CHAPTER—VI

OF PROCESSES TO COMPEL APPEARANCE

A.—Summons

68. Form of summons.—(1) Every summons issued by a Court under this Code shall be in writing in duplicate, signed and sealed by the presiding officer of such Court, or by such other officer as the Supreme Court may from time to time, by rule, direct.

(2) **Summons by whom served.**—Such summons shall be served by a police-officer or subject to such rules as the Government may prescribe in this behalf, by an officer of the Court issuing it or other public servant.

(3) Omitted.

Scope and application—A summons should be clear and specific in its terms as to the title of the Court, the place at which and the day the time of day when the attendance of the person summoned is required, and it should go on to say that such a person is not to leave the court without permission. If these formalities are not duly observed, a conviction for non-attendance in obedience to the summons cannot be sustained (5 All 7). A summons which is not sealed is not valid in law, and, therefore, disobedience to a summons not sealed is not an offence. Every summons should be signed in full by the officer by whom it is issued, with the name of his office or the capacity in which he acts.

9 DLR 923—Ahmed Kabir Dafadar Vs. The State—Dafadar or Choukider is a public servant within the meaning of S. 21 of the Penal Code, and each of them has the right to arrest accused in some circumstances (Ref : 7 DLR 344).

69. Summons how served.—(1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(2) **Signature of receipt for summons.** Every person on whom a summons is so served shall if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation or by registered post letter addressed to the chief officer of the corporation in Bangladesh. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

Scope and application—Section 69 speaks of personal service. This section prescribes also the mode of service on an incorporated company or other body corporate. When correct address and posting of a letter are proved there is a presumption of its delivery in due course. Every summons under that Code must be served as provided in this section.

70. Service when person summoned cannot be found.—Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Scope and application—If the person summoned cannot be found, the summons may be served on an adult male member of his family; the service of summons on the mother of the accused is not warranted by this section (26 Cr. LJ 1393).

71. Procedure when service cannot be effected as before provided.—It service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicious part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

Deccision

43 Cr.LJ 113—Service by affixture can only be availd of if service in the manner specified in sections 69 and 70 cannot by the exercise of due diligence be effected.

72. Service on servant of Republic.—(1) Where the person summoned is in the active service of the Republic, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court under his signature with the endorsement required by that section.

(2) Such signature shall be evidence of due service.

Scope and Application—It is the duty of the court to summon the witnesses who are Govt. employees through the immediate Heads of the Departments concerned. It is the duty of the superior officer who receives summons under this section to serve it on the person summoned.

73. Service of summons outside local limits.—When a Court desires that a summons issued by its shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

74. Proof of service in such cases and when serving officer not persent.—(1) When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

B.—Warrant of Arrest

75. Form of warrant of arrest.—(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench : and shall bear the seal of the Court.

(2) **Continuance of warrant of arrest.** Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

Scope and application—The arrest is to apprehend by legal authority and a warrant of arrest is an order directing a certain person to arrest a named person who is to answer some charge and to produce him before court. The essential of a valid warrant must (a) be in writing i. e. not verbal, (b) describe the person to be arrested with reasonable certainty, and particularly so as to establish his indentity. The onus is on the prosecution to prove identity, (c) specify the offence charged with clearness, (d) be signed by the presiding officer, (e) be sealed with the seal of the court and (f) bear the name and designation of the person who is to execute (14 Cr. LJ 142). Warrant may be cancelled only by the issuing court. Once cancelled it cannot be re-issued (1 CWN 650).

76. Court may direct security to be taken.—(1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; and

(c) the time at which he is to attend before the Court.

(3) Recognizance to be forwarded. Whenever security is taken under this section the officer to whom the warrant is directed shall forward the bond to the Court.

Scope and application—Bailable warrant may be issued even in non-bailable cases (12 Cr. LJ 430). Arresting on a bailable warrant without first intimating the fact that bail would be taken is illegal (16 CWN 549).

20 DLR 828—Md. Abdul Jabbar Khan Vs. The State—Section 76 does not sanction procedure for testing surety by SDPO. Only procedure is schedule V appended to the Code of Criminal Procedure.

77. Warrants to whom directed.—(1) A warrant of arrest shall ordinarily be directed to one or more police-officers, and, when issued by a Metropolitan Magistrate, shall always be so directed, but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

(2) Warrants to several persons. When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more, of them.

Scope and application—A Magistrate cannot issue a warrant to an unofficial person, except when he is without the assistance of competent police-officers and unless the urgency is imminent. Where an accused resides in some foreign country, extradition proceedings have to be resorted to secure his presence in court and a warrant has to be issued for his arrest. The assistance of the Government for the execution of the warrant is to be obtained.

4 BLC 152—Manik (Md) Vs. Chand Mian Sarder and others—Execution of warrant of prosecution witnesses –The learned Special Tribunal has to be satisfied that in spite of execution of warrants of arrest the prosecution witnesses defaulted in appearing before the Tribunal and mere issuance of warrants of arrest against the prosecution witnesses is not enough. Conclusion of the trial and the pronouncement of the judgment without exhusting all steps required to be taken by

the learned Special Tribunal for the examination of the prosecution witnesses for the purpose of unveiling the truth is not at all warranted in law.

78. Warrant may be directed to land-holders, etc.—(1) A District Magistrate of Sub-divisional Magistrate may direct a warrant to any land-holder, farmer or manager of land within his district or sub-division for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence and who has eluded pursuit.

(2) Such land-holder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, his land or farm, or the land under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76.

79. Warrant directed to police-officer.—A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

Scope and application—If a warrant directed to a police-officer is executed by another officer without endorsement, the execution is illegal (22 Cr. LJ 145). Endorsement by initials is undesirable (5 CWN 447).

80. Notification of substance of warrant.—The police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so require, shall show him the warrant.

Scope and application—'Notify the substance' means state clearly and briefly so that the accused may know what is the charge and before what court he is to appear. An arrest without notifying the substance of the warrant is unlawful (26 Cal 748).

81. Persons arrested to be brought before Court without delay.—The police-officer or other person executing a

warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

82. Where warrant may be executed.—A warrant of arrest may be executed at any place in Bangladesh.

83. Warrant forwarded for execution outside jurisdiction.—(1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police-officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police or, the Police Commissioner in a Metropolitan Area within the local limits of whose jurisdiction it is be executed.

(2) The Magistrate or District Superintendent or Police Commissioner to whom such warrant is so forwarded shall endorse his name thereon and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction,

Scope and application—The Code does not authorise the execution of any warrant outside Bangladesh. The section applies also to warrants issued under Special Acts.

84. Warrant directed to police-officer for execution outside jurisdiction.—(1) When a warrant directed to a police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police-officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed to execute the same within such limits, and the local police shall, if so required assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or

police-officer within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution, the police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it.

Scope and application—The police-officer directed to execute a warrant is himself to execute it. But to have authority for the same, he is to get an endorsement from a Magistrate or police-officer not below the rank of an officer-in-charge of a police-station within the local limits of whose jurisdiction the warrant is to be executed.

85. Procedure on arrest of person against whom warrant issued.—When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superientendent of Police or, the Police Commissioner in a Metropolitan Area within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76, be taken before such Magistrate or Police Commissioner or District Superintendent.

86. Procedure by Magistrate before whom person arrested is brought.—(1) Such Magistrate or District Superintendent or Police Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court :

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Police Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Police Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76.

C.—Proclamation and Attachment

87. Proclamation for person absconding.—(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows :—

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village; and

(c) a copy thereof shall be affixed to some conspicuous part of the Court house.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

Scope and application—This section empowers the court to issue proclamation against a person when a warrant against him is returned unexecuted for evasion, concealment or abscondence. The power is common to all Magistrates. Proclamation cannot be issued without first issuing a warrant. Proclamation can issue only when the court is clearly satisfied by examining the serving officer or in any other manner that a warrant had already been issued and that the accused is absconding or concealing (23 Cr. LJ 454). Proclamation being in contravention of section 87, held, liable to be quashed.

55 DLR 536 (HC)—Sirajul Islam (Md) and Ors. Vs. The State—From a careful reading of the provisions of sub-section

(6) of section 27 of the Act it appears that the law makers have comsciously excluded the use of the provisions of sections 87 and 88 of the code in respect of trial under Special Power Act.

49 DLR 189—Jobaida Rashid, wife of Khondaker Abdur Rashid Vs. The State—There is a gulf of difference between absence and abscondence—absence is not abscondence. For holding that a person is an absconder something more has to be shown.

49 DLR 520—Balayet Howlader Vs. The State—The trial Court without taking steps or ascertaining about the compliance of sections 87 and 88 of the Code directed publication of notice. On such facts it cannot be said that the accused was concealing himself from appearing in court and publication of notice in newspaper and commencing the trial was in clear violation of the mandatory provision of law. So the case is sent back on remand for re-trial giving opportunity to the petitioner for cross-examining the PWs already examined.

48 DLR 218— Maulana M. A. Mannan, and 2 others Vs. The State— The prerequisites for publication of a proclamation are the issuance of a warrant and abscondence of the accused so as to evade the execution of the warrant. Attachment under section 88 of the Code of the property movable or immovable, belonging to the proclaimed person can be made after the order of proclamation issued under section 87.

42 DLR 15—Lal Meah Vs. The State—For compelling an absconder accused to be brought to trial, coercive power under sections 87 and 88 could be used. Section 339B added to the Code to provide for trial in absentia. Interpretation of Statute-Procedures though apparently procedural are substantive in nature. Failure to observe these would render subsequent proceeding coram non judice and a nullity.

40 DLR 150—Md. Sabuj Vs. The State—Both the accuseds could not be regarded as having absconded as they were granted bail and summonses and warrants were directed to be issued but there was neither any service of summons nor any

report of their execution. The entire trial of the two accused persons held in their absence was illegal.

13 DLR 736—Abdur Rashid Vs. The State—No bar to the issuance of processes under section 87 and 88 together. They can be issued while a warrant had already been issued. Giving of thirty days time for surrender is not always an absolute rule.

12 BLD 376—Md. Mozibul Hoque Vs. The State—Whether it is imperative on the part of the Special Judge to adopt procedure under sections 87, 88 and 339B of the Code of Criminal Procedure without taking notice as to whether there was any publication of the notification in the official gazette earlier. Trial in the absence of the accused without complying with the procedure is a nullity and the order of conviction and sentence being without jurisdiction, cannot be sustained (Ref : 10 BLD 278).

6 BLC (HC) 220—M Alam Chowdhury and 9 others Vs State (Criminal)—Sections 87, 88 and 339B—(1) Compliance of sections 87 and 88, Cr.P.C is a pre-requisite for taking resort to section 339B but the Drug Court without complying with the procedure prescribed by sections 87 and 88, Cr.P.C resorted to section 339B which is illegal and flagrant violation of such sections.

6 BLC (HC) 184—Shamsul Alam Vs. State (Criminal)—Where the Special Tribunal is satisfied from the record of the Magistrate that even after exhausting the processes under sections 87 and 88 of the Code of Criminal Procedure the accused person has absconded or concealed himself, the Tribunal itself shall pass an order for publication of the notice in at least two Bengali daily newspapers but the notice published by the order of the Magistrate in daily newspapers cannot be considered as compliance with the mandatory provisions of section 27(6) of the Special Powers Act but for that reason the proceeding cannot be quashed. For ends of justice the case is sent back to the Special Tribunal to proceed with the case in accordance with law after setting aside the impugned judgment.

88. Attachment of property of person absconding.—(1) The Court issuing a proclamation under section 87 may at any time order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate or Chief Metropolitan Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(e) by taking possession; or

(f) by the appointment of a receiver; or

(g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(h) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of livestock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Order XL of the First Schedule to the Code of Civil Procedure, 1908.

(6A) If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part :

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative.

(6B) Claims or sbjections under sub-section (6A) may be preferred or made in the Court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Metropolitan Magistrate in accordance with the provisions of sub-section (2), in the Court of such Magistrate.

(6C) Every such claim or objection shall be inquired into by the Court in which it is preferred or made :

Provided that, if it is preferred or made in the Court of a District Magistrate or Chief Metropolitan Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Metropolitan Magistrate, as the case may be, subordinate to him.

(6D) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (6A) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive. (6E) If the proclaimed person appears within the time specified in the

proclamation, the Court shall make an order releasing the property from the attachment.

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of the Government, but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under sub-section (6A) has been disposed of under that sub-section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

Decisions

29 DLR 72—Sultanuddin Ahmed Vs. Murshed Ali—The order restraining both the parties from entering in the disputed land and appointing a receiver for the same amounted to attachment of the land according to the provision of section 88 (3) Cr. P.C.

11 DLR 19—Umesh Chandra Bhadra Vs. Sk. Somed Ali—Under section 88 Cr. P.C it is not incumbent on any claimant to prefer a claim or objection to the attachment of any property. But if anybody prefers a claim or objection, he is to prefer it within six months and, if so preferred, it will be inquired into under sub-section (6D) and the order allowing or disallowing the claim or objection in whole or in part shall be conclusive subject to the result of a suit that may be instituted by such a claimant or objector to establish the right which he claims in respect of the property.

10 BLD 278—Mokthar Ahmed Vs. Haji Farid Alam—Section 339B and Section 87 and 88 Whether synonymous-held not synonymous- The principle of natural justice requires that the accused must be given a chance that he is facing a trial and has to meet the charges framed against him. Failure to comply with the provisions of Section 339B Cr. P.C is not only violative of the provision of sub-section (1) of section 339B Cr. P.C but also violative of the principle of natural justice (Ref : 42 DLR 162).

Revision—Revision lies to quash the attachment in the following cases (i) where the attachment order violates the condition for its exercise (1972 Cr. LJ 289 Mys); (ii) where the proclamation contravenes section 82 (e); (iii) where the court fails to determine the claim or objection filed under section 88; and (iv) where the court simply order the claim or objection to be filed (AIR 1955 All 127, 13 DLR 736).

89. Restoration of attached property.—If, within two years from the date of the attachment any person whose property is or has been at the disposal of the Government, under sub-section (7) of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

Scope and Application—For the purposes of this section it is not necessary that the absconding accused should himself personally apply for the restoration of the property; the application can be made by any one his behalf. But it is essential that the absconding accused should appear and prove the facts required, viz, that he did not abscond or conceal himself for the purpose of avoiding the arrest and that he had not notice of the proclamation (Ref : 13 DLR 736).

Appeal—An order refusing restoration of property is appealable under section 405 Cr. P.C.

D.—Other Rules regarding Processes

90. Issue of warrant in lieu of, or in addition to summons.—A Court may, in any case in which it is empowered by this Code to issue a summons for the

appearance of any person issue, after recording its reasons in writing, a warrant for his arrest—

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

Decisions

7 BLC (HC) 24—Zainal Abedin (Md) Vs. State (Criminal)—Sections 90, 164, 428 and 509A—Learned Attorney-General submits that required procedural legal steps cannot be taken at this appellate stage by the State-respondent and the same are to be taken in the trial Court. In the absence of above legal steps the appellate Court cannot go forward to consider those papers for legal decision in the matter. Accordingly, High Court Division sent the case back to the trial Court for retrial in order to exhaust the legal process and procedure fully to secure the presence of vital witnesses like investigating-officer, MO and Magistrate concerned only for proper disposal of this case according to law and justice.

91. Power to take bond for appearance.—When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court.

Decisions

7 DLR 104 (WP)—Crown Vs. Mst. Qaisar—A woman, over whom two factions threatened to commit a breach of the peace was remanded to judicial custody by a Magistrate. The order had no reference to section 91 Cr. P.C., but was passed in the interest of public tranquility. Held : Such a motive did not give the Magistrate jurisdiction to confine anyone in jail.

92. Arrest by breach of bond for appearance.—When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

93. Provisions of this Chapter generally applicable to summonses and warrants of arrest.—The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

E.—Special Rules regarding processes issued for service or execution outside Bangladesh and processes received from outside Bangladesh for service or execution within Bangladesh.

93A. Sending of summons for service outside Bangladesh.—(1) Where a Court in Bangladesh desires that a summons issued by it to an accused person shall be served at any place outside Bangladesh within the local limits of the jurisdiction of a Court established or continued by the authority of the Government in exercise of its foreign jurisdiction, it shall send such summons, in duplicate, by post or otherwise, to the presiding officer of that Court to be served.

(2) The provisions of section 74 shall apply in the case of a summons sent for service under this section as if the presiding officer of the Court to whom it was sent were a Magistrate in Bangladesh.

93B. Sending of warrants for execution outside Bangladesh.—Notwithstanding anything contained in section 82 where a Court in Bangladesh desires that a warrant issued by it for the arrest of an accused person shall be executed at any place outside Bangladesh within the local limits of the jurisdiction of a Court established or continued by the authority of the Government in exercise of its foreign jurisdiction, it may send such warrant, by post or otherwise, to the presiding officer of the Court to be executed.

93C. Service and execution in Bangladesh of processes received from outside Bangladesh.—(1) Where a Court has received for service or execution a summons to, or a warrant for the arrest of, an accused person issued by a Court established or continued by the authority of the Government in exercise of its foreign jurisdiction, outside Bangladesh, it shall cause the same to be served or executed as if it were a summons or warrant received by it from a Court in Bangladesh for service or execution within the local limits of its jurisdiction.

(2) Where any warrant of arrest has been so executed the person arrested shall so far as possible by dealt with in accordance with the procedure prescribed by sections 85 and 86.

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CHAPTER—VII

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED

A.—Summons to produce

94. Summons to produce document or other thing.— (1) Whenever any court, or, any officer in charge of a police-station considers that the production of any document or other thing in necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order :

Provided that no such officer shall issue any such order requiring the production of any document or other thing which is in the custody of a bank or banker as defined in the Bankers' Books Evidence Act, 1891 (XVIII of 1891) and relates, or might disclose any information which relates, to the bank account of any person except,—

(a) for the purpose of investigating an offence under sections 403, 406, 408 and 409 and sections 421 to 424 (both inclusive) and sections 465 to 477A (both inclusive) of the Penal Code with the prior permission in writing of a Sessions Judge; and

(b) in other cases, with the prior permission in writing of the High Court Division.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Evidence Act, 1872, sections 123 and 124, or to apply to a

letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities.

Scope and application—This section deals with the production of any document or other things. It may be secured either by summons or by warrant. The words document or thing are general and seem to cover any document, the production and inspection of which are necessary or desirable or will serve the ends of justice. Before the Magistrate can order for the production of any document he must judicially consider whether the production of the document is necessary or relevant for the purpose of the trial. The combined effect of the provisions of this section, sections 155 and 165 Cr. P.C is that without an order of a competent Magistrate, a police-officer cannot investigate a non-cognizable case and further that even if he is so authorised, he has to observe the formalities as laid down in this section and 165 before he can compel the production of any document or seize any incriminating article.

If any bank's paper or account or document which is in custody of a bank is required in connection with the investigation the police cannot look those papers without the order of the Sessions Judge or of High Court Division. Because, commercial concerns are entitled to protection from the disclosure of matters which have nothing to do with the case before the court which disclosure may be detrimental generally to their interest (AIR 1943 Sind 51). To pass an order of issuing a summons under sub-section (3), two conditions need be satisfied, viz., (i) the production of documents or things should be necessary or desirable for purposes of investigation, inquiry or other proceeding; and (ii) they must be under the custody of the postal or telegraph authorities. Documents or things not in existence, but to come into the custody of authorities in future cannot, therefore, be the subject matter of an order under this section.

55 DLR 56 (HC)—Mohsin Hossain Vs. Govt. of the peoples Republic of Bangladesh—Section 94 and 160—No police officer can ask any person to attend or to appear before him and no reason is required to attend a police officer merely because he

is ordered or required verbally or in writing unless his attendance is so require in connection with investigation of a criminal case or any proceeding.

54 DLR (HC) 12—Humayun Majid Vs. Bangladesh Bureau of Anti-Corruption and ors (Spl. Original)—Sections 94, 155 & 156—The combined effect of the provisions of section 94, 155 and 165 is that without an order of a competent Magistrate a police officer cannot investigate a non-cognizable case; and even if he is authorised, he has to observe the formalities as laid down in section 94 and 165 of the Code before he can compel the production of any document or seize any incriminating article.

51 DLR 145—Arab Bangladesh Bank Ltd. Vs. Md Shahiduzzaman and others—Section 94 Cr. P. C speaks of production of any document or other things but not of seizure by any police officer from any bank relating to bank's account. The Sessions Judge acted illegally in passing the order according permission to seize the record from the bank's custody. Ref. [18 BLT (HCD) 167].

51 DLR 72—Abdul Hafiz (Md) and others Vs. Director General, Bureau of Anti-Corruption, Government of Bangladesh—The authority of the Anti-Corruption Officer requiring the petitioners to attend and give statements before him in the interest of an inquiry under the provisions of section 94 of the Code cannot be questioned.

51 DLR 421—Imtiazur Rahman Farooqui (Md) (M. I. Farooqui) Vs. Bureau of Anti-Corruption and others—The information asked for by the impugned order from the petitioner is not something which is capable of being searched. Therefore the information asked for does not conform to section 94 of the Code. The impugned order purported under section 94 of the Code and Articles 31/50 of the Anti-Corruption Manual is unauthorised and illegal as they do not confer any power to direct a person to give information.

The information asked for the purpose of inquiry was of a roving nature and was merely fishing for information. If we are to believe that the inquiry was in response to the information

received by the anonymous letter then the wholesale information of all cases handled by the petitioner from 1-3-93 to 20-03-94 cannot be said to be connected with the alleged remittance of the sale proceeds of the house at Motijheel and Gulshan. The asking for such wholesale information of the cases handled by him for that period appears to us to be malafide, fishing for information only to harass the petitioner. [Ref. 19 BLD (HCD) 382].

42 DLR 151—Abdus Satter Bhuiyan Vs. Deputy Commissioner—Provisions of section 94 Cr.P.C discussed. A Court or an Officer-in-Charge of a Police-Station may issue or a written order to the person in whose possession or power such document or thing is believed to be there, for investigation, requiring him to attend and produce it at the time or place stated in the summons or order. Documents required to be filed on 27.4.86 have been filed long after that date by which time cognizance of the alleged offence has been taken on 28.8.86. Held-Prima facie offence has already been committed by the petitioner.

13 DLR 146—Moqbul Hossain Vs. The State—If no inquiry, proceeding of trial is pending no order can be passed to produce any document. Any person means accused or complainant.

16 BLD (HCD) 220—Messrs Hamidia Oil Mills Vs. District Anti-Corruption Officer, Chittagong and ors.—Summons to produce document or other thing.

For the purpose of enquiry into a complaint no formal case or F. I. R is necessary before a police officer can apply for permission to the Sessions Judge for production and seizure of any document. But before according permission the Sessions Judge will have to satisfy himself fishing for information to harass, intimidate or coerce innocent persons.

5 BLC 134.—Gaisuddin -al Mamum and 12 others Vs. DG, Bureau of Anti-corruption and others—Sections 94 and 160- An Officer of the Anti-corruption Department can exercise power under section 94, Cr.P.C while making an enquiry on receipt of complaint and that the offences which are included

in the schedule are not confined to public servant which are liable to be commited by any person and hence an Officer of Bureau of Anti-corruption can exercise power under sections 94 and 160 of the Code of Criminal Procedure against private persons and that the enquiry being of a preliminary nature the statement or documents produced by the petitioners will not lead to their conviction and punishment and a person cannot seek the protection of Article 35(4) of the Constitution when a notice is sent by the Bureau of Anti-corruption under sections 94 and 160, Cr.P.C when section 3 of Anti-corruption Act has empowered an Officer of Bureau of Anti-Corruption to serve notice under sections 94 and 160 of the Code of Criminal Procedure only for the purpose of enquiry to determine the truth of the information received.

4 BLC 376—Monowar Islam alias Monu Vs. State and others—Section 94 and 476–When the document is still lying in the custody of the Court in a proceeding of Civil suit and the claim of the present petitioner is based on the pattanama in question although it has not been used or given in evidence the District judge cannot exercise its power in according permission to the Anti-corruption Inspector to seize the document in question and consequently the enquiry proceeding started by the District Anti-corruption Officer is without jurisdiction which is liable to be quashed.

Revision—Revision lies against the order of the Magistrate before the Sessions Judge under section 435 and 439A Cr. P.C No revision lies against the discretion of the Sessions Judge and High Court Division (AIR 1970 SC 962 Para 13).

Punishment—Omission to produce the document or thing is punishable under section 175 Penal Code.

95. Procedure as to letters and telegrams.—(1) If any document, parcel or thing in such custody is, in the opinion of any District Magistrate. Chief Metropolitan Magistrate, High Court Division or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such

document, parcel or thing to such person as such Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, Police Commissioner or District Superintendent of Police, wanted for any such purpose, he may require the postal or Telegraph Department, as the case may be, to cause search to the made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Metropolitan Magistrate or Court.

Scope and application—This section has to be read along with Sec. 94. A combined reading of these two sections leads to the conclusion that, in order to pass an order, two things must be satisfied; (a) that the production of the documents or thing should be necessary or desirable for the purpose of investigation, trial or proceeding, and (b) that they must be under the custody of the Postal or Telegraph authorities.

B.—Search-Warrants

96. When search-warrant may be issued.—(1) Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, sub-section (1) has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition.

or where such document or thing is not known to the Court to be in the possession of any person,

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant, and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) Nothing herein contained shall authorise any Magistrate other than a District Magistrate or Chief Metropolitan Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or Telegraph authorities.

Scope and Application—This section is supplementary to section 94 and 95, the object being to make provisions effective by issue of a search-warrant. A search is an invasion of the sancitity and privacy of citizen's home. The power to issue search warrant being a drastic one is not to be lightly used and an unjustifiable use of it may lead to serious consequences causing loss of prestige or business to individuals and firms. Search warrant under this section may be issued in three contingence : (a) where the court "has reason to believe" that a summons for production (under section 94 and 95) will not be obeyed, or (b) where the "document or thing is not known to be in possession of any person", or (c) where a general search or inspection is considered necessary for the purpose of trial or inquiry or other proceeding under the Code, whether pending or in contemplation. Issue of a search warrant is a judicial act and it ought only to be issued after judicial inquiry and upon proper materials (44 CWN 82).

52 DLR (AD) 162—Government of Bangladesh and others Vs. Hussain Mohammad Ershad—The submission that by search and seizure no fundamental right of the petitioner is violated is misconceived on the facts of the instant case.

20 DLR 68—Abdul Halim Vs. Sadhan Ranjan Dey—Search warrant when may be issued. All that is required in section 96 Cr. P.C is that the Magistrate should act on information of the commission or suspected commission of an offence (Ref : 5 DLR 53 WP).

Revision—Revision lies under section 435 and 439A Cr. P.C before the Sessions Judge for setting aside the order of the Magistrate who does not apply his mind judicially to the requirements of law and grant search-warrant arbitrarily.

97. Power to restrict warrant.—The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

98. Search of house suspected to contain stolen property, forged documents, etc.—(1) If a District Magistrate, Sub-divisional Magistrate, Metropolitan Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property.

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging.

or, that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging, are kept or deposited in any place.

or, if a District Magistrate, Sub-divisional Magistrate or a Metropolitan Magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit, sale, manufacture or production of any obscene object such as is referred to in section 292 of the Penal Code or that any such obscene objects are kept or deposited in any place; he may be his warrant authorise any police-officer above the rank of a constable–

(a) to enter, with such assistance as may be required, such place; and

(b) to search the same in manner specified in the warrant; and

(c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects, and also of any such instruments and materials or of any such obscene objects as aforesaid; and

(d) to convey such property, documents, seals, stamps, coins, instruments or materials or such obscene objects before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety; and

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments, or materials or such obscene objects knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging or the said obscene objects to have been or to be intended to be sold, let to hire, distributed, publicly exhibited, circulated, imported or exported.

(2) The provisions of this section with respect to—

(a) counterfeit coin,

(b) coin suspected to be counterfeit, and

(c) instruments or materials for counterfeiting coin, shall, so far as they can be made applicable, apply respectively to—

(i) pieces of metal made in contravention of the Metal Tokens Act, 1889 or brought into Bangladesh in contravention of any notification for the time being in force under section 16 of the Customs Act, 1969.

(ii) pieces of metal suspected to have been so made or to have been so brought into Bangladesh or to be intended to be issued in contravention of the former of those Acts, and

(iii) instruments or materials for making pieces of metal in contravention of that Act.

Scope and application—If there is no search-warrant under this section, the search is illegal and the occupiers of the house have a legal right of private defence in resisting it (38 Cal 304). The 'obscene objects' referred to in sec. 292 P.C are not defined.

56 DLR 274—Saiduzzaman (Md) (Mithu) and anr Vs. Munira Mostafa and anr—Even if the facts disclosed in the complaint are true and the properties of the complainant are wrongfully retained, recovery of such goods by issuing search warrant is not at all contemplated under section 98 of the Code.

40 DLR 295—Qari Habibullah Belali Vs. Captain Anwarul Azim Khan—Provision of Section 98 is applicable only when the Magistrate is satisfied that the place to be searched is used for deposit or sale of stolen property. Wrongful detention of articles has nothing to do with section 98 and application of section 98 is not maintainable. Order for issuance of Search-Warrant for recovery of retained article is illegal and is liable to be set aside.

25 DLR 206—Md. Yusuf Ali Vs. Munir Sonar—For seizure of stolen goods no petition is required to be filed by the complainant in the case. Section 98 Cr. P.C does not provide for returning goods to persons from when the same had earlier been seized (Ref : 20 DLR 68).

21 DLR 229—M.K. Hossain Vs. Omar Gazi Chowdhury—Examination of complainant in a pending proceeding is not necessary to issue search-warrant. Simple examination for the cognizance is enough.

99. Disposal of things found in search beyond jurisdiction.—When, in the execution of a search-warrant any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate, and unless there be good cause to the contrary, such Magistrate shall make an order authorising them to be taken to such Court.

99A. Power to declare certain publications forfeited and to issue search warrants for the same.—(1) Where any

newspaper or book or any document, wherever printed, appears to the Government to contain—

(a) any matter the publication of which is punishable under section 123A or section 124A or section 153A or section 292 or section 295A or section 505 or section 505A of the Penal Code (Act XLV of 1860); or

(b) any matter which is defamatory of the President of Bangladesh, the Vice-President of Bangladesh, the Prime Minister of Government, the Speaker of Parliament or the Chief Justice of Bangladesh; or

(c) any matter which is grossly indocent or is scurrilous or obscene; or

(d) any words or visible representations which incite, or which are likely to incite, any person or class of persons to commit any cognizable offence.

The Government may, by notification in the official Gazette, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, words or visible representations and every copy of such book or other document to be forfeited to Government, and thereupon any police-officer may seize the same wherever found in Bangladesh and any Magistrate may by warrant authorise any police-officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In sub-section (1) 'newspaper' 'book' and 'document' have the same meaning as in the Printing Presses and Publications (Declaration and Registration) Act, 1973 (XXIII of 1973).

Scope and application—This section has been substituted by Act No. 16 dated 5.5.91. The conditions necessary for forfeiture are : (a) the Government is to form the opinion that newspaper or book or document contains matters which offend against the section specified, and (b) the Government must by notification of forfeiture state the grounds of its opinion. The last requirement is mandatory. A

mere citation of the words of the section is not enough, but facts must be given (18 CWN 1). No order passed or action taken under this section shall be called in question in any court otherwise than in accordance with the provisions of section 99B. The power to declare any newspaper, book or document to be forfeited to the Government under this section is a quasi-judicial power. The person aggrieved by order under section 99A can move the High Court Division for redress under section 99B (1971 Cr. LJ 1773).

50 DLR (AD) 119—Sadaruddin Ahmed Chisty Vs. Government of Bangladesh and others—To forfeit a publication the government is only required to state by notification in the official Gazette the grounds of its opinion, not its satisfaction for formation of opinion. [Ref. 4 BLT (AD) 199].

48 DLR 39—Sadaruddin Ahmed Chisty Vs. Govt. of Bangladesh & others—Forfeiture Notice—Forfeiture of a book is a preventive provision so that the author or the publisher of the books does not continue to commit the offence. Under the scheme of law forfeiture is provided and the remedy against the forfeiture having been provided under section 99B of the Code, the Government was not required to issue any notice to the author or publisher of the book giving him opportunity of being heard before passing the impugned order.

45 DLR 185—Bangladesh Anjuman-e-Ahmadiyya, represented by its Secretary, Umoor-E-Ama Vs. Secretary, Ministry of Home Affairs. Forfeiture of book-Government is not required to issue notice. The provision may be invoked when the writing and publishing of a book constituted a penal offence. The order of forfeiture is a preventive action requiring no notice to the author or the publisher to give them opportunity of being heard (Ref : 7 DLR 17 FB).

21 BLD (HC) 573—Junaid K. Doja, Marketing Director, International Book Agency, Limited, Dhaka Vs. The State—As under section 99B of the Code a remedy is available to the aggrieved party to redress any grievance against issuance of an order under section 99A of the Code, no prior notice is necessary for issueance of such order.

99B. Application to High Court Division to set aside order of forfeiture.—Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court Division to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any such matter word, sign or visible representation as is referred to in sub-section (1) of section 99A.

Decisions

8 DLR 110 (FC)—The working Muslim Mission and Literary Trust Vs. The Crown—Order of forfeiture by High Court not on grounds stated by the provincial Government but no another ground mentioned in section 99A-High Court acted illegally.

16 BLD (HC) 140—Dr. (Homeo) Baba Jahangir Beiman-al-Shureswari Vs. The State—Power of the Government to forfeit publications and power of the High Court Division to set aside order of forfeiture.

13 BLD 45—Bangladesh Anjuman-E-Ahmedia represented by its Secretary, Umoor-E-Ama Vs. The Secretary, Ministry of Home Affairs, Government of Bangladesh. Under the scheme of law of forfeiture under the Code of Criminal Procedure, the remedy against forfeiture having been provided under section 99B for setting aside the order of forfeiture, the Government is not required to issue any notice to the author or the publisher of the book giving them reasonable opportunity of being heard before passing the impugned order.

99C. Hearing by special bench.—Every such application shall be heard and determined by a special Bench of the High Court Division composed of three Judges.

99D. Order of Special Bench setting aside forfeiture.—(1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other documents, in respect of which the application has been made, contained any such matter, word, sign or visible

representation, as is referred to in sub-section (1) of section 99A, set aside the order of forfeiture.

(2) Where there is a difference of opinion among the Judges forming the Special Bench the decision shall be in accordance with the opinion of the majority of those Judges (Ref : 7 DLR 17 FB).

99E. Evidence to prove nature or tendency of newspapers.—On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the order of forfeiture was made.

99F. Procedure in High Court Division.—The Supreme Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed, the practice of such Courts in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

99G. Jurisdiction barred.—No order passed or action taken under section 99A shall be called in question in any Court otherwise than in accordance with the provisions of section 99B.

C.—Discovery of persons wrongfully confined

100. Search for persons wrongfully confined.—If any Metropolitan Magistrate, Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

Scope and application—The alleged confinement should be such that before the issue of search-warrant the Magistrate has "reason to believe" that it amounts to an offence (e. g. under sections 339, 340, 361, 368 P.C). A belief is based on some difinite facts. On reading of sections 77, 78, 96, 97, 98 it is clear that a search-warrant may be executed at any place in Bangladesh outside the issuing Magistrate's jurisdiction. It is not unoften that the section is invoked by a husband merely for recovery of wife who is with her parents or some other person for some reason or other and the issue of warrant in cases like this is illegal (11 CWN 836). This section applies to wrongful confinement irrespective of kidnapping or abduction and although a Magistrate can pass such order as he considers proper in regard to a person taken before him under this section, it cannot mean that he can rightly deprive a person of his or her liberty. A woman above the age of sixteen should be set at liberty and jail custody would be illegal (61 CWN 330). Magistrate should not act merely upon the allegation of the petitioner. He must satisfy himself by holding an inquiry that there is foundation for the application (17 Cr. LJ 495).

46 DLR 10 (AD)—Wahed Ali Dewan Vs. The State—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 procuration of a minor girl, the court has to proceed on the basis that a girl is a minor who is under 18. In a case like this father always wants to show that the girl is minor. Further the certificate from the Head Master of a school can easily be obtained. The girl refused herself to be examined by the Doctor defying court's order and that she was not produced in the court of the learned Sessions Judge in spite of repeated orders in that behalf. We have already said that we shall not prove into the matter in depth because of the 'fail accompli' brought

about by the birth of a baby in the meantime of the girl. But it is to be observed that the High Court Division failed to decide the matter applying correct principles of law and the usual standards applicable in such cases (Ref : 35 DLR 315).

30 DLR 208—Dr. Rashiduddin Ahmed Vs. Dr. Quamarunnahar Ahmed—Real consideration is the welfare and interest of the minor children concerned.

30 DLR 187—Babul Meah Vs. The State—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.

17 DLR 544—Kiran Bala Chowdhury Vs. The State—Change of faith-To be established in a regular trial. 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.

15 DLR 272—Jnanendra Nath Shaha Vs. Abdul Khaleque—Medical examination for the purpose of ascertaining the age of a girl either by a Medical Board or by a Radiologist can take place only if the girl in question gives her consent.

15 DLR 148—Jahanara Begum Vs. The State—Jurisdiction not vested in Magistrate to detain a person who is sue jures. In a case to which section 100 Cr. P. C is applicable, where a person brought before the court is aged 16 years or over, the will of such person shall prevail.

13 DLR 681—Ayesha Begum Vs. The State—Search-warrant cannot be issued and detention order cannot be passed unless there is allegation of wrongful confinement.

8 DLR 293—Miss Purnia Chowdhury Vs. The State—The petitioner was detained in a rescue home. Petition on her behalf made by some body is proper. The petitioner being major, her movement cannot be restricted.

4 BCR 239—Abdul Gofran Chowdhury Vs. Government of the People's Republic of Bangladesh—Reports of the

Radiologist and the Professor of Forensic Medicine Privately obtained by the accused are not of much immportance to the Court. Age recorded in the Registration card of the Secondary and Higher Secondary Education Board cannot be treated as a scrap of paper and brushed aside. The girl being a minor who understands little about her own welfare, we are of the opinion that she should be given in custody of her father, the petitioner (Ref : 28 DLR 123).

Revision—Revision lies before the Sessions Judge under section 435 and 439A Cr. P. C against the order of the Magistrate.

D.—General provisions relating to Searches

101. Direction, etc. of search-warrants.—The provisions of sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be., apply, to all search-warrants issued under section 96, section 98, section 99 A or section 100.

102. Persons in charge of closed place to allow search.—(1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of section 52 shall be observed.

Scope and Application—This section broadly adjusts the rights of the police with those of the citizens. On the one hand it provides for the right of free ingress of the police officer into closed premises on demand and on production of the search warrant, on the other hand it seeks to ensure a fair search of the said premises without the planting of articles by the police.

103. Search to be made in presence of witnesses.—(1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) **Occupant of place searched may attend.** The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Penal Code.

Scope and application—The object of this section is to ensure that searches are conducted fairly and squarely and that there is no 'planting' of articles by police. The law lays down that the persons of the search witnesses and of the police party must be searched before they are allowed to enter the houses so that the owner should not have any resonable grounds for suspecting that one of the search party had planted anything surreptitiously in his house. This section has a fourfold object in view: (i) to prevent possible unfair

dealings on the part of officers entrusted with search-warrants (27 Cr. LJ 73); (ii) to ensure that searches are conducted fairly and squarely; (iii) to prevent the 'planting' of articles by the police, and (iv) to obtain reliable evidence of search as far as practicable (AIR 1930 Call 143). While (ii) and (iv) are positive, (i) and (iii) are negative. Broadly section 103 adjusts the rights of the police with those of the citizens. This section is applicable to search of persons (AIR 1931 Rang 333). A motor car is a 'Place' within the meaning of sec. 103. A respectable person is a person who would be impartial and on whom owner or occupier of the premises searched can prima-facie-rely (15 Cr. LJ 441 FB). Respectability does not cannote any particular state or wealth or anything of that kind. Any person is entitled to claim respectability provided he is not disreputable in any way. The practice of the police to get the signature or the thumb impression of the accused person on the search list is illegal (AIR 1947 SC 737).

54 DLR (HC) 212—Kashem Vs. State (Criminal)—The Court should not take too rigid a view regarding the provisions of section 103 of the Code. In the absence of any cogent reason to disbelieve the members of law-enforecing agency, the Court is competent to convict the accused relying on their testimony without corroboration.

51 DLR 499—Rana Madbar & others Vs. The State—Prosecution cannot be disbelieved merely because of the fact that the seizure list witnesses state that the arms were not recovered in their presence.

Now, the question is whether in a case like this, evidence of the informant and the Investigating Officer can be disbelieved or not. Here, we have found that there is no suggestion from the side of the defence that the informant and the investigating Officer PW 13 had any enmity with or grudge against the accused persons for which they were falsely implicated in this case. The only suggestion given to the prosecution witness is that the accused persons were falsely implicated by the informant for his personal gain in his service.

45 DLR 521—Subodh Ranjan & others Vs. The State—Search- The provision for search to be made in presence of witnesses are designed to create a safeguard against possible chicanery and a concoction on the part of the investigating officer and it is obligatory for him to ensure that the search was conducted honestly (Ref : 13 BLD 430, 21 DLR 544, 26 DLR 297).

44 DLR 159—Abul Hashem Master Vs. The State—Procedure of search-Applicability. The fulfilment of the provision under section 103 Cr. P.C is not required, because the pipe-gun was not recovered by the police on search but it was produced by the accused himself.

42 DLR 464—Dilip Kumar Ghose Vs. The State—Applicability of the provision relating to search. For the purpose of conducting search in order to find out as to whether a person is guilty of an offence under section 46 of the Excise Act the provision of section 103 Cr. P. C has no application.

41 DLR 26—Siddik Ali Vs. The State—Non-seizure of blood stained clothes, pillow, quilt and earth renders the prosecution story implicating the appellant doubtful. In the absence of examination of the blood-stained articles by the chemical examiner, the prosecution has utterly failed to connect the blood in the aricles with the human blood to connect it with the murder of the victim. The possibility of the victim's death by some of his enemies elsewhere as suggested by the defence cannot be ruled out (Ref : 40 DLR 443).

40 DLR 348—Rouf Meah Vs. The State—Smuggling-that the seized articles are contraband goods must be proved by the prosecution. That the goods were of Indian origin have to be established for convicting the appellants individual liability of each of the appellants ought to have been considered. Seized articles were donated to the Relief Fund without the Court's permission, which prejudiced the prosecution case-the practice of disposal of the seized articles (alamats) pending trial of the case disapproved.

39 DLR 437—Mujibur Rahman Vs. The State—Procedure laid down in section 103 need not be followed by I.O. while seizing alamats. The procedure laid down in section 103 of the Code of Criminal Procedure is not required to be followed at the time of seizure of alamats by the investigating officer. Any person present at the time of seizing alamats can be made witness to the seizure list. Procedure followed while conducting search as per provision of section 103 of the Code of Criminal Procedure is different from procedure followed by the investigating Officer while seizing alamats during investigation (Ref : 7 BLD 380).

21 BLD (HC) 442 —Kashem Vs. The State—Section 103 of the Code enjoins that a search to be witnessed by at least two respectable witnesses of the locality and the seizure list is required to be attested by them. In the context of the realities obtaining in the society in the wake of continuous deterioration of the law and order situation of the country, it is almost impossible now-a-days to get any truly independent local witness to support the prosecution case involving offences under the Arms Act or of smuggling under the Special Powers Act.

12 BLD 126—Mati Meah Vs. The State—Uncorroborated testimony of interested witness whether can be relied on. Held-When the informant in the case is highly interested in the result of the case, his testimony unless corroborated by independant and unimpeachable evidence, no reliance can be placed on it.

8 BLD 106—Nurul Islam Vs. The State—Search and seizure of arms. Whether a Judge may convict the accused disbelieving the witnesses of search and seizure of arms. A Judge may disbelieve a witness of search and seizure if it appears to him that the witness is making obliging statements in favour of the accused to save him from punishment. A Judge may convict an accused solely on the basis of the unimpeachable evidence of the officer who made the search and seizure disbelieving the evidence of witness of search and seizure. But in the present case the witnesses of search and seizure cannot be disbelieved

and it seems probable that the planting of pipe gun was managed by the enemy of the appellant.

7 BLD 22 (AD)—Tamijuddin Ahmed Vs. The State—Illegal search of accused house. Its effect when conducted in an irregular manner. Respectability of a witness is of no importance when a search is not made in accordance with law. Any self respecting person would not be aparty to the kind of search made. Irregularities in a search conducted by an authorised officer may not ordinarily affect the legality of a proceeding and it may only affect the weight of evidence. Search, recovery and seizure of alleged incriminating articles not by a Magistrate or Police officer but by members of the public are illegal (Ref : 6 BCR 301 AD, 4 BLR 472, 1 BSCD 100).

10 BCR 37—Dilip Kumar Ghose Vs. The State—For the purpose of conducting search in order to find out as to whether a person is guilty of an offence punishable under section 46 of the Excise Act the Provision of section 103 Cr. P.C has no application.

4 BLR 426—Sis mohammed Vs. The State—law does not require obtaining of signature of an accused person on seizure list or furnish him with a copy of seizure list unless he specifically asks for the same, only legal requirements are that the seizure should be made in presence of at least two respectable witnesses of locality and the list of things seized should be signed by them and a copy of the seizure list should be delivered to the persons concerned at their request (Ref : 4 BLR 472).

AIR 1956 (SC) 441—Sundar Singh Vs. State of U.P—Section 103 applies where search is to be made of a place, it does not apply to search of a person. It would not apply to the seizure of the shoes worn by the accused when he was with investigating officer. Failure to call respectable persons of locality would not invalidate the search. That would only affect the weight of the evidence in support of the search and the recovery.

8 BLT (HC) 22—Sukkur Ali Kha Vs. The State—The search of a place and seizue of things by the police must be

conducted in the presence of two or more respectable inhabitants of the locality.

8 BLT (HC) 352—Billal Miah Vs. The State—Rules Regulating Search—In the context realities of the society very few local witnesses are available to depose against their powerful neighbours or habitual miscreants. In almost all cases they come to the court to say that they signed blank papers on the asking of the police and disown their presence at the time of recovery of incriminating articles. In such circumstances, absence of evidence from local witness should not be blown too far. There in no warrant of law that evidence of the members of the law enforcing agencies must have corroboration from other source.

3 BLT (HC) 6—Habibur Rahman Vs. The State—The requirements of Section 103 (2) read with 103 (1) are that the entire search from the begining to the end must be conducted in presence of two respectable local inhabitants and the requirements are not fulfilled if the search and the seizure have taken Place either proceeding the arrival of the local inhabitants or takes place after their departure from the place of search---any search and seizure without strictly complying the provisions must be deemed to be illegal and must be left out of consideration in a criminal trial.

9 MLR 429-432—Billal Miah Vs. The State—Rule regulating search and seizure—Since the witnesses are reluctant to depose against their powerful neighbours or habitual miscreants for fear of their life, there is hardly any scope to get local witnesses of seizure and search to give the true evidence during trial. Having regard to the hard realities relating to deteriorating law and order situation, there is no reason not to rely upon the evidence of police personnels of the search and seizure when they appear to be natural and disinterested.

6 MLR (HC) 200-205—Trikul Islam Vs. The State—Search and seizure-Evidentiary value of police personnel's- Witnesses of seizure of contrabands recovered through raid on secret information are to be found in the place where the raid is

conducted. The manner of seizure in such a case may not conform to the requirements of section 103 CrPC in its entirety but any such departure does not diminish the evidentiary value of the witness including that of the police personnel's of the raiding party. Group not taken during trial can not be taken in appeal.

5 MLR (HC) 385—Harun Bepari (Md). Vs. The State—Manner of search and seizure—Police while making search and seizure is mandatorily required to comply with certain formalities. Non-Compliance with such formalities makes the seizure illegal consequently rendering the prosecution doubtful.

5 MLR (HC) 170—Jewel an another Vs. The State—Search and seizure—Consequence of non-compliance of essential requirements—It is mandatory that whenever search and seizure of articles are made this shall be made in presence of some respectable persons of the locality otherwise the seizure and recovery will be doubtful. Non-examination of seizure list witness and independent and impartial witness together with material contradictions and omissions in the evidence on record render the prosecution case not proved beyond doubt leading to acquittal of the accused.

7 BLC (HC) 226—Abu Bakar Siddique Vs. State (Criminal)—PWs 3, 4 and 5 as seizure list witnesses testified that they were not present when recovery and seizure of the gun and cartridges were made, hence seizure and recovery of the arms and ammunition from the actual possession and control of accused Abu Baker Siddique was not proved beyond all reasonable doubt as the provisions of section 103 of the Code have not been complied with.

7 BLC (HC) 319—Badsha Matubbor Vs. State (Criminal)—Normally, provisions of section 103, Cr.P.C are attracted when search of the house of anyone is to be made but section 103 of the Code cannot be invoked in case of search of the body of any accused after search or detention either by police or by public. At best in such case the provision of section 51 Cr.P.C may be attracted. In the present case, it appears from the

evidence on record that after the accused was caught by the waist by PWs 1 and 7 when the accused was trying to cross the boundary wall and when PWs 2, 4, 5, 8 and 9 as close neighbours arrived at the place of occurrence and soon after the accused was detained as above and the body of the accused was searched in presence of inmates of the house including the PWs 1, 3, 6, 7 and close neighbours such as the PWs 2, 4, 5, 8 and 9 and then 5 live cartridges were found packed in a black sock in the jangia (underwear) of the accused and afterwards those 5 cartridges with the gun were seized by seizure list by PW 10 who found 1 live cartridge after opening the gun and the same was also seized by PW 10 with above those 5 live cartridges. In such circumstances of the case, compliance of section 103, Cr.P.C was not necessary as it was a case of the search of body and not for search of the house of the accused.

6 BLC 134—Tarikul Islam Vs. State (Criminal)—The provisions of section 103 Cr.P.C apply only when search is made under chapter VII of the Code and such provisions do not apply to a case of apprehension of persons suspected to be carrying any intoxicant or any other thing which is liable to be confiscated under the law.

6 BLC (HC) 705—Moshfiqul Islam Vs. State (Criminal)—The prosecution has produced 8 witness but out of them PWs 1, 2 and 3 being the attesting witnesses of the seizure list did not support the prosecution version as to the recovery of the arms and ammunition from the possession of the accused appellant. The preponderance of the decision of the apex Court is that even in case of non-examination of the seizure list witnesses or if the seizure list witnesses do not support the prosecution case the conviction cannot be set aside only on that count.

5 BLC 501—Harun Bepari (Md) Vs. State—PW1, the informant is the sole witness not corroborated by any other independent witness on the point of seizure and recovery of bomb from the convict and such testimony cannot be relied on in the absence of corroboration by independent and

unimpeachable evidence as the informant is interested in the result of the case.

5 BLC 703—Musa Miah Vs. State—As there is no iota of evidence on record to show that the informant entered into the place of occurence hut in presence of any respectable local witness and in view of this fact alone the defence suggestion that the appellant had been falsely implicated in the case by one Haji Mokbul Hossain cannot be brushed aside.

5 BLC 514—Aslam Jahangir Vs. State—Section 103 and 537–Since the prosecution has failed to show any hostile animus with the prosecution, mere declaration of some of the seizure list witnesses and first information report named witnesses hostile in no way cured the defect of the prosecution case and the prosecution has hopelessly failed to prove the recovery of the incriminating articles and hence the persistent evidence of the public witnesses regarding denial of their presence at the alleged recovery in no way can be cured by the official witnesses (police personnel) who are none but interested in this case and in the result the order of conviction and sentence is set aide.

E.—Miscellaneous

104. Power to impound document etc. Produced.—Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

105. Magistrate may direct search in this presence.—Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant.

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PART-IV

PREVENTION OF OFFENCES

CHAPTER—VIII

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A.—Security for keeping the Peace on Conviction

106. Security for keeping the peace on conviction.—(1) Whenever any person accused of any offence punishable under Chapter VIII of the Penal Code, other than an offence punishable under section 143, section 149, section 153A or section 154 thereof, or of assault or other offence involving a breach of the peace, or of abetting the same, or any person accused of committing criminal intimidation, is convicted of such offence before High Court Division, a Court of Session, or the Court of a Metropolitan Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first Class.

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace, such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

(2) It the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court including a Court hearing appeals under section 407 or by the High Court Division when exercising its powers of revision.

Scope and application—The object of this Chapter is the prevention and not the punishment of offences and its provisions are aimed at persons who are danger to the public by reason of the Commission by them of certain offences. The order for security is to be made at the time of passing the sentence. An appellate court can pass an order for security on

confirmation of the sentence passed by the original court. An order under this section can only be made in the presence of the accused. The security ordered under this section must be for keeping the peace. An order for furnishing security for good behaviour under this section is bad in law (19 Cr. LJ 439). An order for security is preventive and not penal. The action being preventive is not based on any overt act but on the potential danger to be averted. The provision enables the Magistrate to require the execution of a bond and not to detain the person. An order for security under this section must be passed at the time of conviction and passing of sentence. It must be part of the decision in the main case (26 Cr. LJ 981).

Revision—This section gives a discretion to the Magistrate to pass an order for security and the Session Judge or the High Court Division is reluctant to interfere upon a mere question of discretion, unless the order is on the face of it such an improper exercise of discretion as to require interference (42 All 345). The Sessions Judge or the High Court Division in revision set aside an order under section 106, where the finding of the Magistrate did not sufficiently and clearly show that the acts for which the accused was convicted necessarily involved a breach of the peace (43 Cal. 671).

Appeal—The substantive sentence must be appealable, otherwise mere order for security is not appealable (section 413). An appellate court can pass an order under section 406 in cases where the trial court has no power (12 CWN 752). Unlike the trial court it can pass an order after the disposal of the appeal (29 Cr. LJ 502). Setting aside conviction amounts to cancellation of order for security.

B.—Security for keeping the Peace in other Cases and security for Good Behaviour.

107. Security for keeping the peace in other cases.—(1) Whenever a Metropolitan Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do wrongful act

that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate if in his opinion there is sufficient ground for proceeding may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than the Chief Metropolitan or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

(3) **Procedure of Magistrate not empowered to act under sub-section (1).** When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons.

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody pending further action by himself under this Chapter.

Scope and application—This section may be read with section 13A (2) Cr. P.C. The object of this section is preventive and not penal, rather administrative than judicial. It is intended not to punish persons for anything that they have done in the past, but to prevent them from doing in future

something that might occasion a breach of the peace (74 CWN 939). Section 107 is one of the sections of the Code designed to enable public officers to take action to prevent commission of offences. As the exercise of these powers necessarily results in interference with the liberty of the subject, the powers must be exercised strictly in accordance with law. Before a person is called upon to show cause why he should not execute a bond, it must be established (a) that he is likely to commit a breach of the peace or disturb the public tranquillity, or (b) to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility. A Magistrate ought not to act under this section upon a statement by a private person not made on oath or solemn affirmation, or upon hearsay evidence (21 Cr. LJ 560 Nag), or upon conversation out of court with person, however respectable, or upon personal knowledge of certain facts which he obtains from sources outside the record. Proceedings are of a quasi-criminal nature and a suit for malicious prosecution lies in respect of information given (AIR 1955 Punj 139). A police report is itself a sufficient information on which a Magistrate may issue a summons, but it is in no sense evidence upon which he can determine the case. The Magistrate is not entitled to initiate proceedings upon facts and information which had already been the subject of inquiry under section 107 Cr. P.C., or in connection with charges under the Penal Code brought against the same persons, and which had ended in favour of the accused.

Both the sections 106 and 107 are counterparts of the same policy-the first applying when by reason of the conviction of a person, his past conduct leads to an apprehension for the future, and the second applying where the Magistrate, on information, is of the opinion that unless prevented from so acting a person is likely to act to the detriment of the public peace and public tranquillity. A person against whom preventive action is taken under section 107/151 Cr. P.C is not accused of any offence bailable or non-bailable. Therefore bail cannot be granted to him under section 496 Cr. P.C. The words "pending completion of the inquiry" can only mean that the inquiry has to commence

before an interim bond can be asked for under sub-section (3) of section 117 Cr. P.C. Therefore an interim bond can be asked for only after an order in terms of section 112 Cr. P.C has been made in writing and the person concerned is made aware of it (1969 P. Cr. LJ 272). The proceedings under this section is a judicial proceeding and should be conducted as such. A Magistrate has power to drop proceedings initiated under section 107 Cr. P. C at any stage. as soon as he is satisfied that there is no danger of a breach of the peace and he can pass an order under section 119.

Dispute relating to immoveable property—Where there is a dispute relating to possession of immoveable properties, the proper procedure is to take action under section 145 Cr. P.C and to decide the dispute as to possession once for all so far as the criminal courts are concerned (30 DLR 164, 32 Cr. LJ 1014). But the mere fact that the dispute relate to possession of immoveable property, does not preclude the Magistrate from taking proceeding under section 107 Cr. P.C. The Magistrate has a discretion to proceed under section 107 Cr. P.C of under section 145 Cr. P. C (16 CWN 83 FB). But at same time it should be borne in mind that if the Magistrate proceeds at all under section 107 Cr. P.C., the proper order is to bind down both the parties, so as not give an unfair advantage to one party as against the other (12 CWN 606, 30 Cr. LJ 492).

Procedure—The procedure is that of a trial of cases under Chapter XX of the Code. A Magistrate has power to drop proceedings at any stage. If the material on record discloses that though there was a danger of breach of the peace at one time, but it has disappeared because of a subsequent event, the court can drop proceedings and discharge the person proceeded against (AIR 1972 SC 1225). A Magistrate dealing with proceedings under this section must base his judgment upon evidence relevant to the case.

34 DLR 352 SC—Sultan Ahmed Vs. Haji Sultan Ahmed—Proceedings under sections 145 and 107 of the Code are quite different and independent of each other. But in the course of a proceeding under section 145 the Magistrate is quite

competent to proceed under section 107 if he is satisfied that any party to the proceeding under section 145 is likely to commit breach of the peace. A proceeding under section 107, if so resorted to, in the course of a proceeding under section 145, must be limited to the question of apprehension of breach of the peace and the person who is likely to commit the breach of the peace may be bound down by asking him to execute a bond, with or without sureties, to keep the peace for a period not exceeding one year. Execution of a bond to keep the peace has nothing to do with the possession of any land which is the subject matter of a separate proceeding under section 145. Procedure to be followed in case of proceeding under section 107 whereby provisions under section 112, 108, 109 and 110 shall have to be complied with. Show cause notice as provided in sub-section (1) of section 107 is mandatory which cannot be dispensed with. In case of imminent breach of peace Magistrate, as provided in section 114, may issue warrant for arrest of a person. In matters arising out of section 107, even in case of emergency, provision of section 112 must be complied with and as provided in section 117. Magistrate shall ascertain whether execution of bond is necessary. In case of emergency further provision has been made for execution of interim bond (Ref : 2 BLD 156, 1. BSCD 101).

26 DLR 373—Badal Chandra Ghose Vs. Mujibur Rahman—Complainant (in respect of a proceeding under section 107 Cr. P.C.) being found absent on call, Magistrate passed an order of discharge under section 119 Cr. P.C. Held : There was in law no discharge and the proceedings under section 107 to be treated as alive. There was no question of revival in the case. (Ref : 9 BLD 85).

24 DLR 48—Mujibur Rahman Mallik Vs. Tobarrak Majhi- If on perusal of the petition and hearing the parties, the Magistrate is satisfied that there is apprehension of breach of the peace but he does not state in writing the grounds of his satisfaction then the order, though defective, would not be without jurisdiction. An order of seizing arms under section 25 of the Arms Act can validly be made in a proceeding under section 107 Cr. P.C.

14 DLR 188 (SC)—Ghulam Quadir Vs. Mistry Fazal Din—Complaint lodged under section 107 Cr. P.C. even if false and frivolous, does not justify initiation of proceeding under section 250 Cr. P.C. The object of section 107 of the Code is to prevent the commission of an offence. Therefore a person against whom action is taken by the Court in advance of a commission of an apprehended crime cannot fall within the expression 'accused before a Magistrate of any offence'. The plain intention of this expression is that to justify the application of section 250, a person must be an accused of an offence already committed. Where the respondents were not accused of having committed any offence the only charge being that they were likely to commit an offence, a proceeding under section 250 (1) is not applicable to them and as such any order for payment of compensation in such case is illegal.

13 DLR 690—Rajendra Mohan Das Vs. Serajul Huq—Under the provisions of section 117 (1) of the Cr. P. C., a Magistrate is bound to enquire into the truth of an information upon which action has been taken. It is not open to the Magistrate to dispense with the enquiry and pass an order merely on perusal of papers and on his assumption from something imaginary that there is no apprehension of breach of the peace. The section provides that the Magistrate should have held a full judicial enquiry as soon as the opposite parties appeared and showed cause against the preliminary order passed under section 107 Cr. P. C. The Magistrate should direct both the parties to adduce evidence and should record the evidence. If the parties adduce evidence, and if they do not adduce any evidence, he should decide the proceedings on the materials before him and passed his final order. (Ref : 11 DLR 49 WP).

13 DLR 243—Balaram Sarkar Vs. Naba kanta Sarkar—Proceeding under section 107 need not be drawn afresh on transfer of the case. The failure of the Magistrate to inform the accused of the substance of accusation against them is an illegality which cannot be cured under the provision of section 537 Cr. P. C. (Ref : 74 CWN 939).

6 DLR 79—The Crown Vs. Mashiur Rahman—When a petition is filed before a District Magistrate for initiation of proceedings under section 107, the District Magistrate may either draw up proceedings himself, recording the grounds of his satisfaction, and thereafter transfer them to some subordinate court for disposal or he can send the petition for disposal to some other subordinate Magistrate, for that Magistrate to decide whether in his opinion proceeding under section 107 should be drawn up.

1979 P.Cr.LJ 28—Md. Amin Vs. The State—Proceedings under section 107 Cr. P. C being initiated against petitioner for third time in quick succession earlier proceedings having been quashed- Present proceedings based on same reasons, forming ground in earlier complaints-Proceedings quashed.

31 CWN 388—Ashraf Ali Vs. N. Sarker—Section 247 Cr.P.C has got no application.

24 BLD 144 (HC)—Shah Ghour Jamil Palash Vs. Shah Md. Manssur & ors.—A case in which a civil court is already seized with the subject-matter of dispute and has passed an order regulating possession thereof, the same falls outside the jurisdiction of a Magistrate under section 145 of the Cr.P.C. Action can be taken under section 107 and 151 of the Cr.P.C to prevent breadh of peace, but no order by a criminal court for attachment of the property drawn under section 145 of Cr.P.C can validity be made.

8 BLT (HC) 272—Azhar Rahman & Ors. Vs. The State—Security for keeping the peace and order to give security—Whenever there is a dispute relating to possession of any immovable property, the proper course for the Magistrate is to take action under Section 145 of the Code of Criminal Procedure for deciding the factum of possession of the contending parties in the disputed property once for all on taking evidence. But under special circumstances the Magistrate is competent to take action under Sections 107 an 117 of the Code where the dispute relates to possession of immovable property if he satisfies if there is imminent apprehension of breach of the peace which demands and

emergent action for keeping the peace. When in a case there is an apprehension of breach of the peace over and ancestral immovable property arising out of activities of both the parties it is patently unjust and illegal to ask one of the parties to furnish a bond of good behaviour giving an undue advantage over him to the other party.

Bail—A person arrested under section 107 Cr. P. C even under clause 3 unless there are special circumstances he should be admitted to bail as a matter of right.

Revision—An order of a Magistrate refusing to take action under section 107 Cr. P. C cannot be set aside by the superior court in revision. The object of this section is rather administrative than judicial. A person who moves the superior court in revision under section 435 and 439A Cr. P. C against a preliminary order under section 107 Cr. P. C. should do so with the utmost promptitude at least within 30 days of the order against which he complains (27 Cr. LJ 1132). Under section 439A Cr. P.C the Sessions Judge can be moved for setting aside the order or for interference of Magistrate's order and the Sessions Judge can exercise all powers given to High Court Division under section 439 Cr. P.C. The Sessions Judge has ample power under section 439A to set right any proceeding or order wrongly passed by a subordinate court. If the order passed under section 107 proceedings on wrong motion of law and even fantastic conception of facts, it cannot be upheld (1963 Cr. LJ 621).

Appeal—Section 406 Cr. P. C makes provisions for an appeal against final order by a person ordered to give security for keeping the peace or for good behaviour. The appellate Court has power to suspend the order relating to the furnishing of security and the Appellate Court can also grant bail to the appellant in such a case (33 Cr. LJ 731).

108. Security for good behaviour from persons disseminating seditious matter.—Whenever the Chief Metropolitan or District Magistrate, or a Metropolitan Magistrate or Magistrate of the first class specially empowered by the Government in this behalf, has information that there

is within the limits of his jurisdiction any person who, within or without such limits, either orally or in writing or in any other manner intentionally disseminates or attempts to disseminate, or in anywise abets the dissemination of—

(a) any seditious matter, that is to say, any matter the publication of which is punishable under section 123A or section 124A of the Penal Code, or

(b) any matter the publication of which is punishable under section 153A of the Penal Code, or

(c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Penal Code,

such Magistrate, if in his opinion there is sufficient ground for proceeding may (in mannar hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the Provisions of the Printing Presses and publications (Declaration and Registration) Act, 1973, with reference to any matters contained in such publication except by the order or under the authority of the Government or some officer empowered by the Government in this behalf.

Scope and application—The test under this section is whether the person proceeded against has been disseminating seditious matter, and whether there is a fear of the repetition of such offence. It should be determined with reference to the antecedents of the person and other surrounding circumstances. Every speech must be read as a whole and a fair construction must be put upon it (33 Cr. LJ 881). Section 108 embodies a preventive and not a punitive provision of law (Ref : 34 DLR 352 SC).

Revision—Unless it can be shown that there was no evidence at all against the petitioner interference in revision will not be justified (AIR 1933 Lah 236).

Appeal—Appeal lies under section 406 Cr. P.C to the Court of Session against final order.

109. Security for good behaviour from vagrants and suspected persons.—Whenever a Metropolitan Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receive information—

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precaution with a view to committing any offence, or

(b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

Scope and application—This section may be read with section 13A (2) Cr. P.C. The section provides for taking security, not from persons suspected of a particular offence, but from persons lurking within the Magistrate's jurisdiction who have no ostensible means of subsistence or cannot give a satisfactory account of themselves. Credible information is the foundation of Magistrate's jurisdiction (30 CWN 380). An order on the ground that it is not safe to allow unrestricted personal liberty to a person is illegal (42 CWN 816). Mere proof of want of ostensible means of livelihood is not a sufficient reason for passing an order under this section. The Magistrate should take evidence as to the general character of the person charged with bad livelihood, and not convict him on the mere report of the police officer. There is no provision under section 109 Cr. P. C. to detain a person in jail pending proceeding under the said section. Section 496 Cr. P. C authorises the Magistrate conducting the enquiry to release the person concerned in the inquiry on bail with sureties to ensure his attendance in

court. It is in the discretion of the Magistrate to proceed or not to proceed against a person under this section.

34 DLR 352 (SC)—Sultan Ahmed, Advocate Vs. Hajee Sultan Ahmed—Procedure to be followed in case of proceeding under section 107 whereby provision under section 112, 108, 109 and 110 shall have to be complied with (Ref : 7 DLR 44 WP).

13 DLR 387—Abdul Aziz Lahari Vs. The State—Cl. (a) of section 109 Cr. P. C refers to a continuous act of concealment of the presence of the accused in the jurisdiction and does not apply to a case where there was a momentary effort at concealment to avoid detention and arrest.

5 DLR 109 (WP)—Abdul Mazid Vs. The Crown—Mandatory provisions to be followed when action under section 109 deemed necessary. Suspicious behaviour is not sufficient to demand security.

Revision—Revision lies under section 435 and 439A Cr. P. C from the initial order of demanding security. The Court will not interfere in revision unless there is material departure from legal principles in the trial (31 Cr. LJ 189, 38 Cr. LJ 889).

Appeal—Appeal lies to the Sessions Judge under section 406 Cr. P. C against the final order.

110. Security for good behaviour from habitual offenders.—Whenever a Metropolitan Magistrate, District Magistrate, or sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Government receives information that any person within the local limits of his jurisdiction—

(a) is by habit a robber, house-breaker, thief or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves or aids, in the concealment or disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of the offence of kidnapping, abduction, extortion, cheating or mischief, or any

offence punishable under Chapter XII of the Penal Code, or under section 489A, section 489B, section 489C or section 489D of that Code, or

(e) habitually commits, attempts to commit, or abets the commission of offences involving a breach of the peace, or

(f) is so desperate and dangerous as to render his being at large without security hazardous to the community.

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

Scope and application—The object of this section is preventive and not punitive, and action under it is not intended as a punishment for a past offence (AIR 1940 Bom 416). Habit implies a tendency resulting from repetition of the same act. Habit must be proved by aggregate instances. The power given by this section should be exercised sparingly and with such discretion by the Magistrate (17 CWN 238). Information is the foundation of a Magistrate's jurisdiction. He cannot move unless there is such information as is considered by him sufficient for action (28 Cr. LJ 744). The object is to prevent crime under section 109 and 110. He must be carefully worked and great care should be taken not to abuse them. When the information set forth in the order of the Magistrate refers to an apprehended breach of the peace, section 110 Cr. P. C is not applicable, but proceedings should be instituted under section 107 Cr. P. C. A person when threatens and beats people can certainly be called a desperate and dangerous character and comes within the mischief of the provisions of section 110 (AIR 1942 Oudh 356). Under section 110 a person must be given a sufficient opportunity of showing that he was willing to adopt an honest livelihood (18 Cr. LJ 710). Framing of a formal charge in a proceeding under section 110 is not practicable but in view of the provisions contained in section 112 reading out to the accused the substance of the

accusation is almost equivalent to the framing of a formal charge (8 DLR 401).

22 DLR 491—Siddiqullah Vs. The State—There is no bar in initiating a proceeding under section 110 of the Code simply because the same person has been previously acquitted or discharged of any substantive offence in a case. A previous conviction is not necessary for an order of security being passed in proceeding under section 110 Cr. P. C. A Charge under section 110(a) or (b) Cr. P. C may be proved by adducing evidence of general repute. Positive evidence as to the actual commission of an offence is not necessary in proceeding under section 110 Cr. P. C.

16 DLR 39 (WP)—Bahadur Vs. The State—Harsh condition can be imposed to control the movement of the accused to the satisfaction of the Court making the order. Such conditions though onerous and harsh are yet not illegal and are contemplated by law.

14 DLR 718—Abdur Rahman Vs. The State—Transfer of a case to a Magistrate under section 110 (a) (f) by a Magistrate having power to deal with the same, confers no jurisdiction on the former, if he is not especially empowred to deal with the case. The benefit of ambiguity in the language of section of the Criminal Procedure Code must always be given in favour of the subject and against the legislature who failed to explain itself clearly. Simultaneous order to execute bond and in default to suffer imprisonment is illegal (Ref : 8 DLR 7 Short Note, 7 DLR 98).

12 DLR 156—Surban Rishi Vs. The State—Joint trial of several persons who come under clauses (a) and (f) is illegal as there could not be any association in matters connected with their character. It is true that under sub-section (5) of section 117 a joint trial for an offence of this nature is possible where two or more persons are associated together in the matter under enquiry (Ref : 9 DLR 253, 2 PCR 129).

12 DLR 129—Sujat Ali Vs. The State—In a proceeding under section 110 Requiring security for good behaviour, the accused should be examind under section 342 Cr. P. C.

7 DLR 361—Navas Vs. The Crown—Immunity from arrest cannot be claimed only because proceeding under section 110 Cr. P. C is contemplated.

6 DLR 375—Kaloo Zamadar Vs. The Crown—There is nothing to bar proceeding under section 110 being launched against a member of a criminal tribe.

Revision—Revision lies under section 435 and 439A Cr. P. C. against the preliminary order of the Magistrate. When something appears unsatisfactory and unusual in the proceedings of the lower Court, the Session Judge can look into the record to examine whether the order under section 110 has been properly passed (28 Cr. LJ 502, 28 CWN 23). Normally the opinion of the Court at the first instance in respect of sufficiency or insufficiency of evidence should not be questioned in revision.

Further Inquiry—No Further inquiry can be directed in a case of discharge under section 110 Cr. P. C.

111. Repealed.

112. Order to be made.—When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and sureties (if any) required.

Scope and application—Where a Magistrate gets information of the kind specified in section 107, section 108, section 109 or section 110 and is of opinion that there is sufficient ground for proceedings, the first thing, that he should do is to pass an order in writing under this section against the person concerned (AIR 1920 All 268). A Magistrate cannot pass an order under section 117 without previously passing an order under this section. If he does, the order is wholly wrong (PLD 1961 Dhaka 122). The condition is mandatory and where it has been completely overlooked, the order for interim security under section 117 (3) is premature and illegal. Under this section, the substance of the report

made to the Magistrate should be clearly disclosed to the accused so that he may be informed of the charges or of the nature of the evidence which he is to rebut. There should be sufficient indication of the time and place of the facts charged and sufficient details which enable the accused to know what facts he is to meet (19 Cr. LJ 905, 26 Cr. LJ 1398). Omission to issue the preliminary order renders all further proceedings void (ILR 30 Mad 282). It may be noted that an order under section is analogous to a charge framed in case of a regular trial of an accused person for an offence (AIR 1970 Ori 184) and the order needs being read over to the person proceeded against, though the Code does not provide that he should plead to it. It is to contain a statement of the prosecution case in the abstract. It is an intelligible picture of the nature of the information. The order of Magistrate under section 112 without giving substance of information received is illegal in the eye of law and is liable to be quashed. Section 112 and section 117 provide two different ends and, therefore, a Magistrate has no jurisdiction to pass and order under section 117 (3) along with one under section 112 (AIR 1957 Pat 106). The failure on the part of the Magistrate to record an order as required by section 112 on a complaint received under section 107 will vitiate all the proceedings including the final order under section 118 (1972 P. Cr. LJ 742).

20 DLR 759—Abul Hossain Vs. Aminur Rahman—Magistrate may pass an ad-interim order in emergent circumstances at any stage after the order under section 112, 'Pending the completion of enquiry'. Magistrate may take action under section 117 (3) before the appearance of the second party (Ref : 20 DLR 711, 34 DLR 352 SC, 7 DLR 44 WP).

13 DLR 690—Rajendra Mohan Das Vs. Sirajul Huq—Under the provisions of section 117 (1) of the Cr. P. C a Magistrate is bound to enquire into the truth of an information upon which action has been taken. It is not open to the Magistrate to dispense with the enquiry and pass an order merely on perusal of papers and on his assumption from something imaginary that there is no apprehension of breach of the peace. The section provides that the Magistrate should have

held a full judicial enquiry as soon as the opposite parties appear and show cause against the preliminary order passed under section 107 Cr. P. C. The Magistrate should direct both the parties to adduce evidence and should record the evidence, if the parties adduce evidence, and if they do not adduce any evidence, he should decide the proceedings on the materials before him and passed his final order.

5 DLR 109 (WP)—Abdul Majid Vs. The Crown—Mandatory provisions to be followed when action under section 109 deemed necessary. Substance of information must be set forth under section 112.

Revision—The Sessions Judge or High Court Division has power under section 439 and 439A read with section 435 Cr. P. C to set aside the Magistrate's order under this section and to quash proceedings (AIR 1939 Sind 167). The superior Court can always interfere when the inquiry has not been held in accordance with the law, or a wrong conclusion has been arrived at (41 Cr. LJ 238).

113. Procedure in respect of person present in Court.—If the person respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him.

Decision

20 DLR 759—Abul Hossain Vs. Aminur Rahman—Where the order under section 112 of the Code is already known to them, in compliance with the provisions of section 113 or 114 there is, perhaps, no necessity of reading or explaining the said order to them once again under sub-section (1) of section 117 (Ref : 17 DLR 38).

114. Summons or warrant in case of person not so present.—If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court :

Provided that whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be

recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

Scope and application—Form No. 12, Sch. V of the Code requies that the substance of the information be set forth in the summons. Refusal to grant bail is contrary to the very spirit of the provisions of Chapter VIII of the Code, which are not intended, except under special circumstances, to keep a suspect in custody either during the pendency or after the close of investigation held under this Chapter (31 Mad 315 FB).

34 DLR 354 (SC)—Sultan Ahmed Advocate Vs. Hajee Sultan Ahmed—In case of imminent breace of peace Magistrate, as provided in section 114, may issue warrant for arrest of a person [Ref : 5 DLR 109 (WP)].

115. Copy of order under section 112 to accompany summons or warrant.—Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

116. Power to dispense with personal attendance.—The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by an advocate.

Scope and application—The Magistrate has a discretion to dispense or not to dispense with the personal attendance of the person called upon to give security.

117. Inquiry as to truth of information.—(1) When an order under section 112 has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with or in execution of, a summons or warrant, issued under section 114, the Magistrate shall proceed to inquire into the

truth of the information upon which action has been taken and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in the trial of cases by Magistrate and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in the trial of cases by Magistrate ; except that no charge need be framed.

(3) Pending the completion of the inquiry under sub-section (1) the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded;

Provided that :—

(a) no person against whom proceedings are not being taken under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour, and

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 112.

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

Scope and application—An order under section 112 must proceed any step taken under this section. It is mandatory. Under this section, a Magistrate is bound to enquire into the truth of the information, notwithstanding that the accused admits the allegations against him and consents to furnish security. An inquiry under Chapter VIII is not a 'trial' and the person charged is not an 'accused' but a quasi accused. It should have been noticed that although Chapter XXI which includes 'Of trial of warrant cases by Magistrate' has been omitted and in case of Chapter XX the word 'summons' has been deleted by Ordinance No. XXIV of 1982 dated 21.8.82 the Lagislature has not amended section 117 (2) of the Code in view of the said amendment. It should have been amended accordingly by omitting that words 'summons' and 'warrant' in appropriate places.

The object of section 117 (3) is to empower the Magistrate to direct the person against whom an order under section 112 has been made to execute a bond for keeping the peace or maintaining good behaviour until the conclusion of the inquiry. The orders under section 117 (3), are not mere matters of routine, a routine order, appended as it were to orders passed by a Magistrate under section 112, on an application under section 110. Before a Magistrate passes an order under section 117 (3) he must direct his consideration particularly to the question of emergency and the necessity of immediate measures. The procedure prescribed for conducting trials in cases is applicable to inquiries under Chapter VIII of the Code. The failure to comply with the provisions under this section is not a mere irregularity; it is an illegality which goes to the root of the proceedings (AIR 1943 Sind 175). The Court passing an order under cl. (3) of this section must state its reasons in writing for passing the order, i. e., it must state that there was a likelihood of the accused committing a breach of the peace. Where all that the Magistrate said was that the order was

passed on account of emergency, held that the order was bad and must be set aside (41 Cr. LJ 937). Magistrates like other judicial officers have not only to see that justice is done, but also that the parties are made to feel that justice is being done' (1952 Cr. LJ 1111). The Magistrate must record his reasons, in an application under section 117 (3), with care and prudence, realising that they are not mere routine orders, not orders designed to anticipate final orders that may be made, but that they are urgent orders arising out of an emergency and are only justified in the exceptional circumstances of an emergency.

Procedure—An inquiry in a proceeding for security to keep the peace must be made in the same way as in a trial of cases by Magistrate under Chapter XX as amended by Ordinance No. XXIV of 1982 dated 21.8.82.

20 DLR 759—Abul Hossain Vs. Aminur Rahman—Where the order under section 112 of the Code is already known to them, in compliance with the provisions of section 113 or 114 there is perhaps, no necessity of reading or explaining the said order to them once again under section 117 (1). Magistrate may pass an ad-interim order in emergent circumstances at any stage after the order under section 112. 'Pending the completion of enquiry'. Magistrate may take action under section 117 (3) before the appearance of the second party. A Magistrate exercising power under sub-section 117 (3) may, for reasons to be recorded in writing, pass an ad-interim order directing to execute a bond, to meet the emergencies but such order should not be lightly made, without carefully considering the situation (Ref : 16 DLR 39 WP, 20 DLR 711).

17 DLR 38—Abdur Rashid Vs. Mukhtar Khan—Order directing to execute an ad-interim bond under section 117 (3) Cr. P. C before compliance with the provisions of section 112 Cr. P. C read with section 113 Cr. P. C is improper.

13 DLR 690—Rajendra Mohan Das Vs. Sirajul Huq—Under the provisions of section 117 (1) Cr. P. C a Magistrate is bound to inquire into the truth of an information upon which action has been taken. It is not open to the Magistrate to dispense

with the enquiry and pass order merely on perusal of papers and his assumption from something imaginary that there is no apprehension of breach of the peace. The section provides that the Magistrate should have held a full judicial inquiry as soon as the opposite parties appeared and showed cause against the preliminary order passed under section 107 Cr.P.C.

13 DLR 56 (WP)—Gul Hassan Vs. The State—Detention for failure to execute bond cannot exceed period of conclusion of inquiry. The Magistrate can direct the applicant to furnish sureties for maintaining good behaviour only for the period during which the inquiry is held and no more.

12 DLR 156—Surban Rishi Vs. The State—It is true that under sub-section (5) of section 117 a joint trial for an offence of this nature is possible where two or more persons are associated together in the matter under inquiry. But the expression 'associated together' must necessarily mean acting in concert or that there is something in the nature of a conspiracy among them in respect to the various acts alleged. But a concert or conspiracy with regard to character is difficult to conceive of.

Revision—Revision under section 435 and 439A Cr. P.C lies against the order of the Magistrate before the Sessions Judge. A Court in revisions is not in a position, as is the Magistrate, to understand the emergency and the necessity for the order under section 117 (3), and will not substitute its own opinion for that of the Magistrate, yet the order of the Magistrate must have a legal basis though proceedings under this Chapter are only of a quasi-judicial nature (41 Cr. LJ 937). The Sessions Judge will set aside that order of the Magistrate when he is satisfied that no special reason exist and direction is perverse.

118. Order to give security.—(1) If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties the Magistrate shall make an order accordingly :

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than that specified in the order made under section 112 :

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive :

thirdly, that when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

Scope and application—This section applies equally to an order under section 107 and under section 108 to 110 Cr. P. C. The object being not to punish, common fairnes requires that the amount should be reasonable. The amount should be fixed with due regard to the circumstances of the case and the person's means and station in life. Forms Nos. 10 and 11 of Sch. V of the Code prescribe the forms which a bond for keeping the peace and for maintaining good behaviour, respectively, should be executed. Where sureties are produced, the Magistrate cannot reject them on any ground other than their insolvency. This section applies to proceedings under section 107, 108, 109 and 110 Cr. P. C (AIR 1932 A 122). The person bound over is not 'convicted' within the meaning of section 426 Cr. P.C. The proceedings under Chapter 8 are serious proceedings and are not to be lightly dealt with. The proceedings should be taken with great care and caution only when the public interest compels. Where there is no reason to support that the Magistrate passing an order discharging the accused person under section 119 is not a careful and responsible Magistrate who does not know his charge. and where he has seen the witnesses and heard what they have to say and has come to the conclusion that the case against the suspected person is unworthy of credit and that the evidence should be believed, the High Court will not interfere (AIR 1936 Sind 243).

22 DLR 491—Siddiqullah Vs. The State—The word 'habit' explained. Simultaneous default order to suffer imprisonment not bad when passed in conformity with the provisions of sections 118 and 123 (1) Cr. P. C. But if the order is passed, without giving a reasonable time to the petitioner to execute bond, also an opportunity to time to be released from custody the moment he furnishes the security, the order will be highly improper and bad in law.

17 DLR 50 (WP)—Mohammad Sarwar Vs. The State—Magistrates should remember that the object of taking security is not punitive or to collect revenue for the Government, the section being preventive in its nature the amount of security should be fixed, as enjoined by the provision to section 118, so as to make it possible for the person bound down to comply with the order without incurring heavy expenses or being faced with the prospect of going to jail (Ref : 1 PCR 45).

7 DLR 98—Ledu Vs. The Crown—Simultaneous order to execute bond or suffer imprisonment in default is illegal. Magistrate must give a reasonable time to the accused to furnish security and if he does not do so by his first order directing him to furnish security he may by a subsequent order give him time to furnish securities. Under the provisions of sections 118 and 123 (1) of the Cr. P. C which are mandatory the order passed at the same time as the order to execute a bond that in default of giving security the accused shall suffer imprisonment for one year is clearly illegal (Ref : 5 DLR 109 WP).

Revision—Revision lies to the Sessions Judge against the preliminary order of the Magistrate under section 435 and 439A Cr. P. C. If the Magistrate considers it necessary to take action, the Sessions Judge will interfere only on the very clearest and strongest grounds which demonstrate that there has been in the particular case a gross miscarriage of justice (32 Cr. LJ 570). The Sessions Judge or the High Court Division sitting in revision would not ordinarily constitute itself as a Court on fects (38 Cr. LJ 363). Where the materials on which the order was passed by the Magistrate are clearly insufficient

to support the order the superior Court can interfere (38 Cr. LJ 198).

Appeal—Appeal from final order requiring security for keeping the peace or good behaviour lies under section 406 Cr. P. C.

119. Discharge of person informed against.—If, on a inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

Scope and application—If the case against the person is not proved in the inquiry he should be discharged. If the complainant is absent accused may be discharged (24 Cr. LJ 232). Under the present Code as Sessions Judge's power of revision has been made co-extensive with the power of revision of the High Court Division, Sessions Judge may himself in a fit case interfere by exercising power under section 439A Cr. P. C Magistrate may initiate further proceeding on fresh information (14 Cr. LJ 182).

Further inquiry—Further inquiry under section 436 Cr. P. C cannot be directed against the person discharged under section 119 because the person proceeded against under this Chapter is not accused of an offence.

26 DLR 373—Badal Chandra Ghose Vs. Mujibur Rahman—Complainant (in respect of a proceeding under section 107 Cr. P. C) being found absent on call, Magistrate passed an order of discharge under section 119. Held : There was in law no discharge and the proceeding under section 107 to be treated as alive. There was no question of revival in the case.

9 BLD 85—Sultan Ahmed Vs. Golam Mostafa—Under Revisional Jurisdiction the occasion to interfere with an order of discharge under section 119 Cr. P. C should be rare, particularly at the instance of a private party-But in the instant case bias has been so patent on the part of the

concerned Magistrate that this Court finds it proper to interfere and pass an order binding down the opposite parties to keep peace, without sending the case back to him on remand-The remarks in the body of the impugned judgement against the petitioner is expunged (Ref : 7 PLD 19 Bal).

C.—Proceedings in all Cases subsequent to order to furnish Security.

120. Commencement of period for which security is required.—(1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

Scope and application—'Order' means the final order. Sub-section (2) of this section gives power to the Magistrate to postpone the date of commencement of the order for security. The object is to give time to the person instead of at once ordering imprisonment as if in default (4 CWN 121).

121. Contents of Bond.—The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the later case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

Scope and application—Form X of the Schedule No. V prescribes a bond for keeping peace under section 107, while form XI is for a bond for good behaviour under section 108, 109 and 110. A bond for keeping the peace will not be forfeited by the commission of any offence. It can be forfeited only by the commission of offences likely in their consequences to cause a breach of the peace. In the case of a bond executed by a person binding himself to be of good behaviour, there will be

a breach of the bond only if he commits, or attempts to commit, or abets the commission of any offence punishable with imprisonment, such as an offence of hurt etc. A breach of surety bond for good behaviour is committed when the person bound commits or attempts to commit or abets the commission of any offence punishable with imprisonment (AIR 1936 Pesh 16). The procedure for enforcing the forfeiture of the bond as consequence of a breach of the bond is laid down in section 514 Cr. P. C.

122. Power to reject sureties.—(1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond :

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) Such Magistrate shall, before holding inquiry, give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.

(3) If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1) and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing :

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

Scope and application—The Magistrate should hold an inquiry into the fitness of a surety before accepting or rejecting

it. If the Magistrate rejects the surety he must record his reasons for doing so in his own hand. Fitness or unfitness is a matter for discretion of the Magistrate (21 CWN 925). Refusal to accept on the report of police officer only without any inquiry is unjustified (25 Cr. LJ 91).

17 DLR 50 (WP)—Md. Sarwar Vs. The State—It is clear from the provision of section 122 that the practice of requiring Tahsildar to attest the security bonds or requiring the police to report on the suitability or otherwise of the surety to the bond is not at all revised by the said section.

13 DLR 67 (WP)—Gul Hassan Vs. The State—Refusal to accept surety offered without first holding an inquiry as required under section 122 (1) is illegal.

Revision—Revision lies to the Sessions Judge under section 435 and 439A Cr. P. C against the preliminary order of the Magistrate. If the Magistrate does not apply his discretion judicially, for instance, where no reason is given for rejecting the fitness of surety the superior Court will interfere (13 CWN 80).

Appeal—Appeal lies under section 406A Cr. P. C from order refusing to accept or rejecting a surety.

123. Imprisonment in default of security.—(1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

(2) **Proceedings when to be laid before High Court Division or Court of Sessions.** When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of Sessions Judge; and

the proceedings shall be laid, as soon as conveniently may be, before such Judge.

(3) The Sessions Judge, after examining such proceedings and requiring from the Magistrate any further information or evidence which he thinks necessary, may pass such order on the case as he thinks fit :

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

(3A) If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge under sub-section (2), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-section (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security.

(3B) A Sessions Judge may in his discretion transfer any proceedings laid before him under sub-section (2) or sub-section (3A) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall award the orders of such Court or Magistrate.

(5) **kind of imprisonment.** Imprisonment for failure to give security for keeping the peace shall be simple.

(6) Imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under section 108 be simple and, where the proceedings have been taken under section 109 or section 110, be rigorous or simple as the Court or Magistrate in each case directs.

Scope and application—An order for security is to specify three things, namely, (i) the period for security, (ii) the date of commencement of the period, and (iii) the date of furnishing the security, Section 123 comes into operation if no security is furnished by the last date. In case security is furnished, section 123 does not apply (23 Cal 621). Sub-section (2) has reference only to the case where default is made in finding security. If the security is given, the section does not apply and no reference to the Court of Session is necessary even though the term of security exceeds one year. On a reference made to him under sub-section (2), the Sessions Judge should give notice to the accused and allow him to be defended by an advocate. This sub-section clearly contemplates a decision by the Sessions Judge on the merits of the order demanding security. This section gives power to the Sessions Judge to deal with the case on the merits of the order demanding security (12 CWN 463). This section does not authorise a Sessions Judge to order the re-hearing of a case. After an order is confirmed by the Sessions Judge, the testing of security is to be done not by him but the Magistrate though there is an appeal to him (41 CWN 514). The Sessions Judge has, under this section, power to revise the order of the Magistrate under section 118.

22 DLR 491—Siddiqullah Vs. The State—Simultaneous default order to suffer imprisonment not bad when passed in conformity with the provisions of sections 118 and 123 (1). (Ref : 14 DLR 718, 8 DLR 7 Short notes).

7 DLR 98—Ledu Vs. The Crown—Reasonable time to furnish security must be given and without affording time to execute the bond, the Magistrate cannot is exercising his power under section 123 commit the person to prison.

Bail—The Sessions Judge can admit the accused to bail. There are no words in section 123 (2) controlling the very wide provisions of section 498 Cr. P.C.

Appeal and Revision—No appeal lies from an order of imprisonment in default of furnishing security, or from an

order passed by the Sessions Judge. But such an order is open to revision by the High Court Division (AIR 1935 Rang 33).

124. Power to release persons imprisoned for failing to give security.—(1) Whenever the District Magistrate or the Chief Metropolitan Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Metropolitan or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) An order under sub-section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts :

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) The Government may prescribe the conditions upon which a conditional discharge may be made.

(5) If any condition upon which any such person has been discharged is, in the opinion of the District Magistrate or Chief Metropolitan Magistrate by whom the order of discharge was made or of his successors, nor fulfilled, he may cancel the same.

(6) When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police-officer without warrant, and shall there upon be produced before the District Magistrate or Chief Metropolitan Magistrate.

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a

period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the District Magistrate or Chief Metropolitan Magistrate may remand such person to prison to undergo such unexpired portion.

A person remanded to prison under this sub-section shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

Scope and application—A subordinate Magistrate who thinks that the term of imprisonment in default of furnishing security should be shortened, should report the matter to the District Magistrate with a view to his taking action under this section and the District Magistrate can arrive at the conclusion that the person imprisoned under section 123 may be released on a consideration of the evidence taken by the subordinate Magistrate (14 Cr. LJ 546).

125. Power of District Magistrate to cancel any bond for keeping the peace or good behaviour.—The Chief Metropolitan or District Magistrate may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court.

Scope and application—An order under this section has to be made not on the executive whom of the District Magistrate to free an accused person from his bond or not to free him, but on a judicious weighting of the barious consideration that govern the District Magistrate's decision. The order made by the District Magistrate under section 125 of the Code is, therefore, be amendable to the jurisdiction of High Court Division for interference (PLD 1965 Lah. 318).

126. Discharge of sureties.—(1) Any surety for the peaceable conduct or good behaviour of another person may

at any time apply to a Metropolitan Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction.

(2) On such application being made, the Magistrate shall issue him summons or warrant as he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him.

126A. Security for unexpired period of bond.—When a person for whose appearance a warrant or summons has been issued under the proviso to sub-section (3) of section 122 or under section 126, sub-section (2), appears or is brought before him, the Magistrate shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of section 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118, as the case may be.

Scope and application—This section deals with the order passed by a Magistrate on an application by a surety for his discharge and provides inter alia that an order passed under that section shall for the purposes of sections 121, 122, 123 and 124 be deemed to be an order under section 118. It, however, makes no mention of section 120 (27 Cr. LJ 865 FB).

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CHAPTER—IX

UNLAWFUL ASSEMBLIES

127. Assembly to disperse on command of Magistrate or Police-officer.—(1) Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) Omitted.

Scope and application—Section 127 Cr. P. C contemplates two kinds of assemblies : (i) an unlawful assembly within the meaning of section 141 Penal Code and (ii) an assembly of five or more persons likely to cause a disturbance of Public peace. A Sub-Inspector of Police can command an assembly to disperse under this section (34 Cr. LJ 705).

21 DLR 307—A.K.M. Shahjahan Vs. The State—Deputy Director of Bureau of Anti-corruption Department though a PSP officer is not a police officer within the meaning of section 127 Cr. P. C., and as such cannot disperse an unlawful assembly. Section 127 Cr. P. C empowers only a Magistrate or officer in charge of police station to command dispersal of an unlawful assembly of five or more persons likely to cause a disturbance of the public peace. But the Deputy Director of Anti-corruption, a PSP officer, who is not directly concerned with law and order situation and who has no control over the officer in charge of a police station and not connected with the normal police duties under the Police Act but engaged in some special duties under special laws cannot disperse an unlawful assembly in exercise of the statutory function revised in section 127 Cr. P. C.

Punishment—Disobeying the command to disperse is punishable under sections 145 and 151 of the Penal Code.

128. Use of civil force to disperse.—If, upon being so commanded any such assembly does not disperse, or if without being so commanded, it conducts itself in such a

manner as to show a determination not to disperse, any Magistrate or officer in charge of a police station, may proceed to disperse such assembly by force and many require the assistance of any male person not being an officer, soldier, sailor or airman in the armed forces of Bangladesh for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Scope and application—This section contemplates two kinds of assemblies. (i) an unlawful assembly within the meaning of section 141 P.C and (ii) an assembly of five or more persons likely to cause a disturbance of public peace. This section envisages two types of situation : (a) where such assembly is commanded to disperse but fails to disperse; and (b) where such assembly though not commanded to disperse conducts itself in such a manner showing its determination not to disperse. Failure of an assembly to disperse or even refusal to do so after an order has been give calls into play the necessary provisions and powers of the Magistrate or the police officer. The power of using fire arms to disperse an unlawful assembly cannot be exercised by any person below the rank of an officer in charge of a police station. The taking of life can only be justified by the necessity for protecting persons or property against various forms of violence, or by the necessity of dispersing a rioting crowed which is dangerous unless dispersed (21 Mad 249).

129. Use of military force.—If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present or the Police Commissioner in a Metropolitan Area may cause it to be dispersed by military force.

130. Duty of officer commanding troops required by Magistrate to disperse assembly.—(1) When a Magistrate or the Police Commissioner determines to disperse any such assembly by military force, he may require any commissioned or noncommissioned officer in command of any soldiers in the

Bangladesh Army to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate or Police Commissioner may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

131. Power of commissioned military officers to disperse assembly.—When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of the Bangladesh Army may disperse such assembly by military force and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thence forward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

132. Protection against prosecution for acts done under this Chapter.—No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the Government; and—

(a) no Magistrate or police-officer acting under this Chapter in good faith,

(b) no officer acting under section 131 in good faith,

(c) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130, and

(d) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which he was bound to obey.

shall be deemed to have thereby committed an offence :

Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier in the Bangladesh Army except with the sanction of the Government.

Scope and application—This section is as wide as, if not wider than section 197 and the principle of decision reported in AIR 1929 Mad 659 is equally applicable to section 132 (34 Cr. LJ 528). No sanction is necessary when the police officer is not an 'officer in charge of a police station' as his action is illegal; nor when police officers are charged under sections 302, 304, 326, 148 of the Penal Code, but it becomes necessary if they can show that they acted or meant to act under section 129 (25 CWN 629). To get the benefit of section 132 the accused has to show: (a) that there was an unlawful assembly; (b) that the unlawful assembly was commanded to disperse; (c) that either the assembly did not disperse on command, or if no command had been given, its conduct had shown a determination not to disperse; and (d) that in the circumstances he had used force against the assembly. It is for the prosecution to prove the offence in the sense that it was committed in the circumstances in which no recourse to an exception could be taken (34 Cr. LJ 528).

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CHAPTER—X

PUBLIC NUISANCES

132A. Application.—The provisions of this Chapter shall not apply to a Metropolitan Area.

133. Conditional order for removal of nuisance.—(1) Whenever a District Magistrate, a Sub-divisional Magistrate, or a Magistrate of the first class considers, on receiving a police report or other information and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place, or

that the conduct of any trade or occupation or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structue, or the removal or support of such tree, is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying

on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation ; or

to remove such goods or merchadise, or to regulate the keeping thereof in such manner as may be directed; or

to prevent or stop the erection of, or to remove, repair or support, such the building, tent or structure; or

to remove or support such tree; or

to alter the disposal of such substance; or

to fence such tank, well or excavation, as the case may be; or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do.

to appear before himself or some other Magistrate of the first or second class at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation—A 'public place' includes also property belongging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

Scope and application—Sections 133 to 143 of the Cr. P. C may be read along with S. 268 to 294A of the Penal Code. A 'nuisance' is an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and simple notions among the people. The term 'nuisance' as used in law is not a term capable of exact

difinition. Nuisances are of two kinds: (a) Public : and (b) Private. Before taking action under section 133, the Magistrate must satisfy himself that : (1) it is a public nuisance, i. e., the number of persons injuriously affected is so considerable that they may reasonably be regarded as the public or a portion of it ; (ii) it is not a private dispute between different members of the public for which the proper forum is the Civil Court; (iii) it is a case of great emergency or imminent danger to the public interest (48 Cr. LJ 666). If there is no emergency, or when the alleged nuisance by encroachment has been in existence for several years the party should go to the Civil Court. Session 133 applies only to existing and not to potential nuisances (40 Cr. LJ 444). A private person has no right to insist that a Magistrate shall pass orders under section 133. A transfer of a proceeding under section 133 pending before a Magistrate cannot be transferred to another Magistrate before cause is shown (79 CWN 485). The section confers extra ordinary powers which are meant to be exercised under extraordinary circumstances where recourse to ordinary law is not possible owing to the urgency of the matter. This section does not apply to a private nuisance (AIR 1942 All 443). The obstruction must be on the public way (47 Cr. LJ 217). A noise made in the carrying on of a lawful trade under a licence. If injurious to the physical comfort of the community is a public nuisance (21 DLR 31). The forms in Schedule V (Form No. XVI) should be strictly followed without adding to or subtructing from them on the Magistrate's own initiative (50 Cr. LJ 782). An order under this section is only conditional and not absolute. If a Magistrate is satisfied that there are no sufficient grounds for taking action under this section, he can drop the proceeding. Proceedings once dropped can be revived, if sufficient cause is shown (5 CWN 172). When individual dies, the order passed under section 133 Cr. P. C ceases to have any effect and must be considered spent, and the Magistrate would not be entitled to act further. If he considers it necessary to issue another order against the successor of the deceased, he must take separate proceedings (29 Cr. LJ 445). This section authorises to make redress of six categories of public nuisances as

mentioned in this section by thana Magistrate (vide CD/CJ/6 (8) 82, 2, 300) dated 15.12.82)

Sections 133, 144 and 147—Section 144 is more general and section 133 is more specific. So nuisances specially provided for in this section are taken out of the general provisions of section 144, section 133 is not a bar to a proceeding under section 147. Cr. P. C. The fact that section 133 expressly provides for an order by the Magistrate directing the removal of an obstruction to a pathway does not necessarily imply that a similar order cannot be passed under section 147 (15 Cr. LJ 362). But when proceedings have been taken under section 133, no order can be passed under section 147 Cr. P.C (15 CWN 667). An obstruction which is not caused to the people in general but to a certain number of agriculturists of a particular village using a certain channel, does not fall under this section (29 Cr. LJ 661). An order under this section should be directed against particular individual. No person can be called upon under this section to remove an obstruction not caused by himself (28 Cr. LJ 1036).

Civil Suits—No civil suit will lie to set aside an order passed under this section, and the civil courts have no jurisdiction to question or set aside such order.

Procedure—Where a Magistrate commences proceeding under section 133, he is not at liberty, to proceed otherwise than in conformity with the rules laid down in this Chapter. He cannot dispose of the case summarily under section 144 (29 Cr. LJ 530). Before passing a conditional order under this section a Magistrate is not bound to take evidence, because the proceedings under this section are entirely ex-parte. The report or other information whereon the Magistrate took action making the conditional order is no evidence against the opposite party (44 Cal 61).

26 DLR 9—The State Vs. Secretary, North Bengal Transport Association—Final orders cannot be passed without giving an opportunity to the other party (Ref : 9 DLR 257, 17 DLR 317).

21 DLR 557—Mosharraf Hossain Vs. Haji Nurul Islam—Section 133 Cr. P.C is attracted in the case of obstruction

raised which is of recent origin but not an old one. Magistrate, commits an illegality if a person appears before him upon an order passed under section 133 (1) and denies the existence of the public path if without an inquiry revised under section 139A he makes the order absolute (Ref : 14 DLR 741).

16 DLR 320 (SC)—Arabullah Vs. Abdul Wahid—It cannot be said that once the conditional order under section 133 has been made, there can be no further occasion or necessity of taking any immediate measure under section 142 (1), Section 142 indicates that such an order may be made even after an inquiry has been commenced. It cannot also be urged that once an order under section 142 has been made in any proceeding and recalled there is no further jurisdiction to make any such order at any subsequent stage. Court directing that inquiry into question of existence of the drain, will not be held unless injunction order under section 142 carried out is wrong. The Magistrate cannot postpone the inquiry pending compliance with the order directing the removal of the obstruction. There can therefore; be no justification for the Magistrate keeping the taking of evidence under section 139A in abeyance (Ref : 1 PLD 43, 20 DLR 67 WP, 18 DLR 1 WP).

8 DLR 298—Hafizur Rahman Vs. Abdul Kader Talukder—Provisions of section 133 Cr. P. C are to be invoked on the occasion of grave emergency or imminent danger. If a public nuisance allowed to stand for a long time, this section is not applicable.

8 DLR 233—Nizamuddin Sardar Vs. Akber Ali Sheikh—The question whether steps should be taken under section 133 Cr. P.C is for trying Magistrate alone to decide.. Where the Magistrate, on the materials before him, did not think fit to proceed under section 133 Cr. P.C it was not open to the Sessions Judge to say that the Magistrate on the consideration of the materials was under obligation to proceed under that section.

7 DLR 351—Haji Karamat Ali Pandit Vs. Sadat Ali—The word 'case' in section 192 includes a case under section 133. The world case in section 192 (1) of the Cr.P.C need not

necessarily be confined to a case in which an offence is involved. It is wide enough to include proceedings under section 133 and consequently a Magistrate who drew up proceedings under section 133 is competent to transfer the case to another Magistrate under section 192 (1) of the Code.

3 BCR 209—Kari Bashirullah Vs. The State—If the Magistrate is satisfied about existence of any public right, he is to hold an inquiry and take evidence under Chapter XX.

54 CWN 133—Md. Mohsin Ali Vs. Abdur Rashid Mrida—Under Chapter X of the Cr.P.C a conditional order under section 133 can only be made absolute according to sections 136, 137 and 132 of the Code. There is no provision in the Chapter for any reference of a public nuisance to arbitration and no provisions for making of a conditional order absolute as a result of finding of the arbitration.

Revision—Revision lies against the order of the Magistrate before the Sessions Judge under section 435 and 439A Cr. P. C. But the Sessions Judge will only interfere with a order under section 133 in revision if substantial injustice has been done (AIR 1942 All 443). The Sessions Judge can when there is no evidence or no reasonable evidence or record to justify the Magistrate's finding.

134. Service or notification of order.—(1) The order shall, if practicable, be served on the person against whom it is made, in manner herein provided for service of a summons.

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

135. Person to whom order is addressed to obey or show cause or claim Jury.—The person against whom such order is made shall—

(a) perform, within the time and in the manner specified in the order, the act directed thereby; or

(b) appear in accordance with such order and show cause against the same.

Scope and application—This section gives the party an opinion either to obey or to show cause. The choice lies with it to adopt one of the alternatives (3 BCR 209).

Revision—An order made under this section can be revised by Sessions Judge under section 435 and 439A Cr. P.C.

136. Consequence of his failing to do so.—If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in section 188 of the Penal Code, and the order shall be made absolute.

Scope and application—This section is stringent, the object being promptly to ensure public safety and punishment may be given before the order is made absolute without further notice.

Complaint—The complaint under section 188 of the Penal Code must be made by the Magistrate whose order is disobeyed. If prosecution is started on the application of an applicant in proceedings under section 133 Cr. P.C the proceedings are illegal and amount to an abuse of the process of the court (PLD 1963 Lah. 269).

11 DLR 48 (WP)—Abdul Latif Vs. The State—When a person proceeded against show cause. Magistrate should not make the order absolute but should proceed to take evidence as provided under section 137 Cr. P. C.

137. Procedure where he appears to show cause.—(1) If he appears and show cause against the order, the Magistrate shall take evidence in the matter in the manner provided in Chapter XX.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

Scope and application—The power to issue a conditional order belongs only to the Magistrate mentioned in the beginning of section 133. The Magistrate cannot make an order of dropping the proceedings under sub-section (2) of this

section without taking evidence in the matter as directed by sub-section (1) (22 Cr. LJ 239 Cal). Where a conditional order under section 133 was passed without jurisdiction, the subsequent order under this section confirming the conditional order is also illegal. When a party appears to show cause, the Magistrate is bound to take evidence as in trial of cases under Chapter XX of the Code. He cannot make the order absolute without taking evidence. Even if the party appears after the time fixed in the order, but before the case is taken up, the Magistrate is bound to hear his objection and take evidence for the order he has to make.

21 DLR 101—Ramzan Khan Vs. Md. Madan Khan—Magistrate must take evidence under sub-section (1) before passing any order under sub-section (2) or (3) of section 137 Cr. P. C and shall pass the order on the basis or the evidence after being satisfied with the materials on record. The order passed by the Magistrate must be a judicial order based on legal materials and not an arbitrary one.

17 DLR 317—Md. Afzaluddin Vs. Dwijendra Nath Das—sub-section (1) of section 137 Cr. P.C makes it obligatory on the Magistrate to take evidence before taking action either under sub-section (2) or sub-section (3) of section 137 of the Code.

11 DLR 48 (WP)—Abdul Latif Vs. The State—When a person proceeded against show cause, Magistrate should not make the order absolute but should proceed to take evidence as provided under section 137 Cr. P. C. An order making the interim order absolute without taking any evidence is illegal.

Revision—The Sessions Judge has power to modify the order to such extent as may deem fit under section 435 and 439A Cr. P.C.

138 & 139. Omitted.

139A. Procedure where existence of public right is denied.—(1) Where an order is made under section 133 for the purpose of preventing obstruction nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person

against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 137 inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 137.

(3) A person who has no being questioned by the Magistrate under sub-section (1) failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

Scope and application—If existence of public right is not denied, this section hardly applies (33 CWN 748). The provisions of this section must be observed, failing which subsequent proceedings will be null and void. This section in effect provides that the Magistrate must stay proceedings if he is satisfied that there is a bonafide dispute as to a private right (26 CWN 442 FB, 34 CWN 957). This section does not apply to the cases where the party admits the public right but denies only the fact of obstruction (AIR 1936 Pat 409). With the appearance of the opposite party before the Magistrate he is bound to question him as to whether he denies the existence of any public right in respect of the way, river etc, and if he does so, the Magistrate shall, before proceeding under section 137 inquire into the matter. It is the duty of the Magistrate to follow the above procedure without waiting for the objection to be raised by the opposite party and the Magistrate cannot refuse to inquire into the matter because the objection was not taken until a late stage of the case (29 CWN 649). When the opposite party denies the existence of the public right, the Magistrate's first duty is to take the inquiry under this section and until this inquiry is completed he cannot order the party

to adduce evidence under section 137 (33 CWN 201). From the scheme of arrangement of sections it appears this section has been wrongly placed. It should really have found place immediately after section 135. Expression 'inquire into the matter' under section 139A (1) Cr. P. C means hearing of evidence of person on whom notice under section 133 Cr. P. C served.

21 DLR 557—Mosharraf Hossain Vs. Haji Nurul Islam—Magistrate commits an illegality if a person appears before him upon an order passed under section 133 (1) and denies the existence of the public path if without an inquiry envisaged under section 139A he makes the order absolute. Inquiry held under section 139A is a judicial inquiry and a local inspection held under section 539B cannot take the place of an inquiry under section 139A (Ref : 3 BCR 209, 14 DLR 741).

15 DLR 279—Dhanue Sk. Vs. Rahim Box Sheikh—Failure to question the person concerned whether he denies the existence of path, etc. does not render the trial invalid, if such person without being asked by the court denies its existence and leads evidence to that effect. Irregularity arising out of non-questioning curable under section 537 Cr. P. C (Ref : 18 DLR I WP, 8 PLD 171 Lah).

11 DLR 48 (WP)—Abdul Latif Vs. The State—Where a Magistrate has not questioned the applicant as to whether he denied the existence of any public right, he commits an illegality.

Revision—Revision lies under section 435 and 439A Cr. P. C. against the order of Magistrate before the Sessions Judge. It is open to the Sessions Judge to interfere under section 435 Cr. P.C in cases where the Magistrate has not correctly appreciated the evidence that was produced in denial of the existence of the public right under section 139A (2).

140. Procedure on order being made absolute.—(1) When an order has been made absolute under section 136 or section 137, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a

time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Penal Code.

(2) **Consequences of disobedience to order.** If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorise its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section.

Scope and application—No order under this section should be passed without first proceeding under section 139A Cr. P.C (27 Cr. LJ 474). Sub-section (1) of this section is mandatory and sub-section (2) is merely directory. A Magistrate has no jurisdiction to cancel an order passed by his predecessor for removal of a nuisance under section 133 on the ground of non-service of notice (31 CWN 530). The notice is to be given under Schedule V Form XVIII.

141. Omitted.

142. Injunction pending inquiry.—(1) If a Magistrate making an order under section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made,as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2). In default of such person forth with obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

Scope and application—An order under section 133 is a conditional order and an order under this section is an injunction. The notice is to be given under Schedule VI Form No. XIX.

16 DLR 320 (SC)—Arabullah Vs. Abdul Wahid—Court directing an inquiry without passing an order of injunction under section 142 is illegal (Ref : 3 BCR 209).

143. Magistrate may prohibit repetition or continuance of public nuisance.—A District Magistrate or Sub-Divisional Magistrate, or any other Magistrate empowered by the Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Penal Code or any special law.

Scope and application—The object of this section is to give the Magistrate summary powers to issue an order against a person who is repeating or continuing a public nuisance, that is to say, who has repeated nuisance which has already been forbidden by a competent court. It is not for original use. This section contemplates the prevention of a repetition, or the continuance of a public nuisance by the party against whom an order under section 133 Cr. P. C has already been passed. Form No. XX of Schedule V may be used for the purpose of this section.

Revision—Any order passed by the Magistrate is subject to revision under section 435 and 439A Cr. P. C by the Sessions Judge.

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