materials are alleged to be recovered from the house occupied by the accused jointly with others, the prosecution is bound to show that the accused was occupying the house where from the instruments for forging currency notes were recovered and that he had joint possession or control over the instruments with the other accused or at least that they were brought there with his knowledge. *AIR 1953 Trav-Co 225.*

(8) In considering an offence under this section it is not necessary to prove that the accused had the ability to produce counterfeit currency note with the materials in his possession. *AIR 1928 All 754.*

(9) It is not necessary that the possession of machinery or instrument must be exclusive, it might well be in possession of two or more persons. *AIR 1953 Trav-Co 225.*

(10) Printing machine on the land of the accused—No evidence connecting the machine with counterfeit notes found in his possession—Held, finding of press could not be an incriminating evidence against accused. *(1976 CriLJ 228.*

(11) As to joinder of charges under Ss. 120B, 489A, 489B, and 489D against two or more persons. *AIR 1929 Bom 128.*

(12) Where a substantial sentence of imprisonment is awarded, a sentence of fine in addition may not be necessary. *AIR 1953 Trav-Co 225.*

2. Practice.—Evidence—Prove: (1) That the thing in question was machinery, instrument or material necessary for or used in forging or counterfeiting a currency note or bank note.

(2) That the accused made, or performed, some part of the process of making the machinery, instrument, or material, in question; or that he bought, sold or disposed of it: or that he had in his possession.

(3) That the object of the accused was that such machinery, instrument, or material might be used for the purpose of forging or counterfeiting currency notes or bank notes; or that he knew or had reason to believe, that the same was intended to be used for such purpose.

3. Procedure.—Cognizable—Warrant—Not bailable—Not compoundable—Triable by the Court of Session.

4. Charge.—The charge should run as follows:

I, (name and office of the Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—made (or performed any part of the process of making, bought or sold or disposed of, or had in your possession) an instrument (or material) to wit—, for the purpose of being used (or knowing or having reason to believe that it was intended to be used) for forging (or counterfeiting a currency note or a bank note) to wit—, and that you thereby committed an offence punishable under section 489D of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 489E

[7][**489E. Making or using documents resembling currency-notes or bank-notes.** (1)—Whoever makes, or causes to be made, or uses for any purpose whatsoever, or delivers to any person, any document purporting to be, or in any way resembling, or so nearly resembling as to be calculated to deceive, any currency-note or bank-note, shall be punished with fine which may extend to one hundred [1][taka].

(2) If any person, whose name appears on a document the making of which is an offence under sub-section (1), refuses, without lawful excuse, to disclose to a police-officer on being so required the name and address of the person by whom it was

7. S. 489E was inserted by the Indian Penal Code (Amdt.) Act, 1943 (VI of 1943), s. 2.

printed or otherwise made, he shall be punished with fine which may extend to two hundred [1][taka].

(3) Where the name of any person appears on any document in respect of which any person is charged with an offence under sub-section (1) or on any other document used or distributed in connection with that document it may, until the contrary is proved, be presumed that that person caused the document to be made.]

Materials

1. Scope.—The ingredients are: *A. First Clause:* (1) The thing in question is a document resembling a currency-note or bank-note.

(2) The accused made (or caused to be made) or used for any purpose whatsoever or delivered to any person any document resembling a currency-note or bank-note.

(3) The intention of the accused in doing so was calculated to deceive any person into thinking that such document is a genuine currency-note or bank-note.

B. Second Clause

(1) The thing in question is a document referred to in sub-clause (1).

(2) A police requiring the person whose name appears in such document to give the name and address of the person by whom the said document was printed or made.

(3) If such person refused to disclose such name without lawful excuse.

2. Procedure.—The offence is non-cognizance, bailable, non-compoundable and is triable by any Magistrate.

3. Charge.—I, (name and office of the Magistrate) hereby charge you (name of the accused) as follows:

Clause (1)

That on or about .....at.....you made (or caused to be made or used or delivered) a document purporting to be or in any way resembling (or so nearly resembling) any currency-note or a bank-note calculated to deceive and that you have thereby committed an offence punishable under section 489E of the Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

Clause 2

That on or about.....at.....you whose name appears on the document referred to in clause (1) above refused without lawful excuse, to disclose to the police officer on being so required, the name and address of the person by whom it was printed or otherwise made and that you have thereby committed an offence punishable under section 489E of the Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

4. Facts to be proved.—

(1) The document in question was made or caused to be made or delivered to any person for being used for any purpose.

(2) The said document purported to be or in any way resembling a currency-note or a bank-note.

(3) The said document was calculated to deceive.

(4) The person whose name appeared in such document was required by a police officer to give name and address of the person by whom the document was printed or made.

(5) Such person refused to disclose such name and address without lawful excuse.

CHAPTER XIX
Of the Criminal Breach of Contracts of Service

Chapter introduction.—*The three sections of this Chapter, two of which have since been replaced, were exceptional provisions enacted in this Code. With the growth of Labour Movement, pressure had been brought to bear on Government to repeal not only the two sections of this Chapter but also the whole of the Workmen's Compensation Act. They were repealed by the Workmen's Breach of Contract (Repealing) Act of 1925, which came into effect from the first of April, 1926.*

Section 490

490. Breach of contract of service during voyage or journey.—*Rep. by the Workmen's Breach of Contract (Repealing) Act, 1925 (III of 1925), S. 2 and Schedule.*

Section 491

491. Breach of contract to attend on and supply wants of helpless person.—Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred [1][taka], or with both.

Cases and Materials

1. Scope.—(1) The object of this section is that persons who contract to take care of infants, of the sick and of the helpless lay themselves under an obligation of a very peculiar kind and may with propriety be punishable if they omit to discharge their duty. Unless there is a valid contract, obligations therefrom are not enforceable and even under a valid contract it cannot be said that the breach cannot be repaired with adequate compensation.

(2) Section 491 of the Code does not apply to a person who is engaged only as an ordinary cook to a family and is not bound by contract to attend on or to supply the wants of any helpless person. *Rat Un Cri C 354*

2. Practice.—Evidence—Prove: (1) That the accused entered into a contract to attend on, or supply the wants of, the person in question.

(2) That such contract was a lawful one.

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1. Substituted by Act VIII of 1973, s. 3 and 2nd Sch. w.e.f. 26-3-71, for "rupees".

(3) That such person was helpless or incapable of providing for his own safety or of supplying of his own wants.

(4) That such helplessness or incapableness was due to youth or unsoundness of mind, disease or bodily weakness.

(5) That the accused omitted to attend on such person, or to supply the wants.

(6) That he did so voluntarily.

3. Procedure.—Not cognizable—Summons—Bailable—Compoundable—Triable by any Magistrate.

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—, had entered into a lawful contract to attend for supply the wants of X who by reason of youth (or unsoundness of mind or disease or bodily weakness) (specify which out of the above may apply) was helpless and was incapable of proving for his own safety or of supplying his own wants and that you voluntarily omitted to do so; and thereby committed an offence punishable under section 491 of the Penal Code and within my cognizance.

An I hereby direct that you be tried by this court on the said charge.

Section 492

492. Breach of contract to serve at distant place to which servant is conveyed at master's expenses.—*Rep. by the Workmen's Breach of Contract (Repealing) Act, 1925 (III of 1925) , S. 2 and Schedule.*

CHAPTER XX
Of Offences relating to Marriage

Chapter introduction.—*This chapter deals with offences relating to marriage and consists of six sections viz., sections 493 to 498:*

(1) Section 493 makes punishable cohabitation or sexual intercourse deceitfully making the women to believe that the accused was lawfully married to her.

(2) Sections 494 to 496 relate to Bigamy.

(3) Section 496 deals with marriage ceremony fraudulently gone through without lawful marriage.

(4) Sections 497 and 498 relate to Adultery.

Section 493

493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) Under that section the offence consists in making a woman believe that she is lawfully married to him by deceit and inducing her to cohabit or have sexual intercourse with him in that belief. What is required is that by deceitful means the accused must induce a belief of lawful marriage and than make the woman cohabit with him. This section only punishes a man for obtaining the body of a woman by a deceitful assurance that he is her husband. The act falling within the purview of this section will also come under clause (4) of section 375 of the Penal Code. No court shall take cognizance of this offence except under a complaint made by some person aggrieved by it. The word "marry" implies going through a form of marriage whether the same is, in fact, valid or not *(37 CrLJ 161).*

(2) Provisions of S. 493 explained. The essence of the offence under section 493 of the Penal Code is the practice of deception by a man on a woman in consequence of which a false belief is created in the mind of the woman that she is lawfully wedded to the accused although, in fact, they are not lawfully wedded. A mere promise of marriage made by the accused to her or to her guardian intending never to fulfil his promise does not warrant a conclusion that a false belief was caused in her mind that she was the lawfully married wife of the accused. In order to prove that by deceit she was led by the accused to believe that she was lawfully married to him and on the basis of such belief she was induced to have sexual intercourse with him, it is obvious that the prosecution has to prove that some

form of marriage which is not valid and legal was gone through with a fraudulent intention. Thus, the prosecution has to prove that there was some form of contracting marriage or an apology for contracting a marriage which in the context of the social and religious background of the woman would cause a belief in her mind that she was a lawfully married wife of the accused. *Abed Ali Vs. State (1982) 34 DLR 366.*

(3) Marriage, valid under law—Section 493 has no application—Further a marriage with the bonafide belief that the marriage was valid, subsequent disclaimer that no valid marriage had taken place even then section 493 not applicable. *Abed Ali Vs. State (1982) 34 DLR 366.*

(4) Four ingredients of sections 493 to be established. Section 493 of the Penal Code presupposes proof of at least the four following ingredients: (1) the accused cohabited or had sexual intercourse with the prosecutrix; (2) knowledge on the part of the accused that the marriage, if any, contracted, is not lawful and binding on the parties; (3) a belief caused in her that it was a valid and binding marriage; and (4) such belief was induced by deceit practised on her by the accused. *Abed Ali Vs. State (1982) 34 DLR 366.*

(5) Promise held out to marry the woman with no intention to marry, co-habitiation in such a case not punishable under section 493—but a belief falsely created in the woman that she is married to the man and cohabits with her, punishable under section 493. *Abed Ali Vs. State (1982) 34 DLR 366.*

(6) For an offence u/s. 493 the woman must be of 14 years and above. Offence under section 493 of the Penal Code by any man is only possible when a woman is aged at least 14 years. If she is aged below 14 years, her consent is immaterial and the accused is guilty of rape. *Abed Ali Vs. State (1982) 34 DLR 366.*

(7) When a case is not bought within the four corners of the provisions of the section, and when a person acts bonafide in co-habiting with a woman—No offence. The complainant Radharani put on bangles, new clothes and exchange garlands. From the fact of writing a bond by the accused and handing over the same to the complainant and participating in some sort of ceremony it was held that the accused acted in good faith and his subsequent act of desertion of a pregnant woman, however censurable it may be, would not suffice to make a criminal liability under section 493 of the Penal Code. *Amulya Chandra Modak Vs. The State (1983) 35 DLR 160.*

(8) Ingredient which makes an offence of cohabitation by deceitful inducement punishable when not shown to exist —Offence u/s. 493 not made out. *Jalaluddin Badsha Vs State, (1986) 38 DLR 119.*

(9) Under S. 493, ingredients which must be present for an offence thereunder: To constitute an offence under section 493 of the Penal Code the following ingredients must be present: (i) Before admitting herself to co-habitation or sexual intercourse with the accused the woman must believe honestly that she was the lawfully married wife of the accused; and (ii) Such belief must be caused to the woman by the accused by deceit. *Jalaluddin Badsha Vs. State (1986) 38 DLR 119.*

(10) The victim of alleged cohabitation knew that there was no marriage between her and the accused and that the latter only compromised to marry her on some future date—Such allegations made in the FIR did not come within the mischief of section 493 of Penal Code. *Lukus Miah Vs. State 43 DLR 230.*

(11) The prosecution is required to prove that some form of marriage or an apology for conducting a marriage took place and as a result of which the woman had a belief in her mind that she was the lawful married wife of the accused. In the facts and circumstances of the case and the evidence on record, it is difficult to comprehend how such a grown-up woman with sufficient worldy knowledge

would bonafide believe that she was the legally married wife of accused Hanif on his mere promise to marry her in the future and on such fond belief she surrendered herself to the carnal desire of the accused petitioners, which eventually led to her conception. *Hanif Sheikh (Md.) Vs. Asia Begum 51 DLR 129.*

(12) Co-habitation by a man deceitfully inducing in the victim a belief of lawful marriage—The essence of the offence is the practice of deception by a man on a woman that he is lawfully wedded to the accused—A mere promise of marriage to her or to her guardian intending never to fulfil his promise does not warrant a conclusion that a false belief of marriage was caused in her mind—The prosecution has to prove that some form of marriage, which is not valid and legal, was gone through with a fraudulent intention. *Abed Ali Vs. The State 3 BLD (HCD) 201.*

(13) Deceitfully inducing a belief of lawful marriage—From the evidence on record it can be safely held that both the accused petitioner and the complainant thought that they have been lawfully married and, in fact, a valid marriage did take place—The element of deception which is an essential ingredient of the offence is wanting in the case and as such the order of conviction is not sustainable. *Mashu Mia alias Murshed Mia Vs. The State and another, 8 BLD (HCD) 111.*

(14) A mere promise of marriage made by the accused to a woman or to her guardian intending never to fulfil his promise does not warrant a conclusion that a false belief was caused in her mind that she was the lawfully married wife of the accused. *Makhan alias Putu Vs. The State, 14 BLD (HCD) 122.*

(15) Offence when constituted—Essential ingredients—Promise to marry does not constitute offence—In order to constitute offence punishable under section 493 of the Penal Code there must be the ingredients that the accused deceitfully induced a belief in the mind of the victim woman that she is his legally married wife and under that belief the accused must have had sexual intercourse with that woman after going through some formalities of marriage. Having cohabitation with woman of sufficient experience of marriage under promise to marry her in future does not constitute offence punishable under section 493 of the Penal Code. *Hanif Sheikh (Md.) Vs. Asia Begum—5, MLR (2000) (HC) 362.*

(16) As in the petition of complaint it has been categorically stated that by deceitful means the accused induced a belief in the mind of the complainant that she is lawfully married to him by exchanging garlands and developed carnal relationship with her disclosing a prima facie case of an offence under section 493 of the Penal Code and as such the proceeding cannot be quashed at this stage. *Arzoo Mia (Md.) Vs. State and another (Criminal) 4 BLC 39.*

(17) Ingredient which makes an offence of co-habitiation by deceitful inducement punishable when not shown to exist—offence under section 493 not made out. Under section 493, ingredients which must be present for an offence thereunder: To constitute an offence under section 493 of the Penal Code the following ingredients must be present:

(a) Before admitting herself to co-habitation or sexual intercourse with the accused the woman must believe honestly that she was the lawfully married wife of the accused; and (b) Such belief must be caused to the woman by the accused by deceit. In other words, the gist of the offence is that co-habitation or sexual intercourse must be caused by the accused by deceitfully inducing the woman to a belief of lawful marriage. So if a major man and woman cohabit out of their infatuation or passion for each other secretly with each other even supposing themselves to be husband and wife that cannot constitute an offence within the meaning of section 493 of the Penal Code unless the woman is deceived by the accused to believe that she is the lawfully married wife of the accused. The complainant being a woman aged about 23 years could not honestly believe a lawful marriage merely

by the fact that accused proposed to marry and she accepted the proposal and to start co-habitation then and there as has been represented in the prosecution case. Except the complainant there was no other witness to know about the occurrence because it was the prosecution case as also the statement of the complainant that it was secretly proposed by the accused to marry the complainant which proposal secretly accepted by the complainant and thus married each other secretly by such proposal and acceptance. Conviction set aside. *38 DLR 119.*

(18) To attract an offence under section 493 of the Penal Code there must be deceit. Deceit is false statement of fact made by a person knowingly with intent that it is shall be acted upon by another and harm her. Deceit implies making of a wilful false statement or misrepresentation. Appeal allowed. *36 DLR 178.*

(19) The essence of an offence under this section consists in the practice of deception by a man on a woman, in consequence of which she is led to believe that she is lawfully married to him while in fact she is not lawfully married to him. *(1971) 2 Andh WR 278.*

(20) What is required is that, by deceitful means, the accused must induce a belief of a lawful marriage and then make the woman cohabit with him. *1977 Cal HCN 777.*

(21) In S. 496 the offence consists in dishonestly and with a fraudulent intention, going through the ceremony of being married knowing that such ceremonies do not constitute a lawful marriage. In both cases, a form of marriage must have been gone through with a fraudulent intent. *(1971) 2 Andh WR 278.*

(22) If all the forms of a valid marriage have been gone through, even with an unwilling bride or bridegroom the marriage cannot be said to be invalid. Nor can a subsequent disclaimer of a marriage validly performed make it invalid or fraudulent. *(1971) 2 Andh WR 278.*

(23) The distinction between Ss. 493 and 496 is that an offence under S. 493 consists in giving a false assurance of the marriage to a woman and thereby procuring sexual-intercourse with her, while the offence under S. 496, consists in fraudulently going through the ceremony itself knowing that it was not lawful. *(1971) 2 Andh WR 278.*

(24) In both the sections i.e. Ss. 493 and 496 it is necessary to establish that the deceit and the fraudulent intention shall be found to have existed at the time of the marriage. *(1971) 2 Andh WR 278.*

(25) Where there was no precaution by the accused and the woman voluntarily discarded her husband and went through a form of a marriage with the accused she cannot file a complaint under this section. *AIR 1969 All 489.*

(26) In order to establish deception it must be proved that the accused either dishonestly or fraudulently concealed certain facts or made a false statement knowing it to be false. *AIR 1957 Orissa 198.*

(27) Where the accused practised deception by a false registration without actual marriage ceremony, and the deception was followed by open cohabitation and conception, the accused was held guilty under Section 493 and Section 376 of the Code. *(1967) CriLJ 1411 (Cal).*

(28) Where the accused and the complainant went through certain ceremonies and both parties believed that such ceremonies were sufficient to constitute a valid marriage between them, the element of deception of the part of the accused is wanting and if, after the accused has sexual intercourse with the complainant and she becomes pregnant, but he repudiates the marriage as being invalid, he cannot be held guilty under this section in spite of such repudiation as such repudiation is not sufficient to prove that he deceived the complainant into believing that she was his wedded wife. *AIR 1957 Orissa 198.*

(29) The explanation to S. 415 is missing from the provision of S. 493 Penal Code. Mere omission to mention or even suppression of the fact of "Talak" will not bring within the mischief of S. 493. *(1977) 4 Cal HCN 777.*

(30) Fact that marriage is not performed strictly in terms of the Hindu law is not by itself sufficient to show fraud and deception on part of accused. *1977 CriLJ (NOC) 69 (DB) (Gauhati).*

(31) Woman educated—Invalid Gandharva marriage ceremony—Held no deceit established. *(1974) 6 GujLR 391.*

(32) The guilt of the accused under this section does not depend on the age of the woman with whom he has sexual intercourse by practising deception on her. A minor girl as such is not incapable of being "deceived" within the meaning of this section. *1967 CriLJ 1411 (Cal).*

(33) In the absence of very clear evidence of custom, which if well founded, must be a matter of general notoriety, the cohabitation of a man and a woman under the Aliyasanthana system cannot be considered a marriage within the meaning of Chapter XX of the Code. *1 Weir 560.*

(34) Where an accused is charged for an offence under this section during the pendency of the enquiry, the complainant dies, the enquiry does not abate. *AIR 1967 SC 983.*

(35) The offence under this section is non-cognizable though not compoundable. Therefore, the court has discretion to discharge the accused where the complainant is absent on the date of hearing. *1981 CriLJ 266.*

(36) The accused was summoned in respect of an offence under S. 493, and the committal Magistrate held an enquiry under S. 376. The accused was not discharged of the offence under S. 493. It was held that the Sessions Judge had jurisdiction to try the accused for offences under both the sections. If the accused had sufficient opportunity to meet the charges framed, he is not prejudiced by the framing of the fresh charge. *1967 CriLJ 1411.*

(37) Where charges were framed against the accused under Ss. 493, 376 and 417 in which the element of deceit is common and such element was negative in respect of the first two charges, it was held that the accused cannot be convicted on the third charge without amending the charge. *AIR 1969 All 489.*

(38) Where in a trial for an offence under this section the complainant alleged cheating by the accused the Court can add a charge under S. 417. *AIR 1969 All 489.*

2. Practice.—Evidence—Prove: (1) That the accused caused the woman in question to believe that she was lawfully married to him.

(2) That he induced that woman to cohabit with him under that belief.

(3) That he caused such belief by deceit.

3. Procedure.—Not cognizable—Warrant—Not bailable—Compoundable—Triable by Sessions Judge, Chief Metropolitan Magistrate, District Magistrate. Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—The charge should run as follows:

I, (name and office of the Magistrate/Judge etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, by deceit caused a certain woman, to wit X who was not lawfully married to you to believe that she was lawfully married to you, in that belief, cohabited or

had sexual intercourse with her and that you thereby committed an offence punishable under section 493 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 494

494. Marrying again during lifetime of husband or wife.—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

Cases and Materials : Synopsis

1. *Scope.*
2. *Essential ingredients of the section.*
3. *The accused must have contracted a previous marriage.*
4. *The previous marriage must be a subsisting one.*
5. *Marriage of minor without consent of guardian.*
6. *Fraud.*
7. *Validity of marriage between different sects.*
8. *Validity of marriage—Miscellaneous.*
9. *Dissolution of marriage.*
10. *"Marries."*
11. *Void by reason of first husband or wife living.*
12. *Exception.*
13. *Declaration of divorce—Jurisdiction.*
14. *Mens rea.*
15. *Who can complain—Person aggrieved.*
16. *Abetment of bigamy.*
17. *Evidence and proof.*
18. *Charge.*
19. *Defence.*
20. *Procedure.*
21. *Jurisdiction.*
22. *Sentence.*
23. *Practice*

1. Scope.—(1) The word "marries" in this section means "marries by some form of marriage known to, or recognised by the law." The word "void" is not used in the technical sense in which it is used in Mohannedan law. The Code makes no distinction between a void and an invalid marriage and the term "void" as used in this section covers marriage of both classes. The validity of a marriage in the case of Muslims, Hindu, Buddhists and others will be determined in accordance with their religious usages. If the first marriage is not a valid marriage no offence will be committed by contracting a second marriage. "A marriage, good by the laws of one country , is held good in all

others where the question of its validity may arise". A second marriage during the life time of the first marriage being annulled by divorce or in some formal manner recognised by law as equivalent to divorce is an offence under section 494 of the Penal Code. In order that an offence of bigamy may be committed, there must be at the time of the second ceremony of marriage, a previously valid subsisting marriage. Under the Mohammedan law apostasy from Islam of either spouse to marriage operated as a complete and immediate dissolution of the marriage. A party to a marriage does not commit an offence, if she remarries after the dissolution of her first marriage. Ceremonies constituting second marriage must be proved *(AIR 1966 SC 614)*. In a case under this section, the person aggrieved is either the first husband or the second husband, and not the father of the accused *(11 CrLJ 51)*. When the offence of bigamy is committed by the husband, the wife is the "aggrieved party". Accused is to be tried by that court alone within whose jurisdiction the offence of bigamy is committed *(29 CrLJ 533)*, or where the second marriage is solemnised *AIR 1967 Mad 241*.

(2) Bigamy—Conviction for, not sustainable without proving the existence of a valid prior marriage. *Amena Khatun Vs. Munshi Mia (1960) 12 DLR 309; 1960 PLD 723.*

(3) Marrying again during lifetime of wife—framing of charge under this section was wrong because the Muslim Family Laws Ordinance or any other law does not render second marriage, during the subsistence of the earlier marriage, void. A person can be charged under section 494 Penal Code only when such marriage is void. It is apparent that the Magistrate committed error of law in framing charge under section 494 of the Penal Code instead of under section 6(5) of the Muslim Family Laws Ordinance, 1961. No doubt the accused petitioner pleaded guilty and the conviction is based upon the plea only. But the guilty pleading of an accused person cannot cure the inherent defect in the charge or in the conviction. *Masud Ahmed Vs. Khushnehara Begum and another 46 DLR 664.*

2. Essential ingredients of the section.—(1) The following are the essential ingredients of the section:

(i) The accused must have contracted a previous marriage.

(ii) He must have married again.

(iii) The spouse of the accused must have been living at the time of the second marriage.

(iv) The first marriage must be subsisting at the time of the second marriage.

(v) The second marriage should be void, under the personal law governing the parties, by reason of its taking place during the lifetime of the spouse of the accused. *1976 CriLJ 1333.*

(2) The voidness of the second marriage under the personal law governing the parties , by reason of its taking place during the lifetime of the spouse of the accused is in fact one of the essential ingredients of this section. *AIR 1979 SC 713.*

(3) In order to attract the provisions of this section both the marriages of the accused must be valid in the sense that the necessary ceremonies required by the personal law governing the parties had been duly performed. *AIR 1979 SC 713.*

3. The accused must have contracted a previous marriage.—(1) It is essential to establish that at the time of the alleged second marriage the accused was already a married man. In the absence of proof to that effect the prosecution under this section is not sustainable. The finding of the Civil Court on question of second marriage is not binding on Criminal Court and on a complaint by husband against his wife under S. 494 it is competent for the Magistrate to find otherwise. *(1891) ILR 19 Cal 79.*

4. The previous marriage must be a subsisting one.—(1) It is essential that the previous marriage must be subsisting at the time of the second marriage; otherwise the accused cannot be held guilty under this Section. *AIR 1942 Sind 92.*

5. Marriage of minor without consent of guardian.—(1) A Hindu marriage of a man with a minor girl is not rendered invalid by the mere fact that the father of the girl does not give his consent to the marriage. *AIR 1922 Lah 139.*

(2) Under the Muhammadan law a minor girl who is given away in marriage by her guardian can, under certain circumstances, repudiate the marriage and remarry another person. *(1891) ILR 19 Cal 79.*

6. Fraud.—(1) The marriage of a Hindu tainted by fraud is a violable transaction but is binding until it is set aside by a competent Court. Unless it is declared to be void it can sustain an indictment for bigamy. *AIR 1922 Lah 139.*

7. Validity of marriage between different sects.—(1) Marriage inter se as between different sub-divisions of the Sudra caste is valid. *AIR 1928 Lah 706.*

8. Validity of marriage—Miscellaneous.—(1) The validity of a Hindu marriage among Brahmins is not affected by the fact that it has not been consummated or that the consummation ceremony has not been performed. *(1886) ILR 9 Mad 466.*

(2) In order to attract the provisions of this section both the marriages must be valid in the sense that the necessary ceremonies required by the personal law governing the parties and had been duly performed. *AIR 1979 SC 713.*

9. Dissolution of marriage.—*(A) By decree if Court or by stipulation of divorce.*—(1) Under Mohammedan law, when there is a contract between husband and wife at the time of marriage, empowering the latter to divorce herself in specific contingencies and she exercises such power on the happening of any of such contingencies the divorce will take effect to the same extent, as if it had been pronounced by the husband. It does not require any marriage declaration from a Court of law. The power given to her by the husband is in itself quite sufficient and a marriage with the girl after such a divorce does not amount to the offence of bigamy under this section. *AIR 1953 Tripura 6.*

(B) By Custom.—(1) A custom by which the marriage tie can be dissolved by either the husband or the wife against the wish of the divorced party was opposed to public policy within the meaning of S. 23 of the Contract Act and repugnant to Hindu law and could be not recognised. *AIR 1945 Mad 516.*

(C) Caste Panchayat.—(1) A custom by which the castemen are authorised to declare that a marriage is dissolved and to permit the remarriage of the woman is unreasonable and immoral and cannot be recognised by a court of law. *AIR 1916 Bom 97.*

(D) By repudiation.—(1) A Muslim woman married under the Muslim law can repudiate her marriage on the grounds stated in S. 2 of the Dissolution of Muslim Marriages Act (8 of 1939), there can be no repudiation dehors the said provision. *AIR 1973 Ker 176.*

(2) In the case of a valid repudiation, the marriage is ipso facto dissolved and a decree of the Court is not necessary. *AIR 1950 Lah 133.*

(3) Where in a case arising before the said Act 8 of 1939, a Muhammadan girl was given in marriage during her minority by her mother and when she was about sixteen years of age , before consummation of the marriage, she applied to the Deputy Commissioner repudiating the marriage and married another person later, it was held that she was not guilty. *AIR 1933 Lah 88.*

(4) The option to repudiate is also prolonged until the woman is acquainted with the fact that she has right to repudiate the marriage. *AIR 1929 Lah 827.*

(E) Apostasy and conversion.—(1) Before the Dissolution of Muslim Marriages Act, the apostasy or conversion from Islam of either party to a Muslim marriage effected a dissolution of the marriage. *AIR 1933 All 433.*

(2) A Christian marriage is not dissolved by the apostasy of one of the parties and a subsequent marriage of a Christian wife after her conversion to Islam is bigamy. *AIR 1919 Lah 389.*

(3) Apostasy of one of the parties does not, in the case of Hindus, per se dissolve their marriage and a Hindu wife cannot, therefore, deprive her husband of the legal rights which accrued to him at marriage by simply renouncing Hinduism in favour of Islam or Christianity. *AIR 1948 Lah 129.*

10. "Marries."—(1) It is only where the person who has his wife living "marries" again that this section will apply. The words "whoever.....marries" mean whoever marries validly. *1973 CriLJ 1710.*

(2) When a spouse contracts a second marriage while the first marriage is still subsisting the spouse will be guilty of bigamy under this section, if it is proved that the second marriage was a valid one in the sense that necessary ceremonies required by law or by custom have been actually performed. *AIR 1979 SC 713.*

(3) Where the essential ceremonies necessary (according to the law governing the parties) to constitute a marriage are not performed, there is no marriage at all. Such a case is not within this section. *AIR 1979 SC 848.*

(4) The words "void by reason of its taking place.....wife" imply that the marriage is otherwise valid according to the personal law of parties. *AIR 1955 Cal 533.*

(5) A Christian convert relapsing into Hinduism and marrying a Hindu woman during the lifetime of his Christian wife could not be convicted for bigamy since the Hindu Law which was applicable to his case after conversion to Hinduism allowed polygamy. It was also held that the case would be different if a Christian having a Christian wife marries a Hindu woman according to Hindu rites without renouncing his religion he would be guilty of bigamy as in that case, the law applicable to Christian which does not allow polygamy is applicable. The above decisions can no longer be considered to be valid in respect of the second marriage of converts from Christianity to Hinduism since polygamy is prohibited by the Hindu Marriage Act. *AIR 1951 Mad 888.*

11. Void by reason of first husband or wife living.—(1) The section has no application to cases where a second marriage is allowed by the law or custom governing the parties. *AIR 1971 SC 1153.*

(2) To constitute an offence punishable under this section, it is necessary that the second marriage should be void by reason of its taking place during the lifetime of the first husband or wife. *AIR 1979 SC 713.*

(3) The word "void" which occurs in this section is not used in the technical sense in which it is used in the Mohammadan Law. The Penal Code makes no distinction between a void and an invalid marriage and the term "void" used therein covers both 'void' and 'invalid'. *AIR 1931 Lah 194.*

(4) Even though the Court before whom a charge of bigamy is brought is of necessity a criminal Court that does not discharge the Judge from the necessity of coming to a decision on a point of law regarding the marriage. *AIR 1934 All 589.*

(5) The Jews in Bombay are generally monogamous and cannot except in certain cases lawfully contract a second marriage. *AIR 1926 Bom 169.*

12. Exception.—(1) In order to entitle the accused to the benefit of the second paragraph of the Exception which is analogous to S. 108 of the Evidence Act, it is only necessary to prove that the other party to the marriage had been continuously absent and not heard of as alive by the accused for the space of seven years, it is immaterial under such circumstances whether or not the accused made any enquiries or had reasonable grounds for believing the other party to be dead. *1900 Pun Re (Cri) No. 1 p. 1.*

13. Declaration of divorce—Jurisdiction.—(1) According to international law, it is the Court of the country in which the parties are domiciled that can grant a divorce or make a declaration as to the dissolution of the marriage. Courts in India have no jurisdiction to make such a declaration between parties domiciled in foreign countries. *AIR 1942 Cal 325.*

14. Mens rea.—(1) A penal statue requires mens rea even if it contains no express words to that effect. Section 494 makes no reference to intention, knowledge, fraud or deceit but constitutes the mere contracting of the second marriage a crime. If a person charged with bigamy believed that he was legally free to marry again, after taking learned opinion, it cannot be said that the crime was committed either intentionally or recklessly and the question whether the belief was unreasonable is irrelevant. *1972 Ker LT 1069.*

(2) A plea of ignorance of law cannot be put forward. Where the wife had moved the Munsif's Court for a dissolution of marriage and the suit was dismissed and thereafter she purported on the advice of another person said to be well-versed in Islamic theology, to repudiate the marriage by faskh, and then contracted a second marriage, it was held that a culpable mind was clearly made out, and that she was guilty under this section. *AIR 1973 Ker 176.*

15. Who can complain—Person aggrieved.—(1) The proper person to make the complaint as the person aggrieved within the meaning of S. 198, Criminal P. C. is, in case of bigamy, the previous husband or wife, or the father of the wife. *1967 All WR (HC) 623.*

(2) The fact that the complaint in respect of an offence under this section is written at the suggestion of the police does not contravene the provisions of S. 198, Cr. P. C. *AIR 1919 Lah 389.*

(3) In a charge for abetment of bigamy, the complaint need not be by the person aggrieved. *AIR 1926 All 189 (191) = 27 CriLJ 101.*

16. Abetment of bigamy.—(1) The prosecution should prove that the person alleged to have abetted the bigamy knew, when he arranged or assisted at the second marriage, that the person who was remarried had contracted a valid first marriage and that the husband or wife of the first marriage was still living. *AIR 1955 Madh B 176.*

(2) The person to whom the husband or wife, as the case may be, is remarried cannot be punished under this section. He can only be charged with abetment of that offence. Section 109 indicated the punishment which is to be awarded for such abetment. *AIR 1931 Lah 194.*

(3) Where, by reason of a mistake of fact, the accused thought that the previous marriage of a girl had been declared void by a Court of competent jurisdiction and went through a form of marriage without knowing that the ex parte decree had been set aside, the accused was held not guilty of any offence. *AIR 1918 Lah 217.*

17. Evidence and proof.—(1) Section 494 requires proof of a second marriage in the lifetime of the husband or wife of the party and of the invalidity of such marriage by reason of the husband or wife being alive. *1 Weir 565.*

(2) A previous statement of the accused in a collateral proceeding admitted prior marriage, being of an incriminating nature, cannot be admitted in evidence without giving him an opportunity to explain the statement made. *AIR 1971 SC 1153.*

(3) Where one complaint under this section was dismissed on the ground that the complainant failed to prove his alleged marriage with the accused another complaint by him cannot be entertained. *AIR 1929 Lah 544.*

(4) Where the form of marriage is not opposed to the customs of the community or caste of the parties, the Court can presume that the marriage is a legal one. *AIR 1962 Andh Pra 311.*

(5) Datta Homa and Saptapadi—Performance of these two essential ceremonies at the time of second marriage of accused, not proved—Existence of custom to put "yarn thread" instead of "Mangalsutra" was neither mentioned in complaint nor proved in evidence—Conviction under Sec. 494 not sustainable. *AIR 1979 SC 848.*

(6) Where a spouse contracts a second marriage while the marriage is still subsisting, the spouse will be guilty under Sec. 494 if the second marriage of the accused is proved to be a valid one in the sense that the necessary ceremonies required by law or by custom have been actually performed. *AIR 1979 SC 713.*

(7) Proof of guilt is sustained despite little infirmities. *AIR 1978 SC 1542.*

18. Charge.—(1) It is not necessary that a complaint should precisely state the section of the Code under which the accused has been charged. It is sufficient if the complainant lays before the Magiste the matter Magistrate the matter which, if proved, would be sufficient to warrant commitment under this section. *(1903) ILR 25 All 209.*

(2) A complaint of offence under this section covers a complaint of an offence under S. 498 also. *AIR 1921 Oudh 149.*

(3) 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 of—, at—, having a wife (or husband) to wit—, living married again X, and such marriage being void by reason of its taking place during the lifetime of said wife (or husband), and that you thereby committed an offence punishable under section 494 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

19. Defence.—(1) In a charge under this section, the accused may plead in his defence that the first marriage was null and void, even though he has not obtained a declaration to that effect. *AIR 1945 Mad 516.*

20. Procedure.—(1) Where a complaint alleged facts which seemed to constitute an offence under Section 498 of the Code but in the course of the enquiry it was found that an offence under this section was committed, it is not illegal for the Magistrate to commit the accused for an offence under this section. *(1903) ILR 25 All 209.*

(2) A complaint filed by the Hindu wife who was below fifteen years of age at the time of marriage, alleging that the husband had committed an offence punishable under this section cannot per se be dismissed. *AIR 1977 Andh Pra 43.*

(3) The offence under this section is compoundable with the permission of the Court. Hence, an agreement to compound it is not illegal. *AIR 1973 Raj 260.*

(4) Parties should be permitted to compound the offence with direction to husband to pay compensation to wife, if the circumstances of the case so warrant. *AIR 1978 SC 1542.*

(5) Cognizable—Warrant—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

21. Jurisdiction.—(1) A criminal Court has no authority to refuse to decide the question of marriage or no marriage where it is essential to the decision of the question whether an offence under this section has been committed or not. *1878 Pun Re No. 27 (Cri) p. 67.*

(2) Where a case cognizable only upon a complaint of the aggrieved party is committed to a Court of Session, which has no territorial jurisdiction to try the case, the proper procedure is for the High Court to set aside the proceedings as being without jurisdiction and leave the complainant, if he sees fit, to prosecute his case in a Court having jurisdiction. *AIR 1919 Oudh 69.*

(3) Under the 1898 Code of Criminal Procedure as amended in 1923, a Magistrate of the first class also had jurisdiction to try an offence under this section and dispose of the same without committing the case to the Court of Session. An order of discharge passed by such Magistrate in such a case after the accused had been called upon to enter on his defence was tantamount to acquittal and not discharge. *AIR 1925 Oudh 60.*

(4) Where a person is acquitted under Section 498 by a Magistrate who was not competent to try him under this section, he can subsequently be tried under this section and the finding of the former Magistrate is not binding on the Magistrate trying him under this section. *AIR 1928 Lah 844.*

22. Sentence.—(1) Bigamy is a serious offence and the Court cannot take a very lenient view. *AIR 1979 SC 713.*

(2) Where the prosecution of the accused is initiated only out of vindictive motives, a light sentence can be awarded. *AIR 1926 Nag 127.*

(3) The Magistrate, while discharging the accused, under S. 209, has no power to award compensation to the accused. *AIR 1918 All 126.*

23. Practice.—Evidence—Prove: (1) That the accused had already been married to some person.

(2) That the person with whom he had married was still living.

(3) That the accused married another person.

(4) That the second marriage was void by reason of its taking place during the life of the first spouse.

Section 495

495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.—Whoever commits the offence defined in the last preceding section having concealed form the person with whom the

subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) The section provides a higher penalty when the fact of the former marriage is concealed from the person with whom the subsequent marriage is contracted. Under section 494 and 495, a complaint may be made only by the person aggrieved and if the wife knew that the husband had already been married she cannot complain.

(2) Complaint under S. 495 P. C. can be filed by the first wife only and not by the second wife. *1984 Hindu LR 65.*

(3) Mere passive witnesses of the second marriage are not guilty of abetment of the offence under S. 495. *1982 CriLJ 1362.*

(4) The burden to prove both the marriages as ingredients of the offence under this section lies on the prosecution. *(1974) 40 Cut LT 1145.*

(5) The basic ingredient of an offence under this section is concealment of the fact of the earlier marriage and whether this took place at the residence of the complainant's parents is a question which can be decided only after entire evidence is taken. *1979 CriLJ (NOC) 202.*

2. Practice.—Evidence—Prove: (1) That the accused had already been married to some person.

(2) That the said marriage was legal.

(3) That the person to whom the accused was married was alive.

(4) That the accused married another person.

(5) That the accused when marrying the second time concealed from the person with whom the accused married the fact of the first marriage.

3. Procedure.—Not cognizable—Warrant—Bailable—Not Compoundable—Triable by Chief Metropolitan Magistrate, District Magistrate, Additional District Magistrate or Magistrate of the first class specially empowered.

4. Charge.—(1) The charge should run follows:

I, (name and office of the Magistrate, etc.) hereby charge you (name of accused) as follows:

That you, on or about the—, day of—, at—, had a wife (or husband) X living having been validly married and that you married again Y during the lifetime of X; the said second marriage also having been duly performed and that you concealed from Y the fact of your prior marriage with X; and you have thereby committed an offence punishable under section 495 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this court on the said charge.

Section 496

496. Marriage ceremony fraudulently gone through without lawful marriage.—Whoever dishonestly or with a fraudulent intention goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cases and Materials

1. Scope.—(1) This section punishes fraudulently mock-marriage. It applies to cases in which a ceremony is gone through, which would in no case constitute a marriage, and in which one of the parties is deceived by the other into the belief that it does constitute a marriage , or in which effect is sought to be given by the proceeding to some collateral fraudulent purpose. Section 493 and 496 of the Penal Code are somewhat like; the difference appears to be that under section 493 deception; is requisite on the part of the man, and cohabitation or sexual intercourse consequent on some deception and the offence under section 496 requires no deception, cohabitation, or sexual intercourse but a dishonest fraudulent abuse of the marriage ceremony. No court shall take cognizance of this offence except upon a complaint made by some person aggrieved.

(2) The essential ingredient of the section is that the accused must have acted dishonestly or with intent to defraud. *(1906) 4 CriLJ 152 (Cal).*

(3) An offence under S. 494 is different from an offence under S. 496. If the accused intends that there should be a valid marriage and honestly goes through the necessary ceremonies during the life time of the other spouse then it may be an offence u/s. 494 but if the accused only intends that there should be show of marriage and dishonestly or fraudulently goes through the marriage ceremonies knowing fully well that he is not legally married then it is an offence under S. 496. *1982 CriLJ 1005.*

(4) Where the accused pushed down a girl returning from her father's house with a head-load and forcibly tied a tali round her neck in order to spite her and her parents, it cannot be said that any ceremony of marriage was at all performed. *AIR 1947 Mad 193.*

(5) The fact that the marriage is invalid or void as being bigamous or within prohibited degrees of relationship or between inter-castes or is fraudulent is irrelevant for the purpose of S. 496. *AIR 1937 Cal 214.*

(6) Sham marriages are not invalid unless a dishonest or fraudulent intention is proved. *(1974) 15 Guj LR 391.*

(7) The intention to deceive need to be aimed at any particular person. The accused must be judged by his intention and not by the results. *(1906) 3 CriLJ 488.*

(8) Accused, a Hindu went through a marriage ceremony with a minor girl—Ceremony took place in a field without the sacred fire and performed by a priest of another caste—Consent of the guardian not taken—Held that the accused was guilty under this section. *(1906) 3 Cri LJ 488.*

(9) A priest who officiates at a show of ceremony of marriage cannot be held guilty of abetment unless it is proved that he shared the fraudulent intention of the accused. *(1906) 3 Cri LJ 488.*

(10) A hereditary Katheef Lavvai for Muslims of a certain area cannot complain, as a person aggrieved, against certain Muslim marrying in another area with the aid of another priest, and thus depriving the complaint of his fees. *AIR 1931 Mad 247.*

(11) Where a complaint is made by an aggrieved person such person dies pending enquiry the enquiry does not abate and that the mother of the complainant could conduct the prosecution in such a case. *AIR 1967 SC 983.*

(12) Before a Hindu wife can complain that her spouse is guilty of an offence under this section by marrying another lady the complaint must establish that she and accused No. 1 were legally married in the sense that at least essential rites and ceremonies were duly performed in their marriage. *1973 Mah LJ 310.*

(13) The prosecution must prove that the accused knew at the time of the marriage, that the ceremony gone through does not constitute a marriage according to the law or custom governing the parties and deceitfully and fraudulently went through the ceremony of marriage. *AIR 1937 Cal 214.*

(14) Where the accused had knowledge that the ceremony gone through does not constitute a marriage according to the law or custom governing the parties he or she will be guilty not only under this section but also of cheating punishable under S. 420. *1897 Pun Re (Cri) No. 7 p. 17.*

(15) Sentence of one year's R. I. passed by High Court under S. 496—Appeal by special leave on question of sentence only—Supreme Court reduced it to period of six months already undergone in jail in view of special mitigating circumstances. *AIR 1970 SC 1998.*

2. Practice.—Evidence—Prove: (1) That the accused went through the ceremony of marriage.

(2) That when he went through some ceremony he knew that he was not thereby lawfully married to the complainant.

(3) That he went through the ceremony of marriage dishonestly or with fraudulent intention.

3. Procedure.—Not cognizable—Warrant—Bailable—Not compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

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—, dishonestly (or fraudulently) went through the ceremony of being married to X, knowing that you were not thereby lawfully married, and that you thereby committed an offence punishable under section 496 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge .

Section 497

497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Cases and Materials : Synopsis

1. *Scope of the section.*
2. *This section and S. 10 of the Divorce Act, 1869.*
3. *This section and S. 23, Contract Act.*
4. *Sexual intercourse.*
4. *Wife of another person—Proof of marriage.*
6. *Knowledge that the woman is married to another.*
7. *Without the consent or connivance of the husband.*
8. *"Not amounting to rape."*
9. *Complaint—Essentials.*
10. *Abetment by married woman.*
11. *Proof.*
12. *Procedure.*
13. *Joinder of charges,*
14. *Sentence.*
15. *Practice.*
16. *Charge.*

1. Scope of the section.—(1) This section deals with punishment for an offence of adultery, the law seeks to preserve the sacred relationship between husband and wife. Adultery is an anti-social or illegal act which a third person can commit against a married person on his wife. A woman cannot be an accused person under section 497 or 498 of the Penal Code *(PLD 1974 Lah 1)*. Every act of sexual intercourse with another's wife under circumstances which makes the intercourse an offence under section 497 is a distinct offence *(AIR 1928 Bom 530)*. Strict proof is necessary of the marriage of the woman. The actual fact of the marriage between the complainant and the woman must be proved in some way or another *(16 CrLJ 213)*. If the marriage is sought to be proved by oral evidence, such evidence must be in accordance with section 60 of the Evidence Act namely, that of eye-witness. In order to constitute adultery, sexual intercourse is a necessary ingredient and it is the same as the sexual intercourse required for rape *(36 CrLJ 1298)*. Adultery consists in carnal intercourse with the married woman without the knowledge or connivance of the husband. To sustain a conviction under section 497 of the Penal Code, the complainant must not only prove that the accused has sexual intercourse with his wife but also that the act was done without his consent or connivance. That adulterer need not know whose wife the woman is, proved he knows that she is a married woman. Consent of the woman is immaterial. Direct evidence of adultery is different to get. It has to be inferred from circumstances to justify an inference that sexual intercourse took place. In a charge of adultery it is not necessary to specify the date when the offence was committed. It is enough if the charge specifies the dates between which the offence was committed. The right to file a complaint under this section is governed by section 199 CrPC. The complaint can only be made by the husband of the woman, or during his absence, the person having care of the woman on his behalf *(PLD 1962 Lah 122)*. No court shall take cognizance of the offence except upon a complainant made by the husband of the woman.

(2) Read with the Code of Criminal procedure 1898, Sec. 197—"Complaint" meaning—Cognizance of an offence u/s. 497 of the Penal Code cannot be taken by a Magistrate on a police report and not on a complaint made by the husband as required by sec. 199 of the Criminal Procedure Code—High Court Division correctly took the view that such cognizance of the offence of Police Report was illegal. *The State Vs. Aynuzamman 1987 BLD (AD) 100 = BCR 1986 AD 391.*

(3) Ingredients which must be satisfied when a charge is made under section 497 Penal Code—Absence of any element with regard to a charge under section 497 Penal Code, will render the charge liable to be quashed. No cognizance of an offence under section 497 Penal Code unless the conditions laid down in the section are fulfilled. *Nurul Huq Bahadur Vs. Bibi, 37 DLR 335.*

(4) Mere passive inaction is not enough for a finding of connivance, but as was said by the House of Lords in Gipps Vs Gipps (1864) "conniving" means "not merely refusing to see an act of adultery but also wilfully abstaining from taking any step to prevent adulterous intercourse which, from what passed before the husband's eyes, he must reasonably accept, will occur." (In Halsbury' Laws of England, Vol 12. Third Edition, para 589 at page 197 it is stated that connivance is not limited to active conduct. "It includes the case where a spouse acquiesces in "the adultery alleged, that is to say, where the spouse is aware that a certain result will follow, if he does nothing and desire the result to come about. On the principle of volention-fit-injuria, a person cannot complain of any act, he passively assents to" Matrimonial domicile determines the legality or otherwise of divorce. On the question that marriage having taken place in England under English law, whether such marriage could be dissolved by talak, the wife being a Christian of German nationality, having regard to the fact that the matrimonial domicile of the couple was in Pakistan and the divorce was effected in Pakistan. Held:

The tread of modern authorities appears to be that if the law of the domicile permits a dissolution of marriage by the pronouncement of talaq the divorce may be recognised as valid under the rules of private international law, even if countries where such form of dissolution of marriage is not allowed under their own law. *15 DLR 9 SC.*

(5) The essential ingredients of this section is that the sexual intercourse with a woman must have been without the consent or connivance of her husband. *(1949) 1 PepsuLR 317.*

(6) Section 497 applies to all classes of persons including Europeans. *AIR 1951 Bom 470.*

(7) Section 497 does not contravene the Constitution. *1972 RajLW 159.*

(8) Section 61, Divorce Act (4 of 1869) does not forbid a prosecution, by an injured husband, of the adulterer. *AIR 1970 Mad 434.*

(9) Enticement and detention are not ingredients of the offence under this section. *AIR 1951 Him Pra 25.*

(10) Essential ingredients of adultery—to establish the charge of adultery it must be proved that sexual intercourse took place without the consent or connivance of the husband—Adultery cannot be committed with unmarried woman, widows or prostitutes. *Nurul Huq Bahadur Vs. Bibi Sakina and another 5 BLD (HCD) 269.*

2. This section and S. 10 of the Divorce Act, 1869.—(1) The definition of "adultery" in this section has no application to proceedings for divorce under S. 10 of the Divorce Act, 1869. The word 'adultery' in that section has a wider meaning than it has under this section and includes sexual intercourse by the husband with a woman whether married or unmarried, a widow or a prostitute. *AIR 1959 Cal 451.*

3. This section and Section 23, Contract Act.—(1) Adultery being an offence under the Code it cannot be a valid consideration for a contract. *AIR 1972 Raj 25.*

4. Sexual intercourse.—(1) Sexual intercourse is a necessary ingredient of the offence of adultery. *AIR 1935 Oudh 506.*

(2) Every act of sexual intercourse amounts to an offence of adultery and if a person has several acts of sexual intercourse with a woman, it cannot be said that the offence is a continuing offence. *AIR 1928 Bom 530.*

5. Wife of another person—Proof of marriage.—(1) To sustain a conviction under this section, it must be strictly proved that the woman was married to the complainant. *1978 CriLJ 942 (Sikkim).*

(2) Where the complainant and the woman involved state that they are married, and their testimony is not subjected to cross-examination, that can be treated as direct and legal evidence of their marriage. *AIR 1917 Nag 76.*

(3) The fact that the complainant and the woman are living together is sufficient to raise the presumption of their marriage, where their statements to that effect are unrebutted. *AIR 1927 Rang 261.*

(4) Mere desertion of the husband by the wife does not dissolve the marriage, nor is a complaint under this section liable to be dismissed on the above ground. *AIR 1917 Low Bur 30.*

(5) The conversion of a Hindu wife to Mohammadanism does not ipso facto dissolve the marriage tie with the husband. She continues to be the wife of her former husband in spite of her conversion and

if any one has sexual intercourse with her, such intercourse will be an offence under this section whether it be with or without her consent. *AIR 1947 Nag 121.*

6. Knowledge that the woman is married to another.—(1) Where the accused knows that the woman is married to another person and that her marriage is not dissolved, sexual intercourse with her by him, whether with or without her consent is an offence under this section. *AIR 1947 Nag 121.*

7. Without the consent or connivance of the husband.—(1) To sustain a conviction under this section, the complainant must not only prove that the accused had sexual intercourse with his wife but also that the act was done without his consent or connivance. *1962 MPLJ (Notes) 339.*

(2) To constitute "connivance" mere negligence or inactivity will not suffice. The facts established must lead to a direct and necessary inference that the adultery would be committed with the person charged, and that the husband acquiesced in it by wilfully abstaining from taking any steps to prevent the adulterous intercourse, which, from what passes before his eyes or within his knowledge, he cannot but believe or reasonably think is likely to occur. They may not prove privity to the actual commission of the adultery. *AIR 1963 Orissa 60.*

(3) Where the husband failed to take any action against the accused for a long time and the long delay in preparing the complaint is not satisfactorily explained, then it may lead to the conclusion that the husband had condoned the offence of the accused. *AIR 1934 Sind 10.*

8. "Not amounting to rape.—(1) Sexual intercourse with a married woman without the consent or connivance of the husband will be adultery whether such sexual intercourse is with or without the consent of the woman. *AIR 1947 Nag 121.*

9. Complaint—Essentials.—(1) Under Section 198, Criminal P. C. a charge of adultery can be brought only on the complaint of such offence by husband. *1974 Cri LJ 117.*

(2) In absence of husband a charge of adultery can be brought by somebody on his behalf who has the care of the woman. *AIR 1963 Orissa 60.*

(3) Dissolution of the marriage subsequent to the date of the offence does not take away from the complainant the right to lodge a complaint. *AIR 1922 Lah 477.*

(4) Where the accused committed adultery in houses situated near those of the complainants and threatened the complainants, proceeding under S. 107 at the instance of complainants is competent and S. 198 does not apply. *AIR 1963 J and K 56.*

(5) Where a complaint under Ss. 366 and 368, fulfils all the requirements of a complaint under this section and clearly makes an accusation under that section, then, if the adultery complained of is proved a conviction under this section will not be illegal on the ground that there has been no complaint as required by S. 198, Criminal P. C. *AIR 1934 Lah 945.*

10. Abetment by married woman.—(1) The wife is expressly exempted under this section from being charged as an abettor of the offence under this section. *1972 Raj LW 159.*

(2) Exemption of wife under S. 497 from being charged as an abettor of the offence is not against the provisions of the Constitution on the ground of discrimination. *AIR 1954 SC 321.*

11. Proof.—(1) In a prosecution under this section, it is very difficult to get actual eye-witnesses of the commission of adultery or sexual intercourse and the court has to rely upon the circumstances and conduct of the person concerned. *AIR 1979 Raj 156.*

(2) The circumstantial evidence must be such as to fairly justify the inference that sexual intercourse took place. *AIR 1979 Raj 156.*

(3) A charge that adultery was committed between certain specified dates is sufficient. It is not necessary to specify the date when offence was committed. *AIR 1951 Kutch 17.*

(4) Evidence of the wife, corroborated by statements of the adulteress recorded in Government Maternity Home and Rescue Registers could be used for establishing the offence. *AIR 1964 Mys 280.*

(5) Evidence of acts of adultery subsequent to date of act charged is admissible to show the character of previous acts of improper familiarity. *AIR 1935 Oudh 506.*

(6) Where the only evidence is a letter written by the complainant's wife to the accused, which was not proved to have been received or read by the accused the conviction on such evidence is not sustainable. *AIR 1928 Cal 248*

(7) Allegation of sexual intercourse based on mere surmise—Non-framing of charge under S. 497 held did not result in miscarriage of justice. *AIR 1951 Him Pra 25.*

12. Procedure.—(1) The offence is compoundable. *(1865) 4 Suth WR (Cr) 31.*

(2) Not cognizable—Warrant—Bailable—Compoundable—Triable by Metropolitan Magistrate or Magistrate of the first class.

13. Joinder of charges.—(1) The charges of adultery and marrying again during the lifetime of her husband (Section 494) should not be tried together. *Rat Un Cr C 4.*

14. Sentence.—(1) In awarding sentence, the law prevailing when the offence is committed should be considered. *AIR 1951 Kutch 17.*

15. Practice.—Evidence—Prove: (1) That the accused had sexual intercourse with the woman in question.

(2) That she was then the wife of another man.

(3) That the accused knew, or had reason to believe, that she was the wife of another man.

(4) That such man did not consent to, or connive at, such intercourse.

16. Charge. The charge should run as follows:

I, (name and office of Magistrate, etc.) hereby charge you (name of the accused) as follows:

That you, on or about the—, day of—, at—, committed adultery with X, knowing or having reason to believe her to be the wife of Y, and without the consent or connivance of the said Y, and that you thereby committed an offence punishable under section 497 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Section 498

498. Enticing or taking away or detaining with criminal intent a married woman. —Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any persons or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Cases and Materials : Synopsis

1. Scope of the section.—(1)This section protects only a husband and not any other man who may have a woman living with him even though that union may in fact be as permanent as a marriage contracted in accordance with the law. Therefore in a prosecution under section 498, by the husband, the question of marriage of the woman with the complainant is material. Where the relationship between a man and a woman does not amount to marriage, this section would not apply. Persons dealing with married woman whose husband is alive have the additional responsibility which law does not envisage while dealing with a widow or spinster. Since sanctity of a matrimonial tie is to be preserved persons dealing or behaving in a manner with married woman which tend to severe such a tie, run a great risk which, to a great extent, is akin to dealing with a minor or an insane person. Before a person can be convicted under this section, the prosecution must affirmatively prove not only that a marriage was performed but the marriage so performed was a valid and lawful marriage. A case under this section is sufficiently established if it can be shown that the accused personally and actively assisted the wife to get away from her husband's house or from the custody of any person who was taking care of her on behalf of the husband *(39 CrLJ 1280)*. There must be some influence physical or mental, operating on the woman or co-operating with the inclination at the time the final step is taking which cause a severance of the woman from her husband, for the purpose of causing such step to be taken *(41 CWN 931)*. The word "takes" must be given a meaning somewhat similar to the word "entices" which follows it. If the accused persuaded the woman to leave her husband's house, the act would amount to enticement. If the accused arranged any conveyance for the woman, the act would amount to taking away the woman from the husband's house, the taking must be with the intention stated in the section. The use of word "detain" does require that there should be something in the nature of control or influence which can be properly described as a keeping back of the woman. Proof of some kind of persuasion is necessary to constitute "detention" *(40 CWN 996)*. The word "conceal" must refer to including the wife to conceal herself from her husband with the intent that she may have illicit intercourse with anyone. The willingness of the wife is immaterial and her consent to deprive her husband of his control and protection could not afford a valid defence *(AIR 1959 SC 436)*. The husband after divorcing his wife is not entitled to file a complaint under this section. No court can take cognizance of an offence of adultery except or the complaint of the husband of the woman or in his absence by some persons who had care of such woman. A complaint under this section for detaining a woman for the purpose of illicit intercourse can be inquired into only in the district where such detention occurs *(19 CrLJ 438)*. Section 366 deals with a case where the woman kidnapped or abducted in an unwilling party and does not respond to the criminal intention of the accused. In other

words, section 366 is intended to protect woman from such abduction or kidnapping. Section 498 is intended to protect not the rights of the wife but those of her husband, and so prima facie the consent of the wife to deprive her husband of his proper control over her would not be material. Compulsion or deceit is not essential. It may be pointed out that the offence under section 498 is a minor offence as compared with the offence under section 366.

(2) "Takes or entices away"—Terms interpreted included 'strong influence emanating' from accused and "operating" on woman's mind—Discoverable from circumstances. Witness—(Court witness)—Wife of compliant (in prosecution for enticing away married woman under section 498), found present in Court room, intended to be produced as a defence witness—Examination by Court as a Court witness in course of taking down prosecution evidence—Held to be within its right to adopt such course. *Syed Ali Newas Gardezi Vs. Lt. C. Yusuf (1963) 15 DLR (SC) 9.*

(3) "Taking away" meaning of—Unless there is a finding as to the 'taking away' of the woman by the accused and a finding on this point is essential to warrant a conviction under this section, a charge under S. 498 cannot be said to have been established. The woman going together in the company of the accused by itself does not establish the taking away within the meaning of section 498. It is not very easy to say that 'taking away' means that there must be some influence, physical or moral, brought to bear by the accused to induce the woman to leave her husband in order that her leaving may amount to taking away by the accused. *Abdul Malek Vs. State (1962) 14 DLR 694.*

(4) When facts disclosed a case of civil nature. N filed a petition of complaint against the accused persons for an offence under section 498. M, the wife, produced certified copy of talaknamah showing that N divorced her before the date of the alleged occurrence. Genuineness of the talaknamah was questioned by N on motion by the accused for quashing the proceedings. Held: This question can only be solved by a Civil Court and that a Magistrate would not be competent person to discharge the function of a Civil Court to decide the validity or otherwise of the talak. *Nakibuddin Teli Vs. Nasiruddin Ahmed (1952) 4 DLR 367.*

(5) The provision of this section are intended to protrect the rights of the husband and not those of the wife. The gist of the offence under this section is the deprivation of the husband of his custody and proper control over his wife with the object of the accused having illicit sexual intercourse with her. *AIR 1959 SC 436.*

2. "Takes."—(1) The fact that the woman is the temper and the accused was at first reluctant to take her is not relevant and that even if the accused had merely yielded to the solicitation of the woman and gone away with her, it would amount to a "taking" within the meaning of this section. *(1865) 2 Mad HCR 331.*

(2) If the woman cannot be, under the circumstances of the particular case, deemed to be under the protection of her husband or of any person on his behalf the accused cannot be guilty under this section. *AIR 1951 Kutch 17.*

3. Enticing.—(1) The word 'enticement' necessarily connotes that some kind of persuasion or allurement was held out by the accused, who imposed his will or power upon the woman alleged to be enticed. *ILR (1965) Cut 530.*

(2) Inducement by a man to another's wife that if she wanted to maintain their friendship, she should agree to desert her husband's roof and live with him, in which case he undertook to keep her as his mistress, held to amount to an "enticement." *AIR 1947 Mad 368.*

(3) Where the wife drove the husband out of her house and permitted the accused to live with her and there was no evidence of any inducement or seduction by the accused at the initial stage, the accused could not be held to have "enticed" the wife within the meaning of this section. *AIR 1934 Sind 10.*

(4) Where a married woman, who was discarded by her husband, eloped with another person, with whom she fell in love, such elopement was held to be a joint adventure in which the motive force was mutual affection and there was no "enticement" within the meaning of this section. *AIR 1937 Bom 186.*

4. "Conceals or detains".—(1) The words "any such woman" in the expression "conceals or detains with that intent any such woman" do not mean any woman taken or enticed away as described in the first part of the section but refer to any woman who is and whom the offender knows or has reason to believe to be the wife of any other man. If therefore without any taking or enticement, a woman leaves her husband and goes to the offender who thereafter prevents her by allurement or blandishments from returning to her husband, the offender must be held to have concealed or detained her within the meaning of the section. *AIR 1959 SC 436.*

(2) Proof of some kind of persuasion or allurement or blandishment is necessary to constitute detention. *AIR 1951 Kutch 17.*

(3) Where there is no proof of any persuasion or allurement or blandishment the accused would not be guilty. *AIR 1934 Oudh 258.*

5. "Any woman who is the wife of another."—(1) It is necessary for the prosecution under S. 498 to prove the factum of marriage strictly. *(1880) ILR 5 Cal 566.*

(2) Mere proof of the factum of the marriage is not sufficient where the validity of the marriage is in question. The marriage must be proved to have been performed in accordance with the requirements of law of custom governing the parties. *AIR 1933 Cal 880.*

(3) Marriage must be proved not merely by the admission of the complainant and his wife but by direct evidence of the witnesses speaking to the facts said to constitute the marriage. *AIR 1957 Pat 285.*

(4) If a woman whom the accused is charged of enticing away, is not a married woman, the offence does not fall under this section but may fall under Section 366. *AIR 1955 NUC (Pat) 4586.*

(5) Muhammedan marriage is immediately dissolved on one of the parties to that marriage renouncing the faith of Islam and hence where a Muhammedan married woman renounces her religion and she is thereafter taken away by the accused, the latter cannot be convicted under this section. *AIR 1933 All 433.*

6. Knowledge or reason to believe.—(1) To sustain a conviction under this section there must be evidence that the accused knew that the woman was the wife of another man; mere presumption that he must have known it is not sufficient. *1951 RD (HC) 32.*

(2) Where the accused who lived in a negighbouring village and belonged to the same community as the girl who was enticed away, it was presumed that he had the necessary knowledge that she was the lawful wife of her husband. *AIR 1928 Lah 898.*

(3) Where though the prosecution had not charged the accused with knowledge as requirement under this section, the accused knew what he was charged with and what the prosecution had to prove the absence of a charge alleging the requisite knowledge will not affect the case. *AIR 1927 Lah 432.*

7. From the control of the husband or person having care of her on behalf of the husband.—(1) The taking or enticement of the wife must be proved to have been from the control of the husband of the woman. *AIR 1934 Sind 10.*

(2) Where the woman had been discarded by her husband and was living with her father or brother who were taking care of her on their own account and not on behalf of her husband, it cannot be said that the enticing of such a woman was from the control of the husband or from the person having care of her on behalf of the husband. *AIR 1937 Bom 186.*

8. Intention.—(1) The prosecution must prove that the accused took or enticed away the married woman with the intention that she should have sexual intercourse with the accused himself or with another person. *AIR 1954 Him Pra 39.*

(2) The question of intention is one of fact and is a matter of inference from the evidence and from the surrounding circumstances. *AIR 1952 Mys 34.*

(3) A person who entices away a married woman to dispose of her in marriage commits an offence under this section since any intercourse between her and the person she marries would be illicit. *AIR 1931 Lah 194.*

9. "Any such woman".—(1) The words "any such woman" in this section refers to woman "who is and whom he knows or has reason to believe to be the wife of any other man." It does not mean such a woman as has been so "taken" or "enticed." *AIR 1940 Cal 477.*

10. Complaint.—(1) In the absence of a complaint by husband the Courts have no jurisdiction to try the case and convict the accused. *1980 Cri LJ (NOC) 85.*

(2) Where there was a report to the police for an offence under S. 366A but no complaint by the husband and the accused was convicted for an offence under this section the conviction was bad. *AIR 1933 All 626.*

(3) Where the woman had been discarded by her husband and she was living with her brother and father and during such period, she was enticed away, the complaint by the brother or father is not valid since they were taking care of her on their own account and not on behalf of the husband. *AIR 1937 Bom 186.*

(4) Where a case was registered under Sections 498 and 379 of the Code and there was no complaint by the person concerned and consequently the Magistrate had no jurisdiction to try the offence under this section, the charge under Section 379 could be proceeded with. *AIR 1955 NUC (Ajmer) 3828.*

(5) Where the wife after abandonment by the first husband marries another person, which marriage was recognised as valid by caste custom such second husband and not the erstwhile husband is competent to institute complaint under this section. *AIR 1930 All 834.*

(6) Where the facts stated in the complaint make out a case under S. 497 or 498 and also offences under some other sections, it cannot be said that the complaint is not a proper one as contemplated by S. 198, Criminal P. C. and therefore no cognizance of such offence could be taken by the Magistrate. *AIR 1958 All 76.*

(7) Where the complaint is one of kidnapping and theft of jewels and there is no allegation of any intention that the woman should be made to have illicit sexual intercourse either with the accused or with anyone else, a conviction of the accused under this section will be untenable. *AIR 1924 Mad 323.*

11. Charge and conviction.—(1) Evidence not proving charges under S. 493 but discloses offences under S. 497—Accused can be convicted of that offence even if not charged with it. *1968 CriLJ 1352.*

(2) If the facts, in a trial for an offence under S. 498, disclose an offence under S. 498 read with S. 34 a conviction under S. 498 read with S. 34 is not bad. *AIR 1957 Pat 285.*

12. Abetment.—(1) Where a man is convicted under this section, with "enticing away" a woman the woman cannot be guilty as an abettor. *1871 Pun Re (Cri) No. 6. p. 7.*

13.. Jurisdiction.—(1) A complaint under this section for detaining a woman for illicit intercourse can be enquired into only in the place where such detention took place. *AIR 1918 Lah 357.*

(2) The "taking" is not a continuing offence but is complete as soon as the person concerned is out of the keeping or control of the guardian. 'Enticing', in itself, may be a continuous process but enticing from a particular person cannot be so. *AIR 1937 Bom 186.*

14. Procedure.—(1) Where in a case under this section, the accused are women, the Magistrate should ordinarily, in the first instance, issue summons instead of warrants upon all the women, and, whether their attendance could be dispensed with, should also be considered. *AIR 1939 Sind 342.*

(2) Under S. 320, Criminal P. C., the only person, who is authorised to compound an offence under this section is the injured husband and hence an order of acquittal based on a compromise entered into by any other person, who lodged the complaint is erroneous. *AIR 1924 Lah 330.*

(3) Where the complaint was by the husband and, after the sworn statement was taken by the Magistrate, it was referred to the Police and thereafter process was issued, the cognizance of the complaint is proper. *AIR 1952 Mys 34.*

(4) Criminal prosecution under this section cannot abate merely on account of the death of the injured party, namely, the husband. *AIR 1924 Lah 72.*

(5) Not cognizable—Warrant—Bailable—Compoundable—Triable by any Magistrate.

15. Evidence and proof.—(1) The prosecution must prove all the essential ingredients of the offence. It must be proved that the woman was a married woman, that she was 'taken' or 'enticed' or 'concealed' or 'detained', and that it was done with the intention that the accused or some one else may have illicit intercourse with her. In the absence of such proof there can be no conviction. *AIR 1949 All 237.*

(2) The mere fact that the wife went away of her own accord from the husband's house, and she was accompanied for a part of the way by the accused is not sufficient to show that the accused took or enticed the woman away within the meaning of this section. *AIR 1935 Cal 345.*

(3) On facts it was found inherently improbable that accused who was first cousin of the woman would harbour evil designs against her. *AIR 1980 SC 1729.*

16. Sentence.—(1) Where the woman is an active abettor in her own abduction, the sentence should be a light one. *AIR 1927 Lah 91.*

(2) Where the abducted woman was not returned to the complainant though the accused had promised to do so, the sentence of six months R. I. was considered not excessive. *AIR 1933 Lah 932.*

(3) The fact that the woman enticed away was unchaste is no ground for a lenient punishment. *AIR 1957 Pat 285.*

17. Appeal.—(1) Where the accused is alternately charged under S. 366A or Section 498, and the lower Court convicts the accused under S. 366A, it does not necessarily mean an acquittal of the

charge under S. 498, especially where there is no finding by the lower court about the offence under Section 498. The High Court therefore is competent under S. 386, Criminal P. C., to alter the conviction under S. 366A into a conviction on the alternative charge of S. 498. *AIR 1937 All 353.*

(2) The appellate Court has no power to impose a punishment higher than what the Court of first intance could do. *AIR 1947 Mad 368.*

18. Practice.—Evidence—Prove: (1) That the woman in question is the wife of another man.

(2) That she was under the care of her husband, or of someone on his behalf.

(3) That the accused took or enticed her away from her husband or that other person or persons, or concealed, or detained her.

(4) That the accused knew, or had reason to believe , that she was the wife of another man.

(5) That the accused did as above with intent that she might have illicit intercourse with some person.

19. 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 of—, at—, took away (or enticed away, or concealed, or detained) a certain woman to wit X, whom you knew or had reason to believe to be the wife of Y, from the said Y, (or from Z who has the case of the said X on behalf of Y), with intent that the said X might have illicit intercourse with the same person; and that you thereby committed an offence punishable under section 498 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.