CHAPTER X

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVATS

172. Absconding so avoid service of summons or other proceeding.– Whoever absconds in order to avoid being served with a summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred [1][taka], or with both;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both.

173. Preventing service of summons or other proceeding, or preventing publication thereof.– Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order,

or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice or order, from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred [1][taka], or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both.

174. Non-attendance in obedience to an order from public servant.– Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred 1[taka], or with both;

1. Subs. by Act VIII of 1973, s. 3. and 2nd Sch., for "rupees" (w. e. f. 26th March, 1971).

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [2][taka], or with both.

Illustrations

(a) A, being legally bound to appear before the [1][Supreme Court of Bangladesh] in obedience to a subpoena issuing from that Court intentionally omits to appear. A has committed the offence defined in this section.

(b) A, being legally bound to appear before a Zila Judge, as a witness in obedience to a summons issued by that Zila Judge, intentionally omits to appear. A has committed the offence defined in this section.

175. Omission to produce document to public servant by person legally bound to produce it.– Whoever, being legally bound to produce or deliver up any document to any public servant, as such intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred [2][taka], or with both;

or, if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [2][taka], or with both

Illustration

A, being legally bound to produce a document before a Zila Court intentionally omits to produce the same. A has committed the offence defined in this section.

176. Omission to give notice or information to public servant by person legally bound to give it.– Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred [2][taka], or with both;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [2][taka], or with both;

[3][or, if the notice or information required to be given is required by an order passed under sub-section (1) of section 565 of the Code of Criminal Procedure, 1898, with imprisonmenit of either description for a term which may extend to six months, or with fine which may extend to one thousand [2][taka], or with both.]

1. The word within square brackets were substituted for the words "High Court of East Pakistan" by the Bangladesh Laws Revision and Declaration Act, 1973, Second Schedule (with effect from the 26th March, 1971).
2. The word "taka" was substituted for the word "rupees", ibid.
3. Added by the Criminal Law Amendment Act, 1939 (Act XXII of 1939).

177. Furnishing false information.– Whoever being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both;

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(b) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being, bound, under [2][any law for the time being in force], to give early and punctual information of the above fact to the officer of the nearest police station, wilfully misinforms the police-officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in different direction. Here A is guilty of the offence defined in the latter part of this section.

[3][**Explanation.**– In section 176 and in this section the word "offence" includes any act committed at any place out of [4][Bangladesh] which, if committed in [4][Bangladesh], would be punishable under any of the following sections, namely 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and the word "offender" includes any person who is alleged to have been guilty of any such act.]

178. Refusing oath or affirmation when duly required by public servant to make it.– Whoever refuses to bind himself by an oath [5][or affirmation] to state the truth, when required so to bind himself by a public servant legally competent to requre that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both.

179. Refusing to answer public servant authorised to question.– Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such

1. The word "taka" was substituted for the word "rupees" by Act VIII of 1973 (with effect from the 26th March, 1971)
2. The words within square brakets were substituted for the words, figures and commas "clause 5, section VII, Regulation III, 1821, of the Bengal Code", ibid.
3. Explanation was inserted by the Indian Criminal Law Amendment Act, 1894 (Act III of 1894), s. 4.
4. The word "Bangladesh" was substiuted for the word "Pakistan" by Act VIII of 1973 (with effect from the 26th March, 1971).
5. Ins. by the Oaths Act, 1873 (Act X of 1873), s. 15.

public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both.

180. Refusing to sign statement.– Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred [1][taka], or with both.

181. False statement on oath or affirmation to public servant or person authorised to administer an oath or affirmation.– Whoever being legally bound by an oath [2][or affirmation] to state the truth on any subject to any public servant or other person authorised by law to administer such oath [2][or afirmation], makes, to such public servant or other person or as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[3][**182. False information with intent to cause public servant to use his lawful power to the injury of another person.**– Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant–

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both.

Illustrations

(a) A informs a Magistrate that Z, a police-officer, subordinate to such Magistrate has been guilty of neglect of duty or misconduct knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(b) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false and knowing search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

(c) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section].

1. The word "taka" was substituted for the word "rupees" by Act VIII of 1973, Second Schedule, (With effect from the 26th March, 1917).
2. Ins. by the Oaths Act, 1873 (Act X of 1873), s. 15.
3. Substituted by the Indian Criminal Law Amendent Act, 1895 (Act III of 1895), s. 1. for the original section 182.

Synopsis

1. Scope and applicability.
2. Giving false information to public servant.
3. Knows or believes to be false.
4. Opportunity to prove truth of information.
5. Ulterior intention.
6. To do or omit anything.
7. To the injury of other.
8. Who may file complain.
9. Evidence and proof.

1. Scope and applicability.- To constitute an offence under section 182 the accused must intend to cause or know it to be likely that he will cause a public servant to use his lawful power to the annoyance of any person, that is, of any other person (AIR 1959 All 545).

Ingredents required to constitute the offence are (i) the accused gave some information; (ii) such information was given to the public servant; (iii) such information was false; (iv) the accused knew or believed such information to be false when giving it; (v) the accused intended or knew that this information will probably cause the public servant to act otherwise them he would have acted without it (AIR 1966 Raj 101).

In order to establish an offence punishable under section 182, Penal Code, it must be established that a perosn gave information which he knew or believed to be false to a public servant and that he inteded thereby to cause such public servant to do something which such servant ought not to do or that he knew it to be likely that he would thereby cause such public servant to do something which he ought not to do. The words "to do something" which such public servant ought not to do must mean to do something which the public servant was enjoined to do in his official capacity as a public servant. If a person gives false information to a public servant knowing it to be likely or intending that he would do something which had no connexion with his office as a public servant then the conduct of the person giving such information would not come within the ambit of section 182 Penal Code (AIR 1950 Cal 97 = 51 DrLJ 469).

To constitute the offence punishable under section 182 Penal Code., it is necessary that the information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false, or that he did not believe it to be true; there must have been positive knowledge or belief that it was false (63 Punj L.R.D 566; 1961 All Cr. R. 312).

A person can be prosecuted under this section even after the dismissal of his complaint to a Magistrate. A person gave false information to the police and subsequently made a complaint to a Magistrate and the Magistrate issued a summons to the accused to appear but the complainant did not appear at the time of the hearing and the police reported that the complaint was false. After the discharge of the accused the police officer to whom the complainant had given information laid a complaint and preferred a charge under this section. It was held that the complainants making a complaint to a Magistrate and then dropping the proceedings, was no bar to the police officer acting under this section (20 CrLJ 114).

Section 182 is intended to apply where false information is given to police (34 All 522; AIR 1925 All 906). Where a false report is given tothe police and a similar complaint made to the Magistrate, the police may institute proceedings under section 182 and its jurisdiction is not fettered by the Magistrates jurisdiction (AIR 1928 All 342= 30 CrLJ 342). This section will apply only when a complaint is filed before the court (1961 All 278).

The section applies to information relating to cognizable and non-cognizable offences and the only question to be considered will be whether the report is false or calculated to induce a public officer to do something or omit to do something which he ought to have done or omitted (AIR 1930 All 313; 37 CrLJ 562).

2. Giving false information to public servant.- This section relates to false information given to a public servant which the informant knows or believes to be false, to influence such public servant :-

1. to act otherwise than how he would have acted; or

2. to use his lawful power to injure or annoy other person. The offence will be complete when the informant gives information which he knows or thought to have known to be false. The question whether the public servant to whom such information is given acted in pursuance of it or not or was misled is immaterial. The information furnished must be established to be false to the knowledge of the informant (5 CrLJ 105; ILR 31 Bom 204).

The mere giving of a false information is an offence if the informant knew that on his information, which to his knowledge is false, the public servant to whom such information was given was likely to act which he would not have otherwise done or used his lawful power to injure or annoy any person. The offence is complete when informant gives the information which he knows to be false with the intention of causing the public servant to do anything which he ought not to do or omit to do anything which he ought to do. The fact that the public servant did not in fact do or omit to do anything or did not use his lawful power in pursuance of information is immaterial (ILR 13 All 351).

An informant knowingly giving false information to a public servant voluntarily or on being questioned is punishable under section 182, Penal Code (AIR 1920 Lah 349). It is not necessary that the information is given voluntarily, or that the false report is taken down from dictation (AIR 1962 Ker 133; AIR 1926 Oudh 448). The term 'information' contemplated under section 182 is the first information which leads the police to take action against any such person and the subsequent recording or collecting of evidence or any such statement cannot come within its ambit for in that event the purpose or intention behind the giving of such information can not be attributed to him (1970 Cr Lj 1359 Guj). Were information has already been given and the law has already been set up in motion, the statement made by the informant to a police-officer in the course of investigation can not be regarded as an information (1946 Cr LJ 264 = AIR 1947 Pat 64).

Section 182 makes punishable the positive act of giving false information. There is nothing in the section showing that it intends to punish the withholding of the information as distinct from the actual giving of information (AIR 1940 Lah 15).

False information with allegation of theft with intent to cause investigating agency to use its lawful power to injury of other person was punishable under this section (1985 PCrLJ 1055). But where depositions to police recorded under section 161 Cr.P.C. were neither made on oath nor signed by any one of the petitioners, nor had they the opportunity to see that the same were correctly recorded by the police. Under the law as it now stands the petitioners were under no obligation to state the truth before the police and it would therefore, be wrong to hold them liable under section 182, Penal Code on that basis (NLR 1986 Cr. 105).

Statements made by prisoners for purpose of their defence are not information given to a public servant within the meaning of the section. (2 NWPHCR 128). Even a false statement by a convict in his petition of appeal that the Magistrate had decline

to summon defence witnesses would not make them liable under this section, as the appellant had the privilege of an accused and could be punished for making a false statement, by virtue of section 342, Criminal Code of Procedure (12 Ma 451).

No offence under section 182 Penal Code can be made out where it is not suggested that false information was given to a public servant as defined in the Penal Code (AIR 1924 Bom 51).

The words 'public servant' in section 182, sufficiently cover a police officer (AIR 1936 Sind 94). Therefore if any person gives the first information statement to the police even though not voluntarily which is recorded under section 154 Cr.P.C. an if it ultimately turns out to be false, it would amount to giving false information and the offender would be punishable under section 201 Penal Code provided the requisite intention is proved (AIR 1953 SC 131). But if any false information is given to the police during interrogation or investigation of an offence by the police, it will not come within the mischief of this section (AIR 1962 Ker 133).

3. Knows or believes to be false.- The information given should be information which the accused knew or believed to be false. There must be positive knowledge or belief that it is false (30 CrLJ 1008). The accused can not be convicted if he shows that he had reasonable grounds for believing the information to be true. He is not bound to show that it was in fact true. It is not sufficient to find for a convictin under section 182 that the accused person has given information which he did not believe to be true, but it is necessary that it should be found positively that he knew or believe the information to be false. The accused can only be expected to show upon what facts within his knowledge the information given was founded, but he certainly is not bound to show that the information given was in fact true (PL 1960 Lah 1035). It is not sufficient that the accused has reason to believe it to be false or that he does not believe it to be true. The distinction between statements made on insufficient grounds an statements made with the knowledge or belief that they are groundless is very important (PLD 1975 Lah 264). Where the accused gave false information to the police that his horse was stolen when in fact he himself had sold it, or where by reporting falsely that his father had died, the petitioner induced the revenue surveyor to enter his name in the revenue registers as owner of certain gardens and paddy lands in succession to his father; it was held that the petitioner had committed an offence under section 182 and not under section199, 177 or 193 (AIR 1914 Low Bur 30).

An accused who made a statement negligently and rashly but not intentionally and deliberately was held to be not guilty of an offence under section 182 (AIR 1927 Cal 78) Where in FIR by the father it was stated that his daughter was being illegally confined and the daughter stated that it was not correct, whereupon a compliant under section 182 was lodged against the father. It was held that the mere fact that the daughter of the petitioner repudiated the allegations made by him in regard to her illegal confinement would not bring the case within the ambit of the provisions of section 182, Penal Code. Experience shows that when a girl leaves her parental house and goes with her paramour, she is prone to make statements against the case started by her parents (PLD 1975 Lah 264).

4. Opportunity to prove truth of information :-A person who lays an information before the police is entitled to have his case determined by the court before he is called upon to answer the charge of laying a false information (PLD 1970 Lah 726). Where on a Police report that the case of the complainant was false, he filed a narazi petition objecting to the police report, it was held, that the process cannot be issued against him under section 182 without enquiring into and disposing of the complainant's narazi petition (AIR 1932 Cal 550). Where complainant's case was

disposed of as false but his direct complaint filed in respect of the same incident was pending in court. No action could be taken against him under section 182/211, Penal Code, unless his direct complaint was disposed as false and court directed filing of complaint agianst him (1983 PCrLJ 1097). Where a person when called upon to show cause why he should not be prosecuted under section 182, P.C. challenges the police report and reiterates the charges made before the police it is clearly a complaint, and the Magistrate should deal with it under the provisions of section 203, Criminal Procedure Code. The case under section 182 Penal Code cannot be proceeded with until that person's complaint has been dealt with in accordance with law (AIR 1939 Cal 271). But where a narazi petition against the report of the police has been actually dismissed by the Magistrate under section 203, Criminal Procedure Code, it is finished and done with, and there is nothing further to prevent the trial under section 182 Penal Code (AIR 1939 Cal 340).

5. Ulterior intentions.- The criminality contemplated by section 182 does not depend upon what is done or omitted to be done by the public servant on such false information, but what was from the facts, the reasonable intention to be inferred on the part of the person who gave the false information (37 CrLJ 870). Section 182 requires that information which is false or which is believed to be false should be given to a public servant with a particular intention or knowledge, and if the information is known to be false and is given with the intention of causing a public servant to do or omit to do anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given where known to him, or to use the lawful powers of such public servant to the injury or annoyance of any person, then an offence is committed. The fact that the public servant did not in fact do or omit to do anything or did not use his lawful power in consequence is not a deciding factor. The guilt of the accused lies in his intention or knowledge and a man's intention or knowledge must be judged from his acts and the surrounding circumstances (AIR 1962 SC 1206). Thus where the driver of a car who is driving without a licence, gives a wrong name and address to the police officer who questions him, is guilty of an offence under this section (AIR 1929 Pat 4). It is to be noted that section 182 says nothing about cognizable or non-cognizable offences or anything of the kind. The only question to be considered is whether the report is false and whether it was calculated to induce the public officer to do something or omit to do something which he ought not to have done or omitted (AIR 1943 All 96).

The information which is penalised under section 182, Penal Code, is an information which is inteded to cause or is knows to be likely to cause the public servant concerned to take action. Where information within the meaning of the section had already been given and the law already set in motion, further statements made in the course of investigation would not be further information falling under section 182, Penal Code (AIR 1947 Pat 574).

If the false information is such that the public servant concerned cannot take any legal action of it, it would not fall within section 182 (AIR 1918 All 85). Thus where the accused reported to the police that his buffalo was missing, and the police directed a case under section 379 Penal Code and it was subseqeuntly established that he had sold the animal to a person against whom the accused wanted to set up a case; it was held, that the report not being the report of a cognizable or non-cognizable offence, did not in itself call for any action on the part of the police officer to whom it was made, and hence fell short of fulfilling the conditions necessary to justify a conviction under section 182 (AIR 1932 Pat 170). The other view is that a prosecution under section 182 Penal Code will lie quite irrespective of whether the

action which a pulic servant is asked to take on information given to him is a legal one or not. To take the view that if he is not legally entitled to take action a prosecution will not lie will reduce section 182, Penal Code to a reductio ad obsurdum, does not lay down correct law (24 CrLJ 913).

6. To do or omit anything.- It is necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information. The gist of the offence is not what action may or may not be taken by the public servant to whom false information is given; but the intention or knowledge (to be inferred from his conduct) of the person supplying such information (1928) 7 Put 715).

Where a person gave a false information to a village Magistrate with the view to it being passed on to another officer (station house officer) charging another with having committed an offences he was held guilty under this section (1905) 28 Mad 565).

7. To the injury of other.- Where a person made a petition to the police falsely stating that he suspected another person of having committed an offence and prayed for an injury, it was held that he would come within the perview of this section as he had given false information with intent to cause a public servant to use his lawful powers to the injury of another person where a person falsely gave information to the police that a horse belonging to him had been stolen. When in fact he had sold it sometime previously and did this with the intention that a charge should be brought against the purchaser, it was held that he was guilty under this section (ILR 44 All 647)d. But the case would have been different if the accused had rested content by alleging that his horse had disappeared in which case there being no report of a cognizable offence and not in itself calling for any action by the police the accused could not have been convicted under this section (AIR 1928 All 196; 57 IC (All) 96).

The words 'to use his lawful power' refer to some power to be exercised by the officer misinformed, which shall tend to some direct and immediate prejudice of the person against whom the information is given. They do not apply to such prejudice as might eventually arise in consequence of certain harmless intermediate steps to be taken by the misinformed officer (4 Mad 241).

8. Who may file complaint.- Section 195 Cr. P.C. requires that a complaint under section 182 should be made only by the public officer before whom a false complaint is made. It cannot be made by a private individual (NLR 1985 Cr. 440). The words 'public servant concerned' so far as an offence under section 182 is concerned, would mean a public servant to whom a false information is given with the intention or knowledge that such public servant will do something which he ought not to do (AIR 1961 All 352). It follows that if a false complaint against a police officer is made to D.M. he is quite competent to file a complaint under section 195, Criminal Procedure Code, an offence under section 182, Penal Code, both in his capacity as a public servant to whom a false information is given as well as in his capacity as the head of the criminal administration of the district and to whom the police officers of the district are subordinate (AIR 1961 All 352). Where a false information regarding dacoity was given to the police who did nto proceed on it because it was found to be false, only the police officer concerned are competent to file a complaint under section 182 (AIR 1930 Oudh 414). One view is that the mere fact that a Magistrate to whom false information was given consulted the District Magistrate and did what that officer told him to do does not invalidate the complaint. So long as the Magistrate filed the complaint himself (PLD 1957 Lah 747). But the other view is that a Magistrate cannot file a complaint on the direction of the District

Magistrate because the officer who makes the complaint has to make up his own mind. He cannot file a complaint under the order of some one else. In the latter case it was that other person who filed the complaint and he had no authority to do so (PLD 1960 Lah 1039). Where the complaint was made to the chairman of the Municipality and only a copy of it was sent to S.D.M. who found that the complaint was false and made a complaint under section 182 Penal Code. It was held that the complaint could be made only by the chairman and that the complaint made by the S.D.M. was bad (AIR 1950 Cal 97). Where the officer in charge of a police station, after the usual investigation following a complaint submitted a report to the Magistrate to the effect that the case was false, an order by the Magistrate directing prosecution of the complainant under section 182 is wholly without jurisdiction. The order cannot possibly be brought under section 476, Criminal Procedure Code nor it is covered by any other provision of the Code either (AIR 1951 Assam 54).

A complaint can be lodged only after the Magistrate "come to a *prima facie*" conclusion that the information given was deliberately false complaint under section 182 Penal Code, can only be filed by the Magistrate after himself making up his mind and not on the direction of another authority (12 DLR (WP) 78; 3 PLD 405 Lah).

9. Evidence and proof.- In order to prove the offence under section 182 of the Penal Code the prosecution has to prove that the person to whom the information was given was a public servant; that such information was false; that the accused knew or believed such information to be false when giving it. There can not be any direct evidence to prove intention but intention has to be gathred from the circumstances of the case 91976 MLJ 475).

The points requiring proof are :

1. that the accused gave some information. (AIR 1926 Oudh 448).
2. that the person to whom it was given was a public servant (ILR 5 Pat 33);
3. that the information given was false;
4. that the accused when giving it knew or believed it to be false (AIR 1927 Cal 78);
5. and that the accused intended or knew that his information will probably cause the public servant to act as in clause (a) and (b) (44 IC (All) 113).

The fact that an information is shown to be false does not cast upon the accused the burden of showing that when he made it, he believe it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false (10 crLJ 12; 38 CrLJ 289).

It is necessry for the prosecution to prove by means of positive evidence that the accused has knowledge or belief to the effect the information given by him was false. The onus, therefore, is undoubtedly on the prosecution to prove that the information was false to the knowledge or belief of the person who gave information (19 DLR 460).

183. Resistance to the taking of property by the lawful authority of a public servant.– Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servants, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both.

1. Subs. by Act VIII of 1973, s. 3 & 2nd Sch, (w. e. f. 26th March, 1971), for "rupees".

184. Obstructing sale of property offered for sale by authority of public servant.– Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred [1][taka], or with both.

185. Illegal purchase or bid for property offered for sale by authority of public servant.– Whoever, at any sale of property held by the lawful authority of a public servant, as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred [1][taka], or with both.

186. Obstructing public servant in discharge of public functions.– Whoever voluntarily obstracts any public sarvant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred [1][taka], or with both.

Synopsis

1. Voluntary obstructs any public servant.
2. "In the discharge of his public functions"
3. Complaint.

1. Voluntary obstructs any public servant.-The use of the word voluntary indicates that the legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal mere passive conduct (15 Mad 221; 6 Bom LR 254). The word obstruction means actual obstruction, i.e. actual reistance or obstacle put in the way of a public servant. The word implies the use of criminal force and mere threats or threating language (29 CrLJ 645), or mere abuse (1 Weir 621) are not sufficient to obstruction. It is obvious that threats of violence made in such a way as to prevent a public servant from carrying out his duty might easily amount to an obstruction of the public servant particularly if such threats are coupled with an aggressive or menacing attitude on the part of the person uttering the threats (26 Cult L.T. 596; 1984 (2) Crimes 599).

'Obstruction' connotes a positive act which would interrupt the public servant from carrying on his public duties. It is a physical obstruction (45 CrLJ 407). The obstruction may be in a variety of ways (AIR 1950 Pal 544). The question is whether the obstruction prevented the public servant from carrying out his duties (AIR 1932 Cal 871).

Mere threats will not amount to obstruction. It must be followed by overt acts preventing a public servant from executing his duty. Where a person not merely refuses to give up property but threats to cause harm to the police if he attempts to carry out the warrant, the threat will amount to obstruction. The expression contempaltes actual resistance and implies use of criminal force. Mere running away to avoid arrest will not amount to obstruction within the meaning of this section (AIR 1955 All 104 = 1955 CrLJ 278). But the section does not contemplate constructive obstruction to a judicial officer in the discharge of his judicial functions

1. Subs. by Act VIII of 1973, s. 3 & 2nd Sch, (w. e. f. 26th March, 1971), for "rupees".

even when they are of a *quasi* executive character or when the proceedings before him are in execution (AIR 1936 Pat 74). The section clearly contemplates the commission of some overt act of obstruction and is not intended to render penal merely passive conduct. The word 'obstruction' means physical obstruction, i.e. actual resistance or obstacle put in the way of a public servant (NLR 1983 Cr. 298). It must be intentional and its must be direct (30 DLR 29).

Physical obstruction does not in all cases mean application of physical force or violence, or even threats of violence made in such a way as to prevent a public servant from carrying out his duty, might amount to an obstruction of the public servant particularly if such threats are coupled with an aggressive or menacing attitude on the part of the persons uttering the threats and still more so if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflciting physical injury (PLD 1976 Lah144; PLJ 1976 Lah 777; AIR 1932 Cal 871).

The following acts amount to obstruction (a) Where a man exchanged hot words with a police constable on traffic duty, demanded his number and pushed him about (AIR 1938 All 118). (b) Where there is sufficient indication that force would have been used if the peon having a warrant of attachment had persisted in executing it (AIR 1937 Pat 833). Where a constable entered a house and found in a room three articles alleged to have been stolen, but before the constable could remove them the accused caused the door of the room to be shut and also threatened to kill the constable if he removed the articles (AIR 1924 Mad 760). (d) dClosing the door in face of an officer acting in the discharge of his public function (AIR 1942 Mad 552). (e) Where during the execution of a warrant of possession the judgment debtor and his men paraded the place in a defiant and angry mood (AIR 1943 Nag 334). (f) Refusal to show goods to an octroi officer (AIR 1935 Sind 245). (g) Seriously obstructing insulting and jostlting a proces server in the execution of his duty (AIR 1915 Lah 456). (h) Obstructing a nazir who is removing huts of the accused in execution of a court order (AIR 1933 Cal 469).

The following acts were not held to amount to obstruction. (a) Where a tenant states to a person who wants to effect delivery of possession of the house to a decree holder, that he had rented the house from certain persons and would vacate it only if they asked him to do so (AIR 1950 Pat 544). (b) Mere verbal protests to an officer making a search (AIR 1932 Rang 21). (c) A cart owner refusing to give his cart on hire to a Government officer (9 Bom HCR 185). (d) Spreading a false report and thereby preventing people from bringing their children for vaccination (15 Mad 93). (e) Merely informing a vaccinator that he would get no children to vaccinate in the village, and that he might have saved himself the troubel of coming (1 Weir 130). (f) Taking away of a child by its lawful guardian from a vaccinator who was vaccinating other children (1 Weir 132). (g) Refusal to allow children to be revaccinated and further refusal to show them to the vaccinator so that he might ascertain whether they had before been vaccinated (1 Weir 130). (h) Running into one's house to avoid arrest in execution of a warrant (AIR 1955 All 104). (i) Locking the doors from inside the house to avoid search of the house and not heeding the requests of the commissioner in the matter (15 Mad 221). (j) The refusal of a patwari to allow the Kanungo to go through his book and to check them (AIR 1925 All 409). (k) Resigning membership of Panchayat (AIR 1925 All 401). (l) Escape from lawful custody of a process server and the act of a person in running away and shutting himself up in a room and refusing to come out (AIR 1927 Lah 708).

2. "In the discharge of his public functions".- Proof that the public servant obstructed, was obstructed in the discharge of his public functions, is necessary

before a conviction can be made under the section (30 DLR 29). Public function mean legal or legitimately authorised public functions and do not cover every act undertaken to be performed by a public functionary and bonafide belief of the public servant that he is acting in the discharge of his duties does not make resistance or obstruction to him an offence (8 DLR 452). Thus where a receiver does not take property in contravention of sub-rule (2), R.I. O. 40 C.P.C. from a third person, or where a person resisted an illegal arrest sought to be made by a peon of the Civil Court, or where a person rersisted the police who sought to execute illegal orders of a Magistrate, or where an Assistant Excise and Taxation Officer sought to forcibly check the account books of a shopkeeper which he had no legal power to do, the resistance offered to him was no offence under the section (AIR 1939 Sind 333; AIR 1918 Pat 457; 8 DLR 452; AIR 1932 Pat 276).

If a public officer does not more than act upon the official instructions he has received and if those official instructions are not of such a kind as to be obviously and patently illegal, then he acts properly in carrying out such orders, and resistance to a public officer carrying out orders which upon the face of them are not open to objection and are in proper form, is an offence (AIR 1932 Pat 276). Where a pleader commissioner appointed by court to remove certain obstructions, was obstructed by the accused but the writ under which the commisioner was acting was not proved, it was held that it was impossible to say what his functions were and, therefore, it could not be said that there was obstruction to the commissioner in the discharge of his poublic functions (5 DLR (Pat) 76).

3. Complaint.- Complainant in writing of the public servant concerned or of some other public servant to whom is subordiante, is required (36 CrLJ 714; 1954 CrLJ 15). Where Amin was obstructed while executing decree of District Munsif court, it was held that as the Nezarat was subject to the control of sub-Judge and not of District Munsif, the District Munsif could not file complaint (AIR 1943 Mad 170; 44 CrLJ 326).

187. Omission to assist public servant when bound by law to give assistance.– Whoever, being bounded by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred [1][taka], or with both;

and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lwfully issued by a Court of Justice, or of

preventing the commission of an ofence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred [1][taka], or with both.

188. Disobedience to order duly promulgated by public servant.- Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction.

1. Subs. by Act VIII of 1973, s. 3 & 2nd Sch, (w. e. f. 26th March, 1971), for "rupees".

Shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to month or with fine which may extend to two hundred [1][taka], or with both;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both.

Explanation.– It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.

Illustration

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

189. Threat of injury to public servant.–Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the excercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

190. Threat of injury to induce person to refrain from applying for protection to public servant.– Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

CHAPTER XI

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE

191. Giving false evidence.–Whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation1.–A statement is within the meaning of this section, whether it is made verbally or otherwise.

1. Subs. by Act VIII f 1973, s. 3. and 2nd Sch. (w. e. f. 26th March, 1971), for "rupees".

Explanation 2.–A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

Illstrations

(a) A, in support of a just claim which B has against Z for one thousand 1[taka] falsely swears on a trial that he heard Z admit the justice of B's claim, A has given false evidence.

(b) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(c) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to his belef, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(d) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at that place on the day named or not.

(e) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretaion or translation. A has given false evidence.

Synopsis

1. Scope and applicability.
2. Statement on oath.
3. Verification of pleadings.
4. Declaration.
5. False statement.
6. Affidavit.
7. False statement of accused.
8. Contradictory statement.

1. Scope and applicability.- Whenever in acourt of law a person binds himself on oath to state the truth he is bound to speak the truth and he can not be turn round to say that he was not bound to enter the witness box or should not have sworn to an affidavit. Whenever a man makes a statement on oath he is bound to speak the truth. That is the sanctity of taking an oath in a court of law. Section 14 of the Oaths Act provided that every person giving evidence on oath on any subject in a court of law shall be bound to speak the truth on such subject (AIR 1952 SC 54; 53 CrLJ 547).

This section only defines what amounts to 'giving of false evidence'. The definition has been enacted for the purposes of the provisions of the Penal Code, and it cannot be said that it contains any general principle of law of universal application as such. That a person should always tell the truth is a moral principle, but it cannot be said to be a legal principle as such. Whenever the legislature requires a person to tell the truth, it has so enacted in varius enactments. It is only when it has been so enacted and a person fails to tell the truth that he comes within the mischief of the provisions of the Penal Code (AIR 1965 Bom 195). It follows that before a person can be convicted for giving false evidence under section 193, Penal Code, it has to be proved that he was legally bound by an oath, or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false (AIR 1964 Punj 211). Thus the mere misreading of a

document for the information of the Magistrate by a witness does not amount to giving false evidence under section 191 as he is not legally bound by oath to read the document correctly (9 CPIR (Cr) 5).

A witness who deliberately swears to a false evidence and admits its falsity when confronted with is contestable proof of his falsehood is guilty of perjury (17 CrLJ 491). Unless there is a *prima facie* case of deliberate fatsehood on asubstantial matter prosecution should not launehed (ILR 10 Bom 288). It is enough if a false statement is intentionally made (AIR 1933 All 318). The petitioner who makes false statements in his application under section 24 C.P.C. for transfer of proceedings commits an offnce under section 191 (AIR 1955 NUC (Cal) 2906). The only remedy against a witness giving false evidence is prosecution for perjury (25 BOm 31).

2. Statement on oath.- In order that a person may be 'legally bound by an oath' there must be a valid and legal oath administered by a person authorised by law to administer it. The person to whom the oath is administered must also be a person competent in law to whom such oaths can be administered and the oath must have been taken before the statement in question was made (AIR 1955 NUC (Cal) 2906).

Where a witness, who when giving evidence is required to state the truth by section 14 of the Oaths Act, makes statement which he knows to be false, he commits an offence under section 191 (1939 NagLJ 396). Oaths Act, does not prevent the court from attempting to establsh that a particular statement made by a person under a special oath was false in fact and to his knowledge and that, therefore, he gave false evidence (AIR 1924 Bom 511). Whenever in a court of law a person binds himself on oath to state the truth he cannot be heard to say that as he was not bound under law to go into the witness box or make an affidavit, any false statement which he had made after taking the oath is not covered by section 191 (AIR 1959 SC 843).

3. Verification of pleadings.- A false verification in the pleading will amount to a false declaration (AIR 1930 All 490). Pleadings in a civil suit are thus required to be verified (25 CWN 886), and it is provided by the code of crivil Procedure that for the purpose of verification the person verifying "shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believes to be true" (Order VI, rule 15 (2) C.P.C). But where a verification is specified and deliberately false, there is nothing in law to prevent a person from being prosecuted for giving false evidence, though it is not evidence in the ordinary sense of the term so as to justify the passing of a decree upon its basis (ILR 43 Cal 1001).

False verification of a plaint would an offence under this section (AIR 1940 Mad 677 = 41 CrLJ 906).

It is a false statement made under verification that constitutes an offence punishable under section 193, and not a verification on oath or by solemn affirmation (27 Cal 820). Section 191 was framed in the way in which it stands only with the intention of bringing vertifications of statements in pleadings by a person knowing them to be untrue within section 193 (AIR 1917 Cal 269). A person is under a legal obligation to verify the allegations of act made in the plaint and pleadings. If he verifies falsely, he comes under the clutches of section 191 and is liable to be punished under section 193 for giving false evidence (AIR 1943 Nag 17). It follows that if a defendant makes a false statement in his written statement knowing that the verification is false in view of section 191 he give false evidence and thereby becomes liable under section 193 (AIR 1930 All 490).

Where a person signs and verifies a darkhast containing false statements he is punishable under section 193 and the fact that he signed the darkhast when it was blank would not avoid the penalties attaching under section 193 realting to fabrication of false evidence (6 Bom L.R. 886). The verification of an application, in which the applicant makes a false statement, does not subject him to punishment for this offence, if such an application does not require verification (2 CrLJ 100).

A man who voluntarily and officially verifies a statement, when the law does not want him to do so does not render himself liable to punishment (AIR 1943 Nag 17). A person presenting a verified petition for substitution of parties, containing a false statement of the death of a defendant cannot be considered to fall within the mischief of section 193, as verification is not required for a petition for substitution of parties (AIR 1927 Pat 197). A Deputy Collector acting under the Land Acquisition act cannot require a petition put in before him to be verified in accordance with the Civil Procedure Code as so to make any false statement in it punishable as perjury (27 Cal 820).

4. Declaration.- Where a person makes a false declaration which he is bound to make in law, he would be guilty of perjury. Thus an officer, of the court making a false declaration as to the manner in which the warrant of sale has been executed, is guilty of an offence under this section (1 Weir 155). Where it has not been shown that the statement containing a list of deeds of loans which the petitioner supplied under the order of the Deputy Commissioner amounted to a declaration which he was bound by law to make, the charge against him under section 193, Penal Code, cannot succeed (AIR 1954 Assam 259). A statement made in an application under the Bengal Land Registration Act is a declaration within the meaning of section 191 (12 CrLJ 411).

5. False statement .- To constitute an offence under section 191 it is not necessary that the false evidence should be concerning a question material to the decision of the case in which it is given; it is sufficient if the false evidence is intentionally given, that is to say, if the person making that statement makes it advisedly knowing it to be false, and with the intention of deceiving the court and of leading it to suppose that which he states is true. But if the false evidence does not bear directly on a material issue in the case, being relative to incidental or trivial matters only, that would be a matter to be taken into consideration in fixing the sentence, or making a false claim against the railway for detention of goods by overstating their value is punishable under section 193 (AIR 1924 Nag 35). But mere suppression of circumstances when the facts stated are true is not perjury (AIR 1916 Sind 70).

The false statement must be given in evidence. The mere making of a false balance sheet is not an offence within section 191 (16 All 88).

The offence of perjury is intimately connected with the statements made. There would be as many different offences as there are false statements (AIR 1928 All 706). A false statement as to belief would fall under the explanation (2) to section 191 (AIR 1959 SC 843). No offence of perjury will arise where a person makes a false statement before a police officer investigating a criminal case (7 CrLJ 3), or when a false confession is made (AIR 1959 AP 567).

6. Affidavit.- Sweering to a false affidavit of the witness in a proceeding before court is an offence (AIR 1967 SC 68 = 1967 CrLJ 6).

An affidavit filed by the complinant against a fact admitted in the complaint itself must be considered to be false (Madh BLJ 1954). It has been held that to file a false affidavit with the object of securing admission of an appeal, which is barred by

time on the representation that the copying department has not yet supplied the copy, is a very grave and serious matter and the person who does so commits a serious wrong to the court and to the society as a whole, of which it is not desirable and indeed is dangerous to take a lenient view (AIR 1963 Punj 185). But where the accused swore an affidavit all the paragraphs of which he certified on his personal knowledge and belief without any specification as to which of the paragraphs were based on personal knowledge and which on belief, that it was open to the accused to contend that the mischievous paragraphs were based on belief and that, therefore, he was not guilty of an offence under section 191 (AIR 1947 All 235).

7. False statement of accused.- The Criminal Procedure Code provides that the accused shall not render himself liable to punishment by refusing to answer questions put by the court or by giving false answers to them (section 342 Cr.P.C.).

Section 192 applies to an accused person who fabricates false evidence in order to defend himself, and that there is no warrant for the conclusion that there is an absolute protection or privilege in favour of an accused person who can scape from the penalty impoosed by section 193 by reason of being an accused person (1934) 57 All 403).

Where an accused person applies for the transfer of the case pending against him to some other court supporting his application by an affidavit, he can not, or at least ought not to be prosecuted under section 193 Penal Code in respect of statements made therein (1906) 28 all 331). The Lahore High Court has dissented from this view. It has held that an application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of an application for transfer do not enjoy the immunity conferred by section 342 Cr. P.C. upon answers to questions put to the accused by the court (1922) 3 Lah 46; AIR 1926 Lah 12). Further, it has held that there is no law which confers upon an accused person immunity from prosecution in respect of a false statement in an application for transfer and that such statement can be the subject matter of a charge for perjury (1924) 6 Lah 34). In a recent decision of the Allahabad High Court where the accused had made certain allegations in an affidavit for transfer, which were found to be false, it was held that the accused could be convicted under this section (1966 CrLJ 825).

Where an accused knew that he was swearing to a false affidavit it will fall under this section (AIR 1955 All 608).

8. Contradictory statement.- If the prosecution succeeds in proving that an accused in the witness box deliberatley made two statements which are so contradictory to, and irreconcilable with each other that both cannot possibly be true, he can be convicted of perjury even without its being proved which one of them was not true (AIR 1954 All 424). But a witness may innocently make a statement which is incorrect or wrong and may later correct himself. Simply because he has made two contradictory statements, it can not be said that he had committed perjury (1 CrLJ 390). When, howevr, a witness makes two contradictory statements intentionally, there is nothing to show that the earlier statement was wrong and was corrected by the subsequent statement, and he does not admit that he had committed a mistake in making the earlier statement, and when the prosecution charges him in the alternative with making one of the two statements falsely, he must be convicted of perjury (AIR 1954 All 425).

A court should not convict unless it is fully satisfied that the statements are from every point of view, irreconcilable (11 CrLJ 353). Where the contradictory statements were made in the same deposition no offence of perjury can be made out

(AIR 1927 Nag 189). A statement in cross examination that his earlier statement was false will not neutralise the perjury (1966 CrLJ 834). where there are contradictory statements by a witness one of which should have been false an opportunity should be given to the witness and when real truth is given, he should not be prosecuted under section 191 (72 CrLJ 405; 13 CrLJ 752).

192. Fabrication false evidence.– Whoever causes any circumstance to exist or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

Illustrations

(a) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(b) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(c) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. A has fabricated false evidence.

Synopsis

1. Scope and applicability.
2. Intention of accused.
3. Fabrication of evidence to divest attention.
4. In a judicial proceeding or before a public servant.
5. Effect of fabrication.
6. Admissibility of fabricated evidence.
7. Section 192 and sections 463 and 464.

1. Scope and applicability.- This section defines fabircation of false evidence which is made an offence under section 193. The accused caused a certain circumstances to exist or made a false entry in any book or record or made a document containing a false statement and that such thing was done with the intention that such circumstance or false story or false statement may appear in evidence before a Judge, a public servant or an arbitrator causing them to entertain an erroneous opinion upon any material point (37 CrLJ 562). A person commits the offence of fabricating evidence, if he makes a document which, though it may not contain any false statement in express terms, yet contains false recitals which imply such a false statement (3 CrLJ 196). Section 192 lays down *inter alia* that a person is said to fabricate false evidence if he makes a document containing a false statement intending that such false statement may appear in evidence in a judicial proceeding and so appearing in evidence may cause any person who, in such proceeding is to form an opinion upon the evidence to entertain an erroneous opinion touching any point material to the result of such proceeding (AIR 1967 SC 68).

An entry would be a false entry or a statement in a record or document a false statement if it does, either by reason of some false additions or of some material omissions, misrepresent the truth. The omission may be illegal or may not be illegal.

The thing to consider is what is the effect of the omission on the entry as made or on the statement as occurring in a document (AIR 1937 Cal 42; 38 CrLJ 700).

The important ingredient which constitutes fabrication of false evidence within the meaning of section 192, beside causing a circumstance to exist making false document is the intention that the circumstance so caused to exist or the false document made may appear in evidence in a judicial proceeding, or before a public servant or before an arbitrator, and lead to the forming of an erroneous opinion touching any point material to the result of the proceeding (AIR 1964 SC 725). What, in fact, would amount to fabricating false evidence within the meaning of this section would depend in each case upon the special facts of the case which is the subject matter of a judicial proceeding. What is material in one proceeding may not be found to be material in a different proceeding where the point at issue between the disputants differs from another proceeding (AIR 1956 Pat 154).

Knowledge of the falsehood of the statement or document is a necessary ingredient of the offence. Witnessing the service of summons on a wrong person is no offence under section 193, unless it is proved that the accused was aware that service was to be effected on a different person (AIR 1919 Pat 528). The mere fact of a person placing his signature on a written report, without knowing its contents, is no ground for holding that he necessarily knew or had reason to believe that the contents of the report were false. The act does not amount to an offence under section 193 (AIR 1919 All 316). The tutoring of a man to give false evidence amounts to the "causing of a circumstance to exist" within section 192 (AIR 1927 All 721).

Where a false entry is made and that entry assists the court to form an opinion, an offence under this section is made out (1966 CrLJ 459). Where the accused fabricated an endorsement on a pronote to make it fall within the period of limitation this section is attracted (1933 Mad 413 = (1933 CrLJ 12 54).

The filing of false affidavit in a court by a witness in a proceeding in court constitutes an offence under this section (AIR 1967 SC 68 = 1967 CrLJ 6). Where a medical officer giving expert evidence produced a fabricated diploma to establish that he was an expert, the offence was held to have been made out (AIR 1966 SC 526 = 1966 CrLJ 459).

Unless the document fabricated is intended to be used in a court, no offence under this section will be made out, but once a document is fabricated with the said intention an offence will be made out (ILR 2 All 105). The gist of the offence under this section is the intention to cause failure of justice by the use of a false thing in evidence (ILR 29 All 351; 6 CrLJ 162)

Under section 192 Penal Code, the offence of fabricating false evidence is complete as soon as the fabrication is made intending that it may be used as evidence in a judicial proceeding. It is immaterial that the judicial proceeding has not been commenced or that no actual use has been made of the evidence fabricated (11 DLR 359; AIR 1940 Cal 449).

2. Intention of accused.- An accused can only be guilty under section 192 if he had the intention of fabricating evidence in order that it should appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant as such, or an arbitrator. The prosecution must show that there was such an intention. (AIR 1935 Cal 304). The gist of the offence contained in section 192 does not consist in actually causing a failure of justice but in the intention to cause a failure of justice by misleading the court and with such intent causing the existence of any circumstances, which may appear in evidence. It is the intention and not the actual result that forms the criterion (5 CrLJ 285).

Where evidence leads to an inference of an intention to use fabircated document in a judicial proceeding, the requirement of section 192 is satisfied (AIR 1920 Bom 319). But as the intention that a false dying declaration may appear in evidence in a judicial proceeding and cause an erroneous opinion to the entertained touching a point material to the result of such a proceeding, which is an essential ingredient in the definition, cannot easily be inferred of a man who was thought to be dying at the timed and did nothing by himself or by his friends to communicate with or seek any redress from the authorities, he cannot be convicted of an offence of perjury (AIR 1930 Pat 550).

3. Fabrication of evidence to divert attention.- Section 192 applies to a person who fabricates false evidence to divert attention as much as it applies where the fabrication is done to involve another person in the matter (AIR 1935 Cal 304). But the mere intention to divert suspicion and conceal one's guilt need not necessarily amount to fabricating false evidence which may appear in a judicial proceeding or in a proceeding taken before a public servant or before an arbitrator so that such authorized person would form a different opinion. But if the act of an accused person comes within section 192 he cannot take shelter behind the circumstance that he is an accused person to escape penalty under section 193 (AIR 1934 All 1017) In such cases the prosecution must show that the accused had the requisite intention and that he did not fabricate evidence merely to screen himself in the belief that his conduct would result in no proceedings whatever being taken (AIR 1935 Cal 304).

The police are too often tempted to introduce padding in a case in their over zealousness to establish a charge, which they believe to be true but in support of which the evidence in their possession is weak. But this practice has to be condemned in no uncertain terms (AIR 1958 MP 55 = 1958 CrLJ 190).

4. In a judicial proceeding or before a public servant.- It must be established that the fabricated thing was intended to be used in a judicial proceeding or before a poublic servant or an arbitrator (48 CrLJ 632). It is not necessary that the judicial proceeding in which the fabricated document was intended to be used was pending on the date of fabrication (AIR 1921 Bom 366; 22 CrLJ 49).

To satisfy the definition in section 192 it is essential that there should be an intent that the false entry or statement should be used in a proceeding taken by law before a public servant as such (12 Bom HCR 1). Thus were the accused fabricated account books and relied upon them in an inquiry before an income tax officer, section 192 was attracted to the case (20 Nag LJ 214). Even where a document is tempered with, although the accused did not materially gain by it because he would have got the money, which he sought to obtain by tempering with the document, even if he had done so, he would be guilty of an offence under section 192 because of his guilty intention (AIR 1918 Cal 61). But the position is different where the fabricated accounts are produced before a public servant who is not empowered under the law to examine them. In that case section 192 does not apply (12 Bom HCR 1).

5. Effect of fabrication.- There is no fabrication of false evidence if the document produced does not lead to forming of an erroneous opinion touching a particular point, but rather to the forming of a correct opinion (AIR 1918 All 326). Where a fabricated deed of transfer was produced before the court but as it did not speak of the past possession, which was the point on which the decision of the case depended. It was held that the deed did not have the effect of creating an erroneous opinion in the mind of the Magistrate in proceedings under section 144, Cr. P.C. and therefore the accused could not be convicted under section 192 Penal Code (AIR

1956 Pat 154). But a person who fabricates a document purporting to be a kabuliyat, fabricates false evidence as it might lead the court before which it may be produced to come to the conclusion that the document was genuine (AIR 1940 Cal 449). Similarly where a person deliberately identifies a wrong person as the accused, he would be held guilty under this section, because the identification is such as may create an erroneous opinion in the mind of the trial Magistrate about the guilt of the accused (5 Cr.LJ 285).

6. Admissibility of fabricated evidence.- A person is guilty of fabricating false evidence when he makes a false entry in a document intending that it shall appear in evidence and mislead the Judge or Magistrate. The mere fact that the entry is not legally admissible in evidence cannot affect his guilt, because it is the intention that creates the criminal offence and the mere fact that a document would be ultimately inadmissible in evidence does not necessarily take it out of the mischief of section 193 (AIR 1918 Lah 192). A different view has, however been taken by the courts in some cases wherein it has been held that if the evidence fabricated is not admissible in evidence then there is no fabrication of false evidence under this section (AIR 1942 Mad 92; AIR 1956 Pat 154).

7. Section 192 and sections 463 and 464.-Some of the ingredients of the act of fabricating false evidence which is penalised under section 193 and of making a false document and thereby committing forgery within the meaning of sections 463 and 464 are common. A person by making a false entry in any book or record or by making any document containing a false statement may, if the prescribed conditions of section 463 are fulfilled, commit an offence of forgery. But the important ingredient which constitutes fabrication of false evidence within the meaning of section 192 besides causing a circumstances to exist or making a false document to use a compendious expression is the intention that the circumstance so caused to exist or the false document made, may appear in evidence in a judicial proceeding or before a public servant or before an arbitrator, and lead to the farming of an erroneous opinion touching any point material to the result of the proceeding. The offences of forgery and of fabricating false evidence for the purpose of using it in a judicial proceeding are therefore distinct (AIR 1964 SC 725 = (1964) 1 CrLJ 555).

193. Punishment for false evidence.– Whover intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.–A trial before a Court-martial [1]* * * is a judicial proceeding.

Explanation 2.–An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

1. The words "or before a Military Court of Request" were repealed by the Cantonments Act, 1889 (XIII of 1889). Act XIII of 1889 was repealed by the Cantonments Act, 1910 (XV of 1910) which in turn has been repealed by the Cantonments Act, 1924 (II of 1924).

Illustration

A, in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial procceding, A has given false evidence.

Explanation 3.–An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of judicial proceeding. A has given false evidence.

Synopsis

1. Complaint.
2. Evidence and proof.
3. Punishment.

1. Complaint.- Complaint in writing of the court before which the offence is committed, or some other court to which such court is subordiante, is required (AIR 1942 Mad 326). No prosecution can be instituted for an offence under this section without the previous complaint of the court, public servant concerned as required by section 195 Cr. P.C. whenever the offence of perjury is committed in or in relation to any proceeding in a court of law a complaint from such court or a court to which it is subordinate should be made (AIR 1981 SC 1417) (1426). Cognizance of offence under section 193 or 196, Penal Code, cannot be taken by Court unless a complaint is filed by the court before whem an alleged false affidavit was filed (Som Mahajan & Anr. v. Jitender Kumar 1993 (1) Crimes 921 (P & H). When a person is alleged to have fabricated false evidence & used it in the Court proceeding, congnizance of such an offence dcan be taken by the Court only on written complaint of the Court where the alleged forged document was used (Prahlad Shrinivasrao Kulkarni v. The State of Maharashtra and another 1993 (1) Crimes 1092 (Bom.).

The offence under section 193 Penal Code, is one of those offences which are mentioned in section 195(1) (b) of Cr. P.C. This section provides that no court shall take cognizance of any offence punishable under any of the sections mentioned therein when such offence is alleged to have been committed, in or in relation to any proceedings, in any court except, on the complaint in writing of such court or of some other court, to which such court is subordiante. There is thus a bar under section 195 of the Cr. P.C. against the taking of cognizance in respect of an offence under section 193 Penal Code except upon conditions laid down in that section. The complaint contemplated by section 195 is made as a result of the proceedings under section 476 Cr. P.C. (1984 PCrLJ 1722; AIR 1964 SC. 1154).

Person legally bound by an oath, making false statement before Court, would be charged for an offence falling under section 193, Penal Code (Ikhlaq Fatima v. State 1989 P. Cr. LJ 1979).

Allegation stated in the compolaint petition that the appellants filed a civil suit being O.S. No. 112/82 and obtained an exparte decree from the court of Sub-Judge, Rangpur to the effect that a deed of gift executed on 21.6.80 by the respondent's late husband was forged, collusive and void as it was obtained by giving false evidence, making false statement and false personation. Held that the alleged offence have

been committed in relation to a proceeding in the civil court and no court is competent to take cognizance of an offence mentioned in clause (b) of section 195 Cr. P.C. except on a written complaint by the court concerned (1987 BCR (AD) 94; 1985 BLD (AD) 73 Ref).

Where the district Judge forwarded to the District Magistrate a copy of his judgment with a letter in which he called attention to his remakrs as regards the forgery or fabircation of evidence and requested the letter to take up the matter for judicial investigation, the forwarding letter was the sufficient complaint (25 DLR 472).

It is always discretionary with courts to take or not to take cognizance of offence committed by a person in or in relation to any proceedings (PLD 1987 Lah 214). It is well settled that prosecution for perjury should be sanctioned by courts only in those cases where it appears to be deliberate and conscious and the conviction is reasonably probable or likely. It is also well recognised that there must be *prima facie* case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge (AIR 1978 SC 1753 = 1978 CrLJ 805). A complaint for an offence under this section must specify the false evidence the accused is charged with. The exact words upon which the prosecution is based, and the exact offences which the magistrates is to investigate should be pointed out (AIR 1922 Bom 38). The particualr words which constitute perjury should be specified (26 CRLJ 589), so that the accused person should not be taken by surprise (39 All 367). The accused should be in a position to know what statments are alleged to be false (AIR 1963 SC 816).

2. Evidence and proof.- No man can be convicted of giving false evidence except on proof of facts which, if accepted as true, show not merely that it is incredible, but that it is impossible that the statements of the party accused made on oath can be true. If the inference from the facts proved falls short of this there is nothing on which a conviction can stand because assuming all that is proved to be true, it is still possible that no crime was committed (AIR 1924 Rang 17).

The prosecution will have to establish that all the ingredients of the offence under section 193 are made out and the decision will be based only on the evidence and material placed before the criminal court (1977 CrLJ (SC) 521). In order to convict a person under section 193 of the penal code the prosecution must not only prove that the accused fabircated false evidence but it must also prove that in fabricating those documents he intended that the documents may be used in any stage of judicial proceeding (10 DLR 129).

It must be proved that false evidence was given intentionally. Conviction can not be sustained without a clear finding of an offence of perjury under section 193 Penal Code. For a conviction under this section it is not enough that a certian statement made by a witness should be false, but it must also be proved positively that false statement was made 'intentionally'. Intention may be proved either directly from the existence of certain facts and circumstances, or it may be deduced from the existence of certain facts and circumstances. For the conviction of an accused person on a charge of perjury, a clear and distinct finding must be given, that he intentionally made a false statement, and in the absence of such a finding, the conviction can not be sustained (10 DLR (WP) 5) = 24 CrLJ 321).

To convict a person of perjury it must be shown that the statement made by the accused are on their face deliberately false or that they are so from the extrinsic circumstances. Statements which only attract suspicion or which are made recklessly should not form the basis of conviction (AIR 1924 Pat 276 = 24 CrLJ 321).

Where a deposition by a witness contains a false statement, the deponent is guilty of perjury notwithstanding the fact that it was not read over to the witness (AIR 1950 All 501 = 51 CrLJ 1346).

Where the accused denied that he made the statements for which he was being tried and stated in reply to notice under section 476 Cr. P.C. that their left thumb impressions were taken by court clerk on white paper and that they were not at all produced before magistrate nor their alleged statements were read out to them. Non examination of magistrate or his clerk, was fatal to prosecution case. Conviction and sentence was set aside (1984 PCrLJ 2459). Where magistrate who is alleged to have recorded statements of the appellants under section 164 Cr. P.C. was not examined nor his clerk, in spite of the stand taken by the appellants in their reply to show cause notices conviction of the accused was set aside (1984 PCrLJ 1722).

3. Punishment.- The punishment of perjury must necessarily vary with the gravity of the offence, which depends upon the circumstances under which the false statement was made. Evidently a servant perjuring himself in the interest of his employer will have to be judged by a very different standard to one who was entrapped into inconsistent statements by the ingenecity of the cross examining counsel, or who from ignorance, recklessness or want of proper understanding had made statments which were self contradictory. A deliberate misstatement made in a court of justice, whether it tends to endanger the life and property of others, or to defeat and impede the progress of justice, is not an offence of the same compolexion as a misstatement made with no ulterior object from which no inference can be drawn (7 WR 37). Statement of prosecution witness apparently seemed to be false to his knowledge. Witness was referred to Trial Court for trial for perjury. Such witness deserved exemplary punishment, if offence was proved, so that professional witnesses were climinated from the proceedings in the Courts of justice particularly Shariat Courts (Hassan Abbas v. State 1989 P. Cr. LJ 2112).

Where the statement under section 164 Cr. PC. is found to be false, a light sentence is called for but where that statement is true but the subsequent statement in court is false, the sentence should be severe (AIR 1940 Bom 385 42 CRLJ 185).

Perjury is one of the most heinous social and moral offences. It is not only an offence punishable under the law but is also against the injunction of the Holy Qur'an. It is an evil which tends to disrupt the very basis of the social order and make a mockery of the judicial system, be it Islamic or otherwise. Any person who deliberately tells a lie during the solemn proceedings of a court of law, knowing fully well that he is thereby likely to ruin the life or reputation of an innocent person or put into jeopeopardy his liberty falsely involving him in a criminal case or cause damage to his property, does not deserve any leniency and ought never be let off lightly. The tendency on the part of the courts to take a light view of such cases has over the decades tended to encourage perjury in our courts, with the result that it has now become so common the witnesses do not fell any qualms of conscience while making a false statement in a court of law and have ceased to consider it as an act involving any moral turpitude. The courts must arrest this tendency with afirm hand and do everything in their power to eradicate this evil from its roots. Awarding stiffer sentence would be a positive step in this direction (PLD 1986 SC 6; PLD 1985 SC 448). However, there may be marginal cases in which courts may treat the accused leniently as when with the twisted practies of police investigation, witnesses and complainants are compelled by the police to make false statements in order to seek what they think is justice or when they make statements/confesisons falsely and treat it justified on account of the extreme family and social pressures. The examples can be multiplied (PLD 1986 SC 6 = PLJ 1985 535).

194. Giving or fabricating false evidence with intent to procure conviction of capital offence.–Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital [1][by any law for the time being in force], shall be punished with [2][imprisonment] for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

If innocent person be thereby convicted and executed.– and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment herein before described.

195. Giving or fabricating false evidence with intent to procure conviction of offence punishable with [2][imprisonment for life] or imprisonment.–Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which [1][by any law for the time being in force] is not capital, but punishable with [3][imprisonment for life], or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Illustration

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is [3][imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, with or without fine. A therefore, is liable to [4][such imprisonment for life] or imprisonment, with or without fine.

196. Using evidence known to be false.– Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

197. Issuing or signing false certificate.– Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or blieveing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

198. Using as true a certificate known to be false.-Whoever corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

199. False statement made in declaration which is by law receivable as evidence. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any

1. The words "by the Code" have successively been amended by Act XXVII of 1870, s. 7, Act IX of 1890, s. 149, and A. O., 1949, Sch., to read as above.
2. Subs. by Ord. No. XLI of 1985, for "transportation".
3. Subs. ibid., for "transportation for life".
4. Subs. ibid., for "such transportation".

statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

200. Using as true such declaration knowing it to be false.– Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation.– A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

201. Causing disappearance of evidence of offence, or giving false information to screen offender.– Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

if a capital offence,– shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with [2][imprisonment for life]; and if the offence is punishable with [1][imprisonment for life], or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with less than ten year's imprionsment.-and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Illustration

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

Synopsis

1. Principle and scope.
2. The offence must have been committed.
3. What disappeared must be evidence.
4. Intention to screen the offender.
5. Gives any information respecting the offence which he knows or believes to be false.
6. Knowing or having reason to believe.
7. Evidence and proof.
8. Charge and conviction.
9. Punishment.

1. Principle and scope.- Whenever an offence has actually been committed, any person knowing or having reason to believe that it has been committed, and intending to screen the offender from legal punishment, (a) causes any evidence of

1. Subs. by Ord. No. XLI of 1985, for "transportation for life".
2. Subs. ibid., for "transportation".

the commission of the offence to disappear, or (b) gives any information respecting the offence which he knows or believes to be false, shall be punishable under this section (AIR 1965 SC 1413 = (1965) 2 CrLJ 426).

The ingredients of an offence, under section 210, Penal Code are : (1) that an offence was committed; (2) that the accused knew or had reason to believe that such an offence had been committed; (3) that the accused caused evidence thereof to disappear; and (4) that the accused caused disappearance of the evidence with the intention of screening the offender from legal punishment (AIR 1952 SC 354; AIR 1967 HP 10, (14) 1989 CrLJ 616 (620) All; AIR 1975 SC 1925 = 1975 CrLJ 16).

It also may be that the accused persons has knowledge of the removal of the dead bodies but what section 201 requires is causing any evidence of the commission of the offence to disappear or giving any information respecting the offence, which a person knows or believes to be false (AIR 1963 SC 74(90).

Section 201 merely requires the causing of any evidence of the commission of an offence to disappear. This requirement wll be fulfilled as soon as the accused is proved to have hidden or concealed the evidence of the crime. When the accused had put the body of the deceased in a gunny bag and fastened it so as to conceal the body, the offence under section 201 was completed (PLD 1960 Kar 25).

The gist of an offence under section 201 is causing disappearance of evidence or giving of false information or concealment with a view to conceal evidence. No offence is made out when the accused is charged with the removal of dead body from one place to another unless he had done something to conceal it (PLD 1964 Dhaka 710). But in a recent case the court did not agree with the broad proposition that mere carrying of the dead body in the absence of anything to show that a physical attempt was made to conceal the same, is not enough to attract the mischief of section 201 of the Penal Code. If a murder be committed at place "A" and the dead body be removed from there to another place by a person who knew or had reason to believe that a murder had been committed, certainly he causes the disappearance of evidence of the commissin of murder inasmuch as he has caused to disappear a very important piece of evidence concerning the venue of murder. Such removal of the body is very likely to react against the entire prosecution case therefore the act amounts to an offence under this section (1968 PCrLJ 920). The mere fact that the body was not in fact concealed and was openly visible to anybody who happened to be going along the road does not take away from the applicability of section 201 (1975 PCrLJ 136).

To hold a person guilty under section 201, it must be proved that that person had caused the evidence of the commission of the offence to disappear and not merely that the person knew that some other person had caused the evidence of the commissin of the offence to disappear. It must be positively proved that it was the accused who had caused the evidence of the commission of the offence to disappear (AIR 1962 Guj. 255). Where the accused knew about the disposal of dead bodies but he had not himself caused the evidence to disappear, he cannot be held guilty of an offence under this section (AIR 1963 SC 74).

2. The offence must have been committed.- It must be proved that an offence, the evidence of which the accused is charged with causing to disappear, has actually been committed (3 all 279 FB), and that the accused knew, or had information sufficient to lead him to believe, that the offence had been committed (11 Cal 619; AIR 1975 SC 1252 = 1975 CrLJ 1062). Under the Penal Code no man can be tried for any delusion or misconception of mind however culpable and criminal such delusion or misconception may appear to be (3 all 279 FB).

In order to establish the charge under this section it is essential to prove that an offence has been committed. Mere suspicion that it has been committed is not sufficient that the accused knew or had reason to believe that such offence had been committed (AIR 1952 SC 354, (365 = 1953 CrLJ 154 In the last cited case, the evidence showed that a person had died, that his body was found in a trunk and was descovered in a well and that the accused, who was his wife, took part in the disposal of the body. But there was no evidence to show the cause of his death, or the manner or circumstances, in which it came about, it was held that the accused could not be convicted for an offence under this section.

Before there can be a conviction under section 201 it must be proved that an offence, the evidence of which is caused to disappear, has actually been committed (1982 PCrLJ 221).

Where the charge against the accused was that he casued disappearance of evidence of an offence of forgery, and the first charge failed, the ingredients essential to constitute an offence under section 201, were lacking and the accused could be rightly discharged (AIR 1955 Andh 82). Similarly when the commission of murder is not proved, the accused cannot be convicted under section 201, for hiding evidence of the mruder. (PLD 1962 Kar 58). Removal or concealment of the body of a person not proved to have been murdered, but proved to have committed suicide does not amount to an offence under this section (12 CrLJ 425).

3. What disappeared must be evidence.- The expression 'any evidence of the commission of that offence' in section 201, Penal Code, clearly refers not to evidence in the extensive sense in which that word is used in the Evidence Act but to evidence in its primary sense, as meaning anything that is likely to make the crime evident such as the existence of a wounded corpse or of blood stains, fabricated documents, or similar material objects, indicating that an offence had been committed. Evidence of the commission of an offence must be distinguished from the evidence as to by whom the offence was committed (AIR 1960 Guj 225 = (1962) 2 CrLJ 60).

Removal of corpse from one place to a road so as to suggest that the murder had been committed by the passerby, would be an offence punishable under section 201 penal Code. It is always a question of fact whether upon the proved cirumstances of a case, the accused could be said to have had an intention to screen the offence or to cause evidence to disappear (1971 CrLJ 215). The mere removal of a body from one place to another so as to remove traces of the place where the murder took place, or indications which might implicate a particular individual, even though such removal does not remove undoubted evidence that a murder has taken place, is within the section (AIR 1926 ALJ 737 = 27 CrLJ 1068).

The expression any evidence of the commission of that offence refers not to evidence in the extensive-sense in which that word is used in the Evidence Act, but to evidence in its primary sense as meaning anything that is likely to make the crime evident, such as the existence of a wounded corpse or of bloodstains, fabricated documents, or similar material objects indicating that an offence had been committed. (PLJ 1979 Cr. C. 209). When an offence is committed, there may be evidence of various types : (1) Evidence to show that the offence had been committed, (2) evidence to show that the offence had been committed at a particular place, (3) evidence to show that the offence had been committed by a particular person or persons. When section 201 uses the expression whoever causes any evidence of the commission of that offence to disappear; it disapear and not to the person who causes the disappearance of evidence as to by whom the offence was committed (AIR 1962 Guj 225).

Concealing or otherwise disposing of the body of the murdered person means causing disappearane of evidence (10 CrLJ 321). Where ample evidence was available to show that dead body of deceased was buried by accused and on their pointing out it was recovered from house of accused. Accused were guilty of causing disappearance of evidence of murder and they were, therefore, rightly convicted and sentenced under section 201/34, Penal Code (1987 PCrLJ 2484). One view is that the mere removal of a dead body from one place to another would be no offence unless something has been done to conceal it, or there is final disposal of it (1972 PCrLJ 243; AIR 1941 Cal 456). But in another case the court did not agree with the broad proposition that mere carrying of the dead body in the absence of anything to show that a physical attempt was made to conceal the same is not enough to attract the mischief of section 201. If a murder be committed at place "A" and the dead body be removed from there to another place by a person who knew or had reason to believe that a murder had been committed, certainly he causes the disappearnce of a piece of evidence relating to the commission of murder inasmuch as he has caused to disappear a very important piece of evidence concerning the venue of murder. Such removal of the body is very likely to react against the entire prosecution case and the accused would be guilty under this section (1968 PCrLJ 920; 1971 CrLJ 1215).

Section 201 can not be confiend to the destruction of the evidence of the murder itself. The words 'any evidence of the commission of that offence' clearly include any evidence of the commission by the offender of that offence (1925 all 315). A secret burial of a headless body of a man just murdered is an offence under this section unless it is established that the act of the accused was innocent (AIR 1933 Lah 516).

A burial of the corpse of a murdered man , if done with the intention of concealing the fact that there were marks of violence on it, is an offence under this section (1978 CrLJ (Raj) 469). Where the deadbody of the deceased tied to a scooter was recovered from a well as a result of the informantion furnished by the accused, it was held that by itself would not lead to the conclusion that the accused had committed the murder. However, as the accused had made a statement to the effect that he was a party to the throwing of the body into the well and had given details of the manner in which the body was tied to the scooter, it was held that since the accused was closely associated with the disposal of the body and the scooter, if not with the murder of the deceased, he would be clearly guilty under section 201 (1974 CrLJ 1200).

Where there was no evidence about the part which the accused played in the removal of the deadbodies, the fact that they were in the house and could have possible known of the removal of the dead bodies, would not by itself establish that they assisted in the removal of the dead bodies, and that no offence under section 201 could be said to have been made out (AIR 1963 SC 74.).

Pointing out of place from where dead body was recovered is not sufficient to hold that deadbody was thrown thereby accused (1962) 2 CrLJ 690). But where the recovery of the dead body was at the instance of the accused and the accused admitted that he had himself buried it, it was held that the accused was guilty under section 201 (1968 Raj LW 147).

Where there is clear and independent proof that a person has caused evidence to disappear in order to screen some person or persons unknown,the fact that he had been tried and acquitted of the offence of murder would not, in itself, prevent his conviction under this section (33 CrLJ 283; 1980 CrLJ (NOC) 31 Guy). Where the deceased was last seen alive by many witnesses in the company of the appellants at

the village S about a month prior to the recovery of his dead body from a field belonging to the appellants at the instance of one of the appellants it was held that the conviction of the appellants under section 201 was proper, even though they were acquitted of the other charges under sections 147 and 302 read with sections 34 and 149 and section 396 (AIR 1971 SC 2013 = 1971 CrLJ 1451).

The weapon with which an offence is committed is a very valuable piece of evidence of its commission. The blood stained weapon in a murder case affords a primary evidence of the offence and not an evidence in the extensive sense in such a case, and if a person conceals that weapon with a view to screen the offender, he hereby comits the offence under this section (48 CrLj 786; AIR 1983 SC 360 = 1983 CrLJ 692).

Where even from the prosecutions own version it appeared that one of the accused involved in a murder had washed away any sign of blood from the car used in disposing of the body on the day of the murder itself, it was held that in the absence of any evidence showing that the appellant, who was the owner of the car, caused any blood or other evidence relating to the murder to disappear, the mere washing of the car, five days after the incident, could not be *prima facie* evidence of the actual ingreidents of an offence under section 201 (AIR 1980 SC 1560 = 1980 CrLJ 1098).

Where A2 a police officer, flouted all the statutory requirements of section 174 Cr. P.C. and his conduct in distorting and supressing material evidence and in preparing false records as to the identity of the dead body of a girl found on the sea shore, the cause of her death and the data bearing on that cause, could not be explained on any reasonable hypothesis save that of his guilt, and the circumstances of the case unmistakably pointed to the conclusion that within all human probability, he knew or had reason to believe that the deceased had been done to death by some poerson or persons, it was held that all the ingredients of the charges under sections 201, 218 and 468 had been proved against him. It was furthr held that A-1 had also conducted himself in such a manner that there could be no doubt that he was a guilty associate of A-2 in the commission of the offence under section 201 (AIR 1975 SC 1925 = 1975 CrLJ 1671).

4. Intention to screen the offender.- The act committed must have been done with the intention of screening the offender from legal punishment; mere knowledge that it is likely to do so is not sufficient (AIR 1930 All 45). A person cannot be convicted of screening an offender when the offender himself ahs been tried and acquitted of the offence (3 All 279 FB; (1979Cut L. T. 293).

This section requires that the accused must have had the intention of screening an offender. To put it differently, the intention to screen the offender must be the primary and sole object of the accused. The fact that the concealment was likely to have that effect is not sufficient, for the section speaks of intention as distinct from a mere likelihood (AIR 1963 MP 106). Whether the intention with which the evidence was caused to disappear was to screen an offender is a question of fact (AIR 1930 Oudh 113). It is not necessary for the state to prove that the accused intended to screen a specified offender (AIR 1927 Sind 241).

Where the requisite knowledge and intention are not proved, the accused cannot be convicted under this section (1969 PCrLJ 1029). Where the body was cremated publicly after the murder, it could not be said that there was requisite intention to justify conviction under this section (1931 Mad W.N. 765). The mere fact that the dead body was found in the field of a third party without showing the requisite intention of that party to conceal evidence of the offence of murder, would not attract section 201 (PLD 1959 Lah 50).

Where the act of causing disappearance of evidence is not voluntary and is not done with the intention of screeing the offender, no offence is committed (AIR 1930 All 45). A person cannot be convicted of an offence under section 201, if his conduct in removing the dead body was on account of his fear of instant death at the hands of the murderers if he refused to do so (AIR 1957 All 184). But where the persons threatened continue the disposal or removal of evidence even after the threat has ceased, they would be guilty under this section (AIR 1936 All 91).

5. Gives any information respecting the offence which he knows or believes to be false.- An analysis of this section shows that the section will apply only when that false information touching the offence with intent to screen the offender is given to those interested in bringing the offender to justice, such as persons in authority and the persons so interested that they would take action to bring the offender to justice, e.g. the father, guardian, caste head, etc., if the accused gives information to a wayfare, it will only be a case of gossiping and not with intent to screen to offender (AIR 1960 Mad 9 (14) = ILR 1959 Mad 654). Any disposal of a body of a dead person who committed suicide, without informing the Police and without their clearance, attracts the provisions of section 201 Penal Code (Kalidas Achamma v. State of Andara Pradesh 1988 (1) Crimes 593 (AP).

If any person gives first information to the police which is recorded under section 154 of the Cr.P.C. and if ultimately it turns out to be false, an offence under section 201 is attracted if the other ingredients are satisfied (1989 CrLJ 150; AIR 1952 SC 354 = 1963 CrLJ 154).

To sustain a conviction under section 201 for giving false information it must be proved that the accused gave the information and that it was false (3 Mad HCR 251). The information need not be given to the police or a Magistrate and it is immaterial whether that information is volunteered or given in reply to enquiries (AIR 1937 Sind 28). It is however to be noted that section 201 will apply only when the false information touching the offence with intent to screen the offender is given to those interested in bringing the offender to justice. If the accused gives information to a wayfarer, it will only be a case of gossipping and there will be no intent to screen the offender. This **connotation** vastly reduces the denotation of the person thus informed, and in practice would reduce itself only to the authorities, persons in authority and the persons so interested that they would take action to bring the offender to justice, e.g. the father, guardian, easte fellow, etc. of the victim (AIR 1960 Mad 9). If any person gives the first information statement to the police even though not voluntarily, which is recorded under section 154, Cr. P.C. and it ultimately turns out to be false, it would amount to giving false information and the offender would be punishable under section 201, Penal Code, provided the requisite intention is proved (AIR 1962 Ker 133).

6. Knowing or having reason to believe.- To sustain a charge U/ S. 201 of the Penal Code it is essential to prove that an offence has ben committed and that the accused knew or had reason to believe that an offence has been committed and with the requisite knowledge and intent to screen the offenders from legal punishment causes the evidence there of todisappear or gives false information in respect of such offence, knowing or having reason to believe the same to be false (Khandkar Md. Moniruzzaman Vs. Tthe State; (1994) 14 BLD (308) 309). Before a person can be convicted under this section, it must be proved that the offence was committed and that the accused knew or had information sufficient to lead him to believe that the offences had been committed (1959 CrLJ 1349; AIR 1975 SC 1883 = 1975 CrLJ 1657). Where it could not be said that informant definitely knew more about facts disclosed by him, he could not be convicted under section 201 (1975 CUJ (SC) 115).

Before a conviction under section 201 can be recorded it must be shown to the satisfaction of the court that the accused knew or has reason to believe that an offence had been committed and having got this knowledge, tried to screen the offender by disposing of the dead body (AIR 1979 SC 1245). Where there is sufficient evidence to show that the acused knew as to how the dead body of the deceased was carried for disposal by other accused and that she refrained from informing the police about the disapearance of the deceased, she can be held guilty under section 201 (AIR 1979 SC 1534; 1979 crLJ 959).

7. Evidence and proof.- To establish the charge under section 201, Penal Code, the prosecution must first prove that an offence had been committed not merely a suspicion that it might have been committed and that the accused knowing or having reason to believe that such an offence had been committed, and with the intent to screen the offender from legal punishment, had caused the evidence thereby to disappear the proof of the commission of an offence is an essential requisite for bringing home the offence under section 201, Penal Code (AIR 1968 SC 829; 1985 CrLJ 1369).

Whenever the evidence relating to the offence of murder and for casuing the evidence of murder to disappear was common, it was held that if once the prosecution case regarding the offence of murder was not accepted, it followed that the appellant could not be convicted for the offence under section 201 Penal Code, either as suspicion, however strong, could not take the place of proof of guilt (1971 SCC (Cri) 472; AIR 1963 SC 74The recovery of the body of a person murdered on its being pointed out by the accused would be very strong evidence of an offence under this section (39 CrLJ 977; 1979 S. C. C. (Cri) 929 = 1979 CrLJ 871 (SC).

If the evidence relating to the offence of murder and disappearance of evidence is the same and the case of the prosecution regarding the offence of murder is not accepted, it follows that the accused can not be convicted for the offence under section 201 Penal Code (AIR 1971 SC 1461).

Under section 201 Penal Code, it is necessary to prove : (a) that an offence has been committed, (b) that the accused knew or had reason to believe that such an offence had been committed, (c) that the accused caused evidence thereof to disappear, and (d) that the accused did this with the intent to screen the offender from legal punishment (PLD 1961 Kar 658). The mere pointing out of the place of burial does not lead to a presumption that the accused concealed the dead body there (1970 PCrLJ 165). In such a case the decision of the question whether he himself put it there will depend on a variety facts. Three hypotheses are likely to arise, viz, that the accused saw some one bury the article there or heard from some one that it was buried there or he himself did it. When the first two possibilities are ruled out or are not reasonably possible, the court can take the last possibility as proved (AIR 1945 Lah 27). Where the accused absconded after the murder and when arrested, he pointed out the place where the dead body was buried, but it was not proved that he was the murderer, it was held that an offence under section 201 Penal Code was proved though no offence was proved under section 302 Penal Code (AIR 1934 Lah 23).

Where the jewellery of the deceased was recovered from the possession of the accused which proved his knowledge that murder had been committed, it was held that the accused could be convicted under section 201 (AIR 1928 Lah 858).

Mere possession by a person of property belonging to the deceased immediately after the murder is sufficient to prove his guilt under this section (PLD 1960 SC 223). Where the head and clothes of the deceased was recovered at the

instance of the accused, or where the clothes which the deceased was wearing shortly before the attack on him were recovered from the accused, or where the accused was found in possession of jewellery of the deceased but the charge of murder could not be brought home to him, he was convicted under section 201 Penal Code (AIR 1954 J&K 42; PLD 1960 SC 223; AIR 1954 Mad 1088).

Where the accused children of the murdered man pointed out his dead body and there were reaons to believe that they knew that they father had been murdered. They caused the evidence to disappear. The body of their father was buried in their house and they had knowledge of the commission of murder. But as they had no motive to commit the murder, they were acquitted of the murder charge but their conviction under section 201 was maintained (1984 PCrLJ 2011). There was no witness saying that the accused participated in concealment dand burial of the ad body, nor the eye-witnesses disclosed that the accused assaulted the victim. In such circumstances, mere pointing out the place where the dead body was concealed would not constitute the offence of causing disappearance of evidence (Gopal Rajgor Vs. State 1990 42 DLR (1990) 446 = 1989 BLD 455).

Merely because accused were brothers, it could not be presumed as a matter of legal proof that they must be deemed to have the knowledge of the murder of the deceased by her husband. There must be direct and legal evidence to prove the charge under section 201 (AIR 1979 SC 1245). Where the shoes of the murdered man were discovered at the instance of accused, the evidence was held ample to establish an offence under section 201 (AIR 1963 Guj 153).

Where the accused gives no explanation about their knowledge of the whereabouts of the corpse, the inference will be that the accused had themselves concealed corpse (1971 crLJ 1215). An offence under section 201 is established when approver's evidence relating to the offence is coupled with the reliable material in proof of the recovery of the dead body of the deceased at the instance of the accused and the recovery is believed by the court for good reasons (AIR 1979 SC 1280 = 1979 CrLJ 871).

Where a person, though fear of other reason, did not interpose to prevent the commission of a murder, and afterwards helped the mruderers, in concealing the body, it was held that he was not guilty of abetment of murder, but was guilty of an offence under this section (AIR 1974 SC 778 = 1974 CrLJ 664).

A person who assists the actual murderers in removing the corpse of their victim to a distance from the place where the murder was committed, is guilty of an offence under this section (1924) 47 All 306). Wher the accused was ordered by her husband to help him to remove the deadbody of a murdered man, it was held that she was not guilty under this section as her acts were not voluntary nor done with the intention of screening the offender from punishment (31 CrLJ 37 = AIR 1930 All 45).

Where from a consideration of all the circumstances of the case including the total denial of the circumstances by the accused, the only inference that could be drawn was that the accused after having induced the deceased to accompany them committed his murder and then took out the ornaments which were on his body and then threw away the deadbody in a well and on the next day, sold away the ornaments to a goldsmith at another village it was held that their conviction for the offences under sections 302/34, 201/34 and 404/34 must be confirmed (1986 CrLJ 518). When the murderer himself tries to screen the offender and removes the evidence of his guilt, he can not be convicted under section 201 Penal Code (PLD 1988 Lah 359 DB). Dead body of deceased found buried in house of accused. Process

of digging grave; filing of grave and then erasing traces, cannot be said to have been done by accused alone. However, there was not an iota of evidence to show that appellant-wife of accused, helped hm in concealing dead body. Merely because appellant is wife of accused and inmate of same house it cannot be assumed that she was guilty of causing disappearanceof evidence. Wife entitled to benefit of doubt (AIR 1993 SC 1696).

Where the deadbody was recovered at the instance of the appellant which was testified by two witnesses, the conviction of appellant under section 201 was upheld (AIR 1979 SC 1280 = 1979 CrLJ 871). If a murder has been committed and the deadbody was removed and hanged to a tree in order to give a colour of suicidal hanging, such an act, by itself, would not amount to causing evidence of the offence to disappear (1982 CrLJ 942 Ori). Where there is sufficient evidence to show that the accused knew as to how the dead body of the deceased was carried for disposal by other accused and that she refrained from informing the police about the disappearance of the deceased, she can be held guilty under section 201 (AIR 1979 SC 1534 = 1979 CrLJ 959). It may be correct that the process of digging a grave of five feet deep the filling of the grave and then crasing the traces etc. may not have been done by appellant alone, but simply she is the wife of the appellant and as such is supposed to be living with the appelant and as such is supposed to be living with the appellant in the same house it cannot assumed that she is guilty of the offence U/S. 201/ 34 Penal Code (Sardar Singh etc. v. State (Delhi Administratio, Delhi 1993 (2) Crimes 14 (S. C.).

No person other than the accused would be anxious to bury the body. They had been last seen with the deceased by many witnesses. In order to avoid suspicion falling upon them they would be keen to get rid of the body, even if the deceased was not murdered by them. That they buried it in their own field further shows their complicity. Burying in somebody else's field might have been dangerous. Further, the accused denied the whole prosecution story. This again lends some assurance that they were denying the facts in order to conceal their participation in the crime (AIR 1971 SC 2013 = 1971 CrLJ 1451).

This section is not restricted to the case of a person who screens the actual offender. It can be applied to the person guilty of the main offence though a court will not normally punish a person for both offences (AIR 1953 SC 131= 1953 CrLJ 668). A conviction of an offender under section 302 and under this section is not illegal although a separate sentence may not be called for. Where a person is charged under section 302 and 201, and is acquitted under section 302, Penal code, he can be convicted under section 201 (AIR 1923 Bom 262). Even if there is no charge under section 201, a man may be convicted under this section if there is sufficient evidence to justify a conviction (AIR 1925 PC 130 = 26 CrLJ 1059; AIR 1952 SC. 159).

The pre-requisite for sustaining a charge under this section is the proof of the commission of the main offence (AIR 1968 SC 839). Where a dead body was recovered at the instance of the accused, it would strong evidence of an offence under section 201 (39 CrLJ 977). Where the shoes of the deceased was discovered at the instance of the accused, it was held insufficient to find him guilty under section 201 (AIR 1963 Guj 135). A person can not be convicted of screening an offender when the offender himself has been tried and is acquitted of the offence (1979) 47 Cut LT 293). Mere pointing out the place where the dead body was concealed would not constitute the offence of causing disappearance of evidence (Raigor v. State (1940) 42 DLR 446 1989 BLD 455; 1971 CrLJ 1215).

8. Charge and conviction.- The charge should run thus :

I (name and office of Magistrate, Sesions Judge, etc.) hereby charge you (Name of accused), as follows :-

'That you..... on or about the..... day of....., at ..... knowing (or having reason to believe) that certain offence, to wit ..... punishable with ....., have been committed, did cause certain evidence of the said offence to disappear, to wit ..... (or knowingly gave false information, to wit .....) with the intention of screening the said (name of the offender screened) from legal punishment and thereby committed an offence, punishable under section 201 Penal Code, and within my cognizance.

And I hereby direct you be tried on the said charge.

A man can be charged both under section 302 for the offence of mruder as well as under section 201 Penal Code for causing disappearance of the evidence of murder but in a case where the same person has been charged under section 302 as well as under section 201 it is proper that the charge under section 201 should be madde in the alternative. Where charge under section 302 against an accused fails there is nothing illegal to convict him under section 201 if offence under this section is established aginst him. This is permissible even though charge under section 201 was not in terms framed against him as such a course is permissible under the provisions of section 237 of the Cr. P.C. (21 DLR 783;1 6 DLR 189).

A conviction of an offender under section 302 and under section 201 is not illegal although a separate sentence may not be called for. Where a person is charged under sections 302 and 201, and is acquitted under section 302, Penal Code, he can not be convicted under section 21 (AIR 1923 Bom 262). Even if there is no charge under section 201, a man may be convicted under this section, if there is sufficient evidence to justify conviction (AIR 1925 PC 130 = 26 CrLJ 1059; AIR 1952 SC 159). Accused were charged under section 302/34 of the Penal Code, but trial court on consideration of evidence on record found them guilty under section 201 Penal code. High court Division upheld the conviction by referring to section 236 and 237 of the Cr. P.C. Appellate Division found no illegality in the observation and finding of the HCD (1981 BCR (AD) 129).

When the murderer himself tries to screen the offender and removes the evidence of his guilt, he can not be convicted under section 201, Penal Code (PLD 1988 Lah 359; 1984 P. CCr. L. J. 2011). When a person is acquitted of the charge of murder and other cognate offences with which he is charged his conviction under section 201 without any further charge is not illegal (AIR 1952 SC 159; AIR 1953 SC 131).

9. Punishment.- The punishment depends upon the gravity of the offence which was committed and which the accused knew or had reason to believe to have been committed. If an accused on seeing blood marks on the ground made as a result of an offence punishable under section 323, erases the blood marks with the intention of screening the offender whom he erroneously believe to have committed the offence of murder, he could be convicted only on the footing that an offence under section 323 was committed and that he acted with the intention of screening such an offender believing that such an offence was committed, and he may be punished accordingly under the fourth paragraph with imprisonment extending to three months; but he could not be convicted on the basis of his having screened a murder merely because he wrongly imagined that an offence of murder has been committed (AIR 1965 SC 1413 = (1965) 2 CrLJ 426).

Where the accused was found to have concealed evidence relating to the commission of an offence under section 304-A, penal Code, he could be convicted

only under section 201, Part III and not under section 201, Part I or part II. In that case the maximum sentence that could be passed on the appellant was rigorous imprisonment for one year only (1268 PCrLJ 1479 Kar).

The accused having caused the evidence of the two offences under sections 330 and 348 to disappear, committed two separate offences under section 201. But, normally, no court should award two separate punishments for the same act constituting two offences under section 201. The appropriate sentence under section 201 for causing the evidence of the offence under section 330 to disappear should be passed and no separate sentence need be passed under section 201 for causing evidence of the offence under section 348 to disappear (AIR 1965 SC 1413 = (1965) 2 CrLJ 426). Where the same act constitutes two offences under section 201, court should not award separate punishment (AIR 1965 SC 1413 = (1962) 2 CrLJ 426).

Where in a case of pre-planned dacoity in which a lorry carrying many chests of tea was hijacked around midnight, taken to another place and the driver of the lorry and others who were in the lorry were murdered in cold blood and their bodies were burried with a view to cause evidence of the crime to disappear, it was held that the accuseds plea for reduction of sentence to the period already undergone by them must be rejected (1986 CrLJ 1083 (SC).

202. Intentional omission to give information of offence by person bound to inform.– Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

203. Giving false information respecting an offence committed.– Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or belives to be false, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[1] [**Explanation**.– In section 201 and 202 and in this section the word "offence" includes any act committed at any place out of [2][Bangladesh], which, if committed in [2][Bangladesh], would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.]

204. Destruction of document to prevent its production as evidence.– Whoever secrets or destroys any document which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such court or public servant as aforesaid, or after he shall have been lawfully summond or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

1. Explanation was inserted by the Indian Criminal Law Amendment Act, 1894 (Act III of 1894), s, 7.
2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Schedule (w. e. f. 26th March, 1971).

205. False personation for purpose of act or proceeding in suit or prosecution.– Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

206. Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution.– Whoever fraudulently removes, conceals, transfers or delivers to any person any property or any interest therin, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

207. Fraudulent claim to property to prevent its seizure as forfeited or in execution.– Whoever fraudulently accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

208. Fraudulently suffering decree for sum not due.– Whoever, fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him fraudulently suffers a judgment to pass against him for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decree. Z has committed an offence under this section.

209. Dishonestly making false claim in Court.– Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

210. Fraudulently obtaining decree for sum not due.– Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

211. False charge of offence made with intent to injure.– Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, [1][imprisonment] for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

212. Harbouring offender.– Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment.

if a capital offence.– shall, if the offence is punishable with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine;

if punishable with [1][imprisonment] for life, or with imprisonment.– and if the offence is punishable with [1][imprisonment] for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or, with fine, or with both.

1. Subs. by Ord. No. XLI of 1985, for "transportation."

[1]["Offence" in this section includes any act committed at any place out of [2][Bangladesh], would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in [2][Bangladesh.]]

Exception.– This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to [3][imprisonment] for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

213. Taking gift, etc; to screen an offender from punishment.– Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment,

if a capital offence.– shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with [3][imprisonment]for life, or with imprisonment.– and if the offence is punishable with [3][imprisonment] for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisoment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

214. Offering gift or restoration of property in consideration of screening offender.– Whoever gives or causes, or effers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not procedding against any person for the purpose of bringing him to legal punishment.

if a capital offence.– shall, if the offence is punishable with death, be punished with imprisonment of either decription for a term which may extend to seven years, and shall also be liable to fine;

1. Ins. by the Indian Criminal Law Amendment Act, 1894 (Act III of 1984), s. 7.
2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Sch. (with effect from 26th March, 1971).
3. Subs. by Ord. No. XLI of 1985, for "transportation".

if punishable with [2][imprisonment] for life or with imprisonment.– and if the offence is punishable with [2][imprisonment] for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extent to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

[1][Exception.– The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.]

[Illustrations.] Rep. by the Code of Criminal Procedure, 1882 (X of 1882).

215. Taking gift to help to recover stolen property etc.– Whoever takes or agrees or consents to take any gratification under **pretence** or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehened and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

216. Harbouring offender who has escaped from custody or whose apprehension has been ordered.– Whenever any person convicted of or charged with on offence, being in lawful custody for that offence, escapes from such custody,

or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say.

if a capital offence.– if the offence for which the person was in custody or is ordered to be apprehended is punishable with death, he shall be funished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with [2][imprisonment] for life, or with imprisonment.– if the offence is punishable with [2][imprisonment] for life or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine;

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided or such offence for with fine, or with both.

1. Subs. by the Indian Penal Code Amdt. Act, 1882 (VIII of 1882), s. 6, for the original exception.
2. Subs. by Ord. No. XLI of 1985, for "transportation".

[1]["Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of [2][Bangladesh] which, if he had been guilty of it in [2][Bangladesh], would have been punishable as an offence, and for which he is, under any law relating to extraditin, or under the Fugitive offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in [2][Bangladesh], and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in [2][Bangladesh].

Exception.– This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

[3][216A. Penalty for harbouring robbers or dacoits.– Whoever, knowing or having reason to believe that any persons are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity, or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.– For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be commitied, or has been committed, within or without [2][Banglasdesh].

Exception.– This provision does not extend to the case in which the harbour is by the husband or wife of the offender.

216B. [Definition of "harbour" in sections 212, 216 and 216A.] Omitted by the Penal Code (Amendment) Act, 1942 (VIII of 1942) s. 3.]

217. Public servant disobeying direction of law with intent to save person from punishment or property from punishment or property from forfeiture.–Whoever, being a public servant, knowingly disobeys and direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

218. Public servant, framing incorrect frames that record or writing with intent to save person from punishment or property from forfeiture.– Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public

1. Ins. by the Indian Criminal Law Amendment Act, 1886 (Act X of 1886), s. 23.
2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Sch. (with effect from 26th March, 1971).
3. Sections 216A and 216B were inserted by the Indian Criminal Law Amendment Act, 1894 (Act III of 1894), s. 8.

or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

219. Public servant in judicial proceeding corruptly making report, etc., contrary to Law.– Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a Judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

220. Commitment for trial or cofinement by person having authority who knows that he is acting contray to law.– Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or confinement, or keeps any person in confinement, in the exercie of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

221. Intentional omission to apprehend on the part of public servant bound to apprehend.– Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say:-

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with death; or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with [1][imprisonment] for life or imprisonment for a term which may extend to ten years; or

with imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years.

222. Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed.– Whoever, being a public servant, legally bound as such public servant to

apprehend or to keep in confinement any person under sentence of a Court of Justice for any offence [2][or lawfully committed to custody], intentionally omits to apprehend such person, or intentionally suffers such person to escape or intentionally aids such person in escaping or attempting to escape form such confinement, shall be punished as follows that is to say:-

with [3][imprisonment for life] or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death; or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by sentence of a Court of Justice, or by a virtue of a commutation of such sentence, to [3][imprisonment for life] [4]* * * [5]* * * * [6]* * * * or imprisonment for a term of ten years or upwards; or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years [2][or if the person was lawfully committed to custody].

223. Escape from confinement or custody negligently suffered by public servant.– Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence [2][or lawfully committed to custody], negligently suffers such persons to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

224. Resistance or obstruction by a person to his lawful apprehension.– Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such ofence shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.– The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.

225. Resistance of obstruction to lawful apprehension of another person.– Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person

1. Subs. by Ord. No. XLI of 1985, for "transportation".
2. Ins. by the Indian Penal Code Amendment Act, 1870 (XXVII of 1870), s. 8.
3. Subs. by Ordinance No. XLI of 1985, for "transportation for life".
4. The words "or penal servitude for life" were omitted by the Criminal Law (Extinction of Discriminatory Privileges) Act, 1949 (II of 1950), Sch.
5. The words "or to transportation" were omitted by Ordinance No. XLI of 1985.
6. The words "or penal servitude" were omitted by Act II of 1950, Sch.

is lawfull detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with [1][imprisonment for life] or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued is liable under the sentence of a Court of Justice or by virtue of a commutation of such a sentence to [1][imprisonment for life], [2]* * * *, [3]* * *, or imprisonment, for a term of then years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with [1][imprisonment for life] or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

[4][**225A. Ommission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for.**– Whoever, being a public servant legally bound as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222 or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished–

(a) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and

(b) if the does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

225B. Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.– Whoever, in any case not provided for in section 224 or section 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to be lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which

1. Subs. by Ordinance No. XLI of 1985, for "transportation for life".
2. The words "or to transportation" were omitted, ibid.
3. The words "penal servitude" were omitted by the Criminal Law (Extinction of Discriminatory Privileges) Act, 1949 (II of 1950), Sch.
4. Ss. 225A and 25B were substituted by the Indian Criminal Law Amendment Act, 1886 (X of 1886), s. 24(1), for section 225A, which was inserted by Act XXVII of 1870, s. 9.

that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.]

1* * * * * * *

227. Violation of condition of remission of punishment.– Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

228. Intentional insult or interruption to public servant sitting in judicial proceeding.– Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servent is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand [taka], or with both.

Synopsis

1. Principle and object.
2. Insult or interruption must be intentional.
3. Sitting in a judicial proceeding.
4. Procedure.

1. Principle and object.-Object of the section is to guard the respect due to a Court of law and against interruption and insult while acting as such. Courts duty is to see that what is objected to really amounts to insult or interruption of the work. Contempt proceeding is not to be used as a protection to a Judge in his individual capacity. Underlying idea is to maintain the authority of the court in the estimation of the poublic and that confidence in justice is not shaken. While sitting as a court of law the Judge should not be too sensitive should have a measure of indulgence to lawyers when arguing case (29 DLR 311). The essence of crime of contempt of court lies in the respect due to the administration of justice and the necessity of protecting him against interruption and insults. Such interruptions and insults must be intentional, and where it is a case between the bench and bar, the court is both to act unless there is clear proof that the conduct of the pleader was so clearly vexatious as to lead to the inference that his intention was no other but to insult and intrrupt the court (6 Bom L.R. 541 (543).

The intentional insult to a judge or doing something to interrupt the proceeding of the court which at the time was doing judicial work is covered by this section (1966 CrLJ 1087). Ingredients of the section that must be satisfied namely, insult or interruption to a 'public servant' in a 'judicial proceeding' held before an authority which must be a 'court'. Section 228 is wide enough for the purpose of bringing into the mischief of the section any person guilty of insulting or causing interruption to a public servant engaged in a judicial proceeding. In the first place, the public servant mentioned in the section, must be engaged in a judicial proceeding. An offence under section 228 of the Penal Code can not be tried, except by a court and under section 28 of the Cr. P.C. the court itself must be the court which has been interruppted or insulted (19 DLR 354). It is contempt of court to intenttionally offer insults or cause intrruption to a public servant in any stage of a

1. Section 226 was omitted by Ordinance No. XLI of 1985

judicial proceeding. Three things are essential to constitute this offence (a) intention, (b) insult or interruption, and (c) the public servant insulted or interrupted being then sitting in any stage of a judicial proceeding (AIR 1959 SC 102(104); AIR 1969 Delhi 214). The public servant insulted or interrupted must have been sitting in any stage of a judicial proceeding (AIR 1959 SC 102; AIR 1968 Cal 249).

The insult or intrruption must be intentional. The fact that the court feels insulted is no reason for holding that any insult was intentended. It must be shown that the accused knew that the court was at that time doing judicial work, and that, having this knowledge, he intentionally insulted the judge or did something in order to interrupt the work of the Court (AIR 1966 MPLJ 373, (374, 375).

There is a mental part of the offender which should also be taken into consideration and that mental part is that the offender had the intention to cause the said insult or interruption. Both these elements must co-exist in order to constitute an offence under section 228 Penal Code. The fact that the court feels insulted is no reason for inferring contempt when no suit was so intended. To put in a short compass, the elements of an offence under section 228, Penal Code, are both objective and subjective - objective is the sense that the factum of insult or interruption must be there and objective because the same has to be accompanied by an intention on the part of the offender to commit the same and the entire thing must take palce against the backdrop of judicial proceeding (AIR 1958 Cal 249).

2. Insult or interruption must be intentional.-The sine qua non of the offence under section 228, Penal Code is causing intentional insult to the Court and obstruction to its proceedings (Ramesh Chand v. State of H. P. 1989 (2) Crimes 311 (H. P.). Accused (Advocate) used derogatory language imputing incompetence to Court in his application under S. 438 (2), Cr. P. C. Accused misbehaved in the Court by intentionally offering insult and causing interruption in judicial proceedings. Such behaviour coming from an Advocate, who was an officer of Court could not be approved and no exception could be taen to the order of conviction (Syedul Muhtiar Siddiqui v. State 1989 P. Cr. LJ 1932). The insult must be offered intentionally in order to be punishable under this section (AIR 1933 Rang 28 = 34 CrLJ 467). If a counsel appears in court drunk without any idea of insulting the court even if the court feels insulted by his appearing before it in that state, it can not be said that he has intentionally insulted it. It can not be said that the courts feeling insulted by his appearing drunk is a natural and probable consequence of the act which must be presumed to have been intended by him (1956 CrLJ 676; 1989 (2) Crimes 311 (313) H. P). Whether there is an intention to offer insult to the magistrate trying the case or not must depend on the facts and circumstances of each case and it is not advisable to lay down any inflexible rule thereto (AIR 1959 SC 102). Merely uttering of words and not keeping silent can hardly be construed as intentional insult or interruption caused by an undefended prisoner during the course of a judiial poroceeding against him (10 CWN 1062 4 CrLJ 210). An intentional disobedience by a person of the order of the court leads to the conclusion that the person offered insult to that officer (AIR 1967 SC 1494 = 1967 CrLJ 20).

Section 228 requires that the insult or interruption to the Court should be intentional (AIR 1922 Lah 187). The question is not whether a judicial officer felt insulted, but whether an insult was actually offered and intended (AIR 1923 Lah 210). Therefore an audible remark which interrupted the proceedings in a court of justice, is not enough to sustain a conviction under section 228. The Court must further be satisfied that the accused intentionally offered interruption (AIR 1916 Mad 648). It follows that if a remark is not addressed to a court, however rude or

vulgar it may be, it cannot be made the subject of an offence under section 228, even if the court happens to overhear it (AIR 1943 Lah 14).

Where the accused called the Judge 'a prejudiced Judge' or where the Presiding Officer of a court asked the petitioner to quit the court but the petitioner insisted upon staying in spite of the warning that action for contempt of court might be taken against him, or where an application for transfer submitted to the Magistrate is intended to offer insult to the Magistrate, the act would fall within the purview of section 228 (AIR 1922 Bom 261; AIR 1960 Pat 309; PLD 1955 Lah. 16).

As regards interruption on the part of the pleaders it has been said "some latitude should be allowed to a member of the Bar, insisting in the conduct of his case upon his question being taken down or his objections noted, where the court thinks the question inadmissible or the objections untenable. There ought to be a spirit of give and take between the bench and the bar in such matters and every little persistence on the part of a pleader should not be turned into an occasion for a criminal trial unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or interrupt the court" (1956 crLJ 1415; 1969 CrLJ 582).

If a remark is not addressed to a Court, however rude or vulgar it may be, it cannot be made the subject of an offence under this section even if the Court happens to overhear it (AIR 1943 Lah 14(18) = 14 CrLJ 181).

To convict the accused under section 228, Penal Code, the Court has to be satisfied that the accused intentionally offered interruption to the court. The power should be used only in exceptional cases. The Courts taking action, under this section ought not to give room for the impression that they are unduly sensitive about their dignity (1974 CrLJ 211).

To constitute an offence under section 228, (1) there must be either insult or interruption, (2) the insult or interruption must be intentional and (3) the insult must have been offered or the interruption caused to a public servant siting in any stage of a judicial proceeding. It is not necessary that the interruption must delay the proceedings of the court for any length of time. The point for determination is not the duration of time but the nature of act of the accused (AIR 1918 Lah 65).

The court should not be unduly sensitive or tuchy about their dignity. A mere audible remark not meant for the court should not be taken as an interference or interruption in court's work while siting in any stage of judicial proceedings (1969 PCrLJ 627). A judicial office being a sacred trust the presiding officer is never intended to be swayed in arriving at his decision by feelings of his personal relation. It is only by sustaining and keeping this high standard that public confidence in the entegrity of the courts can be maintained (AIR 1960 Punj 211 = 1960 CrLJ 511). If the averments scandalise the court itself and impair the administration of justice, they amount to contempt of court and not merely to the offence under section 228 Penal Code (AIR 1967 Mad 162; 1964 Cal 249). In invoking section 228 and punishing offenders the courts must be very careful in satisfying itself that there was an intentional insult or interruption of judicial proceeding (52 CWN 336; AIR 1933 Bom 478 = 35 CrLJ 107). Merely uttering words or not keeping silent can hardly be taken to amount to interruption of judicial procedings (4 CrLJ 210). Court should not be over touchy by remarks made by disappointed litigants (AIR 1956 Ori 28).

Persistance of an advocate putting question for being answered by a witness even after the court ruled out the question as irrelevant will not amount to an offence

under this section (1972 Guj L.R. 548). Counsel expressing his intention to retire from the case or to move for transfer of the case will not amount to an offence under this section.

Every protest made, in fact, does interrupt the Court but it is its duty to listen to protests how much soever they may delay its proceedings. So long as they are made bona fide they do not constitute such interruption which the section punishes as contempt. But if they are made with the sole object of interruption, they cease to be bona fide and they may then supply necessary element to constitute an offence (AIR 1953 Hyd 285). The mere act of addressing a presiding officer of the court during the pendency of a proceeding does not amount to culpable interruption. 'Interruption' as used in section 228, contemplates something far more serious, far more obstructive than this. Hence, the act of a lawyer in calling the attention of the presiding officer of the court to the rude conduct of the court peon in preventing a respectable person from entering the court room does not constitute interruption within the meaning of section 228 (AIR 1943 Lah 14; ILR 1943 Lah. 791). The accused had a scuffle with some other person in the verandah of a court room and the court Chaprasi intervened and stopped it. No interruption was caused to the court and there was no intention to insult the court. It was held that the accused was not guilty of an offence under this section (AIR 1919 All 330).

The administration of law and justice is a matter of vital importance to any civilized society. The machinery by which law is enforced has been crystalized by centuries of wisdom and experience. The Bench and the Bar, in this behalf, constitute one unit and each is the complement of the other. The relationship between the bench and the bar calls for a balanced exercised of patience and reasonable indulgence. It is a relationship which must be tempered by tolerance and restraint which the wisdom of experience teaches us. Lawyers are expected to show due respect to a Court and the Court, on its part, is required to be reasonably indulgent to a lawyer to exercise such caution and patience as are calculated to promote the calm and unruffled climate of a Court of law (1968 PCrLJ 682). A lawyer cannot take up the defence in contempt of Court proceedings against him that under a mistaken notion of facts he believed that what he was saying was true (PLD 1967 Lah 1231). It is necessary in the interest of justice that a lawyer should be secure in his independence in performing his duties and an over subservient Bar is a misfortune. It may be said that an overbearing and disrespectful Bar is a calamity, and if the judge happens to be sensitive, that would be a veritable danger to the proper dispensation of justice (PLD 1964 Dhaka 1152). Therefore some latitude should be allowed to a pleader and he should not be tried under section 228 for every little persistence on his part unless his conduct is so vaxatious as to indicate that his intention is to insult or interrupt the Court (6 Bom IR 541). Where between a Judge and an Advocate a breezy encounter in Court had occurred due to misconception and that advocate had no intention to bring the court into disrespect at the relevant time. Conviction of the advocate under this section was set aside (NLR 1984 Cr. 538). Both the Bench and the Bar are two arms of the same machinery and unless they wor harmoniously justice cannot be properly administered. An erring Judge and erring contemner are both a danger to the *pristine purity* of the seat of justice (Moazzem Hossain Vs. State (1983) 35 DLR (AD) 292).

It is time that all persons including parties to a cause, their lawyers, and other officers of the Court are duty bound to protect the dignity and authority of the Court. But of all persons, the Judges are themselves required by their selfimposed code of conduct to protect and maintain their own dignity everywhere, and all the time. They must regulate their behaviour and dealings with those who have to come in

contact with them, in such a way that there can arise on occasion when their free and fair mind and sense of impartiality may, become subject of criticism or speculation. They must guard their position Jealously, but should not be touchy about it (Moazzem Hossain Vs. State (1983) 35 DLR (AD) 194).

A lawyer is also expected at all time to maintain the dignity of the Court regardless of the short comings of the individual presiding over the court, for, it is not his personal dignity but the dignity of his office which is in the public interest to be respected (PLD 1963 SC 1). Where a counsel who was altogether unconnected with the case and he started criticizing an interim order of the court after it had been announced without having recourse to the usual forms of address and without seeking the permission of the court, in an insolent manner and made it a sort of mission of criticizing the order of the court even after he had left the court room and instigated the disobedience of that order, he was held guilty of contempt of court (PLD 1967 Lah 1231).

3. Sitting in a judicial proceeding.- What section 228, Penal Code, requires is that ublic servant, must be actually dealding wih the matter pertaining to the judicial proceeding at the moment when insult is offered. When a judicial proceeding is pending on the file of the public servant, he can not be said to be sitting over that judicial proceeding all the time that is pending on his file even though he is not actually dealing with it (AIR 1966 Bom 19; 1970 Cut. L. T. 1282). Section 228 of the Penal Code empowers any public servant to take action when a person intentionally offers insult or causes interruption to him while he is sitting in any stage of a judicial proceeding. The commissioner comes within the definition of public servant as defined in section 21 of the penal code. While discharging his judicial functions if there is any interruption to the judicial poroceding or if any one intentionally offers any insult in any stage of the judicial poroceding, he can only punish such person in the manner specified in section 228 (1978 CrLJ 1040, 1041 Guj).

In order to be a judicial proceeding the proceeding must relate in some way to the administration of justice (1965) 1CrLJ 550). a Sub-Registrar is a public officer, and proceedings before him are judicial proceedings, within the meaning of this section (22 WR (Cr) 10). So are proceedings before an income Tax officer pursuant to a notice under section 23(3) of the Income Tax Act 1922 (1927) 25 Cal 423).

Generally speaking a person performs judicial functions if he is enjoined by the law to adjudicate upon and determine, as between the parties some controversy relating to the existence or non-existence of a right or liability whether such right or liability be the creation of common law or statute, provided the right or liability is actionable either under the general law or a special law, and the duty to determien the controversy is derived from the state and rests on the ascertainment, with notice and opportunity to parties, of the facts and the law applicable to them and not on policy expediency or some other extraneous consideration (PLD 1957 SC 91).

Merely to receive evidence or to summon witnesses would not attract the provisions of section 4(m) of the Code of Criminal Procedure, there must be authorty and power to administer an oath to witnesses and to record evidence given on oath

(1968 PCrLJ 682). Therefore the test whether a proceeding is or is not a judicial proceeding is whether, in the course of that proceeding, the presiding judge has the power legally to take evidence on oath and not whether he has actually taken such evidence (AIR 1964 All 290). A private interview with a District Magistrate is not a stage in a judicial proceeding; and offering insult to that officer at such an interview is not an offence under section 228, Penal Code (AIR 1948 Sind 97). Similarly where a person is alleged to have adopted rude behaviour towards a Judge when he was not engaged in judicial proceeding but was acting in his administrative capacity, no offence under this section is committed (1969 PCrLJ 920). Therefore while acting under this section the officer concerned should specifically state that he was insulted or interrupted during judicial proceedings. Omission to record proceedings in the manner laid down in section 481 Cr. P.C. is not merely an irregularity but an illegality in the mode of trial. Thus where the accused was alleged to have shouted outside the court, but the accusation neither mentioned the stage of proceeding nor actual words used by him, his conviction and sentence were set aside (1969 PCrLJ 627).

Where the order of the Magistrate showed that he was engaged in the trial of criminal cases and that he had finished recording the deposition of a witness and was presumably to proceed with the recording of other depositions when the interruption occurred, it was held that this was sufficient to indicate the case in which he was engaged and the stage of the judicial proceeding at which he was interrupted (AIR 1953 Hyd 285).

4. Procedure.- An offence committed under section 228 should be tried then and there by the court in which it is committed and orders passed under that section (6 CrLJ 405). In order to enable them to punish such contempts two things are essential (a) the offence must have been committed in the view or presence of the court, and (b) cognizance of the offence must be taken on the same day before rising of the court. The jursidction to try the offenders is lost if the matter is deferred to another day (ILR 11 All 361; AIR 1948 Sind 47 = 49 CrLJ 237). Where, however, a Magistrate took cognizance of the offence, but postponed passing final orders for days in order to afford an opportunity to the accused to show casue, it was held that the procedure was irregular but not illegal (ILR 11 All 361). A charge under section 228 should be dealt with in a summary manner under section 480 Cr. P.C.

The procedure under this section is by summary trial (PLD 1967 Lah 1231). But the rights of the subjects are guarded by making it imperative on the court to prepare the record as provided in section 481 Cr. P.C. (AIR 1928 Lah 357). Plea of guilty. Tender of unqualified apology in a contempt case could be considered as equivalent to plea of guilt. Appeal against such conviction and sentence is not competent except to the extent of legality of the sentence (Syedul Mukhtiar Siddiqui v. State 1989 P. Cr. LJ 1932). The procedure laid down in exceptional cases of contempt of court wherein the Presiding Officer himself is competent to punish the contemner, has to be faithfully adhered to, particularly when such an offence committed before the Presiding Officer is likely to result in conviction in summary proceedings (1971 PCrLJ 621). As the procedure under section 480 is in the nature of a summary trial, the necessity is all the greater for a full and clear record which is not only a guarantee of the coolness and judicial temper of the presiding officer but

which affords materials for the appellate court to proceed on (1969 PCrLJ 627). An omission to record the particulars required by this section is fatal to the proceedings under section 480 (1969 PCrLJ 627). The record of the court must show the nature and the stage of the judicial proceedings in which the court was interrupted or insulted and the nature of the interruption or insult. Therefore where all that appears from the record is that the appellant shouted outside the court, but it does not indicate at what stage of the trial the offence was committed, and what was the nature of the interruption or insult, nor the actual words used by the appellant find mention in the accusation, the omission is fatal to the prosecution (1969 PCrLJ 627).

In a proceeding under section 480 in respect of an alleged contempt under section 228, Penal Code, it is necessary for the court to state to the accused, the particulars of the offence of which he is accused and give an opportunity to him of explaining and correcting any misapprehension as to what had, in fact, been said or meant by him. It is only after affording this opportunity that the court shoud make up its mind whether any intentional insult was offered. This opportunity is all the more necessary to be given in a summary proceeding under section 480, Cr.P.C. as the court itself is the prosecution and the prosecution witness and there is to be no trial or examination of witnesses and the only opportunity for the accused to make a statement is in reply to the question put to him under section 242 Cr. P.C. The failure to do so amount to miscarriage of justice and is fatal to the proceedings (1968 PCrLJ 682). It is to be noted that the words if any, in sub-section (1), merelyd indicate that the offender cannot be compelled to make a statement, but they do not deprive him of the right to an opportunity to make it (1971 PCrLJ 621).

In a case of proceedings for contempt of court under section 228, the record must show the nature and the stage of the judicial proceedings in which the court interrupted or insulted was sitting and the nature of the interruption or insult (AIR 1931 Nag 193 = 32 CrLJ 1221; AIR 1953 All 54 = 1953 CrLJ 320).

An offence under section 228, Penal Code can not be tried except by a court and under section 28 of the Cr. P.C. the court itself must be the court which has been interrupted or insulted (1968 PcrLJ 682 = 9 DLR (DB); 16 DLR 519). In such cases where the offence falls under section 228 Pneal Code, the High Court has no jurisdiction to proceed to try the accused for contempt of court (1969 SCMR 369 = 1969 P. Cr. LJ 920).

Provisions of the section to be applied immediately. Proceeding under section 228 follow the procedure laid down in section 480 Cr. P.C. and the provisions of that section have to be applied by the court then and there before its rising (2 DLR 80).

229. Personation of a juror or assessor.– Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled or sworn as a juryman or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled or sworn, or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extnd to two years, or with fine, or with both.

CHAPTER XII

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

230. **"Coin" defined.**-[1][Coin is maetal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.]

[2][Banglsdesh] coin is metal stamped and issued by the authority of the Government [3]* * in order to be used as money; and metal which has been so stamped and issued shall continue to be [2][Bangladesh] coin for the purposes of this Chaper, notwithstanding that it may have ceased to be used as money.]

Illustrations

(a) Cowries are not coin.

(b) Lumps of unstamped copper, though used as money, are not coin.

(c) Medals are not coin, inasmuch as they are not intended to be used as money.

(d) The coin denominated as the Company's [4][taka] is the Queen's coin.

[5][(e) The "Farukhabad" taka, which was formerly used as money under the authourity of the Government of India, is Bandgladesh coin although it is no longer so used.]

231. Counterfeiting coin.-Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punishad with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.-A person commits this offence who itntending to ,practise deception, or knowing it to be likely that deception will thereby practised, causes a genuine coin to appear like a different coin.

232. Counterfeiting Bangladesh coin.-Whoever counterfeits, or knowingly performs any part of the proscess of counterfeiting Bangladesh coin, shall be punished with [7][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

233. Making or selling instrument for counterfeiting coin.-Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

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1. Sbustituted for original paragraph by the Indian Penal Code Amendment Act, 1872 (Act XIX of 1872).
2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Sch. (with effect from 26th March, 1971).
3. The words " of Pakistan" were omitted, ibid.
4. The word "taka" was subs. for the word "rupees" by Act VIII of 1973 (w. e. f. 26th March, 1971).
5. Ins. by Act VI of 1896, s. 1(2).
6. The original words "the Queen's Coin" have successively been amended by A. O., 1961 (with effect from 23th March, 1956) and Act VIII of 1973 (with effect from 26th March, 1971) to read as above.
7. Subs. by Ordinance No. XLI of 1985, for "transportation".

234. Making or selling instrument for counterfeiting Bangladesh coin.-Whoever makes or mends, or performs any part of the process of making or mending or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting Bangladesh coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

235. Possession of instrument or material for the purpose of using the same for counterfeiting coin.-if Bangladesh coin.-Whoever is in possession of any instrument or material, for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment of that purpose, shall be punished with imprisnment of either description for a term which may extend to three years, and shall also be liable to fine ;

and if the conin to be counterfeited is [1][Bangladesh coin], shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

236. Abetting in Bnagladesh the counterfeiting out of Bangladesh of coin.-Whoever, being within [2][Bangladesh], abets the counterfeiting of coin out of [2][Bangladesh] shall be punished in the same manner as if he abetted the counterfeiting of such coin within [2][Bangladesh].

237. Import or export of counterfeit coin.-Whoever imports into [2][Bangladesh], or exports therefrom, any counterfeit coin, knowingly or having reason to believe that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall be liable to fine.

238. Import or export of counterfeits of Bangladesh coin.-Whoever imports in [2][Bangladesh], or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of [1][Bangladesh coin], shall be punished with [3][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

239. Delivery of coin, possessed with knowledge that it is counterfeit.-Whoever, having any counterfeit coin which, at the time when he became possessed of it, he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

240. Delivery of Bangladesh coin possessed with knowledge that it is counterfeit.-Whoever, having and counterfeit coin, which is a counterfeit of [1][Bangladesh coin], and which at the time when he became pasessed of it, he

1. The original words "the Queen's Coin" have successively been amended by A. O., 1961 (with effect from 23rd March, 1956) and Act VIII of 1973 (with effect from 26th March, 1971) to read as above.
2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, 2nd Sch, (with effect from 26th March, 1971).
3. Subs. by Ordinance No. XLI of 1985, for "transportation".

knew to be a counterfeit of [Bangladesh coin], fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

241. Deliver of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit.-Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any conterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Illustration

A, a coiner, delivers counterfeit Company's taka to his accomplice B, for the purpose of uttering them. B sells the taka to C, another, utterer, who buys them knowing them to be counterfeit, C pays away the taka for goods to D, who receives them, not knowing them to be counterfeit. D after receiving the taka, discovers that they are counterfeit and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under section 239 or 240, as the case may be.

242. Possession of counterfeit coin by person who knew it to be counterfeit when he counterfeit when he became possessed thereof.-Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

243. Possession of Bangladesh coin by person who knew it to be counterfeit when he became possessed thereof.-Whoever, faraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, which is a counterfeit of Bangladesh coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liabl to fine.

244. Person employed in mint causing coin to be of different weight or composition from that fixed by law.-Whoever, being employed in any mint lawfully established in [Bangladesh], does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition form the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

245. Unlawfully taking coining instrument from mint.-Whoever, without lawful authority, takes out of any mint, lawfully established in [Bangladesh] any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

246. Fraudulently or dishonestly diminishing, weight or altering composition of coin.-Whoever, fraudulently or dishonestly performs on any coin any operation which diminishes the welght or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.-A person who scoops out part of the coin and puts anything else into the cavity alters the composition of that coin.

247. Fraudulently or dishonestly diminishing weight or altering compostion of Bangladesh coin.-Whoever fraudulently or dishonestly performs on [1][any Bangladesh coin], any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonemt of either description for a term which may extend to seven years, and shall also be liable to fine.

248. Altering appearance of coin with intent that it shall pass as coin of different description.-Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonement of either description for a term which may extend to three years, and shall also be liable to fine.

249. Altering appearance of Bangladesh coin with intent that it shall pass as coin of different description.-Whoever performs on any Bangladesh coin any operation which alters the appearance of that coin, with the intention, that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

250. Delivery of coin, possessed with knowledge that it is altered.-Whoever, having coin in his possession with respect to which the offence defined in section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence has been committed with respeet to it fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

251. Delivery of Banglsdesh coin possessed with knowldege that it is altered.-Whoever, having coin in his possession with respect to which the offence defined in section 247 or 249 had been committed, and having known at the time when he became passessed of such coin that such offence has been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonemnt of either description for a term which may extend to ten years, and shall also be liable to fine.

1. The original words "any of the Queen's coin" have been successively amended by A. O., 1961 (with effect from 23rd March, 1956) and Act VIII of 1973 (with effect from the 26th March, 1971) to read as above.

252. Possession of coin by person who knew it to be altered when he became possessed thereof.-Whoever fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 246 or 148 has been committed, having known at the time of becoming possessed thereof that such offence and been committed with respect to such coin, shall be punished with imprisonment of 'eitheer descripion for a term which may extend to three years, and shall also be liable to fine.

253. Possession of Bangladesh coin by person who knew it to be altered when he became possessed thereof.-Whoever fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the sections 247 or 249 has been committed having known at the time of becoming possessed thereof, that such offence had been committted with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

254. Delivery of coin as genuine which, when first possessed, the deliverer did not know to be altered.-Whoever delives to any person as genuine or as a coin of a different description from what it is , or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 148 or 149 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation has been perfomed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

255. Counterfeiting Government stamp.-Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with [imprisonment] for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.-A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

256. Having possession of instrument or material for counterfeiting Government stamp.-Whoever has in his possession any instrument of material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose to revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall shall also be liable to fine.

257. Making or selling instrument for counterfeiting Government stamp.-Whoever. makes or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or konwing or having reason to believe that it is intended to be used, for the

purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and also be liable to fine.

258. Sale of counterfeit Government stamp.-Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be comunterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

259. Having possession of counterfeit Government stamp.-Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose of the same as genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

260. Using as genuine a Government stamp known to be counterfeit.-Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

261. Effacing writing from substance bearing Governmnet stamp, or removing from document a stamp used for it, with intent to cause loss to Government.-Whoever fraudulently or with intent to cause loss to the Government, removes or effaces from any substance, bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a differnt writing or document, shall be punished with imprisonment of either descripton for a term which may extend to three years, or with fine, or with both.

262. Using Government stamp known to have been before used.-Whoever fraudulently or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before usud, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

263. Erasure of mark denoting that stamp has been used.-Whoever fraudulently or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark, put or impressed upon such stamp for the purpose of denoting that the same has been used , or knowingly has in his possession or sells or disposes of any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[1]**263A. -Prohibition of fictitious stamps.** (1)Whoever

(a) makes, knowingly utters, deals in or sells any fictitious, stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(b) has in his possession, without lawful excuse, any fictitious stamp, or

(c) makes or without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred [1][taka].

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and shall be forfeited.

(3) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263 both inclusive, the word "Government" when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorised by law to administer executive government in any part of Bangladesh and also in any part of Her Majesty's dominions or in any foreign country.

CHAPTER XIII

OF OFFENCES RELATING TO WEIGHTS AND MEASURES

264. Fraudulent use of false instrument for weighing.-Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

265. Fraudulent use of false weight or measure,-Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of lenght or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

266. Being in possession of false weight or measure.-Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

1. 263A was inserted by the Indian Criminal Law Amendment Act, 1895 (III of 1895), s. 2.
2. Substituted by Act VIII of 1973, s. 3 and 2nd Sch, (w. e. f. 26th March,1971), for "rupees'.

267. Making, or selling false weight or measure.-Whoever makes, sells or disposes of any instrument for weighing, or any weight, or any measure of lenght or capacity which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

CHAPTER XIV

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS

268. Public nuisance.-A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury , danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

269. Negligent act likely to spread infection of disease dangerous to life.-Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

270. Malignant act likely to spread infection of disease dangerous to life.-Whoever malignantly does any act whcih is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fne, or with both.

271. Disobedience to quarantine rule.-Whoever knowingly disobeys any rule made and promulgated by the Government [3] * * *] for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infection disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

272. Adulteration of food or drink intended for sale.-Whoever adulterates any article of food or drink, so as to made such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand [4][taka], or with both.

3. The word "or the Crown Representative" were omitted by A. O., 1949, Sch.
4. The word "taka" was substituted for the word "rupees" by Act VIII of 1973 (with effect from 26th March, 1971).

273. Sale of noxious food or drink.-Whoever sells or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with both.

274. Adulteration of drugs.-Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of scuh drug or medical preparation, or to make it noxious, intending that it will be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it has not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand take or with both.

275. Sale of adulterated drugs.-Whoever, knowing any drug or medical perparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal puposes by any person not knowing of the adulteration, shall be punished with imprisionment of eithr description for a term which may extend to six months, or with fine which may extend to one thousand [1][taka], or with both.

276. Sale of drug as a different drug or preparation.-Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medicinal preparation, as a different drug or medical preporation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand taka or with both.

277. Fouling water of public spring or reservoir.-Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred taka or with both.

278. Making atmosphere noxious to health.-Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred [1][taka].

279. Rash driving or riding on a public way.-Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to [2][three years, or with fine which may, subject to the minimum of one thousand taka, extend to five thousand taka], or with both.

1. Subs. by Act VIII of 1973, s. 3 and 2nd Sch. (w. e. f. 26th March, 1971), for "rupees".
2. Subs. by Ord. X of 1982, s. 3, for the comma and certain words,

[3][**Explanation.**-Any person driving any vehicle, or riding, on any public way, in a speed whcih exceeds the limit prescribed in this behalf by or under any law for the time being in force shall, for the purpose of this section, be deemed to have driven so rashly or negligently as to endanger human life, or cause hurt or injury to any other person.]

Synopsis

1. Scope and applicability.
2. Rash or negligent driving.
3. Danger to others.
4. Responsibility of other persons.
5. Evidence and proof.

1. Scope and applicability.- Section 279 applies to the driving of any vehicle, or riding, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person where no hurt has actually been caused (AIR 1969 Ori 49; 1984 (1) Crimes 808).

To be guilty of an offence under section 279 the accused must drive a vehicle in such a rash or negligent manner as to endanger human life or to be likely to cause hurt or injury to any other person. Both ingredients must be satisfied. The accused must drive the vehicle in arash or negligent manner. And the driving in a rash or negligent manner must be such as to endanger human life or be likely to cause hurt or injury to any other person. A certain aggravated degree of rash or negligent driving is contemplated here (1975) 1 CrLJ 77; (1980) 49 cut L. T. 337). The mere fact that an accident has taken place and some persons have been injured can not lead to a conclusion of rash or negligent driving. This has to be established like any other fact to be established in a criminal trial (1973 BLJR 304).

An offence under section 279 is distnct from an offence under section 337 or section 338 and, therefore, a person convicted of an offence under section 337 or section 338 can also be convicted of an offence under section 279. If the two offences are committed in the same transaction, section 71 will govern the assessment of punishment (NLR 1981 SCJ 87). However where accused by his rash and negligent driving caused grievous hurt and was convicted under section 338. He cannot be convicted under section 279 (PLD 1982 Lah 171).

Section 112 of the Motor Vehicles Act would apply to offences not only underd the Motor Vehicles Act, but also for breach of provisions, the punishment for which is not provided for under those provisions. Section 279 of the Penal Code on the other hand is a self contained provision like any other section in the code prescribing the extent of punishment. It being independent by itself there is no meaning in connecting it or reading it with section 112 of the Motor Vehicles Act. Section 112 also cannot be read with section 279 of the Penal Code. An offence under section 279 Penal Code cannot be said to be an offenc eunder section 130 (1) of the Motor Vehicles Act (AIR 1958 Mad 286).

2. Rash or negligent driving.-The question whether a certain act is rash or negligent cannot be answered in the abstract. It must depend upon the time, place, and the nature of the road. a person driving by daylight in a deserted street has not to exercise the same degree of caution as one driving at night or by the dim light of the street lamps and in a street crowded at the time. But the fact that at a particular time the street was vacant does not justify rash driving, for the horse driven may get out of control, and then over run people when the driver is helpless. No rider or driver can tell when a pedestrian may happen to arrive on a road, consequently he cannot drive or ride rashly or negligently even at a time when the road happens to

3. The explanation was added, ibid.

be temporarily unoccupied by any pedestrian or by any vehicle. And this is so not only because any person or any vehicle may happen to arrive on the road at any time, but also because the driver or the rider is to look to his own safety as well and cannot at all indulge in a riding or driving which may endanger his own life (AIR 1944 Lah (163); 164; 213 J.C. 208).

What is rash and negligent driving would depend upon the facts of each case. The decision in other cases are illustrative. There is a duty on very user of the road to exercise due care and caution while walking or driving. It is not necessary for the purpose of section 279 that the rash or negligent driving should result in an injury to life of any person or property. It is also not encessary for the prosecuton to prove that at the time of the accident there was any person on the road. What is necessary for the prosecution to establish under this section is that the vehicle or car was driven on a public road in a manner so rash or negligent as to endanger human life (AIR 1968 Goa 77).

There is a clear distnction between 'negligence' and 'rashness' and that distnction is contempalted even by section 279. Negligence connotes want of proper care and rashness conveys the idea of recklessness or the doing of an act without due consideration (AIR 1944 lah 163). Culpable rashness consists in acting with consciousness that mischievous and illegal consequences may follow but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening. Culpable negligence consists in acting without consciousness that illegal and mischievous effects will follow but in circumstances which show that the actor has not exercised the caution incumbent on him and that if he had, he would have had such consciousness. The imputabilty arises from the neglect of the civic duty of crcumspection (AIR 1953 Pat 56). Rash and negligent act need not result in injury of life or limb. Bare negligence involving risk of injury is enough (AIR 1953 Trav Co 173).

The term negligence indicates want of care; it is failure to exercise care demanded by the circumstances. The standard of care ordinarily would be that which a prudent and reasonable man would observe in a set of circumstances, unless the case is such as to require a higher degree of care (1938 Nag LJ 226). Criminal negligence is gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public generally or to an individual in particular which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted (AIR 1934 Rang 194).

3. Danger to others.-Section 279 makes rash driving or riding on a public road punishable, if such driving or riding endangers human life or is likely to cause hurt or injury to any other person (AIR 1939 Pat 388). For an offence under section 279 there must definitely by some one to be endangered (AIR 1938 Rang 161). If there is no danger to the public, outside the car who are using the road, no offence under section 279 is committed (AIR 1930 Sind 64). It is however to be noted that if a person rides rashly and negligently, even in a street temporarily deserted, he can be punished under section 279 (19 Bom 715).

The words, "any other person" in section 279 are every wide, and do not distinguish between perosns on a road, as distinct from the occupants of the particular vehicle which is being rashly or negligently driven. They are wide enough to include the occupants of a motor bus because they have as much right to be protected against rash or negligent driving on the part of the driver of the bus as have other people on the road. But where the driver had been convicted under

section 337, as he actually caused hurt to some of the occupants of the bus, it was not necessary that he should be convicted under section 279 also, even if that section is applicable (AIR 1936 Oudh 148).

4. Responsibility of other persons : When the prosecution is under the Penal Code, and danger is alleged to have been caused by rash or negligent driving, it must be borne in mind that it is not only on the part of the drivers of vehicles that rests the civil duty of circumspection from the neglect of which the probability of culpable negligence arises (3 CrLJ 494). There is a duty on every user of the road to make a reasonable use of it for the purpose of passing along it, and to allow others to do so also. A person driving a motor car has a right to expect that persons negligently loitering on the road would make way for him, especially when he has seen that they were aware of his approach. Even when they signalled to him to stop, he is not bound to do so whatever the rules of courtesy may be. He has the right to assume that they would get out of the way when they see him ignore their signals. Motorists are not the only persons who owe a duty of care; others also have a responsibility and must conform to the ordinary usages of the road (AIR 1934 Nag 65). Therefore every case of collusion between a motor car and a pedestrain must be judged on its merits. Where a person injured a woman carrying a load of grass, in a spacious street, by driving his car rashly and negligently. He left her lying on the street after she was so injured and went on his way. He was fined Rs. 20 by the trial court; the High Court held that the offence was a serious one and justified an additional punishment of 3 months rigorous imprisonment (AIR 1927 Oudh 441). Where a man was sleeping under a tree in the court precincts and the driver of a car reversed his car after blowing the horn and the wheel of the car passed over the man, the driver was held to have acted negligently (1938 Nag L. J. 226).

5. Evidence and proof.- The points requiring proof of the offence are -

1. That the accused was driving a vehicle or was riding.

2. That he was driving or riding on a public way.

3. That he was driving so rashly or negligently.

4. That it endangered human life, or was likely to cause hurt or injury to any other person.

For establishing crimnal liability resulting from negligence or rashness, the degree of proof that would be required has to be very strict. Ordinarily if it is established that the impact was a result of negligence or the impact was of a nature which can by itself lead to an inference of negligence it would not be necessary to obtain direct proof of circumstances out of which negligence could be spelt out. Where the vehicle had swerved from the road and dashed against a wall, it may be itself furnish satisfactory proof of negligence (PLD 1973 Kar 427).

Under this section the rashness or negligence shown must be what may fairly be described as criminal rashness or criminal negligence. There must be something more than a mere error of judgment or something more than mere carelessness (AIR 1938 Sind 86). But it is not necessary for the prosecution to prove the same high degree of negligence as in a prosecution for culpable homicide (AIR 1948 PC 183 = 49 CrLJ 665).

There can be no presumption of negligence from the mere fact that somebody is killed. There must be evidence of rashness or negligence acceptable to the court. The death of a pedestrian in running-down cases may very well be purely accidental, or may be due to his own negligence, and to presume that because a person has been killed, the driver of the vehicle must be guilty overlooks these two possibilities. To

these two possibilities one more may be added as a third possibility, that is, that there may be what may be called a pure error of judgment on the part of the driver of the vehicle which neither amounts to negligence or rashness, nor can it lead to an inference that the occurrence of the incident was accidental (1977 CrLJ 403 Bom).

The onus is on the prosecution to establish beyond reasonable doubt that the truck was being driven in a rash or negligent manner. What is rash or negligent driving would depend upon facts and circumstacnes of each case. No hard and fast rule can be laid down. In the instant case, the deceased purchased chocolate from pan shop and while he was coming back to his house by crossing the road, the front right side bumper of the truck dashed against him. The truck was not in a high speed. It was in normal speed and the petitioner was blowing horn. Held that the case falls within the ambit of that class of case where the court is not able to get a clear picture as to how the incident happened. It might be that all of a sudden the boy came in front of the truck. The petitioner is, therefore, entitled to the benefit of doubt (L.T. 245, 246, 247, 248; 1984 (1) Crimes 808).

280. Rash navigation of vessel.-Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand taka, or with both.

281. Exhibition of false light, mark or buoy.-Whoever exhibits any false light, mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

282. Conveying person by water for hire in unsafe or overloaded vessel.-Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to one thousand [1][taka], or with both.

283. Denger or obstruction in public way or line of navigation.-Whoever, by doing any act, or by omitting to take under with any property in his possession or order his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred taka.

284. Negligent conduct with respect to poisonous substance.-Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person.

or knowingly or negligently omits to take such order with any poisionous substance in his possession as is sufficient to guard against probable denger to human life from such poisonous substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousnd taka, or with both.

1. Subs, by Act VIII of 1973, s. 3 and 2nd Sch. (w. e. f. 26th March, 1971), for "rupees".

285. Negligent conduct with respect to fire or combustible matter.-Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury any other perosn,

or knowingly or negligently omits take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonemnt of either description for a term which may extend to six months, or with fine which may extend to one thousand taka, or with both.

286. Negligent conduct with respect to explosive substance.-Whoever does, with any explosive substance, any act so rashly or negligently as to endanger haman life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand taka, or with both.

287. Negligent conduct with respect to machinery.-Whoever does, with any machinery, any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand taka, or with both.

288. Negligent conduct with respect to pulling down or repairing buildings.-Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand taka, or with both.

289. Negligent conduct with respect to animal.-Whoever knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisnment of either description for a term which may extend to six months, or with fine which may extend to one thousand taka, or with both.

290. Punishment for public nuisance is cases not otherwise provided for.-Whoever commits a public nuisance in any case not otherwise punishable

by this Code, shall be punished with fine which may extend to two hundred taka.

291.Continuance of nuisance after injunction to discontinue.- Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injnction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

[1][292. Sale, etc., of obscene books, etc.-Whoever

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any others obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception.- This section does not extend to and book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Synopsis

1. Obscene.
2. Test of obscenity.
3. Intention.
4. Publication on art or science.
5. Religious matters.
6. Proof.

1. Obscene.- 'Obscene' means 'offensive to chastity or modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed; empure, as obscaee language, obscene picture", any thing 'expressing or suggsting unchaste and lustful ideas, impure, indecent, lewd' (1953 CrLJ 763). If

1. Substituted by the Obscene Publications Act, 1925 (Act VIII of 1925), s. 2, for the original section 292.

a publiation is detrimental to public morals and calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it may come, it will be an abscene publication, which it is the intention of the law to supress (1905) 28 All 100).

A book may be obscene although it contains but a single obscene passage (AIR 1965 SC 881 = (1952) 2 CrLJ 8). Where a book is intented to give advice to married people on how to regulate the sexual side of their lives to the best advantage, it will not come within the purview of this section (1947 CrLJ 910) = 1947 Lah 383).

The word 'obscene' is not defined in the penal Code. What has to be considered as obscene or indecent has changed from time to time and may not exactly be the same in different countries. The tendency in reent tiems is not to prohibit sex knowledge to be spread on scientific lines, works of art are generally not considered as obsence (1954 CrLJ 1622).

A picture of a woman in the nude is not *per se* obscene. The court should only consider whether there is anything obscene in the object itself. When there is nothing in it to ofend an ordinary decent person it is impossible to say that the object is obscene. Unless the pictures are an incentive to sexsuality and excite impure thoughts in the minds of ordinary persons of normal temperament who may happen to look at them, they cannot be regarded as obscene within the meaning of section 292, Penal Code. For the purpose of deciding whether a picture is obscene or not one has to consider to a great extent the surrounding circumstances, the pose, the posture, the suggestive element in the picture, the person into whose hands it is likely to fall etc. (AIR 1940 Cal 290 (291); ILR (1940) 1 Cal 581).

The idea as to what is to be deemed to be obscene varies from age to age, from region to region and even from person to person (1956 CrLJ 415). As a matter of fact all that can be done in such a case is to apply a set of tests which depend on every individual's notion of obscenity and there is no doubt that there cannot be an immutable standard of moral values. The test of obscenity is this, "whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall (PLD 1960 Lah 172).

Obscenity denotes the quality of being obscene which means offensive to modesty or decency, lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that latter denotes writing, pictures etc. intended to arouse sexual desire while the former may include writing etc not intended to do so but which have that tendency. Both of course, offend agianst public decency and morals but pornograpy is obscenity of a more aggravated form (AIR 1965 SC 881). It follows that if a publication is detrimental to public morals and calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come, it would be an obscene publication which it is the intention of the law to supress (2 CrLJ 520).

2. Test of obscenity.- The test of obscenity on a review of the authorities would be as to whether or not looking to the present day standards of morals and thoughts, the tendency of the book alleged to be obscene would be to deprave public morality; in other words, the question is, has it got the tendency to corrupt or deprave the mind of an ordinary man into whose hand the book is likely to fall by raising in him lascivious thoughts. It cannot be said that standard of morality vary from region to region and it is impossible to have one inflexible standard of obscenity for all countries. The court has to take into account all the factors before it comes to the

conclusion as to whether or not a publication is an obscene publication. Authorities clearly indicate that while judging the character or publication, the court must consider the effect that it would produce on the mind of an average person in whose hand the book is likely to fall. While so judging, neither a man of wide culture or superb character nor a person of depraved mentality only should be taken as a reader of such publication. It is also evident from the case ILR 39 Cal 377; AIR 1952 Cal 214 that the court must also consider the effect on the mind of young and unwary persons or those of impressionable age. after all, it depends on the question as to who are likely to read the book. If the book is likely to be read by adolescent, there can be no reason to exclude the consideration of effect on their mind (AIR 1961 Cal 177).

Obscenity may be adjudged in the light of influence which the impogned matter may have not only on the minds of the persons already depraved or abnormal but also on the minds of persons who may be completely unintroduced to sex and may be innocent. If any material incites extreme immoral perversities in respect of sexual indulgence then it incites the impulses to depravity and degeneration. Such material would be undoubtedly obscene (1971 Delhi LT 752).

In judging the obscenity of one book of the character of their books is a collateral issue which need not be explored (AIR 1970 SC 1390).

'Obscene' means 'offensive to chastity or modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to the expressed, impure, as an obscene language, obscene pictures', anything 'expressing or suggesting unchaste and lustful ideas, impoure indecent, lewd" (1953 CrLJ 763).

A picture of a woman in the nude is not *per se* obscene. For the purpose of deciding whether a picture is obscene or not one has to consider to a great extent the surrounding circumstances, the pose, the posture, the suggestive element in the picture, and the person or persons in whose hands it is likely to fall. It is no justification that the mater published is by an eminent writer or is composed in a style not easily understood by all. There can be no doubt that the books was written, printed and published and brought into circulation for ruffian tastes. But the probable effect of the publication was to prejudice public morals and decency. The book was intended for those who had ardent sex appeal in them and it was for the delitescent of the married and the unmarried, for the gratification of their normal and abnormal sex appetities and it described varieties of sexual intercourse in a manner which to say the least was obscene. The matter was held constituted obscene matter under section 292 (1959 CrLJ 9; AIR 1959 All 49). For the purpose of testing whether a picture is obscene or not, one has to consider to a great extent the surrounding circumstances such as the pose, the posture, the suggestive element in the picture and last of all the person or persons, in whose hand it is likely to fall (O. P. Lamba and ors. v. Traun Mehta and anr 1988 (1) Crimes 81 (P & H).

Nudity in itself cannot under all circumstances be classified as obscene. The test of obscenity is whether it excites or not the aevrage persons enjoying a normal state of mind to have rcourse to depravity as a matter of degenerate pleasure. If the material is such that it would excits such minds which are unintroduced to immorality to incur carnal desire seeking immoral satisfaction, then such material would beyond and doubt, be obscene (1971 Delhi LT 152).

In deciding whether a publication absorbed with sex relationship of men and women and pourporting to describe the contemporary life, is an obscene libel, it is necessary to take into account the chance brought out in the society (ILR (1951) 1 Cal 678).

Whether a publication is or is not obscene is a question of fact (2 CrLJ 520). One of the tests to be applied for determining whether a book is obscene or not is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of that sort may fall (PLD 1979 Lah 279). A publication would be obscene if it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character (AIR 1965 SC 881). It is the effect of the publication on the mind of an ordinary young person that has to be considered in deciding whether it is obscene or not (AIR 1961 Cal 177). It is a matter in which the court is entitled to rely on its own judgment as well as the evidence of witnesses in support of this finding of fact (AIR 1954 Mys 164). The question does not altogether depend on oral evidence of a writer and Art critic because the offending writing and the portions which are the subject of the charge must be judged by the court, in the lght of section 292 (AIR 1965 SC 881). The question cannot be determined by the opinions of majority of witnesses nor is the opinion of any particular witness a true test whether a particular book/material is obscene or not. It is the duty of court to decide on the facts of each case whether the material is obscene or not. Whether a picture/photograph/article is obscene depends upon surrounding circumstances and facts in each and every case. Therefore where the socalled obscene literature allegedly recovered from the petitioners is not on the record, there is no observation the trial court which should point out or state distinctly what were the particular representations and words or pictures or photographs or caricatures which it found on evidence to be obscene within the meaning of section 292 Penal Code, nor was it stated that in what manners this literature or magazines had the tendency to corrupt the mind of those who were open to immoral influence by exciting in them sensuality and carnal desire. Conviction must be set aside (PLD 1979 Lah 279).

3. Intention.- Where a man publishes a work manifestly obscene he must be taken to have intended the inevitable consequences. The object which the writer has in view is immaterial. If the publication is an obscene publication it would be no defence to say that the law was broken for some wholesome and salutary purpose (AIR 1954 Mys 164). Therefore although in a prosecution under section 292 it is better and advisable to indicate the charge how and in what particulars the book is obscene, yet if the accused is not prejudiced in his defence and the prosecution maintains that the whole book is obscene, mere failure of the prosecution to mention particular passages is no reason for interfering in revision (AIR 1932 Cal 651).

4. Publication on art or science.- Generally works of art are never considered obscene(AIR 1954 Mys 164). The publisher of an obscene matter is taken to ahve intended the natural consequences of the publication. Beyond this the question of intent is not essential to an offence under the section. a publication describing illicit love for another man's wife and sellign at a low price which places it within the reach of all leaves no doubt about its obscene nature in law in spite of the publishers intention being only to publish classical works (AIR 1918 Mad 1195). A picture of a woman in the nude is not *per se* obscene, when there is nothign in it which would shock or offend the taste of any ordinary or decent minded person. Unless the pictures of nude females are an incentive to sensualty and excite impure thoughts in the minds of ordinary persons of normal temperament who may happen to look at them, they cannot be regarded as obscene within the meaning of section 292. For the purpose of deciding whether a picture is obscene or not one has to consider to a great extent the surrounding circumstances, the pose, the picture, the suggestive element in the picture, the person into whose hands it is likely to fall, etc. No hard and fast rule can, therefore, be laid down for the determination of the matter. (AIR

1940 Cal 290). In the present state of society in this country or anywhere else in the civilised world, there can be no doubt that a description of the acts preparatory to sexual intercourse, however graphic or lifelike that description may be, would be considered obscene (PLD 1952 Lah 384).

Scientific treatises and journals are not to be tested in the same way as books and papers which are published for being read by the common and ordinary man and woman (AIR 1952 Cal 214). Therefore books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book without the medical text would certainly be considered to be obscene (AIR 1965 SC 881). It follows that though there should be no printing of description of sexual act or organs in writing for the general public yet descriptions of diseases with appropriate remedies therefor intended only for doctors and patients are not criminal (AIR 1917 Lah 288).

Books intended to give advice to married people, and particularly husband, on how to regulate the sexual side of their lives to the best advantage, that is to say, with a view to promoting the health and mutual happiness of the spouses, serve a useful purpose when properly written, and they are published on a large scale and widely circulated in all civilised countries including Britian and the United States of America. If such books are effectively to fulfil their intended purpose it is obvious that they must be written in fairly plain language in order to be understood. It cannot be said that the publication of such books should be barred altogether because of the danger, against which it is undoubtedly very difficult to provide effective safeguards that they may fall into wrong hands (AIR 1947 Lah 383).

5. Religious matters : A religious publication is not obscene within section 292 as its tendency is nto to deprave morals but if extracts from it contain objectionable matter and have a tendency to deprave or corrupt minds which are open to immoral influences, then the fact that it formed part of a religious publication is no ground for publishing it. The text to determine whether a publication is abscene or not is to see if the tendency of the matter charged as obscene is to deprave and corrupt the minds of the people reading it and if a book has this effect the sale of it is a criminal offence though the author has an ulterior object which is innocent and laudable (13 CrLJ 177). A passage in a religious book may become obscene if it finds a palce in a journal intended for the public. Where the consequences of a publication are likely to introduce in the minds of readers impure thoughts and to insinuate revolting ideas not present in their minds before, the publication in an offence under this section (AIR 1917 Lah 219).

6. Proof.- The question whether a particular article or book is obscene or not does not altogether depend on oral evidence. It is the duty of the court to ascertain whether the book or story or any passage or any passages therein offend the provisions of section 292. Even so as the question of obscenity may have to be judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence and views of leading literatures on that aspect particularly when the work is in a language with which the court is not conversant. Often a translation may not bring out the delicate nuisances of the literary art in the story as it does in the laguage in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value though as was said in an earlier decision, the verdict as to whether the book or article or story considered as a whole panders to the porurient and is obscene must be judged by the courts (72 Bom LR 917 (1918) = AIR 1970 SC 1890).

It cannot be said with any assurance that the novel is obscene merely because slang and unconventional words have been used inthe book in which there have been empohasis on sex and description of female bodies and there are the narrations of ferlings, thoughts and actions in vulgar language. The author who is a powerful writer has used his skill in focussing the attention of the readers on such characters in society and to describe the situation more elequently he has used unconventional and slang words so that in the light of the author's understanding, the appropriate emphasis is there on the problems. Thus the novel is not obscene and does not offend section 292 Penal Code (1985) 2 Crimes 782 SC).

Where the book has been writen by the author, who is a sociologist,with an object of general good inasmuch she had carried out a research in the lives of the call girls in order to serve the social purpose of eradicating or minimising the evil of call girls pervading our society. The book falls under the exception to section 292 Penal Code (1989 CrLJ 1241 Delhi).

A book was said to contain passages laying emphasis on sex descriptions of the body of a female is vulgar language. Held, on facts, the language used was appropriate for the prot-agonist of a novel. Vulgarity did not bear connotation similar to obscenity nor did a vulgar novel necessary becomes obscene nor will it corrupt the morals of its readers (1985) 2 Crimes 782 SC).

A mere showing of a female in nude form is itself held not obscene unless it aroused unhealthy lustful thoughts in the minds of the viewirs (1983 ALJ 1133 =(1983) 2 Cr. L. C. 417 (All). What the court has to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts around in their minds. The charge of obsenity must therefore, be judged from this aspect (AIR 1970 SC 1390 = 1970 Cr LJ 1273 = (1969) 2 SCC 687).

[1][**293. Sale, etc., of obscene objects to young person.**-Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.]

[2][**294. Obscene acts and songs.**-Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene songs, ballad or words, in or near any public place.

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.]

[3][**294A. Keeping lottery office.**-Whoever keeps any office or place for the purpose of drawing any lottery [4][not being a State lottery or a lottery authorized by the Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

1. Section 293 was substituted for the original section by the Obscene Publications Act, 1925 (Act VIII of 1925), s. 2.
2. Section 294 was substiiuted for the original section by the Indian Criminal Law Amendment Act, 1895 (Act III of 1895), s. 3.
3. Section 294A was inserted by the Indian Penal Code Amendrent Act, 1870 (Act XXVII of 1870) s. 10.
4. Substituted by A. O. 1937, for "not authorised by Government".

And whoever pbulishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket lot, number or figure in any such lottery shall be punished with fine whech may extend to one thousand taka.

[3][**294B. Offering of prize in connection with trade, etc.**- Whoever offers, or undertakes to offer, in connection with any trade or business or sale of any commodity, any prize, reward or other similar consideration, by whatever name called, whether in money or kind, against any coupon, ticket, number or figure, or by any other device, as an inucement or encouragement to trade or business or to the buying of any commodity or for the purpose of advertisement or popularising any commodity, and whoever publishes any such offer, shall be punishable with imprisonment of either description for a term which may extend to six months, or with fine, or with both.]

CHAPTER XV

OF OFFENCES RELATING TO RELINGION

295. Injuring or defiling place of worship, with intent to intent the religion of any class.- Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[4][**295A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs.**-Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [5][the citizens of Bangladesh by words, either spoken or written, or by visible representations insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]

296. Disturbing religious assembly.- Whoever voluntarily causes disturbance to any assembly lawfullly engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

297. Trespassing on burial places, etc.- Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby,

3. Section 294B was added by Act XX of 1965, s. 3.
4. Secton 295A inserted by the Criminal Law Amendment Act, 1927 (XXV of 1927), s. 2.
5. Substituted by A. O., 1961, Art, 2 and Sch., for "His Maesty's subjects" (with effect from the 23rd March. 1957.
6. Substituted Act VIII of 1971, s. 3 and 2nd Sch, (w. e. f. 26th March, 1971)-for "Pakistan".

commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

298. Uttering words, etc. with deliberate intent to wound religious feelings.-Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any objdect in the sight of that person, shall be punished with imprisonemnt of either description for a term which may extend to one year, or with fine, or with both.

CHAPTER XVI

OF OFFENCES AFFECTING THE HUMAN BODY

Of Offences offecting Life

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

Illustrations

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

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

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

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

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

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

Synopsis

1. What is culpable homicide.
2. "With the knowledge that he is likely by such act to cause death."
3. "With the intention of causing such bodily injury as is likely to cause death."
4. Death caused without intention or knowledge.
5. Explanation 1. "A person who causes ....., and thereby acceterates the death....."
6. Explanation II. Although by resorting to proper remedies and skilful treatment the death might have been prevented.'
7. Evidence and proof.

1. **What is culpable homicide**.- To come within the definition of culpable homicide under section 299, Penal Code, the act of the accused should cause death and it must be (a) with the intention of causing death, or (b) with the intention of causing such bodily injury as is likely to cause death, or (c) with the knowledge that he likely be such act to cause death.(AIR 1967 Mad 205=1967 CrLJ 576). In the absence of any conspiracy, preplan or pre-meditation on the part of the accused inflicting injuries on the hands and legs of the victim by using lathis, iron rod, subble and ballam resulting in the death of the victim four days after the occurrence is not murder as the accused did not intend to cause death of the victim by inflicting the said injuries; but culpable homicide not amounting to murder (Dalilur Rahman Vs. State, 44 DLR 379=(1992) 12 BLD 327).

Section 299 is divided into three parts. The first part refers the act by which the death is caused by being done with the intention of causing death. That part corresponds to the first part of section 300. The second part of section 299 speaks of the intention to cause such bodily injury as is likely to cause death. This has corresponding provisions in clauses "secondly" and "thirdly" of section 300, Penal Code. Section 304, part I covers cases which by reason of the Exceptions under section 300, are taken out of the purview of clauses (1), (2) and (3) of section 300, but otherwise would fall within it and also cases which fall within the second part of section 299 but not within section 300, clauses (2) and (3). The third part of section 299 corresponds to clause "Fourthly" of section 300. Section 304, Part II Penal Code, covers those cases which fall within the third part of section 299 but do not fall within the fourth clause of section 300 (1971 Cut LT 667). If the criminal act is done with the intention of causing death then it is murder clear and simple. In all other cases of culpable homicide it is the degree of probability of death from certain injuries which determine whether the injuries constitute murder or culpable homicide not amounting to murder and, if death is likely result of the injuries it is culpable homicide not amounting to murder; and if death is the most likely result then it is murder (Momin Mabtha Vs. State, 41 DLR 37)AD) 1165 Rel. on).

In the case of murder, the offender has a positive intention to cause the death of the victim. He assaults him with the intention of causing death or with definite knowledge that the bodily injury inflicted by him would cause death or the injury would be sufficient in the ordinary course of nature to cause death, or the injury was so imminently dangerous that it must cause death. In the case of culpable homicide the intention or knowledge is not so positive or definite. The injury caused may or may not cause the death of the victim. To find that the offender guilty of murder, it must be held that his case falls within any of the four clauses of section 300. Otherwise he will be guilty of culpable homicide not amounting to murder (Bander Ali Vs. State, 40 DLR (AD) 200).

All murders are culpable homicide but all culpable homicides are not murder. Excepting the General Exceptions attached to the definition of murder an act committed either with certain guilty intention or with certain guilty knowledge constitutes culpable homicide amounting to murder. If the criminal act is done with the intention of causing death then it is murder clear and simple. In all other cases of culpable homicide, it is the degree of probability of death from certain injuries which determines whether the injuries constitute murder or culpable homicide not amounting to murder. If death is likely result of the injuries it is culpable homicide not amounting to murder; and if death is the most likely result, then it is murder (The State Vs. Tayeb Ali 1987 BLD (AD 165 (Para - 8).

Comparison of clause thirdly of section 300, Penal Code and the phrase "or that the intention of causing such bodily injury as is likely to cause death", in section 299, point out a subtle distinction between murder and culpable homicide not amounting to murder. Under clause thirdly, the injury intended to be inflicted should be sufficient in the ordinary course of nature and in the phrase of section 299, Penal Code the injury caused may be 'likely' to cause death. The difference though subtle, is quite distinct. If the injury inflicted is only likely to cause death, the offender cannot be held liable for murder as defined in section 300, Penal Code (1978 P. Cr. L. J. 303). To cause death by an act intended to cause death is culpable homicide amounting to murder. To cause death by an act intended to cause a bodily injury which is known to the doer to be likely to cause the death of the person in question, or to cause death by an act intended to cause a bodily injury sufficient in the ordinary course of nature to cause death is culpable homicide amounting to murder. To cause death by an act known to be likely to cause death is culpable homicide, but it is not murder, unless the conduct is so imminently dangerous that death, or bodily injury likely to cause death, must in all probability occur (1980 P. Cr. L. J. 489). Culpable homicide, may not be murder where notwithstanding that the mental state is sufficient to constitute murder, one of the exceptions to section 300 applies, or where the mental state thought within the description of section 299, Penal Code is not of the special degree of criminality required by section 300 (1981 SCMR 329).

The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death; in the other, the injuries must be such as endanger life (AIR 1946 Bom. 38). If the probabilities of death flowing from the blows are greater, the offence would fall under section 300, Penal Code, 1860 and if these are small it will fall under section 299 of the Code. Where in inflicting five lathi blows on the head with great force, the accused knew full well that death would be the consequence, it was held that the degree of probability required by part thirdly of section 300, Penal Code, 1860 was present in the case and the offence, therefore, fell under section 300 (PLD 1961 Kar. 358)

The mental element in culpable homicide, i. e. mental attitude of the agent towards the consequences of his conduct, is one of intention or knowledge. Motive is immaterial so far as the offence is concerned and need not be established (PLD 1967 Pesh.45). However, motive may be taken into consideration along with other elements to see if the accused had the requisite intention. Where there is not motive for causing death or bodily injury sufficient to cause death, accused cannot be convicted under this section (NLR 1981 Cr. 24).

In section 299 the word 'act' depicts intention of doer, who is supposed to know possible consequences of his 'act' but doer of a 'rash and negligent act' shows his recklessness and indifference about its consequences (1984 PCrLJ 2599).

2. **'With the knowledge that he is likely by such act to cause death.'-** To constitute culpable homicide there must be knowledge that the act is likely to cause death. Knowledge implies consciousness - a mental act, a condition of the mind which is incapable of direct proof. The word 'likely' means probably (AIR 1966 SC 148).

The knowledge referred to in section 299 and 300 is the personal knowledge of the accused who causes injury (AIR 1930 Bom 483=32 CrLJ 289). Where lathis were used for attacking persons, the accused must have had the knowledge that death may result and so the accused was punished for the offence of culpable homicide not amounting to murder (1941 All LJ 348). Similarly where the accused fired in the air to scare persons belonging to the opposite party and one pellet hit the deceased and the accused knew that the act was dangerous and in all probability cause death the second part of section 299 was held apply (1953 CrLJ 305 = AIR 1955 Punj 13).

Both intention and knowledge are questions of fact which must be decided ont he circumstances of each case (AIR 1940 Rang 259). It is not enough to prove that death had been caused by the act of the accused; it must also be established that the act had been committed with the requisite intention or knowledge (AIR 1960 AP 153). Intention and knowledge are different things. In order to possess and to form an intention there must be a capacity for reason. And when by some extraneous force the capacity for reason has been ousted, the capacity to form an intention must have been unseated too. But knowledge stands upon a different footing. Some degree of knowledge must be attributed to every sane person. Obviously the degree of knowledge which any particular person can be assumed to possess must vary (AIR 1940 All 486).

As intention and knowledge deal with certain mental conditions they are often incapable of proof by direct evidence and recourse must be had to some rule of natural presumptions which the courts are entitled to draw. In drawing the presumption, the court must have regard to the common course of natural events. Thus there is an accepted doctrine that a man of mature understanding is presumed to intend the natural and probable consequences of his acts (AIR 1940 Rang 259). In deciding the question of intention in cases of murder, the nature of the weapon used, the part of the body on which the blow is given, the force of the blow and its number are some of the factors which assume importance. Death from a blow or blows on the head with a heavy sharp edged weapon is as a rule associated by the villagers with the breaking of the skull. Therefore a person who gives such a blow will be presumed to have the requisite intention to cause death (AIR 1952 Bhopal 25). Where the accused went on firing at deceased until he hit him and his third and fatal shot was fired at very close range, the felonious intention stood proved (PLD 1976 SC 377).

3. **"With the intention of causing such bodily injury as is likely to cause death".-** To fall under the definition of culpable homicide under section 299, the act of the accused should cause death and it must be - (a) with the intention of causing death, or (b) with the intention of causing such bodily injury as is likely to cause death, (c) with the knowledge that the act is likely to cause death (AIR 1967 Mad 205). The guilty intention in the first two conditions contemplates the intended death of the person harmed or the intentional causing of an injury likely to cause his death. The knowledge in the third condition contemplates the knowledge of the likelyhood of the death of the person (AIR 1966 SC 148). The act of indiscriminate firing of persons with fire arms shows an intention of causing such bodily injury as is likely to cause death (II Raj 134). Where the accused actually gave blows on the head of the

deceased with a stick to smash the skull it was held that he intended to cause such bodily injury as is likely to cause death falling under the second part of section 299 (AIR 1930 Bom 483).

Section 299 does not requrie that the offender should intend to kill (or know himself to be likely to kill) any particular person. It is enough if he causes the death or any one, by doing, an act with the intention of causing death to any one whether the person in intended to be killed or any one else (PLD 1967 Pesh 45). Therefore where the accused prepared sweets containing poison with the intention of giving them to her husband. The husband with some others ate them and one of the guests died in consequence of it; it was held, that the accused was guilty of murder (AIR 1917 All 455). When a man stabs another in a vital part of the body such as the chest with a dangerous weapon like Gupti, he must be held to have intended to cause the death of his victim (Issaq Mohammad and another vs. State of Rajasthan 1988 (2) Crimes 20 Raj).

The evidence shows that the accused stabbed the deceased below the nipple with consideration force and he again stabbed the victim when he was falling down. The intention of the accused was nothing but to cause the death of the victim. Held trial court was perfectly justified in finding the accused guilty under section 302 of the Penal Code (Narendran Nair Vs. State of Kerala 1989 (2) Crimes 526; Chahat Khan Vs State of Haryana AIR 1972 SC 2574 relied on).

Intention and knowledge are the facts which can be proved but not always by direct evidence. They have generally to be inferred from the circumstances (Saroj Kumar Gupta Vs. State of U.P. 1988 (2) Crimes 181 All).

The expression "intention to cause such bodily injury as is likely to cause death: in section 299 merely means an intention to cause a particular injury which injury is, or turns, out to be, one likely to cause death. It is not the death itself which is inteded, but the effect of the injury (AIR 1940 Rang 259). Where it cannot be said that the injuries were likely to cause death. Section 299 will not apply. (NLR 1981 Cr. 24). Where the deceased received two grievous injuries. His one arm and a leg were fractured. There was no injury on a vital part of the body of the deceased. He was an old man of 60 and died in hospital because of certain complications arising out of having to stay in bed for a long time. His death cannot be connected with the injuries and therefore this section does not apply (1982 PCr.LJ 934).

The expression likely to cause death connotes that there is less probability of death (PLD 1967 Pesh 45). Where death is caused in the heat of the moment and without premeditation in the course of minor altercation, by giving the accused a single blow with an iron pipe, the offence is culpable homicide not amounting to murder and all that can be said is that the accused knew that he was likely to cause death (PLJ 1973 Kar 304). Similarly where the accused stuffed a cloth into deceased's mouth in order to silence him and not with any idea of killing him, but death was caused; it was held that the most that could be said was that the accused must be presumed to have known that they were likely in so doing to cause death (AIR 1916 Mad 651). A person inflicting a dagger blow in flank of another can well be said to have caused death by doing an act, at least, with intention of causing such bodily injury as is likely to cause death. Such a case would be clearly covered by second part of section 299(NLR 1986 AC 80).

Where the evidence showed that four men armed with deadly weapons pursued the deceased and set upon him and killed him or where the accused inflicted eight severe wounds on the face of the deceased with a hatchet or they gave a blow on the head with a lathi, it was held that the accused must be presumed to

have either intended to cause death or to cause bodily injury likely to cause death. (AIR 1924 Lah 415; 12 CrLJ 597; AIR 1928 Pat 169).

Under section 299 there need be no proof of knowledge that the bodily injury intended was likely to cause death. Before deciding that a case of culpable homicide amounts to murder, there must be proof of intention sufficient to bring it under section 300. Where the injury deliberately inflicted is more than merely likely to cause death but sufficient in the ordinary course of nature to cause death, a higher degree of guilt is presumed (AIR 1960 AP 141).

Where the accused assaulted his wife with a wet rope. It was held that assault with the wet rope was an act so imminently dangerous that it must, in all probability cause death or such bodily injury as was likely to cause death, though it is not certain that he knew that the assault was so dangerous an act as to be likely to cause death. The offence thus falls under the third clause of section 299, Penal Code but it does not come withinthe definition of murder. He must therefore, be punished under the second part of section 304, Penal Code (1969 PCrLJ 715). Where an injury was inflicted by the appellant on the spur of the moment and the fact that it was directed on the arm which a ordinarily not considred as one of the vital and valunerable parts of the human body would rather show that the appellant was no valunerable parts of the human body would rather show that the appellant was not intending to cause any injury which was likely to prove fatal. The further circumstance that after causing one injury he did not repeat his attack further points to his being innocent of a design to bring about the death of the deceased. It was held that the offence fell under section 326. Penal Code and not under section 302 Penal Code (PLD 1969 Kar 162).

In the following cases the accused must be held to have knowledge that death is likely ot be caused by his act : (a) Where 17 injuries were inflcited with blunt side of weapon out of which 8 were on the head (AIR 1933 Punj 262), (b) where out of the three accused who felled the deceased on the ground, one pressed the hands and the other pressed the feet of the deceased on the ground and the third gave repeated blows on the hands and feet of the deceased with his bhujali thus causing eighteen injuries as a result of which the victim died in the hospital after a lapse of about eighteen hours. (AIR 1964 Pat 334), (c) where the accused killed his wife by striking her on the head with a wooden pestle (AIR 1925 Lah 244), (d) where the deceased was given a merciless beating, and the injuries inflcited upon him were so numerous, even though no bones were broken and not a signle one of the injuries individually amounted to more than simple hurt. (AIR 1925 Lah 621) (e) where lathi blows were delivered on the head of the deceased with full force (PLD 1961 Kar 358). (f) where the accused administered dhatura poison to five men in order to facilitate the commission of robbery and in consequence thereof three men died (AIR 1926 Bom 518). But where dhatura was administered by a homeopath to a patient who died, it was held that the offence was no more than a rash and negligent act. It did not fall within the scope of section 299 (AIR 1956 SC 831), (g) five persons armed with dangs assaulted the deceased and beat him to such an extent that one of his things became a mass of bruises, fractured both his legs below the knee and also gave him various other minor injuries on the legs and on the trunk which caused death, but no injury was caused to the head and the injuries on the trunk also were minor (AIR 1929 Lah 157), (h) where a person inflicts incised wounds with a spear on the head of the deceased (AIR 1938 Oudh 88), (i) where a grown up person in full possession of his senses stabs another person in the stomach in the region of the umbilicus inflicting a wound and causing the intestiness to protrude through it and that injury is found by medical evidence to be very serious

and when death also has occurred as a result of that injury (AIR 1959 Kar 230), (j) where the decesed was given first blows and kicks in the abdominal region causing severe damage to internal organs (1980 PcrLJ 489), (k) where the accused shot at the thigh of the deceased (PLD 1976 SC 377), (l) where sudden penknife blow caused one injury on the chest of the deceased amidst a quarrel. There was no allegation of enmity or malice. Circumstances of the case did not furnish proof of accused's motive or intention to cause death or to cause bodily injury likely to result in victim's death. Accused was, however, presumed to have knowledge that he was likely by his act to cause death. The case was held to fall within the mischief of third clause of section 299 (PLD 1970 Dacca 790).

4. **Death caused without intention or knowledge.**- If the accused had no intention or knowledge to kill, the offence would be only hurt or grievous hurt (1954 CrLJ 444). If the offence is committed by using a small knife section 299 was held not to apply but only the first part of section 304 (AIR 1930 Bom 483= 32 CrLJ 289).

When a person causes the death of another by causing an injury which is likely to cause death, if the circumstances appearing in evidence do not show an intention to cause death, he should be convicted under section 325 or section 326 Penal Code as the case may be regard being had to the nature of the weapon or means used to causing the injury (PLD 1959 Kar 162). thus if a stab with a kinife or a dagger aimed at an arm or a leg severs an artery and the injured man dies as a result or where death is caused by a single blow with an iron piped, the offence is not culpable homicide (PLJ 1973 Kar 304).

Where a competent medical witness after examinaing the injury is not in a position to state whether the wound is one which in the ordinary course of nature would cause the death of the victim, it will be too much to attribute knowledge to the accused that the injury he was inflciting would bring about such a result (ILR 1955 Trav-co 23). If a person was suffering from a disease which would render injuries, which would not have fatal effect on an ordinary man, but proved fatal to that person as where a man died on being kicked twice in the abdomen or where a person squeezed the testicles of his adversary with considerable force for a considerable time in a sudden quarrel and medical evidence showed that under normal conditions it would not endanger life, or where no injury is inflicted on any vital part of the deceased, the injury is not such that it would in ordinary course of nature cause death the accused cannot be convicted under section 299 Penal Code (AIR 1921 Cal 64; AIR 1941 Mad 560; AIR 1917 Bom 259; AIR 1932 Oudh 279).

Ordinarily if a child of two years is thrown across a wall five feet high, death will not be the imminent result. If therefore the child dies, the offence does not fall under section 302 but under section 304 (AIR 1960 MP 102).

5. Explanation 1. "A person who causes ..... and thereby accelerates the death'. — Explanation (1) to section 299, assumes that bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it. Where death has been caused it is no defence that the deceased was suffering from it complaint which would have caused his death in any event (1977 SCMR 33).

Where the accused was suffering from tuberculosis in an advanced stage but he did not die because of that disease. The death was accelerated by the injury caused to the deceased with a kinife by the appellant on a delicate part of his body. It was held that the fact that the doctor had expressed his opinion that the patient would have died in a month if he had not recieved the injuries and alternatively he would have

survived if he was not suffering from tuberculosis did to take the offence committed by the appellant outside the ambit of section 299 Penal Code (1977 SCMR 33).

Where several persons recklessly attacked a person with lathis and the latter died as a result of the injuries that he received, it was held that even if the existence of a fatty heart might have contributed to the death, in view of Explanation 1, death must be held to be the consequence of the injuries which were inflicted (1935 WN 51; 1982 SCC Cri 476).

6. Explanation 2. Although by resorting to proper remedies and skilful treatment the death might have been prevented.- Negligence in medical treatment, held, was no ground to take a case outside the pale of section 299, Penal code (qamar Sultan Vs. State 1989 PCrLJ 402). This explanation is explicit and gives no room for discussion. The reason for the provision is obvious. It is not always that proper remedies and skilful treatment are within the reach of a wounded man and the danger of allowing any exception in the matter could be easily imagined (1965) 2 CrLJ 42). Where an injury is intentionally inflicted the defence that no proper medical treatment was forthcoming does not exonerate the person who caused the injury from guilt of murder if he intended that the injury should be sufficient in the ordinary course of nature to cause death, or knew that it was likely to cause death to that person. It does not exonerate him from guilt of culpable homicide if death ensures as a natural or likely consequence such a person is deemed to have caused the death and his degree of criminal responsibility must depend on the knowledge or intention to be gathered from the proved facts (1937) Rang 384 (FB); 41 CrLJ 491; 1979 SCC (Cri) 241.

Where an injury is intentionally inflicted and the defence was that no proper treatment was taken, the person inflicting the wound is not exonerated (38 CrLJ 1097). Where the death was due to unskilled treatment and the injury caused was only the remote cause of his death the accused may not be responsible for causing death and section 299 did not apply (AIR 1949 Nag 19 = 49 CrLJ 547).

Where an injury is intentionally inflicted the defence that no proper medical treatment was forthcoming does not exonerate the person who caused the injury from being guilty of commission of murder, if he intended that the injury should be sufficient inthe ordinary course of nature to cuase death or knew that it was likely to cause death of that person (PLD 1976 SC 377). Failure to resort to proper remedies and skiful treatment in a particular case might be because such remedies are not available or because of errors of judgment on the part of those treating the victim of the occurrence or because of negligence in the treatment of the victim. Although the legislature was aware of these possibilities, it has expressly brought within the mischief of the section all cases of failure to resort to proper remedies and skilful treatment. Therefore, even though the deceased might not have died but for negligence in the treatment of his wounds. Even though the haemolysis to the deceased might have developed on account of negligence inthe treatment of the wound, he would be guilty of an offence under this section (PLD 1976 SC 377).

The fact that an operation might have saved the victim cannot reduce the offence from murder to culpable homicide, in view of explanation 2 to section 299. Penal Code (AIR 1949 Nag 19). Where the accused had wounded the deceased by pistol shots causing injuries to left lung, pleura, stomach and the spleen and the latter organ had to be removed by the surgeon, the patient died after the operation and the postmortem ascribed death to shock and haemorrhage which resulted from the injuries as well as from the removal of the spleen, the accused was held guilty of an offence under section 302, Penal Code (PLD 1957 Lah 332).

Where the injuries caused by the accused were not the direct cause of death of the person, on whom they were inflcited, but the person died as a result of gangrene that set in one of the wounds as a result of some dirty substance coming in contact with it, or if a person receives grievous injuries and is detained in hospital and as a result of those injuries pneumonia supervenes and the victim dies, or where the disease which actually causes death is meaning it is, tetanus etc, and it is a natural and probable result of the injury, the person who inflicts the injury must be held responsible for the disease arising from the injury (AIR 1936 Rang 526; AIR 1928 Lah 851; 1969 PCrLJ 482).

The offence of culpable homicide can be committed only if death is caused by the doing of an act with the requisite intention or knowlede. If death is not caused by such an act, but something else intervenes between the doing of the act and the death of the person concerned, the offender would not be guilty of the offence of culpable homicide (PLD 1974 Cr. C 434). thus where death was not due to the injury but to other supervening cuases such as gangrene or fever or the tetnus, which developed during the stay of the deceased in the hospital and which was the direct cuase of his death, appeared to have developed on account of careless medical treatment. It is not possible to hold that the injuries received by the deceased were the direct cause of his death. The accused may be convicted under section 326 (1946 Marwar L.R. 11; PLJ 1974 Cr.C 434).

Where according to medical evidence, death resulted from haemolysis which followed transfusion given to the deceased as a part of treatment of his abdonminal injury, it was held that haemolysis was not the direct or even the promximate result of the injury and so section 299 of the Penal Code had no application and the accused could not held guilty of the offence of murder (PLD 1959 Lah 451). Where the death was due to ignorance of the deceased and the unskilful treatment which he received and the injuries were only the remote causes of death, or where the immediate cause of death was seeptic meningitis, the sepsis being due to the neglect in treatment and the application of some village poultice on the wound. The injury itself was not such as would in the natural course result in death, it was held, that section 299 did not apply to the case and conviction under section 304 was bad (AIR 1935 Oudh 466).

The fact that better medical treatment could not be available at the local dispensary does not affect the nature of the offence (1958 crLJ 1367). If death results from an injury voluntarily caused, the person who causes that injury is deemed to have caused death, although the life of the victim might have been saved if proper medical attention had been given, and even if medical treatment was given but was not the propoer treatment, provided that it was administered in good faith by a competent physician or surgeon (AIR 1937 Rang 384 FB). The fact that if an operation had been made within half an hour after the infliction of the injury and that consequently his life could have been saved would not be valid defence to the charge of culpable homicide (AIR 1961 Mad 498 = (1961) 2 CrLJ 781).

7. **Evidence and proof.**- The prosecution is required under the law to bring the case under any of the four clauses of section 300 to sustain the charge of murder and if the prosecution fails to discharge this requirement, the charge under section 300 would not be made out, and the case may fall under section 299 (1977 CrLR 436 (SC).

The *mens rea* or mental element in culpable homicide is intention of knowledge towards the consequences of his conduct. There are three kinds of *mens rea* - (i) an intention to cause death (ii) an intention to cause a dangrous injury, and (iii) the knowledge that death is likely to result.

The prosecution is not bound to establish motive for a crime, but evidence of motive may be adduced, and considered (AIR 1934 Oudh 405). Where the offence can be proved by evidence motive may not be of much use to the accused (AIR 1974 SC 1139; 1974 CrLJ 908) Motive will be academic if the charge of murder could be established otherwise (AIR 1975 SC 1252; 1975 CrLJ 1062). The question of motive becomes academic when other circumstantial evidence is worthy of credence (AIR 1974 SC 1193; 1974 CrLJ 908).

In the absence of intention or knowledge as envisaged by section 299 Penal Code, the offence committed may be one of grievous or simple hurt (AIR 1966 SC 1874).

In this country it is rare to come across the testimony of a witness which does not have a fringe or an embroidery of untruth although his evidence may be true in the main. It is the function of the court to separate the grain from the chaff and accept what appears to be true and reject the rest. It is only where the testimony of a witness is fainted to the core, the false-hood and the truth being inextricably interlinked, that the court should discard his evidence in toto.

The mere fact that P.W. 7 and some other witnesses did not admit or had expressed ignorance about certain collateral facts was hardly a ground to reject their ocular account when there was general agreement among them with regard to the substratum of the prosecution case. In short, all the arguments employed by the High court in rejecting the evidence of the eye-witness and other material witnesses examined by the prosecution were, with respect, clearly unsustainable, whereas those given by the trial court in accepting the evidence of these eye-witness were weighty and sound (AIR 1981 SC 897 (904, 905) = 1981 CrLJ 23).

It was therefore, for the accused to establish with a balance of probability circumstances which would bring his case within any Exception. Since the deceased was unarmed and the assault cannot be said to be sudden and unpremeditated, Exception II or any other Exception in secton 300 Penal Code will not apply. Since the accused had caused the injuries to the unarmed deceased before he received the stick blows given by P.W. 10 it cannot be said that the deceased was the aggressor and that the accused caused those fatal injuries to the deceased to ward off any imminent apprehension of death or grievous hurt to himself (AIR 1981 SC 897 (904, 905) 1981 CrlJ 23).

Whether the Trial Court, after appraising the evidence held that the common object of the unlawful assembly constituted by the five accused persons was to give a good thrashing to the deceased, and no more, and the fatal blow by one of the accused to the deceased was not given in the prosecution of the common object of that assembly, it was held that the view of the evidence taken by the Trial Court was also reasonably possible. In such a situation, when two views of the evidene, one indicating conviction and the other supporting acquittal, are equally possible, the High Court should not have disturbed the findings of the Trial Court. That finding could not be said to be clearly erroneous (1982 CrLJ 1577 (1578) = AIR 1982 SC 1224).

The nature of the injuries viz. 22 on one, 12 on the other and 13 on the third deceased clearly showed that there could be no question of a plea of private defence. The accused party had come to teach the deceased a lesson for having raised dispute in respect of land about which they had hinted even a month back when the FIR was lodged. The manner of the assault, the consequence of which was the death of three persons cannot for a moment give rise to a justificaiton for pleading a right of private defence. Moreover exception (ii) of section 300 clearly

enjoined that there cannot be any quesiton of exceeding the right of private defence where the accused cause more harm than it was necessary for the purpose of his defence. The clear evidence of witnesses was that even after the deceased had fell down on the grund and were rendered harmless and were not in a position to offer any resistance, the accused continued to assault them untill they had inflicted all the injuries. In these circumstances, therefore the plea of the right of private defence could not be accepted for a moment (AIR 1983 SC 488, (490).

Circumstantial evidence relied upon by the prosecution must be complete and incapable of explanation or of any other explanation or hypothesis than that of the guilt of the accused (AIR 1978 SC 1544 = 1978 CrLJ 614).

A man of status of District Judge not giving information to police regarding the deaths of his wife and three daughters, whether by accident or by suicide, and at the same time making consistent attempts to let the outside would know that his wife and three daughters were alive somewhere, are circumstances which go to show that he must have had some hand in their deaths (1975 CrLJ 354 Assam).

A discrepancy as to the description of the object seized. While appreciating the evidence, it could not disclose the prosecution case (AIR 1978 SC 1142 = 1978 CrLJ 1122).

While appreciating the evidence the explanation of the injured person, who did not say that the accused was wearing a turban, due to anguish could not be said to be unsatisfactory. Further where the identity of the accused was not established on the basis of foot-prints, it could not be said to be enough to justify acquittal while there was overwhelming evidence against him (AIR 1978 SC 1204 = 1978 CrLJ 1137).

While appreciating evidence in a murder trial, it must be borne in mind that normally a sharp weapon would cause punctured wound but a weapon like a Ballam can cause incised wound (AIR 1978 SC 1142 = 1978 CrLJ 1122).

The accused was car driver of the deceased and he was driving the car with deceased's some time before the incident on the way to deceased's house. The motive of murder was said to be strained relation between the two because of illicit connection of accused with deceased's wife. The articles belonging is deceased and the weapon of assault were recovered at the instance of the accused. The Indian Supreme Court held that the High Court was right in accepting prosecution case (AIR 1980 SC 1708).

Where the case was dependent entirely on the evidence of approver, the accused was acquitted due to absence of satisfactory evidence to corroborate approver's evidence in material particulars regarding participation of accused (AIR 1980 SC 1871).

The evidence of the so called eye-witnesses was discrepant as pointed out by the Sessions Judge. Their conduct in not telling anybody about the incident on the date of the incident also made their evidence not worthy of acceptance. The other material before the Court was not sufficient to hold the accused guilty. That was not a case in which it could be said that the appreciation of evidence by the Sessions Judge was either perverse or that only one opinion, namely, that the accused was guilty of the offence was possible. In those circumstances, the High Court was in error in reversing the judgment of acquittal recorded by the Trial Court. (AIR 1983 SC 491 = 1983 CrLJ 829).

In the instant case the procedure of conducting an experiment which was carried out two years after the incident in Court with the aid of a young lawyer who was asked to handle a different gun altogether and which had been used to reject the

truth of the evidence of the eye-witnesses appeared to be highly irregular. The High Court has not addressed itself to the degree of efficiency or shall it be said inefficiency of accused in handling a gun. The time taken by any person to reload a gun depends upon several factors including the condition of the gun and the surcharged atmosphere created by the firing about which may have preceded the time of reloading the gun (AIR 1983 SC 867).

There was not a little of evidence on the record that the appellant was so drunk that he could not have found the intent necessary to constitute an offence falling within clauses secondly and thirdly of section 300, Penal Code. On the other hand, the material on the record was sufficient to warrant an inference that the appellant had formulated a deliberate attempt to commit an offence as defined in section 300, Penal Code. That in the evening he was shouting, abusing and also threatening the deceased. Deceased was drawing water from the hand pump, when the appellant fired at her resulting in her death instantaneously. Those circumstances were consistent only with the theory that the appellant had formed at least an intention to cause a bodily injury mentioned either in clause secondly or clause thirdly of section 300, Penal Code. Therefore they were not explicable on any other hypothesis. It followed that the offence committed by the appellant was one of murder and his voluntary drunkenness did not avail him to reduce the offence to one of culpable homicide not amounting to murder (1982 CrLJ 1364 P&H).

Whether the Trial Court, after appraising the evidence held that the common object of the unlawful assembly constituted by the five accused persons was to give a good thrashing to the deceased, and no more, and the fatal blow by one of the accused to the deceased was not given in the prosecution of the common object of that assembly, it was held that the view of the evidence taken by the Trial Court was also reasonably possible. In such a situation, when two views of the evidence, one indicating conviction and the other supporting acquittal, are equally possible, the High Court should not have disturbed the findings of the Trial Court. That finding could not be said to be clearly erroneous (1982 CrLJ 1577 (1578) = AIR 1982 SC 1224).

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

Secondly.-If it is donw with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm as cuased, or-

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

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

Illustrations

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

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in

consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

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

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

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

The above exception is subject to the following provisos :-

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

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

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

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

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act acused by the provocation.

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

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

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

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

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

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

Illustration

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

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

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

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

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

Illustration

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

Synopsis

1. Scope.
2. Distinction between murder and culpable homicide.
3. Clause 1.
4. Clause 2.
5. Clause 3.
6. Clause 4.
7. Exception 1. person committing the act knows ..... causing death.
8. Proviso 1 to exception 1
9. Exception 2 - exceeding the right of private defence.
10. Nature and extent of right of private defence.
11. Where the right of private defence was exceeded.
12. Where the right of private defence was not exceeded.
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14. Burden to prove right of private defence.
15. Exception 3.
16. Exception 4. death caused without premediation in a sudden fight in the heat of possion..... in a cruel manner.

17. Wwithout premediation.
18. Death caused by single blow.
19. "Unfair advantage and cruel manner".
20. Both parties receiving injuries.
21. Killing unarmed adversary.
22. Exception 5 - consent of death.

1. **Scope.**- There is no definition of murder in section 300, and the section merely takes the four more serious types of culpable homecide, basing on the *mens rea*, and designates them murder. They are an act with the intention of causing death, an act with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, an act done with the intention of causing such bodily injury which is sufficient in the ordinary course of nature to cause the death of any person, and an act, which the offender knows, is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. In the four types of culpable homicide designated murder, *mens res* in the first three is constituted by different types of intention and the *mens rea* in the last is knowledge - two types - one, the knowledge that the act is so imminently dangerous that it must in all probability cause death, and two the knowledge that the act is so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death. If any one of these ingredients of *mens rea* is present, the particular culpable homicide is murder and not otherwise. It is then that the five exceptions to section 300 come. The exceptions deal with special circumstances under which murder is committed, for example, if the offence is committed when the offender is deprived of his power of self control due to grave and sudden provocation, the offence is only culpable homicide because of exception I, though otherwise (but for the exception) the offence will be murder; if the offence is committed in the exercise, in good faith, of the right of private defence but in excess of that right, the offence will not be murder, but will only be culpable homicide by virtue of exception 2 etc. Thus, for the applciation of one of the five exceptions to section 300, the offence must otherwise be murder. In other words, if the offence does not fall within one of the four categories mentioned in section 300, no question of the applciation of the exceptions to section 300 can arise. This is the scheme of sections 299 and 300 and section 302 provides for the punishment for murder and section 304 provides for the punishment of culpable homicide (1971 Ker LJ 182 (186-187); 1972 CrLJ 1416).

All murders are culpable homicides but all culpable homicides are not murder. Excepting the general exceptions attached to the definition of murder an act committed either with certain guilty intention or with certain guilty knowledge constitutes culpable homicide amounting to murder. If the crimnal act is done witht he intention of causing death then it is murder clear and simple. If death is likely result of the injuries it is culpable homicide not amounting to murder; and if death is the most likely result, then it is murder (1987 BLD (AD) 165; Momin Matetha vs. State 41 DLR 38 Para 22).

When question of intention arises, it must be borne in mind that person is presumed to intend the natural and probable consequences of his act until the contrary is proved. It is, therefore, necessary in order to arrive at a decision as to an offender's intention to enquire what the natural and probable consequences of his acts would be. Once there is evidence that a deceased person sustained injuries which were sufficient in the ordinary course of nature to cause death, the person, who inflicted them can be presumed to have intended those natural and probable consequences. His offences would fall under the third head of section 300, Penal Code. Intention has to be inferred from what he does. But there are cases in which

death is caused and the intention which can safely be imputed to the offender is less grave. The degree of guilt depends upon intention and the intention to be inferred must be gathered from the facts proved. Sometimes an act is committed which would not in an ordinary case inflict injury sufficient in the ordinary course of nature to cause death, but which the offender knows is likely to cause the death. Proof of such knowledge throws light upon his intention. Under section 299, there need be no proof of knowledge that the bodily injury intended was likely to cause death. Before deciding that a case of culpable homicide amounts to murder there must be proof of intention sufficient to bring it under section 300, where the injury deliberatley inflicted is more than merely likely to cause death but sufficient in the ordinary course of nature to cause death : the higher degree of guilt is presumed (1960 CrLJ 303=AIR 1960 AP 141).

Under the Penal Code the acts which consttute murder are more particularly described, namely (a) Doing an act with the intention of causing death. (b) Doing an act with the intention of causing such bodily injury as the offender knows is likely to cause death of the person to whom the injury is caused. If the offender knows that the particular person injured is likely either from peculiarity of constitution or immature age, or other special circumstances to be killed by an injury which would not ordinarily cause death (1 Bom 342). (c) Doing an act with the intention of causing bodily injury which injury is sufficient inthe ordinary course of nature to cause death. The difference between these cases though nice is appreciable and it is a question of the degree of probability which will resolve itself to a consideration of the weapon used, the blow whether it is from a first or a stick on a vital part of the body which will be likely to cause death, a wound from a sword on a vital part of the body is sufficient in the ordinary course of nature to cuase death. (d) Doing an act without sufficient excuse knowing that the act is so imminently, dangerous, that it must in all probability cause death or such bodily injury as is likely to cause death. The last clause (e) applies to cases where there is no intention to cause bodily injury or death but it is not limited to those (ibid). Under it, will fall such acts as going deliberatley with a horse used to strike or discharging a gun among a crowd. To bring it under this clause, it must be shown distinctly that the accused at the time of committing the act charged knows that in all probability, it is likely to cuase death or that it would bring about such bodily injury as is likely to cause death. Thus where a poisonous drug was administered to a woman to procure miscarriage and there was no evidence that the accused had any knowldge of the propriety of the drug beyond the immediate purpose for which it was employed or that it is likely to cause death or such injury is likely to result in death, it was held that the accused were not guilty of murder, but an offence under section 314. (AIR1955 AP 24 = 1955 CrLJ 329).

In deciding whether there is intention to kill the following factors are relevant (a) nature of weapons used, (b) the part of the body where the injury is inflicted, (c) the force used, (d) the nature of injuries and (e) number of injuries (AIR 1952 Bhopal 25). Where a deadly weapon which penetrated through the hurt was used, the intention to kill is clearly established (1977 CrLR 460 (SC).

For the commission of the offence of murder it is not necessary that the accused should have the intention to cause death. It is now well settled that if it is proved that the accused had the intention to inflict the injuries actually suffered by the victim and such injuries are found to be sufficient in the ordinary course of

nature to cause death, the ingredients of clause thirdly of section 300 of Penal Code are fulfilled and the accused must be held guilty of murder punishable under section 302 of the Code (AIR 1958 SC 465; AIR 1977 SC 45).

2. **Distinction between murder and culpable homicide**.- Culpable homicide in section 299 is : " whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits culpable homicide, murder has been described in section 300 of the Penal code, and without correct understanding of what is "culpable homicide" one cannot understand what is "murder". To put it in a simple way, an aggravated form of culpable homicide is murder. In other words, culpable homicide falling within any of the four classes of cases specifically described in section 300 is murder. All murders are necessarily culpable homicide, but all culpable homicides are not murder, and those cases are termed as "culpable homicide not amounting to murder". Mere killing of a person or mere causing a person's death is not murder, culpable homicide or even any other criminal offence; but it is so when caused with certain guilty intention or guilty knowledge. Three classes of cases have been described in section 299 as culpable homicide and four classes of cases have been described in section 300 as 'murder'. Cases described in class (1) as common in both the two sections, 299 and 300. That is, when death is caused by an act "done with the intention of causing death, then it is mruder or culpable homicide amounting to mruder. In the other categories of cases as described in both these sections, the difference between mere" culpable homicide and culpable homicide amountint to murder is hte mere degree of probability of the death being caused; when death is probable, it is culpable homicide; and when death is most probable, then it is murder (State, Vs. Ashraf Ali and others; (1994) 46 DLR (AD) 241 (Para - 5) 1994 BLD (AD) 127). The distinction between culpable homicide (section 299) and murder (section 300) has always to be carefully borne in mind while dealing with a charge under section 302 Penal Code. Under the category of unlawful homicides fall both cases of culpable homicide amounting to murder and those not amounting to murder. Culpable homicide is not murder when the case is brought to within five exceptions to section 300 Penal Code. But even though none of the five exceptions are pleaded or *prima facie* established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of section 300 Penal Code, to sustain the charge of murder. If the prosecution fails to discharge this omission in establishing any one of four clauses of section 300, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under section 299 (1977 CrLJ (SC) 436=1977 SCC (Cri) 656).

It has been held in 1987 BLD (AD) 265 that "all murders are culpable homicide but all culpable homicides are not murder. Excepting the General Exceptions attached to the definition of murder, an act committed either with certain guilty intention or with certain guilty knowledge constitutes culpable homicide amounting to murder. If the criminal act is done with the intention of causing death then it is murder clear and simple. In all other cases of culpable homicide it is the degree of probability of death from certain injuries which determine whether the injuries constitute murder or culpable homicide not amounting to murder and, if death is the likely result of the injuries it is culpable homicide not amounting to murder; and if

death is the most likely result then it is murder (Momin Malitha Vs. State 41 DLR (1989) 38 Para 22).

All murders are culpable homicide but all culpable homicide are not murder. Every act falling within section 290 and not falling under section 300 is culpable homicide not amounting to murder (11 CrLJ 295). The Penal Code recognises no exception to a case of murder other than the five exceptions enacted in section 300 and no Court will be justified in reducing a crime of murder into one of culpable homicide not amounting to murder without advertence to those exception (AIR 1954 Trav-co 396). The elements which constitute the offence of culpable homicide are expressed and explained in terms of four explanations enacted in section 300. If an act which an accused person is said to have committed does fall within any of those explanations, and does not fall within any of the exceptions, the act is murder, but if it does fall under one or other of those explanations and also falls within any of the exceptions enacted in section 300, the act is one of culpable homicide not amounting to murder (AIR 1928 Oudh 15). Where the evidence did not disclose that there was any intention to cause death but it was clear that the accused had the knowledge that their acts were likely to cause death, the accused can be held guilty under the second part of section 304 Penal Code. The contention that in order to bring the case under the second part of section 304 Penal Code, it must be brought within one of the exception to section 300 Penal Code, is not always correct (AIR 1960 AP 141).

An offence may amount to culpable homicide but no murder even though none of the exception in section is 300 is applicable to the case. The clauses of section 300, imply a direct mental intention and a special degree of criminality (AIR 1935 Oudh 239). Therefore if the requirements of section 300 are not fulfilled and the offence does not fall under any one of its four clauses, the Court should proceed to see whether it was committed with the intention mentioned in Part I or only with the knowledge described in Part II of section 304 (2 Pepsu L.R. 558).

The provisions relating to murder and culpable homicide are probably the most complicated in the Penal Code and are so technical as frequently lead to confusion. Not only does the Code draw a distinction between intention and knowledge but fine distinctions are also drawn between the degrees of intention to inflict injury (AIR 1934 Sind 145). The distinction between culpable homicide and murder is merely a question of different degrees of probability that death would ensue (PLD 1967 Pesh 45). It is murder if such injury is sufficient to cause death in ordinary course of nature, or if death is its most probable result (AIR 1932 Oudh 186= PLD 1967 Pesh 45).

An intention to cause death is a part both of section 299 and section 300. But intention is not a necessary ingredient of murder. If the act is done with the knowledge that death is likely to be caused thereby, it is culpable homicide and if it is done with the further knowledge that the act was so imminently dangerous that it must, in all probability, cause either death or such bodily injury as was likely to cause death then that culpable homicide is murder. Thus knowledge is sufficient to establish murder without any inention, whatever, being proved (AIR 1939 Rang 225).

Culpable homicide may not amount to murder, where notwithstanding that the mental state is sufficient to constitute murder still one of the exceptions to section

300 applies or where the mental state though within the description of section 299, is not of special degree of criminality required by section 300 (AIR 1915 Cal 773;AIR 1939 Sind 57).

For the convenience of comparison the provision of section 299 and 300 may be stated as below :

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is one -	Subject to certain exceptions culpable homicide is murder, if the act by which the death is caused is done -
(a) with the intention of causing death;	(1) with the intention of causing death;
(b) with the intention of such bodily injury as is likely to cause death;	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person;
	(3) with the intention of causing bodily injury to any person, and the bodily injury intended to be inflcited is sufficient in the ordinary course of nature to cause death;
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death.

Thus it is seen that section 299 (a) corresponds to section 300 (1), section 299 (b) correspondens with section 300 (2) and 3, section 299 (c) corresponds with section 300 (4).

What distinguishes these two offences is the presence of a special mens rea which consists of four mental attitudes in the presence of any of which the lesser offence of culpable homicide becomes the greater offence of murder. The four mental attitudes are inherent in section 300 as distinguishable from murder and culpable homicide (AIR 1966 SC 1874 = 1966 SCD 959). In the case of murder, the offender has a positive intention to cause the death of the victim. He assaults him with the intention of causing death or with the definite knowledge that - (1) the bodily injury inflicted by him would cause death or (2) the injury would be sufficient in the ordinary course of nature to cause death, or (3) the injury was so imminently dangerous that it must cause death. In the case of culpable homicide the intention or knowledge is not so positive or definite. The injury caused may or may not cause death. Even if exceptions 1 to 4 to section 300 Penal Code, are not applicable, the offence can still be culpable homicide. To find that the offender is guilty of murder, it must be held that his case falls with any of the four clauses of section 300, otherwise, he will be guilty of culpable homicide not amounting to murder (1982 CrLJ 1821 All).

The difference between the two offences of culpable homicide and murder is fine but real. Culpable homicide is a generice term. The offence will amount to murder if the conditions laid down in section 300 are satisfied. If the offence comes under section 299 or under one or other of the exceptons to section 300, it will be culpable homicide not amounting to murder.The offence is culpable homicide if the

bodily injury intended to be inflicted in the ordinary course of nature to cause death. The distinction is fine but appreciable. Where the accused used a stick 3.5 feet in length and 3 inches in diameter to beat the deceased on his head causing serious injuries both external and internal including fracture of the skull resulting in compression of the brain and also used a knife to chop of the victims nose when he fell on the ground. It was held, that the accused intended to cause bodily injury sufficient in the ordinary course of nature to cause death. The serious wounds caused in the vital part of the body of the deceased were also sufficient in the ordinary course of nature to cause death. The caccused was therefore guilty of murder (AIR 1955 AP 24 = 1955 CrLJ 329).

Culpable homicide may not amount to murder (a) Where though the evidence is sufficient to constitute murder, one or more of the exceptions of section 300, Penal Code, apply, or (b) where the degree of *mens rea* specified under section 299, Penal Code, is present but not the special degree referred to by section 300 (AIR 1934 Sind 145 (149) = 36 CrLJ 22). The offence is culpable homicide if death is likely to result and it is murder if death is the most probable result (1936 ALJ 73). To cause death by an act intended to cause death is culpable homicide amounting to murder. To cause death by an act intended to cause bodily injury which is known to the doer to be likely to cause the death of the person in question or to cause death by an act intended to cuase bodily injury sufficient in the ordinary course of nature to cause death is culpable homicide amounting to murder. To cause death by an act known to be likely to cuase death is culpable homicide but it is not murder unless the conduct is so imminently dangerous, that death or bodily injury likely to cause death, must in all probability occur. Wherever culpable homicide amounts to murder, it is reduced to culpable homicide if it falls within one or other of the exceptions to section 300 (AIR 1959 Mad 323 = 1959 CrLJ 993). It follows that if the accused causing the death of another had no intention to kill, then the offence would be murder only if the accused knew (1) that the injury inflicted would be likely to cause death or (2) that it would be sufficient in the ordinary course of nature to cause death or (3) that the act must in all probability cause death. If the case can not be placed as high as that, and the act is only likely to cause death and there is no special knowledge, the offence comes under section 304, Part II (AIR 1956 SC 116=1956 CrLJ 291).

In the case of murder, the offender has a positive intention to cause the death of the victim. He assaults him with the intention of causing death or with definite knowledge that the bodily injury inflicted by him would cause death or the injury would be sufficient in the ordinary course of nature to cause death, or the injury was so imminently dangerous that it must cause death. In the case of culpable homicide the intention or knowledge is not so positive or definite. The injury caused may or may not cause the death of the victim. To find that the offender is guilty of murder, it must be held that this case falls within any of the four clauses of section 300, otherwise he will be guilty of culpable homicide not amounting to murder. Facts of the case show that death was caused without premeditation (Bandez Ali Vs. Teh State 40 DLR (AD) 1988 (200).

In the scheme of the Penal Code "Culpable homicie" is genus and 'murder' is specie. All murders are culpable homicide but not *vice versa*. Speaking generally, 'culpable homcide' sans special characteristics of murder' is culpable homicide not amounting to murder. For the purpose of fixing punishment, proportionate to the gravity of this generie offence, the code practically recognises three degrees of culpable homicide. The first is what may be called culpable homicide of the first stage. This is the gravest form of culpable homicide which is defined in section 300 as 'murder'. The second may be termed as culpable homicide of the second degree.

This is punishable under the first part of section 304. Then there is culpable homicide of the third degree. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest amongst the punishments provided for the three grades (AIR 1977 SC 45; AIR 1977 SC 2267; 1979 SCC (Cri) 241).

3. Clause 1.- 'Act by which the death is caused is done with the intentionof causing death'.- Where the intention to kill is present, the act amounts to murder; where such an intention is absent, the act amounts to culpable homicide not amounting to murder. To determine what the intention of the offender is, each case must be decided on its own merits. Where it is proved that the accused fired a gun shot at such a close range that it could not have had other than a fatal effect and it is indicative of the intention of the accused that after firing at one person he reloaded the gun and fired another shot at another person there is a clear indication of his intention to commit murder (34 CrLJ 1071 = AIR 1933 Pat 147).

The accused were waiting on the road and thereafter they accosted the deceased and A-1 inflicted the fatal injury. Therefore, the only inference that the intention to cause the death of the deceased attract clause I of section 300, Penal Code (1993 CrLJ 3671) (SC).

Where the accused set fire to the cottage in which the deceased was sleeping and before doing so took care to lock the door from outside so that the servants of the deceased who were sleeping outside would be of no help to the deceased and further took active steps to prevent the villagers also from bringing any succour to person who was being burnt alive, it was held that intention of the accused to kill the deceased was clear from their facts (AIR 1956 SC 171; 1965 CRLJ 338).

After subjecting the evidence to a careful scrutiny and noticing the manner in which the two accused has attacked the deceased after asking him to come home to collect the money claimed by him and the nature of the weapon used and the serious nature of the injuries caused on him by accused 1 repeatedly stabbing him and accused 2 effectively abetting the commission of the offence by keeping a tight hold on his hands till all the stabs were inflicted, the Court came to the conclusion that the offence committed by the two accused clearly amounted to murder punishable under section 302, Penal Code (ChandraKanta Somnuth vs. State of Moharashtra 1990 SCC (Cr.) 29 (31).

Where the evidence discloses that the deceased had fallen after the very first blow inflcited by the accused by the blunt side of a tabla and that even after the fall, the accused inflicted further assault on his person with the sharp edge of the tabla that can be only consistent with the intention of finishing him to death (1955 CrLJ 597; AIR 1955 Pat 161).

The weapon used was a lethal one and the injury, grave in nature, was cuased on the vital part of the body. The intention to cause death of the victim, therefore, is *prima facie* apparent. Even otherwise it can be said that the act was done witht he intention causing such bodily injury as the offender knew to be likely to cause death of victim. It is also clear that the act was done with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The act of the accused appellant thus clearly falls within the first, second and third clauses of section 300 Penal Code. The mere fact that the victim luckily survived for two weeks on account of treatment in the hospital is no ground to put a premium on the offence committed by the accused. A victim of violence cannot be left to die quickly leaving him unattended only for securing a conviction for murder. Be that as it may, there having been no material on record to sustain the contention that the facts of the case are covered by

exception 4 to section 300 Penal Code and there having been no mitigating circumstance, there was no occasion for the High Court Division or the Trial Court to consider the applicability of section 304 Penal Code (Md. Abdul Majid Sarkar Vs. The state 1988 BLD (AD) 71; 40 DLR (AD) 84).

A blow on the head with a dangerous weapon like an axe which causes a fatal injury, justifies the inference that the person who gave the blow intended to cause that person's death or to cause such bodily injury as would be sufficient in the ordinary course of nature to cause death (1956 CrLJ 1066; AIR 1956 Bom 609).

Where the fact was that the accused had used a dangerous weapon like a rifle and having regard to the fact that he had fired at deceased as many as five shots, one of which was fired after deceased was hit by a bullet and collapsed on the ground, it was impossible to accept the contention that the accused had not done the act with the intention of causing his death (AIR 1983 SC 614; 1983 CrLJ 993; (1983) 1 Crimes 1080).

Where the cumulative effect of the circumstances clearly shows that the deceased was actually put on the ground and then run over by the cart driven by the accused and at the same time, the conduct of the accused in meeting the witnesses in the hospital and taking steps to bear the expenses of the treatment of the deceased clearly shows that he had no clear intention to cause the murder of the deceased, it was held that the accused was liable to be convicted not udner section 302 but under section 304, Part II of the Penal code (1979 CrLJ 1386= AIR 1983 SC 284; 1983 CrLJ 429).

In case of death from an injury, the death must be regarded as a promimate cause and not to remote a consequence of the injury. Such a death should be direct result of the injury, or if the death is caused by some intervening factor, that factor intervenes between the injury and death and death is not the direct result of the injury, it cannot be said that the injury caused the death. If death of a person is the direct result of an act committed by another person, which the requisite intention or knowledge, or if as a result of that act something else intervenes, such as gangrene, tetanus, peritonitis, etc, which is the direct result of that injury, the offneder would be guilty of the offence of culpable homicide. If, however, something that intervenes between the act complained of and the death of the injured man is not the direct result of the injury, it cannot be said that death had resulted from the doing of the act which caused the injury (PLD 1971 Pesh 175).

The important point is that if any disease or other circumstance intervene, it should be such as would have most probably intervened after or as a result of the act done by the accused. Thus where four armed persons attacked a man with deadly weapons and he jumped down from the roof of his house to escape from them and died as a result of the injuries received by his fall. It was held that the attack by the accused persons must be held to be the direct cause of death of the deceased (AIR 1960 Mys 228).

Where the intention to cause death is clearly made out it does not matter that death was caused not directly but by a chain of consequences, each following upon the other in the process of nature and not being an unexpected complication causing a new mischief. Thus where the accused stabbed his wife in her back with a pen knife which injured her spinal cord and resulted in paralysis of the lower limbs and of the bladder, followed by cystitis and bedsore and in turn by death after seven months in hospital; it was held, that death was caused by the injury and the accused was guilty of nothing short of murder (AIR 1958 Ker 207).

Where the accused struck many blows on his victim and in spite of medical attention one of the well known perils of a wound supervened namely blood poisoning and the man died. It was held that the chain of causation between the act of the accused and the death of the deceased was direct. The supervening of blood poisoning therefore, could not exonerate the accused of murde. When the disease which actually caused death was meningitis, pritonitis, tetanus, pneumonia, etc. etc. and it was natural probable result of the injury which the person inflicting the injury had cuased, the person who inflicted the injury must be held responsible for the disease arising fromthe injury (PLD 1966 Pesh 255). Where the medical evidence was that the injuries inflicted on the deceased were not necessrily sufficient in the ordinary course of nature to cause death, and that death was due to megningitis and compression of the brain but this had no direct connection witht he injuries, or where death was caused by the opoeration which was medically necessary to correct the damage done by the injuries caused by the accused; it was held that the accused was guilty of an offence under section 302 Penal Code (AIR 1962 Guj 77).

If there was a joint attack with dangerous weapons by four or five persons on one men and the latter died almost on the spot as a result of the injuries inflicted on him, at least the offence of culpable homicide must be said to have been made out, and the mere fact that it is not possible to say who inflicted the fatal injury would not be sufficient to support a finding that even the offence of culpable homicide has not been committed. (1972 CrLJ 1313 (SB). But if the killing was not in prosecution of the common object of the unlawful assembly and the author of the fatal injury is also not known, then none of the members can be convictd for the murder. However, the members of the assembly can not escape the liability under section 326 or section 325 with the aid of section 149 (1987 CrLJ 541 Raj).

Although, due to the injuries, the deceased died after about two days of the occurrence, there is no doubt whatsoever that the injuries caused by *dao* on the vital parts of the body including the head of the deceased were so sever that the deceased offence of causing death of the deceased by the accused, for that reason, will not come within the purview of section 304 part II of the Penal Code, but clearly comes within the definition of offence of intentional commission of murder as defined in section 300 of the Penal Code which is punishable under section 302 of the Penal Code (1993 DLD 354 (361).

If the direction of an accused to his followmen is a direction to the fire indiscriminately as against the members of his hostile group, he would clearly be guilty if his direction brings about a shooting and death of any one or more out of the persons of that group. (AIR 1956 SC 172 (180); 1956 CrLJ 341).

Where a man armed with a deadly weapon (s sleas) thrust that weapon into the chest of his victim and caused instantaneous death; (1974 CrLJ 624 SC; 1981 CriLJ 626 SC; 1980 SCC (Cri) 340).; where the accused inflicted repeated blows on vital part of the body with a deadly weapon; (1987) 2 SCC 236) where the appellants shot the deceased and after her fell down inflicted farsa blows on the neck and chest of the deceased (1987 CrLJ 952 Ori), where the respondent throttled to death the deceased, a field worker in the family planning department, after initially attempting to rape her when they were going through a jungle to reach another village (1972 SCC (Cri.) 237); where the 9 accused armed with bankas and lathis had assaulted the deceased with whom they had enmity to death and even cut off his head and threw it into a river (1973 CrLJ 1828 SC); where eight persons deliberately attacked the deceased, who was alone and unarmed, and even after they knocked him down continued to beat him with lathis causing his death (1985 SCC (Cri) 470; 1975 CrLJ 1315 SC); where the appellants, armed with deadly weapons, entered the room of a

70 year old woman, chained it from inside and strangled the deceased (1978 SCC (Cri) 601); where the accused struck the deceased with such determination that when the stick broke he armed herself with another weapon and chased the deceased into another man's compound and assulted him with the second weapon (1933) 34 CRLJ 1245; AIR 1943 Rang 278); where the accused sprinkled and poured kerosene oil in deceased's shop as well as on person of the deceased and set fire to the deceased and the shop, 1987 CrLJ 152 SC; AIR 1987 SC 98; 1986 SCC (Cri) 503); where four accused persons armed with deadly weapons attacked an unarmed man on the roof of a house and caused him some injuries and thereafter the victim jumped from the room of the house, fell down on the ground motionless and was thrown by the accused on some burning haystacks (AIR 1960 Mys 228), where the appellant and others had attacked the deceased with various weapons and as many as eighteen injuries were caused to the deceased including an injury which resulted in the fracture of the parietal bone (1972 SCC (Cri) 712; 1973 SCC (Cri) 953; 1975 SCC (Cri) 427) and where a man struck the deceased on the head with a formidable lathi and fractured his skull (35 CrLJ 101; AIR 1933 Lah 930; 43 CrLJ 616; AIR 1942 Mad 213), where each one of the five injuries suffered by the deceased in the head region was caused by a blow intended to kill though the motive for the assault was trivial (1981 SCC (Cri) 676) it was held that murder was committed.

It is the duty of the Court, in a case of death because of torture and demand for dowry, to examine the circumstances of each case and evidence adduced on behalf of the parties, for recording a finding on the question as to how the death has taken place. While judging the evidence and the circumstances of the case, the Court has to be conscious of the fact that a death connected with dowry takes place inside the house, where outsiders who can be said to be independent witnesses in the traditional sense, are not expected to be persent. The finding of guilt on the charge of murder has to be recorded on the basis of circumstances of each case and the evidence adduced before the Court.In the instant case, the occurrence took place in the open courtyard during the day-time which is not consistent with the theory of suicide. It was a case of murder (AIR 1993 SC 1387).

Intention is always a question of fact (AIR 1939 Lah 245). It must be proved and cannot be asumed (AIR 1946 Nag 321). The prosecution had affirmatively to prove not only that pistol was fired by the appellant but that it was fired with the requisite intention, namely, to cause death of the victim or to cause an injury likely to cause death or sufficient in the ordinary course of nature to cause death (1988 PCrLJ 645). There was no onus on accused person to prove any special plea, including accidental firing, and he would certainly be entitled to acquittal of charge of murder if prosecution failed to prove such intention or knowledge as mentioned in section 300 (1988 PCrLJ 645).

In a case of murder, where intention is one of the essential elements of the offence it is always necessary that there should be a definite finding on evidence brought on record that person who had caused bodily injury intended to inflict such bodily injury as was sufficient to cause death in ordnary course of nature (1988 PCrLJ 981). Where the presence of requisite knowledge or intention under section 300 was not clear conviction under section 302 was altered to one under section 326 (1969 PCrLJ 1233). Where accused neither had intention to kill the old lady nor could he have realised that he was likely to cause her death from nature of injuries inflicted with khurpi. The accused at most intended to cause grievous hurt to deceased. His case would fall under section 325 and not under 302. Conviction and sentence passed by trial court under section 302 were altered to one under section

325 and accused was sentenced to 5 years R.I. (1983 PCrLJ 36). Where the accused had come only with the intention to carry on his intrigue with a woman. He was carrying a loaded gun to meet any eventually which may arise. He was spotted and given chase and while in flight he fired wildly in a desperate attempt, to shake off his pursuers and killed one of them. He was held to have no intention to cause death and was convicted under section 304 (11) (PLD 1980 Kar 199). Where the appellant was an issueless woman and wanted to take a child evidently for the purpose of adopting him. While carrying the child, she somehow smothered her. The only inference that can be drawn is that she acted in that manner with the knowledge that her act was likely to cause death or to cause such bodily injury as was likly to cause death within the meaning of section 304 (11) Penal Code (1977 PCrLJ 91).

Where deceased was thrown into a ditch and brickbatted thereby causing him as many as 28 injuries. Intention of accused could be nothing less than murder of deceased. Fact that accused caused no injuries either with fire arm or sharp edged weapon was of no avail. Conviction under section 302 Penal Code, was maintained (1984 PCrLJ 1642). Where something untoward initially erupted between a prosecution witness on one hand and some members of accused party on the other and members of both parties rushed in defence of their respective companions. Neither members of complainant party nor weapons carried by them nor manner of their sporadic approach gave any apprehension to accused to use their guns mercilessly and recklessly so as to kill two persons from a point blank range. Action of accused in firing at deceased was held to be wilful and intentional. Sentence of death was awarded (1984 PCrLJ 1642).

Where evidence of eye witness showed that nobody could rescue the deceased and take him to the hospital after he had been hit because the accused kept on firing for two hours and that the deceased died due to profuse bleeding; it was held that the circumstances indicated that the accused had an intention to kill the deceased (1969 PCrLJ 555). Where the accused administered dhatura to a group of four of his friends, with the object of making away with the loot when they had returned after committing a robbery all of them became unconscious and the accused finding one of the them was about to regain consciousness killed him with a hatchet and buried his body. Later, the other three were found by villagers lying unconscious in a sugar cane field. The body of the fourth man was recovered on the pointing out of the accused. It was held that the plan clearly was that the bodies should be found and there should be no clue as to the person responsible for their death. If they were merely stupelied, in the expectation that they would regain consciousness, the petitoner would necessarily have taken precautions against the clear likelihood that they would either report his action to the police, or take revenge against him directly. Intention to cause death was proved (1968 SCMR 33 (SC).

Nature of offence, may be determined from weapon used, seat and nature of injuries as well as consequences arising out of injuries so given (1982 PCrLJ 862). the nature of injuries onthe deceased may be looked at to prove intention (1983 PCrLJ 1183). When the injury is not serious and there was no intention to cause death or grievous hurt nor had the accused knowledge that it was likely to cause grievous hurt or death, a man is guilty of hurt and not death. In other words to constitute the offence of voluntarily causing hurt, there must be complete correspondence between the result and the intention or the knowledge of the accused. If the injuries inflicted are not grievous, the offender cannot be credited with the knowledge that the injuries were likely to cause death and he could only be convicted under section 323, Penal Code (PLD 1983 Pesh 87). Where both accused and deceased were schoolmates. They suddenly quarrelled on their way to school

and accused gave deceased a jerk by catching hold of his neck, resulting in dislocation of his cervical vertebrae and damage to spinal cord which proved fatal. Facts did not suggest any intent to cause grievous hurt much less death. Conviction of accused under section 325. Penal Code was altered to one under section 323, Penal Code (1984 PCrLJ 2197).

Where accused caused two incised wounds on thigh of victim, out of which one was declared as simple while the other one caused death, accused was convicted under section 326, Penal Code (1984 PCrLJ 1420). Where confusions on body of deceased were not caused by powerful and forceful blows. There was no fracture of thriode hone. Constusions showed that sufficient force was not used to completely throttle deceased. It was clear that accused had no intention to cause death. Death occurred as result of cumulative effect of all injuries. Conviction was altered from section 302 to secton 304 Part II (1983 PCrLJ 1686).

Where accused inflcited injuries with a heavy sharp cutting weapon such as chanjoor, resulting in severing of victim's head and her instant death, accused was held to have no other intention but to kill deceased (1982 PCrLJ 735). Where as a result of an alteration a son attacked his father with a stick, and a careful scrutiny of the medical evidence revealed that the blows given by the appellant to the deceased were not with full force. Moreover, he caused only one injury on the head of the deceased which was simple. Even the bone was not cut. It appeared from allthe circumstances that the appellant could be attributed only the knowledge that his act was likely to cause death but he had no intention to cause death or to cause such bodily injury as was likely to cause death. His case fell properly within the mischief of Part II of section 304, Penal Code (1973 PCrLJ 680).

Where injury caused to deceased led to legitimate inference that it was a hurt which endangered life of victim. Doctor opined that deceased died as a result of shock and haemorrhage. Conviction was altered to section 326, Penal Code (NLR 1985 AC 97). But where accused caused deceased simple and grievous injuries. Grievous injuries appeared to have been based on attrition as no less than three ribs were factured besides breaking one of the legs. Action of accused was quite gruesome leading to no other inference than a sinister intent to cause death. Contention that since injuries from sharp side of hatchet were simple intention of culpable homicide could not be imputed to accused was not accepted (1984 PCrLJ 2759).

If the injuries were caused on vital organs of the body by a sharp edged weapon, the inference is irresistible that the accused intended to kill the deceased (PLD 1982 SC 8). Where a woman is killed by plunging a knife in her temple the offence falls under section 302 (ILR 1939 Lah 435). An accused who caused three stab wounds to deceased on his chest, or plunged a chhuri in the back of his chest so as to cause instant death, or a person who causes such a deep injury in the abdomen of a person as to cut his liver, is ordinarily presumed to have the intention of killing the person to whom he caused such an injury (1982 PCrLJ 1015); 1988 PCrLJ 95; AIR 1978 Kar 295).

Though infliction of serious injuries on vital parts of the body of the victim is invariable a proof of the inention to cause death yet it cannot be laid down as an invariable rule that if vital parts of the body of the victim are spared the offence in no case amounts to murder if death ensures because a person may be given an extremely large number of injuries on the other parts of the body and killed by that means. Each case will depend on its circumstances (PLD 1961 Lah 543). Where the Pharsi, though a lethal weapon was not applied on a vital part of the body and the

assaulants took care to inflict all the injuries with the dangerous weapon only on the thigh, it was held that an intention to cause death cannot be attributed even to the actual assailant who caused the injuries on the thigh (1964 Jaipur LR 298). Although buttocks are not a vital part of body yet death can be caused by injury on non-vital parts of body also. In such cases necessary intention has to be gathered from nature of injury, conduct of assailant, and surrounding circumstances of the case (1982 PCrLJ 862).

The nature of attack helps in determining the intention of the accused. When a long and merciless beating is given by the assailants to a completly unarmed adversary and particularly when he had fallen down and had been incapacitated from offering any resistance, if the victim succumbs to the injuries the offence committed would be murder (1970 PCrLJ 373). Thus offence would fall under section 302 where an attack with a knife was merciless and brutal and made despite shouts of deceased's father to spare his son, or where the accused gave the deceased four hatchet blows inthe regon of the head of his victim or four persons attacked an unarmed man with sticks, knocked him down and gave him merciless beating, broke his bones and ribes and caused fracture of skull, resulting in his death, or where the accused struck the deceased with such determination that when the stick broke, he armed himself with another weapon a nd chased the deceased into another man's compound and assaulted him further with the second weapon, with the result that death ensued, or where the accused inflicted thirty six injuries with a sickle, some of which were individually fatal, or where the injuries inflicted by the accused on the deceased with a dah were several in number and of a very serious nature and one of them cut the neck and severed the fourth cervical vertebra and another wound cut the skull and exposed part of the surface of the brain, etc, or where the accused mercilessly caused large number of injuries to the deceased with a sharp edged weapons resulting in his death with 5 hours, or where accused gave as many as five successive dagger blows on chest of deceased ina brutal manner (1981 PCrLJ 565; AIR 1919 Lah 382; AIR 1933 Rang 278; AIR 1965 Mys 150; AIR 1938 Rang 331.

4. Clause 2.- "With the intentionof causing dsuch bodily injury as the offender knows to be likely to cause death.- The second clause deals with acts done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused. The mental attitude here is two fold. There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury (AIR 1966 SC 1874, (1878).

Clause (2) of section 300 deals gnerally with cases where the intention is to kill the subject of the assault even though the injury is not fatal in the ordinary course of nature but is fatal in the case of particular victim by reason of a physical infirmity or pecularity, such as an enlarged spleen, known to the culprit to be enlarged,or the emaciated condition of the victim known as such to the culprit. In this view all cases falling within this clause would also fall within clause (1) (AIR 1939 Lah 245; (1979) 47 CLT 312).

Causing of a serious injury on a vital part of the body of the deceased with a dangerous weapon, like an axe, must necessarily lead to the inference that the accused intended to kill the deceased. His act would therefore amounts to murder (1973 CrLJ 271 SC; 1978 CrLJ 14 SC; 1980 SCC (Cri) 314; 1987 CrLJ 1070 (SC).

Where there were 24 injuries on the person of the deceased and of them 21 incised. They were either on his head or neck or the shoulders and on the forearms. All these except perhaps the last are vital parts of the body and anybody who causes

injuries with deadly weapons must be fixed with the intention of causing such bodily injury or injuries as would fall within section 300 of the Penal Code (AIR 1958 SC 672 = 1958 CrLJ 1251).

Where there was an altercation and exchange of abuses between the parties shortly prior to the occurrence and when the deceased and others were on their way to another place the accused persons waylaid them and one of the accused stabbed the deceased with a dagger in his stomack, and after the stabbing the accused ran away together from the place of occurrence, it was held that the conviction of the accused under section 302/34 was justified on the basis of the evidence in the case (1985 SCC (Cri) 446).

Where the accused gave a hard blow on the head of the deceased which broke his skull (PLD 1958 Lah 408), or where, a grown up person in full possession of his senses stabs another person in the stomack in the region of the umbilicus inflicting a wound 3" long and causing the intestines to prottrude through it and that injury is found by medical officers to be a very serious injury with "very little chance of survival" and when death also had occurred as a result of that injury (AIR 1959 Ker 230; 1959 CrLJ 981), or where the person of the deceased bore into wounds of a penetrated nature one of which completely perforated the heart; the other penetrated the abdomen on the left side and divided the intestines and death was due to shock and haemorrhage, or where the accused gives spear blows to the deceased damaging vital parts of his body (1979 CrLJ 80), the accused was presumed to have known that the injury would cause death (AIR 1926 Lah 143 = 27 CrLJ 238).

Where the accused gave blows on the head of the deceased even after he had fallen on the ground, it was held that even assuming that the accused had originally no intention of killing, the ferocity of attack even after the victim was unconscious showed that they beat him with the intention of causing such bodily injury as was likely to cause death (AIR 1935 Oudh 381 = 36 CrLJ 573). But where an injury caused to the deceased was one which does not ordinarily result in death, e.g. a solitary injury on the forearm of the deceased with a small knife and then the accused abstained from repeating his attack (1969 PCrLJ 495; 21 DLR (WP) 190), or where a solitary injury is caused in the thigh, the accused can not be held guilty of murder as he can not be said to have known that the stab on the thigh would be likely to cause death (1970 PCrLJ 495). Where injuries are inflicted on vital parts of the body the accused who caused those injuries with deadly weapons must be fixed with the intention of causing such bodily injury or injuries as would fall within section 300 (AIR 1958 SC 572 = 1958 CrLJ 1251).

Where the weapon used is not so dangerous as would in all probably cause death, the accused would not be said to have intentionally caused the death of the victim. Thus where the acucsed assaulted his wife with a wet rope and caused her death; it was held that the offence committed fall under section 304 Penal Code (22 DLR 269 = 1969 PCrLJ 715).

Where a person struck the deceased with a highly lethal weapon with the knowledge that the act was such as was likely to cause death, he was held guilty of murder (1980 SCC (Cri) 648; 1983 SCC (Cri) 621). Where the appellant was accused of murdering his cousins wife and their infant child by throwing acid on them it was held that the conviction of the appellant and sentence of death passed under section 302 must stand (1972 CrLJ 1196 (SC).

5. Clause 3.- "With the intention of causing bodily injury to any person ..... sufficient in the ordinary course of nature to cuase death".- Under clause 3 of section

300, Penal Code, in particular, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death (AIR 1979 SC 1006; 1984 CrLJ 445). In order to constitute murder under this provision it is enough if three requirements are satisfied, namely, (i) that there must be intention to cause bodily injury, which is subjective fact, (ii) that the injury or injuries must be sufficient in the ordinary course of nature to cause death, and (iii) the phrase "bodily injury intentded to be inflicted" means merely that the injuries were not caused accidentally in that whoever caused the injuries intended to cause them (1971 All Cr. R. 594; 1971 All LJ 439). 'Intention' is different from motive or ignorance or 'negligence'. It is the 'knowledge' or intention with which the act is done that makes difference, in arriving at a conclusion whether the offence is culpable homicide or murder. "Intention" means shaping of one's conduct so as to bring about a certain event. Therefore, in the case of 'intention' mental faculties are projected in a set direction (Jai Prakash Vs. State Delhi Administration, (1991) 1 SCJ 319).

The sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause, irrespective of an intention to cause death. Here again, the exceptions may bring down the offence to culpable homicide not amounting to murder (AIR 1966 SC 148(151).

As has been mentioned in illustration (c) to section 300 Penal Code, it is not necessary for the prosecution to prove that he accused had intended to cause the death of the victim. The prosecution has only to prove that the accused intentionally caused injuries sufficient to cause the death of the victim in the ordinary course of nature, and on such proof the provisions of thirdly of section 300, Penal code, are satisfied and thereby the offence committed would be murder punishable under section 302, Penal Code. Where the prosecution satisfactorily proved that the accused did cause the injuries found on the person of deceased, that the accused intentionally inflicted those injuries, and that the injuries were sufficient in the ordinary course of nature to cause death and the death was actually caused. The requirements of thirdly of section 300, Penal Code, are fully satisfied and the offence committed is that of murder punishable under section 302, penal Code. (State of Maharashtra Vs. Arun Savalaram Pagare 1989 CrLJ 1918 (1925) Bom).

In a case there is evidence that the accused acted in a cruel manner taking undue advantage of the position that he was armed with a dangerous weapon whereas the deceased was unarmed. When a person causes an injury on a vital part of the body, the intention to kill can be attributed to him. When serious injury has been caused on a vital part with a dangerous weapon, it must necessarily lead to the infernece that the accused intended to kill the deceased (Narendra Vs. State of Kerala 1989 (2) Crime 526(529) Ker).

Merely because death has ensued from a single stab, cut or blow, the act of the accused would not automatically fall out of clause 'thirdly' of section 300 of the Penal Code, 1860 (Ranjit Singh and others Vs. State of Punjab 1991 (1) crimes 326 Mad). For attracting the provisions of clause thirdly of section 300 Penal Code, the prosecution should prove that the injuries on the person of the deceased were caused with an intention to inflict those injuries and none of the injuries was caused un-intentionally. It should further be proved that the injuries caused to the deceased were sufficient in the ordinary course of nature to cause his death (Shiv and others Vs. State of MP, 1988 (3) Crimes 8 MP. Jairam Vs. State of Tamil Nadu 1976 Cri LR 236 SC).

If a man deliberatley strikes another on the head with a heavy log of wood or an iron rod or even a lathi so as to cause fracture of the skull, he must, in the absence of any circumstances negativing the presumpton, be deemed to have intended to cause the death of the victim or such bodily injury as is sufficient to cause death. The whole thing depends upon the intention to cause death,and the case may be covered by either clause firstly or clause thirdly. The nature of intenton must be gathered from the kind of weapon used,the part of the body hit, the amount of force employed and the circumstances attendant upon the death (AIR 1981 SC 1552).

It is fallacious to argue that the death is caused by a single blow clause thirdly is not attracted because under clause thirdly to section 300, Penal Code, the Court is concenred with the intention to cause that particular injury which is a subjective enquiry and once such intention is established and if the intended injury is found objectively to be sufficient in the ordinary course of nature to cause death, clause thirdly is attracted and it would be murder unless one of the exceptions to section 300 of the Code is attracted.(Jai Prakash Vs. State (Delhi Admn.) 19991 (1) Crimes 475 SC). When the prosecutions has failed to prove that any of the injuries on the person of the deceased was sufficient in the ordinary course of nature to cause death or that the cumulative effect of the injuries caused to the deceased was sufficient in the ordinary course of nature to cause death or that cumulatively the injuries were sufficient in the ordinary course of nature to cause death, the provisions of clause thirdly of section 300 Penal Code, 1860 are not attracted (Shiv and others Vs. State of Madhya Pradesh 1988 (3) Crimes 9 MP).

To bring a case under clause thirdly of section 300 Penal Code, it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature. It must in addition be shown that the injury found to be present was the injury that was intended to be inflicted (Narayanan Thankappan Vs. State 1988 (2) Crimes 848 Kar).

"The third clause discards the test of subjective knowledge. It deals with acts done with intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this cause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not, as was laid down in Virsa Singh vs. State of Punjab (AIR 1958 SC 465; 1958 CrLJ 818). for the application of this clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established."

Applying these tests to the facts of the present case the prosecution has satisfactorily proved that the respondent -accused did cause the injuries found on the person of deceased, that the accused intentionally inflicted those injuries, and that the injuries were sufficient in the ordinary course of nature to cause death and the death was actually caused. Therefore, the requirements of thirdly of section 300, Penal Code, are fully satisfied and the offence committed is that of mruder punishable under section 302 Penal Code (1989 CrLJ 1918 (1925) Bom).

To bring the case under clause "thirdly" of section 300 the prosecution must prove objectively (i) that a bodily injury is present, (ii) the nature of the injury and

(iii) that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the inquiry proceeds further, and (iv) it must be proved that the injury of the type described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of enquiry is purely objective (AIR 1958 SC 465(467, 468); 1958 SCJ 772; 1958 SCR 1495).

Once these four elements are established by the prosecution the offence is murder under section 300 "thirdly". It does not matter that there was no intenton to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature. It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the inquiry is purely objective and the only question is whether, as a matter of purely objective inference, the inquiry is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequence; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional (1947) 1 All ER 813 (816); AIR 1968 SC 867; AIR 1972 SC 952; AIR 1977 SC 1756 (1760); AIR 1979 SC 1006).

Where the death occurred nine or ten days after the receipt of the injury and duirng this period the deceased had been operated upon in the hospital, there is no escape from the conclusion that the prosecution had failed to prove beyond all manner of doubt that the injury on the abdomen of the deceased, was sufficient to cause death in the ordinary course of nature. The act of the accused would not amount to murder, the nature of the offence committed would be culpable homicide not amounting to murder (AIR 1976 SC 1519; 1976 CrLJ 1186). The injuries inflicted on the deceased were not necessarily sufficient in the ordinary course of nature to cause death. Death was due to meningitis and compression of the brain which had no direct connection with the injuries it was held that the offence fell under section 326 and not under section 302 (AIR 1934 Lah 368; 35 CrLJ 1283). Where the accused inflicted knife blow on thigh which is not a vital part and it was only by coincidence that the femoral artery was cut, the case would not fall under clause thirdly of section 300 as the accused could not be said to have the intention to cause the particular injury of cutting the femoral artery and hence the offence committed was one punishable under second part of section 304 (1984 CrlJ 1045). But where the ferocity of the attack on a non-vital organ is such as to show the intention of the accused to cause fatal injury, the intention to kill may be inferred. Thus where the accused stabbed the deceased in the thigh with a knife "with a nine-inch blade with so much force that it cut the femoral vein of the deceased, he was held guilty of murder (1970 PCrLJ 585 SC). The fact that the appellant gave only one blow on the head would not mitigate the offence of the appellant and make him guilty of the offence of culpable homicide not amounting to murder. As the injury on the head was deliberate and not accidental and as the injury was sufficient in the ordinary course of nature to cause death, the case against the appellant would fall squarely within the ambit of clause "thirdly" of section 300 (AIR 1972 SC 952 (954).

In the instant case,the prosecution has proved the facts that severe bodily injuries were present on the body of the deceased, and that those injuries were not unintentional or accidental. Then, it has also been proved that those injuries were

sufficient to cause death in the ordinary course of nature. It was held that all the necessary elements have been proved to bring the case under section 300, thirdly, of the Penal Code. The appellants committed offence in prosecution of the common object of their unlawful assembly or, at any rate, they knew that offence was likely to be committed in prosecution of their common object. They were therefore all guilty of committing the offence under section 302/149 of the Penal Code (1977 crlJ 1148 (1151) SC).

Multiple injuries were inflicted all over body of deceased including head and face and several fractures resulted for these injuries including fractures of skull and face bones. It was held that the injuries were intended and sufficient in the ordinary course of nature to cuase death. The offence was held punishable under section 302 and not under section 304 (1984 CrLJ 1069 MP).

Merely because the accused death at single blow would not mitigate the offence and make him guilty of the offence of culpable homicide not amounting to murder punishable under section 304, Part II, Penal Code. If a man deliberately dealt a blow on the head with a heavy weapon so as to cause fracture of skullbones he must, in the absence of any circumstances negative the presumption, be deemed to have intended to cause the death of the victim or such bodily injury as was sufficient to cause death. The intention must be gathered from the kind of weapon used,the part of the body on which the blow was dealt, the amount of force applied and circumstances attendent upon the death (1982 CrLJ 1160 (Ori); AIR 1983 SC 284; 1983 CrLJ 429; AIR 1981 SC1552).

The accused, a young boy aged 18 years, gave a blow to his victim who fell down. In falling down, the victim had a knock at some hard substance which resulted in his death. It was held that the accused could not be said to have had the intention of causing death or of causing injury sufficient in the ordinary course of nature to cause death or an injury likely to result in death and that it could only be presumed that he had the intention to cause injury likely to cause grievous hurt and hence he was liable to be convicted under section 325 and not under section 302 (48 CrLJ 367 (370); 229 I.C. 293).

The question was not whether the accused intended to inflict a serious injury or a trivial one, but whether he intended to inflict the injury that was proved to be present. If he could show that he did not, or if the totality of the circumstances justified such an inference, then of course, the intent that the section required was not proved. But if there was nothing beyond the injury and the fact that the accused inflicted it, the only possible inference was that he intended to inflict it. Whether he had known of its seriousness, or had intended serious consequences, was of no importance. Whether the injury was serious or otherwise, and if serious, how serious, was a totally separate and distinct question and had nothing to do with the question whether the accused intended to inflict the injury in question (1980 RLW 159, (161, 162).

No special knowledge is requried to know that one may cause death by burning if he sets fire to the clothes of a person. In any case the accused must have known that he was running the the risk of causing the death of victim. The accused brought a case containing kerosene and poured the kerosene on his wife. He then took out a burning tur stump from the hearth and applied it to the sari of his wife. As a result of this her clothes started burning. The wife died of shock due to extensive burns. It was held that the accused was rightly convicted for an offence punishable under section 302 of the Penal Code (1978 MLJ 324, (325,338,339).

Clause thirdly of section 300 Penal Code requires that the bodily injury must be intended and the bodily injury intended must be sufficient in the ordinary course of

nature to cause the death. The first part is a subjective one, indicating that the injury must be intentional. The second part is an objective one. In that case the Court must be satisfied that the injury sustained by the victim was sufficient in the ordinary course of nature to have caused the death. Where the injury which appellant intended to cause, was only meant to wound the deceased who died on the fourth day of the occurrence, clause thirdly of section 300 Penal Code, does not cover the case and the matter must fall within the ambit of culpable homicide not amounting to murder (1973 CrLJ 1443, (1446,1447); 1977 CrLJ 1987 SC).

In the instant case the beating was premediated and calculated. The aim of the assailants was to smash the arms and legs of the deceased, and they succeeded in that design, causing no less than 19 injuries, including fractures of the most of the bones of the legs and the arms. The weapons were unusually heavy, lethal weapons. Held that all these acts of the accused were sufficient in the ordinary course of nature to cause death. The mere fact that the beating was designedly confined by the assailants to the legs and arms, or that none of the multiple injuries inflicted was individually sufficient in the ordinary course of nature to cause death, will not exclude the application of clause thirdly of section 300 (1977 CrLJ 1602, (1604) SC).

In Sudersham Kumar Vs. State of Delhi, (1977 CrLJ 1 (11,12) SC), it was established beyond all reasonable doubts that the accused intended to cause injuries by throwing acid and injuries were caused on the person of Maya Devi : Dr. V.K. Jain, who treated Maya Devi in the City Clinic stated in his evidence that the injuries suffered by Maya Devi were sufficient collectively, in the ordinary course of nature, to cause death. The opinion of Dr. Jain was corroborated by the evidence of Dr. K.S. Raj Kumar. It was held that the evidence of these doctors would show that the injuries caused to Maya Devi were of a dangerous character. The fact that Maya Devi lingered for about twelve days would not show that the death was not the direct result of the act of the appellant in throwing acid on her. The fact that Maya Devi developed symptoms of malaenea and respiratory failure and they also contributed to her death could not in any way effect the conclusion that the injuries caused by the acid burns were the direct cause of her death. As the injuries caused by the appellant were sufficient in the ordinary course of nature to cause death, the appellant is guilty of an offence punishable under section 302 Penal Code (AIR 1974 SC 2328, (2330, 2331).

Thirdly of section 300 contemplates that death must be the most probable result of the injury having regard to the ordinary course of nature. From the nature of the injury on the deceased and the fact that death was the cumulative effect of all multiple injuries thirdly of section 300 would not apply. However, the evidence clearly shows that the first accused trampled on the face and neck of the deceased and there are corresponding injuries also. Therefore, it is clear that the first accused had done it with the knowledge that it is likely to cause death. The offence would come under section 304, Part II, Penal Code (1989 (1) Crimes 771, 775 Ker; Abdul Aziz Vs. State, 1988 (1) KLT 703 relied on.).

It is patent that before an intended injury can be said be 'likely' to cause death, it must be an injury which is sufficient in the ordinary course of nature to cause death. "An injury sufficient in the ordinary course of nature to cause death" essentially means that the death will be the most probable result of the injury having regard to the ordinary course of nature. The word "likely" means "probably", and can eassily be distinguished from "possibly". When the chances of a thing happeing are very high, it is said that it will most probably happen (1989 CrLJ 214 (223) P&H).

In the under noted case there was no previous enmity. There was no premeditation. But what happened was simply an altercation between Radhey and

Doodhanath and Radhey brought out knife from his pocket, stabbed deceased only once. There was none to stop him from stabbing deceased again and again, if this intention had been to kill him. Immediately after this occurrence all the accused ran away. All these facts point to the only conclusion that the intention of accused Radhey was not to commit the murder, but with all this he is still to be credited with the knowledge that his act was likely to cause death and hence his case will fall under section 304, Part II, Penal Code (1989 (1) Crimes 205 (210) All).

6. **Clause 4.- "Person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any execuse for incurring the risk of causing death".**- The clause fourthly comprehends generally the commission of imminently dangerous acts which must in all probability cause death or cause such bodily injury as is likely to cause death. When such an act is committed with the knowledge that death might be the probable result and without any execuse for incurring the risk of causing death or injury as is likely to cause death, the offence is murder. This clause, speaking generally, covers cases in which there is no intention to cause the death of any one in particular (AIR 1966 SC 148 (158). The last clause applies only to a cause of dangerous action without an intention to cause specific bodily injury to any person e.g. furious driving or firing at a target near the public road (AIR 1946 Nag 120; 47 CrLJ 441).

Clause 'fourthly" of section 300, requires a higher or greater knowledge than the one contemplated in third clause of section 300. The extent of knowledge is not capable of direct proof, is must necessarily be inferred from various circumstances of the case, including the nature of the act, expected consequence of the act and the degree of risk to human life. If death is only likely result, it is the third clause of section 300 which will apply; if death is most probable result of the act, "fourthly" of section 300 will be attracted. "Fourthly' contemplates extreme culpable negiligence of very high decree coupled with lack of execuse, it contemplates much higher degree of knowledge and greater capability of the act. If the circumstances betray such callousness towards the result and the risk taken is such that it can be stated that the act is so imminently dangerous that it is in all probability likely to cause death or such bodily injury as is likely to cause death this provision is attracted. The character of the act must be such as to necessarily lead to the inference that the accused had full consciousness of the probable consequence. There must be knowledge of the imminent danger, ordinarily such knowledge can be presumed if the act causing death is so imminently dangerous (1989 (1) Crimes 771 (775) Ker; 1988 (1) KLT 703 relied on).

Although this clause is unually invoked in those cases where there is no intention to cause the death of any particular person the clause may on its terms be used in those cases where there is such callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death (AIR 1968 SC 881; 1968 CrLJ 1025). A teacher poured petrol in the chamber of an administrative officer and ignited it with a burning torch. The accused alleged that he had shouted outside amongst visitors that he is burning the chamber but none came forward to support him. The officer was burnt alive and died. Held, the accused under the circumstances was guilty of murder (1983 CrLJ (Guj) 303).

The main ingredient of this clause is that the person committing the act in question should have had that the knowledge the act done is so imminently dangerous that it must in all probability cause the death or such bodily injury as is likely to cause death and that the act was committed without any execuse for causing

death or such bodily injury as is likely to cause death. This clause deals with doing of an act which is imminently dangerous (1977 CrLR (SC) 436). To tie a man so that he can not help himself, to close his mouth completely and plug his nostrils with cotton wool soaked in chloroform is an act imminently dangerous to life, and it may well be said to satisfy the requirements of the last clause also, although that clause is ordinarily applicable to cases in which there is no intention to kill any one in particular (AIR 1966 SC 1874 (1879).

Where the accused had no intention of killing any one and fired stray shots with a firearm to scare away people, but one person was hit by a bullet and was killed; it was held that section 300 clause fourthly applied to the case (PLD 1967 Pesh 45; AIR 1955 Punj 13 (DB). Where a person does not aim at any particular individual but fires at the general mass of men and kills some of them, his act would be murder as defined in clause 4 of section 300 (AIR 1929 Lah 637; 30 CrLJ 662 (DB).

If the direction given by the accused to his comrade is a direction to fire indiscrimenately at the members of the hostile group, he would clearly be guilty if his direction brings about the shoting and death of any one or more out of the members of that group (AIR 1956 SC 177; 1956 CrLJ 341).

It is not possible to lay down as a principle of law that a person who caused death by administering *dhatura* poison would in all cases be guilty of the offence of murder. If it were proved in a particular case that the quantity of *dhatura* administered was very large, intention or knowledge contemplated by section 300 may be presumed. But if the quantity of *dhatura* administered is not large, it will be unsafe to hold that the offence committed was one of murder, especially when it is proved that dhatura was administered not because of any ill will but merely to facilitate the commission of robbery or some other offence of like nature (PLD 1953 Lah 549). Thus where the accused poisoned three of his friends by administering *dhatura* poison in food with the intention of committing theft and as a result one man died. The offence was held to fall under this clause of section 300 (AIR 1923 All 608; 24 CrLJ 937).

In the undernoted case from the act of the accused in catching hold of the legs of the accused and dashing him against the ground thrice as adverted to earlier, it can very well be inferred that though he might not behaving the requisite intention of causing the death of the deceased, yet it cannot be stated that his act was not one, not done without any knowledge of the consequences of his actions in the sense of himself having the knowledge of doing away with the deceased. The act of the accused in such circumstances was imminently dangerous and the act had been performed by the accused with full knowledge of the consequences of his action without any execuse for the same. In such circumstances the act of the accused will squarely fall within clause 4 of section 300, Penal Code [1989 (2) Crimes 597 (599, 600) Mad].

7. *Exception 1 - Grave and sudden provation.*- Under this exception culpable homicide is not murder if the offender cause death of the person who gave the provocation or that of any other person by mistake or accident provided the provocation was grave and sudden and by reason of the said provocation the offender was deprived of his power of self control and the offence was committed during the continuance of deprivation of the power of self control. The applicability of the doctrine of provocation rests on the fact that it brings about a sudden and temporary loss of self control. The test applied is the conduct of a reasonable person in circumstances which give rise to grave and sudden provocation. What a reasonable man will do in certain circumstances depends upon the culture, social and emotional

background of the society to which an accused belongs. Mental background created by the previous act of the victim may be taken into consideration in ascertaining that a subsequent act caused grave and sudden provocation to cause death. Exception to section 300 is inapplicable where the provocation did not flow directly from the victim. If some other factors emananting from other sources intervene which lead to the provocation and the fatal blow cannot be traced directly to the influence of passion arising from the conduct of the victim, the accused is deprived of the benefit of the exception in mitigation of the offence which he has committed (1973 ALJ 111 (116, 117); AIR 1972 SC 502; 1973 CrLJ 12207.

Exception 1 to section 300 Penal Code can apply only when the accused is shown to have been deprived of the power of self-control by grave and sudden provocation which is caused by the person whose death is caused.

Test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which he was placed, would upset not merely a hot-tempered or a highly sensitive person but one of ordinary calmness (Khannan Khan Vs. State 1992 PCrLJ 1993).

'Provocation' contemplated in exception 1 of section 300 Penal Code, shall not only be grave but also it shall be sudden and if considerable time intervenes in which the passion aroused by the provocation subsides, then there is hardly any scope for deprivation of power of self control. The defence of grave and sudden provocation was not available to the accused (1987 BCR (AD) 214; 1978 SCMR 136; PLJ 1978 SC 386). In order to remove culpable homicide from the category of murder, provocation must not merely be grave but also sudden and must have by its gravity and suddenness deprived the appellant of the power of self control. When provocation ripens into resentment and malice and the person aggrieved deliberately determines to take the life of the other person, it can not be construed that he acted under grave and sudden provocation (1972) 16 MLJ (Cr) 191; 1978 CrLJ 290 (298); PLD 1982 SC 139; 1988 PCrLJ 575 (2); 1975 SCMR 51).

Where true reason for the assault appeared to be that a month or so before the incident, the deceased had attempted to outrage the modesty of the wife of the accused, the interval between that incident and the assault on deceased was two long to afford to the accused the benefit of the plea of grave and sudden provocation (AIR 1974 SC 387 (388); 1983 SCMR 922; 1970 SCMR 576).

The test for grave and sudden provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self control. In the present case the appellant belongs to a backward class. The deceased gave out that he would kill the appellant and then dealt a blow by a lathi which missed the appellant's person. It was then that on the spur of the moment and evidently being enraged and whilst deprived of the power of self control owing to sudden and grave provocation caused by the words and act of the deceased, the appellant dealt some blows on the deceased causing his death. Thus in the circumstances of the case, the case would come under Exception I to section 300 of the Code (1985 CrLJ 888(889) Ori)= 1986 (1) Crimes 19, 21).

In the instant case the compromising position in which the accused found the deceased with his wife gave the accused the grave and sudden provocation. This provocation was further aggravated when the accused found the deceased taking further offence of causing multiple injuries including grievous injury to him and in the circumstances the right as envisaged under section 100 became available to the accused. No Court expects the citizens not to defend themselves particularly when

they already suffered grievous injuries. It is clear that though the accused has a chopper in his hand he did not initially use it against the deceased and it was only when the deceased succeeded in using the oil lamp, which is described as dangerous weapon, which caused multiple injuries including grievous injury, that the accused provocation got further aggravated and the accused made use of the chopper and caused the death of the deceased. Thus it cannot be said in the facts and circumstances of the case that the accused has exceeded his right of private defence. Consequently the accused would be entitled to acquittal (AIR 1993 SC 203). Where the accused saw his ex-wife having sexual intercourse with another man, and killed her. Held, the deceased was no longer his wife and any misconduct on her part, could not, therefore, constitute a valid reason for stabbing her to death and as such it would not be covered by Exception 1 to section 300 of the Penal Code. Conviction under section 302 was confirmed (1969 PCrLJ 971=1969 SCMR 403).

In order to invoke the benefit of the exception, circumstances must be established which may lead to the only conclusion that the act of violence was of causing grave and sudden provocation. Where it is shown that assailant had a period of time during which he could contemplate over the act which may be the alleged source of grave and sudden provocation, then it will have to be seen whether he had not pondered over every aspect and conceived criminal intention to take revenge. In such a case no benefit of exception 1 in section 300 can be given to the appellant (1974 CrLJ 834; AIR 1974 SC 387).

The test of grave and sudden provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would so provoked as to lose his self control. Words and gesture may, under certain circumstances, cause grave and sudden provocation so as to attract the first exception. The mental background created by the previous acts of the victim can also be taken into consideration in judging whether the subsequent act could cause grave and sudden provocation but the fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time or otherwise giving room and scope for premediation and calculation (AIR 1962 SC 605; 1962 (1) CrLJ 521; 1974 CrLJ 381);AIR 1972 SC 502=1973 CrLJ 1223). Conduct of accused is a guide to his mental state. Where acccused had lost self control acted like a mad man, and was unable to regain self control while chasing deceased upto the end. Provocation, undoubtedly grave and sudden entitled accused to the benefit of exception 1 of section 300 and he as such was not guilty under section 302, but under section 304, Part I (PLD 1982 SC 294).

In a case in the past there used to be quarrel between the deceased and accused. On the date of occurrence the deceased approached the accused drunk and abused him in filthy language. Having regard to the emotional frameworm, of the accused, it cannot be said that he was not subjected to grave and sudden provocation. There was no time to cool off. He reacted immediately with the stick that was in his hand. There was no preparation, there was no prior deliberation. The reaction was a sudden as the provocation. Held that on the facts and in the circumstances, first exception to section 300, Penal Code, was attracted and the act would amount not to murder but culpable homicide not amounting to murder (1989 CrLJ 753 (755) Ori= 1989 (1) Crimes 536 (538) Ori.

The provocation must be such as will upset not merely a hasty and hat-tempered or hypersensitive person, but one of ordinary sense and calmness (AIR 1969 All 61; 1969 CrLJ 129; 1988 SCMR 619). The Court has to consider whether a reasonable person placed in the same position as the accused would have behaved in

the manner in which the accused behaved on receiving the same provocation. If it appears that the action of the accused was out of all proportion to the gravity or magnitude of the provocation offered, the case will not fall under the exception. The case can only fall under the exception when the court is able to hold that provided the alleged provocation is given, every normal person would behave or act in the same way as the accused in the circumstances in which the accused was placed, acted. Where the deceased had asked the appellant a rustic question enquiring whether the appellant had kept any buffalo for drinking milk and on this the appellant, who bore a grudge against the deceased for having attempted to outrage the modesty of the appellant's wife about a month or so before the incident, became so enranged that he beat the deceased to death, it was held tht the interval between the earleir incident and the assault on the deceased was too long to afford the appellant the benefit of the plea of sudden and grave provocation and hence his conviction under section 302 was confirmed (1974 CrLJ 446 SC; 1988 SCMR 615).

The defence of provocation rests upon the fact that provocation was grave and sudden by reason of which the accused was deprived of his power of self control. One of the conditions for the operation of this exception is that the accused must have used force is consequence of grave and sudden provoccation. It is to note that provocation is an external stimulus which can be objectively measured. But loss of self control is a subjective phenomenon. to peep into the mind of the accused is seldom possible. the state of mind can be inferred from he surrounding circumstances (1983 CrLJ 145).

If the provocation is not immediate and grave, but is culmination of a long period of awaggering and insult, which finally makes an accused loss his temper, the benefit of Exception I of section 300 of Penal Code cannot be given to him. A provocation, however, grave which is not sudden, but is a chronic one, will not satisfy the requirement of this exception. The word 'sudden' involves two elements. Firstly, the provocation must be unexpected, and secondly the interval between the provocation and the homicide be as brief as possible. Provocation must be distinguished from resentment. Therefore, where the accused committed murder of his mother, for frequently alleging and objecting to his illicit relationship with certain women, the provoccation could not be said to be grave and sudden which deprived acccused of his self control (1993 CrLJ 145; AIR 1962 SC 605; 1962 (1) CrLJ 521).

Where accused husband coming to know that his wife was making arrnagments to go along with her paramour caused death of wife. Accused could be said to have committed offence under grave and sudden provocation - His conviction under section 304, Part - I was propoer (1993 CrLJ 2565 Mad).

The law provides that if a murder is not premeditated but is committed under grave and sudden provocaiton, it is culpable homicide not amounting to murder (PLJ 1974 Cr. C 203). In a case such as malicious wounding there is no such thing as a defence of provocation. That defence only arises in a case of murder to reduce murder to manslaughter (1959-2 WLR 63). Where the accused has been given the benefit of that exception conviction would be under section 304, part I. It can never be under the second part of section 304, because that part can apply only in those case where there was no intention to kill (PLD 1958 Lah 468). Where accused was attending village Panchayat without any design to fight but lost mental equilibrium when his daughters were imputed unchastity by calling them dancers. Death was cuased by him under grave and sudden provocation. Conviction of accused under section 302 penal Code was altered to one under section 304, Part I, Penal Code (1984 PCrLJ 1925).

There can never by any direct evidence as to what was the psychological effect of the provocation upon the mind of a person in certain circumstances. The state of mind of a person is to be gathered in the circumstances of a given case. There are social groups ranging from lowest to the highest state of civilization in our courtry. For this reason it would not be desirable to lay down any standard with precision. It is for the Court to decide each case having regard to the relevant circumstances, such as the customs, manners way of life, traditional values of the class or tribe to which a person belongs. It is the effect of the provocation upon the person provoked and probability of its producing a similar effect upon person of similar class, which is always considered as material consideration for attracting this exception (PLD 1984 SC 21).

In deciding whether the provocation was grave and sudden it is not open to an accused person to show that he was a person of particular excitability or of a particular mental instability or of a particularly volatile temperament. The Court should take into account the habits, manners and feelings of the class or community to which the accused belongs and not the peculiar idiosyncracies of the offending individual (AIR 1939 Sind 182).

The question of provocation is a psychological question and one cannot apply considerations of social morality to such a question (AIR 1932 Mad 25). Provocation in law consists mainly of three elements, the act of retaliation proportionate to the provocation. The defence of grave and sudden provocation thus connotes something more than a provocative incident, which could constitute only one of the elements aforesaid. And further the circumstances must also be related to each other particularly in point of time, so that there was no time for passion to cool and the inference of deliberation or design was excluded (1980 PCrLJ 214).

Grave would mean an action which in the normal course of nature is likely to result in serious consequences or to produce serious harm and damage. The term sudden connotes happening of a fact without previous notice or with very brief notice. The term sudden is defined as happening without warning or premonition; and unpremeditated act done without forethought. It would generally mean, in the context of Exception I to section 300 Penal Code a short interval between the provocation and the homicidal action during which under the spell of the provocation a normal person is likely to lose his mental equilibrium when there is very brief or little time for cooling down of the passions so aroused. Since no hard and fast rules can be laid down as to what would constitute grave and/or sudden provocation, the totality of all the facts and overall circumstances of the case have to be looked into and not an isolated fact torn from its background for determination of these elements. In considering as to what would constitute grave and/or sudden provocation the norms of morality and the customs of the society to whch a person belongs, his age, mental make up, his education and environments in which the offence is committed are also to be kept in view (PLJ 1978 SC (AJ & K) 87).

Where the plea is not proved or is negated by facts, conviction will be for murder (PLJ 1985 CrC 120). In a case of a plea of grave and sudden provocaton the onus is upon the accused in the sense that if there be no evidence on the point, the presudmption is in favour of the prosecution and that the prosecution is not bound to establish negatively that there were no such circumstances as would attract the exception. Because if such pleas, without any evidence are accepted, it would give a licence to kill innocent people. Therefore mere allegation of moral laxity without any unimpeachable evidence to substantiate it would not constitute grave and sudden provocation (1985 SCMR 2055). Thus where although there was no evidence to establish his plea of grave and sudden provocation but possibility that plea of grave

and sudden provocation raised by accused might be true was not ruled out. The plea of accused was accepted for safe administration of justice. Conviction was altered from section 302 to 304-1 (1985 PCrLJ 2070). Where the motive for the offence was abduction of the sister of the accused by the sons of the deceased. The occurrence took place in broad daylight and witnesses were available in the vicinity, but none of them appeared to support prosecution case. The plea of the accused that he acted under grave and sudden provocation was accepted and conviction was altered to one under section 304, Part I (1985 PCrLJ 44).

The plea of grave and sudden provocation must be taken by the accused at the earliest possible opportunity. A delayed plea can not be ordinarily accepted. However where the prosecution has failed to prove its case, the Appellate Court may accept the plea even when the Trial Court had rejected it as an after thought (PLD 1982 SC 208). Even where the accused did not specifically take the plea of grave and sudden provocation, but such plea was inferable from circumstances brought on record. Benefit of the same was extended to the accused (PLD 1985 Lah 158; 1985 PSC 513).

Where the provocation was not in the nature of immediate and grave provocation but was the culmination of a long period of swaggering and insult which finally made the accused lose his temper, the offence is murder and does not fall within the exception which may reduce the offence to one of culpable homicide (1975 SCMR 51; AIR 1937 Rang 4).

Where accused made an attack to save his own wife on whom the deceased attempted to rape, it was held that he could not be held guilty for the offence for causing the death of Harpal singh (1978) 80 Punj LR 331 (335).

Deprivation of power of self control.- The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation, is whether the provocation was sufficient to deprive the particular person charged with murder (e.g. a person afflicted with defective control and want of mental balance) of his self control (AIR 1969 Ker 120; 1969 CrlJ 494). The act must be done whilst the person doing it is deprived of self control by grave and sudden porovocation. That is, it must be done under the immediate impulse of provocation (1939) 42 PLR 88; 1982 CrLJ 957; AIR 1962 SC 605).

The deprivation fo the power of self control must continue in order to benefit a man who kills another under circumstances of grave provocation (1987 BCR (AD) 214; 1978 SCMR 136; 1978 CrLJ 290 (298).

In the instant case deceased had been refusing appellant conjugal relationship and had been carrying on with another person. On the day in question she had declined to allow the appellant to send that person on an errand and on the top of it she had thrown the vegetable cutter on him twice and it even caused him injury. Held that her act in throwing the vegetable cutter at him constituted grave and sudden provocation which deprived him to the power of self control within the meaning of exception I (1974 CrLJ 381 (384).

Before benefit of exception could be given, provocation, should be grave and sudden and that by its gravity and suddenness offender should be deprived of power of self-control (1988 SCMR 615). The question whether these conditions are satisfied in a given case, is essentially one of fact which the Court has to decide in the light of facts of that particular case (PLD 1976 SC 241).

The test to see whether an accused acted under grave and sudden provocation is whether the provocation given was in the circumstances of the case, likely to

cause a normal reasonable man to lose control of himself, to the extent of inflicting the injury or injuries that he did inflict. If it appears that the action of the accused was out of all proportion to the gravity or magnitude of the provocation offered, the offence will not fall under Exception I to section 300 Penal Code. Where the accused constable on being punished and slapped by a senior officer, killed him by shooting eight bullets into him half an hour later. It was held that to kill in the cold calculated fashion for the slap received by him, would hardly be an adequate cause. It shows the effect of a brutal and diaholical malignity than of human frailty; the true symptoms of what the law denominates malice. Conviction under section 302 was upheld (PLD 1975 Quetta 18). Where accused only suspected deceased of trying to develop illicit relations with wife of accused's maternal cousin. He did not find deceased and wife of his cousin *flagrante delicto* so as to loose his mental balance. He could not claim benefit of Exception I to Section 300 Penal Code (PLD 1987 Pesh 104).

A severe blow on the head with a stick very frequently causes loss of self control. If such a person, in the heat of passion, stabs his assailant, who dies later on. It would be a clear case of culpable homicide not amounting to murder (1946 AMLJ 9). Similarly where a person is abused and assaulted and he suddenly loses power of self control and caues the death of his assailant, or where the accused, a youth aged 14-1/2 years, finding deceased (a history-sheeter badmash, involved in a number of murder cases including those which claimed lives of five members of family of accused) by chance in police custody at a bus stand, fired at him and killed him on the spot, his case wuld fall under Exception (I) to section 300 (KLR 1982 Cr.C. 374).

Where the parties exchanged first blows but they were separated but subsequently accused, nephew of one of the parties, shot and killed a member of the other party on instigation of his uncle. Plea of grave and sudden provocation and self defence was rejected (1974 SCMR 339). Where the accused went to the place of occurrence along with several other heavily armed persons and killed the deceased to avenge the beating of his servant by the deceased sometime earlier, the case did not fall under this exception (1969 PCrLJ 926).

When a husband had knowledge of his wife's infidelity but kept brooding over it and finally killed both her and the paramour on a day when they had done nothing improper, it was held that no question of grave and sudden provocation arose (1961 ALJ 13). When the accused resenting his wife's intimacy with a stranger and asked her to cut off all relaltions with him. Two months thereafter he came to his wife's house with a kinife. He found the stranger and his wife sitting on the floor and the stranger giving her some money. He asked her to stand up and when she did not obey, he kicked her. Thereafter when she stood up he inflicted a knife blow on her abdonmen. It was held that the accused came prepared with an intention to take revenge. Even the passing of money provided no grave and sudden porovocation as was clear from the fact that he did not attack her with the knife immediately but waited until she stood up so that he could inflict the knife blow effectively. In the circumstance exception I was not attracted (1974 CrLJ 834).

Where the accused had knowledge of illicit intimacy of his sister with the deceased and the latter had an unofficial licence of visiting house of the accused and mixing with his siter. Plea of grave and sudden provoccation was not available to the accused when he caused death (1983 PCrLJ 1761). Where the accused suspected his wife of infidelity and one day when he came to his house, he found her in the company of her paramour, and in a fit of anger shot her dead: he was convicted under section 304, Part I and not under section 302 Penal Code (1984 PcrLJ 2804; 1983 PcrLJ 1817).

Where the accused saw his wife committing adultery (1983 PCrLJ 1199), or suspected her of having illicit relations with another person and killed her (PLJ 1978 CrC 227), or when he killed his wife who was loving with her paramour (1977 PCrLJ 172), or where the accused found his wife in a compromising position with her paramour and he killed her (1985 PCrLJ 2928) or both of them. He was convicted under section 304 part I (1985 SCMR 720; 1975 PCrLJ 218).

Where the mother of accused had obtained divorced and married her paramour. When the accused came face to face with the latter he got furious and killed him. Conviction was altered to section 304, Part II (1983 PCrLJ 1712).

Considering the moral values and notions of honour and chastity, as well as social customs, which prevail in our society, particularly among the respectable families in rural areas, it must be regarded as a provocation of the gravest kind for a men to actually witness the degrading spectacle of a woman of his family being subjected to illicit sexual intercourse. If he loses self control under the impact of such grave and sudden provocation and assaults the perosn responsible for bringing this disgrace on him and his family, his act would clearly fall under exception I of section 300 (17 DLR (SC) 420; PLD. 1965 SC 366). Even where the Court finds that exception I does not apply to the case, they should keep in view strong sentiment of the people of this country in matters pertaining to sexual behaviour of the womenfolk, and death sentence should not be passed on the accused who has committed murder to vindicate his family honour (17 DLR (SC) 606; PLD 1966 SC 129). Going at night armed and with suspicion in search of sister (or wife) and finding the latter in compromissing position with a man and then killing both. Held, plea of grave and sudden provocation valid (Md. Saleh Vs. State 17 DLR (SC) 420; 13 DLR (SC) 1 ; 1955 PLD 356).

Provocation caused by words or gestures.- Words and gestures may also, under certain circumstnaces, cause grave and sudden provocation to an accused so as to bring his act withinthe first exception (1962) 1 CrLJ 521= AIR 1962 SC 605= AIR 1972 SC 502= 1973 CrLJ). Where a man called the accused son of a dog and hit him on the head, and the accused relatiated with a murderous attack ont he deceased without premeditation (AIR 1932 Lah 369; 33 CrLJ 338), or where the wife used very foul language to her husband and he killed her in the heat of the moment (AIR 1923 Oudh 112), or where the deceased called the accused a cateemite or where a man launted another about his intimacy with his wife and boasted of the fact and expressed his intention to take her to live with him in the house of her sister to whom he was already married (AIR 1936 Rang 472= 38 CrLJ 144), or where the wife refrused to cook the evening meals and spread the beds and threatened to leave the house and then on the husband trying to appease her, she gave him a kick on the chest and said that he should have sexual intercourse with his mother and sister rather than with her and the husband picked up a stone lying nearby and hurled it at the head of the wife, inflicted a fatal injury (1963) 1 CrLJ 120), and where the accused, a weaklooking youth of about seventeen years of age (His wife being about thirty five), on his unspected return to his house found the paramour of his wife coming out of his house and on remonstrating with his wife was further annoyed by her reception of his remonstrance and killed her with a hoe (14 CrLJ 208) the cases fell under section 300, Exception 1.

Mere gesture or use of abusive or vulgar language cannot be regarded so grave a provocation as to bring the case within the ambit of the Exception I (1983 SCMR 27; 1988 PCrLJ 717). To call one a chamcha can not possible so provoke him as to bring him within Exception I of the section 300 (1988 SCMR 615). The exception applies only where it can be proved that the accused lost self control on hearing an abuse.

Where that is not proved, the accused would be guilty of an offence under section 302 (1941 WN 872 DB). Foul abuse which causes grave and sudden provocation may be a basis for conviction for culpable homicide not amounting to murder (1985 PCrLJ 88; AIR 1964 ALL 262).

A mere allegation that a close relation of the accused was guilty of moral laxity without his having seen her in *pari delicto* would not constitute grave and sudden provocation where accused heard one of his two wives repraoching the other that her daughter had contracted intimacy with a Mochi, took an exe and attacked and killed his wives and daughter in a quick succession; it was held, that the accused had not received grave and sudden provocation (AIR 1924 Lah 450; 25 CrLJ 1050). But when accused saw his sister and deceased sitting on the roof of their house. It was held that though case of extremely grave provocation was not made out yet case of acting in provocation would be made out and he could not be burdened with responsibility of committing culpable homicide amounting to murder. Accused was therefore, held guilty under section 304, part I of Penal Code (1987 PCrLJ 110).

8. **Proviso to exception 1**.- The effect of this proviso, read with the exception, is that the provocation must come to him; he must not go to the provocation where the aggrieved husband followed his wicked wife to a place of assignation, away from his house, and killed either her or her paramour, the accused went deliberately in search of the provocation (AIR 1934 Lah 103; 1980 PCrLJ 531). The accused when knew that his sister was suspected of criminal intimacy with a stranger, went on being told one night that the two were there together, went to the sister's house with an axe, broke into it in spite of protests and murdered both of them. It was held that the exception I of section 300 did not apply (AIR 1937 Lah 562; 38 CrLJ 637).

Once the provocation is given by the offender himself he cannot subsequently urge that the opposite party had acted in a provocative manner (1988 SCMR 370). Where the accused had come from his house and was standing at the house of the deceased where in loud voices, exchange of hot words had taken place and the accused has thereupon, taken out a pistol and fired from a short distance shows that the accused had prepared himself in advance to pick up a fight with the deceased and had taken the pistol from his house which would lead to an inference that he had come determined to kill and therefore, the offence had clearly, been preplanned (1980 PCrLJ 1087).

The mere fact that abuses were exchanged before the fatal attack would not bring the case within this exception. Where the accused gave the initial provocation which lead the deceased to challenge them to come out and fight. Thereupon the accused killed him. It was held that the accused could not claim the benefit of Exception I to section 300 (AIR 1962 AP 166). Similarly where the offender himself invited the provocation as where an allegation against the accused by the deceased which, once made before, had almost been forgotten, was repeated by the deceased on being challenged to do so by the accused, the repetition could not amount to grave and sudden provocation falling within Exception I. It would on the other hand fall within the first proviso to Exception I to section 300 and would not reduce the offence from murder to culpable homicide (AIR 1952 Bhopal 21=1952 CrLJ 946). But this general principle is subject to one exception. Where the accused suspected that there was a clandestine affair going on between a man and one of his close woman relations and he kept a look out, and finding them in a compromising position, caused the death of one or both of them, it could not be said that he sought the provocation, and his case would fall within exception I. Where the accused found his sister missing from her bed at night and went in search of her. He found her having sexual intercourse with her paramour in the nearby fields and killed her as

well as her paramour. It was held that the idea that a young unmarried girl in a village family is entitled to leave her bed during the night and go where she pleases, and that a male member of the family going in search of her is only asking for provocation if he finds her misbehaving in a sexual way, simply cannot be entertained. The accused was not seeking provocation when he went to look for his sister and therefore his conviction was altered to one under section 300, Exception I (PLD 1955 SC 366).

9. **Exception 2.- Exceeding the right of private defence.-** The law is clear that the right of private defence extends to the causing of death in certain specified situations, but there is such a right against any assault on the person which extends only to the causing of such harm as is necessary to avoid the danger (1963 PLD 740 (744). The second exception deals with the case where a person exceeds the right of private defence. If the excess is intentional, the offence is murder; if unintentional, it is culpable homicide.

To invoke exception 2 there should be no pre-mediation and there should be no intention to do more harm than necessary. Where the deceased was in the field harvesting the crop on land with the assistance of police and the accused who claimed the crop went to the field fully armed with guns with intention to kill the deceased, it can not be said that the accused acted without premediation and without the intention of doing more harm than necessary (AIR 1965 SCC 257= (1965) 1 CrLJ 242; AIR 1965 Mys 150).

Right of private defence arises when the person has to face assailants who can reasonably be apprehended to cause grievous hurt to him. When an individual citizen as faced with a danger and immediate aid fromthe state machinary was not available the individual citizen is entitled to protect himself and his property. But the force that a citizen is entitled to use must not be unduly disproportionate to the injury which has to be averted or which is reasonable to apprehend and should not exceed its legitimate purpose. To begin with a person excercising a right of private defence must consider whether the threat to his person or property is real and immediate. As soon as the cause for reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion for exercise of the right of private defence. If the danger is continuing, the right is there; if the danger or the aprehension about it has ceased to exist, there is no longer the right of private defence (1972 MLJ (Cr) 38 (40,41); PLD 1983 SC 261).

It is a necessary incident of the right of private defence that the force used must bear a reasonable proportion to the injury to be averted, that is the injury inflicted on the assailant must not be greater than is necessary for the protection of the person assaulted. Undoubtedly, a person in fear of his life is not expected to modulate his defence step by step or tier by tier (AIR 1974 SC 1570, 1575).

It is true that if the threat to the person or property which the accused is entitled to defened is real and immediate he is not required to weigh in golden scales the kind of instrument and the force which he uses at the spur of the moment but a man exceeds the right of private defence if he thrusts his ballam in the chest of the person who after giving lathi blows fell on the ground as there can be no apprehension in his mind of grievous hurt because no sharp weapon is used nor there can be any reasonable apprehension of grievous hurt or death (AIR 1972 SC 535).

Where the accused was in actual and effectual possission of the disputed land and the crops thereon and the deceased persons were not unarmed they were drunk at the time of occurrence, that the deceased party went to the field with the

determination to remove the crop, that there was some fight, exchange of blows, causing injuries to the both parties, the injuries received by the deceased party being larger, it was held that though the accused had a right to defend their property, that the course adopted by them was execssive and exception II to section 300 could not be availed of (1979 JU (SC) 115). Where the accused was the aggressor inflicting three injuries on the deceased maliciously and vindictively and not in defence exception II to section 300 will not apply (1979 UJ (SC) 600). Where the accused gave the fatal injury to the unarmed deceased no right of private defence was available (1974 CrLR (SC) 85).

'The occurrence had taken place in front of the house of the appellant. He had categorically stated that two deceased persons along with another person came and opened fire at him. The doctor had found quite a number of gun shot injuries on the person of the appellant. These circumstances probablise his version. Even if the explanation given by the prosecution has to be accepted, even then the fact remains that the accused received gun shot injuries at the hands of one of the companies of the two deceased persons. In that event also he could exercise his right of self defnece to the extent of protecting his own person. However, in view of the specific plea of right of self defence and the attendant circumstances, the plea set up by him appears to be probable. Therefore, he is entitled to the benefit of doubt. However, we are of the view that there was no necessity for the accused to cause the death of two persons. In that view of the matter, it has to be held that he exceeded his right of self defence in which case the offence, as rightly held by the Sessions Court, would be one punishable under section 304, Part I, Penal Code (AIR 1993 SC 970 (971).

Four cardinal conditions must have existed before the taking of the life of a person is justified on the plea of private defence. Firstly, the accused must be free from fault in bringing about the encounter, secondly, there must be peresent an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity, thirdly, there must be no safe or reasonable mode of escape by retreat. And fourthly, there must have been a necessity for taking of life (AIR 1959 Punj 332). The right of private defence of the body extends to the voluntary causing of death only where the assault is such as may reasonably cause the apprehension inter alia that death will otherwise be the consequence of such assault. In the case of property, robbery, house breaking by night and house reaspass causing reasonable threat of death or of grievous injury could justify the causing of death. The other set of limitations concern the continued subsistence of such a right of self defence of person or property or both at all the relevant stages of an occurrence (1982 SCMR 1239). In other words a victim, who is subjected to an assault which may reasonably cause an apprehension that grievous hurt will otherwise be the consequence of such assault, is entitled in his defence to the voluntary causing of death or of any other harm to the assailant (PLD 1975 AJ & K 1). When the instinct for self preservation is the uper most and much heat is generated by the fight, the quantum of force used to fend off the attack cannot be measured in golden scales. Law does not require the infliction of actual grievous hurt on a person to give him a right of self defence (PLD 1975 AJ&K 1). Where the accused was attacked at night in his room, and he gave blows in self defence which caused death. He was has not committed any offence and may be acquitted (1971 PCrLJ 999).

Where the complainant party went to the scene of occurrence with arms and were first to open attack on the accused, and the accused had reasonable cause to apprehend that at least grievous hurt would be the consequence of complainant's assault; it was held, that the accused's right of private defence extended to causing of death of their assailants (1976 PCrLJ 329). Where the deceased caused injuries to

the accused whereupon he shot him dead. The accused was held to have acted in self defence under apprehension of grievous hurt or death (NLR 1978 Cr. 607). Where the deceased hit the accused and others, the accused had a right to use his knife and cause death in self defence (1975 PCrLJ 694). Where the deceased inflicted grievous injuries the companions of injured persons inflicting two dang blows on the vital parts of the deceased. The right of private defence was not exceeded (1975 PCrLJ 923).

Where the accused aged 13/14 years caused his death when the deceased was trying to coerce him into submitting to sodomy by threatening him with a knife, he was acquitted (PLD 1984 Lah 370). Where the deceased tried to overpower the accused to commit unnatural act on him. The accused hit at random with a danda in private defence and caused death. He was acquitted (1976 PCrLJ 1089). But where the deceased was not armed with a deadly weapon, and the accused had no reason to apprehend grievous hurt or death from him, the accused could not plead private defence to a charge of murder (1976 SCMR 179).

Where an altercation over the use of water took place between the complainant and the accused party in the morning, but the accused all of a sudden opened attack on the complainant party at degrawela, the plea of self defence and grave and sudden provocation, was held to be not available to the accused in the circumstances (1970 SCMR 576).

Where accused and companions entered house of deceased with fire arms like stenguns and revolvers. It showed that they did not come there on innocent mission. They did not stop firing when called upon to do so by police, whereupon the latter opened fire and killed one of the accused persons. It was held that inmates of the house were well within their right to fire at the accused party (1973 SCMR 978).

An accused who is the aggressor cannot claim the right of private defence against the rescuer of his victim (1978 CrLJ 484 SC). Where peaceful citizens were attacked by a body of men armed with deadly weapons, it was held that it could not be said that the right of private defence was exceeded if those attacked, in their turn, used similar weapons; nor could it be said if in using those weapons one of the aggressors was killed, that would necessarily be exceeding the right of private defence (1933) ALJ 581; 34 CrLJ 765). It was held that he had exceeded the right of private defence when he fired the second and third shot (1981 SCMR 206).

Where the accused respondents were in settled possession of the disputed land and on the day of occurrence the complainant party entered the field, destroyed the crops and also a small shed constructed thereon, it was held that the complainat, party were the aggressor and the respondent party had a legitimate right to exercise their right of defence of property that was in their settled possession (1985 CrLJ 1463 AP).

If a person in exercising the right of defending his own person (1976 SCC (Cri) 106; 1981 Raj Cr C 169) or the body of another person against any offence affecting his body, in fact does no more than exercise such right he commits no offence (1972 CrLJ 275 SC), but if he exceeds that right and kills the offender when in fact it was unnecessary to kill, then under this exception it is still a lesser offence than murder if the intention of the accused was to do no more harm than he believed necessary in the exercise of his right. Even though there was a reckless criminality in the act the case would fall within this exception if the right of private defence was the only impulse operating in the mind of the accused, and he did not kill with a vengeful motive in the purported exercise of his right (1953) 2 Patiala 428).

The law does not confer a right of self defence on a man who goes and seeks an attack on himself by his own threathened attack on another, an attack which was likely to end in the death of the other. The right of self defence conferred by the law or preserved by the law for an individual is a very narrow and circumscribed right and can be taken advantage of only when the circumstances fully justified the exercise of such a right (1981 SCC (Cri) 364).

Where there was old animosity between the two parties and on the day of the occurrence there was an altercation between the deceased and the accused persons which broke out into a scuffle but the parties were separated from fighting by a third person but soon after the third person left and the borthers of the deceased persons reached the scene, again a fight broke wherein 2 persons lost their lives and 4 others related to the deceased received serious injuries, it was held that if the party of the deceased were the aggressor and had made a concerted attack on the appellants, as contended by the defence, there was no reason why the former should have come out second best in the combat. The fact that practically all the injuries received by the deceased were located in the head region and were inflicted with great force made it highly probable that it was they who were taken unawares and had to bear the burnt of the attack which they had perhpas no means to repulse. The fact that their women folk were also injured during the occurrence made it probable that the ladies had to intervene because the fight was unequal and their respective husbands were finding it difficult to cope with it. The brothers of the deceased probably reached the place of occurrence while they were being belaboured and they took up cudgels on behalf of the deceased which would explain the simple injuries received by the accused party. In the result, appellants, 1 to 3 were convicted under section 302/34 while the appellants 4 to 6 regarding whose participation in the fight no safe evidence was on record were given the benefit of doubt (1980 SCC (Cri) 364).

In the undernoted case when one blow was given on the chest and after receiving the blow the deceased leaned down and at that time another blow was given on the back of the deceased. This shows that the accused who gave knife blows took undue advantage. The case cannot be covered by exception 4 to section 300 of the Penal Code. It can be said that the accused Number 1 had a right of defence of the body of accused No. 2 but had no right to inflict two knife blows on the deceased. This is, therefore, clearly a case of accused No. 1 have exceeded right of defence of the body of the accused No. 2. The offence, therefore, would fall within exception 2 to section 300 of the Penal Code though not within exception 4 to section 300 Penal Code (1989 CrLJ 183 (184) Guj).

A plea of private defence can be raised at various stage. Where it is contined in the statements of the accused, the suggestions in and trend of cross-examination and the defence evidence. Where accused party prosecuted the complainant party for having attacked them. It cannot be said that it does not disclose the plea of self-defnece (1979 SCMR 611).

The plea of private defence, if substantiated on the prosecution evidence itself, must be accepted and the benefit of this plea be given to the accused notwithstanding the fact that the accused has not expressly taken up this plea in his statement (1988 SCMR 388; PLD 1986 Lah 382). But in such cases there should be strong circumstances in their favour to raise an inference of the accused having acted in the exercise of such right (1973 PCrLJ 517(DB) Kar).

Despite the fact that no evidence had been led by the accused to prove a plea of self-defence, yet if the plea received support to the extent of being reasonably

possible, from the circumstances proved by the prosecution evidence, the accused is entitled to acquittal (PLD 1964 Presh 143 DB; AIR 1957 Ker 53 DB).

Where the accused in his trial for murder did not plead the right of self-defence, but it was in evidence that he had to struggle against three persons; it was held that the court was bound to consider the accused's right of self-defence (PLD 1970 Pesh 6 (DB); 12 CdrLJ 18 DB (Mad).

While judging the explanation of the accused person in a criminal case, what has to be seen is whether it is a reasonable one, and if it does appear to be so it cannot be rejected upon the suggestion of a remote circumstance. To do so would offend against the principle that the burden of proving the offence is upon the prosecution and the accused is always entitled to the benefit of a reasonable doubt. Where the examination of the whole evidence revealed a reasonable possibility that the defence put foreard by the accused might be true, the accused was held entitled to the benefit of the doubt and was acquitted (1985 SCMR 510; 1985 PCrLJ 59).

When the accused was also injured in the encounter in which another person was killed and he lodged a separate report in which the accused gave his own version of the incident, wherein he pleaded that he acted in self-defence, it was held that such plea taken in a separate proceeding could not be treated as a defence plea in the trial of the accused for murder (PLD 1967 SC 356=19 DLR SC 459).

Two things are very essential to prove for right of private defence, firstly, that it was other party who initiated fight and secondly, party taking plea of self-defence also suffered injuries at the hand of other party first and then resorted to take measures to defend himself against the aggressor (1987 SCMR 385).

The burden to prove the plea of self-defence is not very heavy on the accused and they have simply to show from the evidence or the circumstances that there is a reasonable possibility of the existence of the right of self defence (1984 PCrLJ 1312).

When a right of private defence was set up, essence of case should be to ascertain as to who was aggressor and whether accused used more violence than was necessary. Where medical evidence showed that deceased was first to open attack, accused was entitled to exercise of right of private defence (1987 SCMR 385).

Where the accused had several injuries on his body which were not explained by the prosecution. The deceased had only one stab wound. The accused was held to have acted in the exercise of the right of private defence (1973 PCrLJ 221).

The law governing the plea of the right of private defence throws burden of proving the existence of circumstances bringing the case within any of the general exceptions, of which the plea of private defence is one, on the accused. Of course, for this purpose an accused can rely on the evidence directly adduced by him or on facts and circumstance arising from the prosecution evidence or materials brought out in cross-examination of prosecution witnesses by him (1969 PCrLJ 1548=1969 scmr 802).

Accused cannot be convicted on their failure to establish their version beyond reasonable doubt (1985 PCrLJ 1295=PLJ 1985 Cr.C 195=NLR 1985 Cr 292 & 494 DB).

Even if the defence had failed to prove affirmatively that there existed circumstances which entitled him to a right of private defence but succeeded in proving merely the circumstances which were likely to give rise to a right of private defence, it is enough and the accused are entitled to acquittal if they have not exceded their right of self defence (21 DLR 164 (DB).

Where defence plea was neither proved by defence nor spelt out from prosecution evidence or attending circumstances, benefit of the plea cannot be given to the accused (1986 PCrLJ 1466+1985 PCrLJ 2455+1983 PCrLJ 1312).

Where the story told by the accused does not appear to be true as there is no direct or circumstantial evidence to support accused's plea except for his own ipsi dixit (NLR 1984 AC 344=1984 PCrLJ 1031), and there is nothing on the record to show that the accused received even some scratches when the deceased allegedly attacked him witha dagger (1980 SCMR 937),or where hte injuries on the accused are superficial as could be self-inflicted whereas the deceased had seven stab wounds on his body, the plea of self defence cannot be accepted (1970 PCrLJ 1080 DB).

Where the accused took up the plea that the deceased was going to hit him with a hatchet when he fired at him but the singing around the wound of the deceased believed the fact that the shot was fired from such close quarters that the accused really was within the hitting range of the deceased when he fired it; the accused was not given the benefit of the doubt (1968 SCMR 327).

Where the plea of private defence was contradicted by medical evidence and no evidence was produced in support of it. The plea was rejected by the court (PLD 1978 BJ 55=PLJ 1978 Cr.C 188 DB).

If accused produces evidence in support of his plea of self defence, it must be independent and credible. Where the only witness produced by him in support of his plea was the wife of acquitted co-accused brother. It was held, such a highly interested and closely related witness cannot be relied upon to sustain a plea of self defence (1984 PCrLJ 93 DB).

Where injuries inflicted by appellant unmistakably showed his being animated by a felling of extreme vindictiveness and cruelty. Appellant's act, amounted to an offence under section 302, Penal Code, and was not covered by section 300, Exception - II (1982 SCMR 1239).

Where it is found that, the accused has acted in good faith in the evidence of his right of private self-defence it cannot be said that he exceeded the right, merely because the act of the accused has resulted in death of the aggressor. It cannot always be said that when a person hits another with a blunt instrument on the head, he necessarily intends to cause death. The intention may well be to incapacitate the aggressor in order to save his own life or to escape grievous hurt being caused to himself (PLD 1983 SC 225=PLJ 1983 SC 128; AIR 1954 Assam 56=1954 CrLJ 353 DB).

10. Nature and extent of right of private defence.- The Code excepts from the operation of its penal clauses large classes of acts done in good faith for the purposes of repelling unlawful aggression but this right has been regulated and circumscribed by several principles and limitation. The most salient of them concerned the defence of body are as under : firstly, there is no right of private defence against an act which is not in itself an offence under the code; secondly, the right commences as soon as - and not before - a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is conterminous with the duration of such apprehension (section 102). That is to say, right avails only against a danger imminent, present and real, thirdly, it is a defensive and not a punitive or retributive right. Consequently, in no case the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence (section 99). In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened.At the same time, it is difficult to expect from a person

exercising this right in good faith, in weigh "with golden scales", what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the *bona fide* defender "if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack". It would be wholly unrealistic to expect of a person under assault, to modulate his defence step by step according to the attack; fourthly, the right extends to the kiling of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of section 100. Only the first two clauses of section 100 are relevant. The combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence: if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words a person who is in imminent and reasonable danger of being his life or limb may in the exercise of right of self defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and incommensurate with the quality and character of the perilous act or threat intended to be repelled; fifthly, there must be no safe or reasonable mode of escape by retreat, for the person confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailant; sixthly, the right being, in essence, a defensive right does not accrue and avail where there is time to have recourse to the protection of the public authorities (AIR 1980 SC 660 (666) SC).

Before an accused is held guilty and punished under first part or second part of section 304, death must have been caused by him under any of the circumstances mentioned in the five exceptions to section 300, which include death caused while deprived of power of self control under grave and sudden provocation, while exercising in good faith the right of private defence of person or property, and in a sudden fight in the heat of passion without premeditation. Where the informant and injured having learnt that the accused persons were harvesting their paddy from the plot went there and when they protested as to why their crops were being harvested one of the accused caught hold of the hands of the injured and the appellant accused assaulted on his head with the back protion of a weapon, there would be no occasion for convicting the accused under section 304 when death itself had not been caused. Once the finding was recorded that the proseccution has not disclosed the true version of the occurrence and the right of private defence of person and property was available to the appellant accused, then he would be entitled to be acquitted (AIR 1993 SC 1977).

"The deceased though received only one injury dies as the same resulted in the fracture of skull bones. Having regard to the specific plea put forward by the accused under section 313, (old 342) Cr. P.C. there is reason why it should be rejected outright. In this context, it has to be noted that the accused need not establish their right beyond all reasonable doubt. It is enough if a reasonable doubt arises on examination of the probabilties of the case. In the instant case we have seen that the accused persons reeeived fairly number of injuries. Some of them were on vital parts. The prosecution has no plausible explanation. In such a situation, the plea put forward by the accused appears to be quite probable and, therefore, it cannot be rejected. The next question is whether they have exceeded the right of private defence. Only one overt act is attributed to A-1. It is clear that he inflicted only one injury and dealt one blow on his head. Therefore, in such a situation, it cannot be said that the act of A-I is not in conformity with the limitations laid down in section

100, Penal Code. In the result we give the benefit of doubt to all the accused as such. We are of the view that they have not exceeded the right of self-defence". The appeal is allowed. (AIR 1993 SC 1979 Para 3).

It is the duty of the prosecution to explain the injuries on the accused. Of course even if there is no explanation that can be ignored provided the other evidence is cogent and convincing. But in case where the accused set a plea of self defence and relied on the medical evidence in support of the fact that they had injuries on their persons and thus justify their right of self defence, that creates a doubt. Where a son, in finding that his father is being beaten up, inflicts injuries on his father's assailants and the accused persons had received simple injuries possibly as a result of scuffle, it could not be said that the accused are falsely pleading the self defence. They are entitled to the right of self defence. However, when there was no reasonable apprehension that death or grievous hurt would be caused it has to be held that in causing death of the deceased the accused had exceeded their right of self defence. Accordingly they would be liable to be convicted under section 304, Part I and not under section 302 read with section 34. (AIR 1993 SC 2652).

The right of self defence arises in cases where there is an apprehension of hurt or grievous hurt; the right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence (PLD 1972 Lah 596). Where initially the accused had a right of private defence factors of overall damage done to parties, their comparative superiority in number and weapons, nature and extent of likely threat to person and property, were to be taken into consideration for determining whether or not accused exceeded the right of private defence (PLD 1983 SC 135). Thus where the accused were not content with chopping off the head from body but inflicited other grievous injuries on the deceased which showed that death was caused with full vengeance and not to ward off an attack in self defence. The plea of private defence was repelled (PLD 1981 Kar 184). The accused found the deceased concealed in his house he took him for a burglar and killed him with repeated shots of rifle and blows of blunt and sharp edged weapons. The force used was out of all proportion to the necessity. The plea of self defence was rejected. Conviction under section 302 was uphled (1971 SCMR 166).

Where the right of private defence is being exercised and in the exercise of that right more harm is caused than is necessary, the person exceeds the right of self defence. In such a case, Exception 2 to section 300 Penal Code is available if there is no intention to cause more harm than is necessary for the purposes of defence. Where the right of self defence does not exist or has ceased to exist for it exists as long as the apprehension lasts, as proved in section 102 Penal Code, there can be no right of self defence nor a situation leading to the exceeding of the right arises. The question whether an accused has or continues to have a right of private defence and when or whether it has come to an end, is in every case essentially a question of fact, to be decided according to the circumstances of each case. It cannot even be aid that the accused can in no case claim the right of private defence of person, the moment the deceased is disarmed, for the apprehension of danger to the accused may not have come to an end by the fact that the weapon had been taken away from the deceased. It may be difficult to judge accurately the moment when the right of private defence comes to an end but to long as the apprehension of hurt or grievous hurt continue to exist, the right of self defence continues, and an accused person cannot be penalised for not weighing in golden scales the amount of force, which should suffice to allay the apprehension of danger from the aggresor (PLD 1983 SC 225).

When one party makes a deliberate attack on the other party, and the assailant with a deadly weapon has not fully and satisfactorily departed from the spot, it would be extremely difficult for the opposite party to conclude that he has stopped harming further and may not continue his assault any further. Every case has to be considered on its own facts and before giving an accused person benefit of right of private defene a court of law must be satisfied that his case is clearly covered by the general exception (PLD 1983 Pesh 48). In such cases number of injuries caused by accused are not to be the sole consideration. Nature of injuries suffered by accused, weapons used against him, number of persons launching attack and question as to what could have been the result if accused, when defending co-accused would not have acted in the manner he did could not be ignored. Proportion ratio and nature of harm on each side in addition to extent, proportion, and ratio of apprehension are amongst other several important factors to be considered (PLD 1983 SC 225).

Right of defence has not to be weighed in golden scale (PLD 1987 Lah 603). Where six injuries were suffered by accused while he was trying to snatch weapon from deceased and his companions. Injuries to accused were caused while he was defending himself against persons who were armed with lathis and had already given blows with it and had not stopped doing so. One injury was in fact on a vital part of body which did indicate degree and imminence of danger experienced by accused. He was entitled for having not exceeded his right in inflicting a solitary fatal blow (PLD 1986 SC 335). It depends on the facts of each case as to how much force or number of blows would be required to repel an assault giving rise to an apprehension of death or grievous hurt. The law relating to self defnece has made the victim of the assault the Judge of his own peril and permitted him to repel the attack even to the taking of the life of his assailant, so the courts are to judge him by placing themselves in the same position in which he was placed. Where there was not much disparity in the number of injuries suffered by the accused and those inflicted by him in his defence as only one of the four injuries was declared dangerous to life. To hold that the victim of the assault after inflicting a lathi blow on the head of his assailants in self defence a little harder than necessary exceeds the right of private defnece, would be placing a grteater restriction on the right of the right of private defence, would be placing a greater restriction on the right of private defence of the body than the law prescribed under section 99 (PLD 1972 Lah 596).

Where there were six sharp-edged and one blunt weapon injury on person of one accused and two sharp-edged injuries on the other. Out of these injuries six were on arms and palm of hand. Deceased received seven sharp-edged and one blunt weapon injury. The defence plea that accused acted in self-defence was accepted as more probable than prosecution plea of attack having been lodged by accused (1987 PCdrLJ 102 DB).

Where accused was given five injuries by complainant party including deceased who attacked him with sharp-edged weapons on different parts of body including vital parts such as chest and abdonmen. Right of private defence accrued to accused legally to the extent of causing voluntary death of assailants (1988 PCrLJ 494 (DB).

Where the accused received injury though simple but with sharp edged weapon on vital part of his body, it was held, reasonable apprehension of grievous injury was enough to entitle person to effectively defend himself. Conviction and sentence were set aside (PLD 1983 Lah 542=PLJ 1983 Cr.C. 338).

Where the injuries on the hand of the accused were caused by the attack he made on the deceased. They could be even self-inflicted. The appellant had no right of self-defence. They were convicted under section 302 (1977 SCMR 179).

In the instant case, there was no evidence to show that having given a stroke with a lathi the decesed was making further attempt to assault the accused to prevent which the latter dealt tangi blows on the head of the deceased. The deceased was about 55 years old and the accused who was his nephew was much younger in age being about 35 years old. If the deceased assaulted him with a lathi, the accused could easily snatched it away from him, if at all he enticipated any further assault by the deceased. There was absolutely no justification for him to use his tangi, and deal with blows on the head of the deceased which proved to be fatal. Held that in the circumstances, even if the right of private defence was available to the accused, he had far exceeded it in dealing the fatal blows on the head of the deceased. He must, therefore, be held guilty under the first part of section 304 Penal Code (1972) 38 Cut LT 597 (604).

Where both the lower courts had found that (1) the land was in the possession of the accused persons, (2) paddy crop had been grown by the accused persons and the same was ready for harvesting; (3) the deceased and their people were the aggressors and (4) when the accused persons tried to resist the attempt of the deceased and their group in the matter of harvesting of the paddy croop two of the accused persons were badly beaten up and they had several grievous injuries, it was held that under the fact and circumstances of the case, the right of private defence of body and property was available to the accused persons even to the estent of causing death. This was not a case where the Exception unders 99 applied. The person in possession of the propoerty was entitled to maintain his possession and for that purpose was entitled to the use of reasonable force to keep away the trespasser. In the result, the judgment of the High Court was reversed and the trial courts acquittal of the appellants restored (1985 CrLJ 1898 SC).

Accused have been proved to be in actual possession of the land and were sought to be dispossessed by the complainant's party who tresdpassed on their land armed with lathis. The appellants, therefore, would undoubtedly have a reasonable apprehension of hurt being caused to them and were, therefore, entitled to defend their person and property in exercise of their right of private defence. A large number of injuries on the deceased clearly show that the appellants had undoubtedly exeeceded their right of private defence. Their case is, therefore, completely taken out of the purview of section 302 Penal Code and falls within Exception 2 to section 300 Penal Code. In view of above finding that the appellants exceeded their right of private defence, the common object with which they were charged failed and their conviction under section 147/149, Penal Code, cannot be sustained (1976) CrLJ 1745 (1755) SC).

Where from the findings of the learned Courts below the facts that emerged were (1) that it was the appellants who were the aggressors; (2) that the occurrence took place on the land in front of the house of P.W.1 who was in possession thereof; (3) that P.W.1 and the deceased had the right of private defence of property and person and they did exercise that right, aggressors even if they receive injuries from the victims cannot have the right of private defence (AIR 1981 SC 1379, 1381).

A person cannot avail himself of the plea of self defence in a case of homicide when he was himself the aggressor and wilfully brought on himself, without legal excuse, the necessity for the killing. A person cannot take shelter behind the plea of self defence in justification of the blow which he struck during the encounter if he provokes an attack, brings on a combat and then slays his opponent (1974 SCC (Cri) 113; 1981 SCC (Cri) 556; 1983 CRLJ 1356 SC).

Where there was a chronic land dispute between the accused and the deceased party and on the day of the occurrence when the deceased along with his

companions was going to his field for cultivating the same, the accused party, variously armed, enraged and waylaid them and started assaulting them resulting in three persons receiving fatal injuries to which they later succumbed and the deceased companions tried to protect themselves with whatever weapons they had in their cart and inflicted some injuries on the person of the accused, it was held that the plea of self defence raised by the accused could not be sustained. The accused party had gone to teach the deceased a lesson for having raised a dispute in respect of the land and the manner of their assault was such that three persons lost their lives. Exception 2 to section 300 clearly enjoined that there could be no question of exceeding the right of private defence when the same was not exercised in good faith. In the result the appeal was dismissed (1983 SCC (Cri) 398; 1981 SCC (Cri) 556).

Where from the evidence it was probable that some members of the accused party, particularly the five alleged assailants who received numerous injuries were attacked first and they use their weapons to inflict a small number of injuries in order to save themselves, it was held, that while it was true that one or two guns were used on the side of the accused, that circumstance by itself could not make them the aggressors and guilty of the offence of murder or of attempted murder and hence the prosecution's case against the accused party could not be said to have been proved beyond reasonable doubt, the appeal was therefore allowed and conviction of the appellant was set aside (1971 SCC (Cri) 181).

The Trial Court as well as the High Court found that when Chhotey Lal and Kunwar Lal were going to the market they were waylaid by 13 persons, armed with various deadly weapons and the offence took place in the field of Raja Ram. The defence did not question the findings of the courts below that the occurrence took place as put forward by the prosecution but submitted that even if the prosecution version was accepted as true, the defence was entitled to right of private defence. The case put forward by the defence was that the incident took place near the filed of Viswanath when the accused attempted to drive the cattle which were unauthorisedly grazing the accused fields but the police officer, who investigated the crime found no marks of any trampling in the field of Viswanath or nearabout. There were no blood stains or any signs of fight on the scene where according to the defence, the occurrence took place. On the other hand, the prosecution had established that the occurrence took place in the place spoken to by them. It was held that on the findings that when the prosecution witness P.W. 1 and the deceased were going to the market, they were waylaid and attacked by the accused with dangerous weapons and that the occurrence did not take place in the field of Viswanath as pleaded by the accused, no question of right of private defence arose (1978 CrLJ (SC) 551(553).

Where deceased was not armed and had no intention of causing any injury to the accused and the accused far exceeded his right by using the dangerous weapon, Chhura, with deadly effect and causing two injuries which cut the heart and the lung, it was held that conclusion was irresistible that the accused exceeded his right or private defence of property. It was held that the appellant was guilty of an offence under section 304 ,Part I, instead of section 302 (1979 CrLJ 28 (33).

The accused caused injuries after the firing of at least two shots from the pistol. 28 injuries were caused to Thakur Prasad and the skull bone of Lalta Prasad was fractured resulting in his death after the pistol had been snatched. It was held that it could be safely presumed that the accused exceeded their right of private defence and caused the injuries when there could have been no cause for apprehension that death or grievous injury would be caused to them. All the accused were acquitted of

the offence under section 302, Penal Code, read with section 149 but were found guilty of offence under section 329 Penal Code, read with secction 149. (1978 Cr.LR (SC) 432 (437-438).

Where a fight ensued on an attempt by the accused to enter the disputed land. The accused cannot claim the right of private defence against the party in possession (PLD 1975 SC 556; 1972 PCrLJ 944).

Where accused was irrigating his land with water purchased by him at time of occurrence, and deceased diverted the same. Right of self defence of property accrued to accused authorising him to cause harm short of death. Accused by causing death exceeded right of self defence of property. Conviction of accused under section 302, Penal Code, was set aside and instead he was convicted under section 304, Part -I, Penal Code (1985 PCdrLJ 2264).

Where the deceased unlawfully tried to divert water to his land. The accused resisted and was hit by the deceased with a belcha. The accused shot him dead. The accused was held to have acted in the exercise of the right of private defence and was acquitted (1972 SCMR 990).

Resistance to unlawful arrest.- Where the police party tried to arrest the accused unlawfully. He was justified in resisting arrest and trying to escape by threatening them with a gun he was carrying. But that is no equivalent to saying that in order to avoid arrest, he was justified in causing the death of a pursuer. Having so effective a weapon as a gun, it was the legal duty of the accused so to use it as to stave off the danger of arrest with the minimum use of force. The accused should have shot the pursuer in the leg or the arm, by shooting on the face of the deceased he exeeeded the right of private defence. Therefore the offence of the accused properly fails under section 304, Penal code, Part I (1975 SCMR 80).

11. **Where the right of private defence was exceeded.**- Where the right of private defene is being exercised and in the exercise of that right more harm is caused than is necessary, the person exceeds the right of private defence. In such a case, exception 2 to section 300 Penal Code, is available and if there is no intention to cause more harm than is necessary for the purpose of defence, the conviction may be made under section 304 Part I (PLD 1983 SC 251; 1988 PCrLJ 714).

Where a creditor's peons armed with *lathis* and *kirpans* seized the accused (the debtor) and dragged him from his house and the accused suddenly struck one of the peons with the knife as a result of which he died, held the right of private defence was exceeded (AIR 1930 Pat 347; 32 CrLJ 84). Where the accused inflicted murderous assault with dangerous weapons by way of vendetta to gratify his feeling of revenge the accused having no reasonable apprehension of harm, and after inflicting fatal injuries to the deceased he flew away, he was not entitled to the benefit of exception (AIR 1974 SC 1550= 1974 CrLJ 1015).

The benefit of Exception (2) to proviso (i) will be available where the accused showed that he had no intention of doing more harm than necessary (1973 CrLJ 1336). It will apply to cases where the accused caused the death of a person without premediation and that he had no intention of causing more harm than was necessary for purpose of private defence (1969 Cul LT 322).

A person claiming the right must be under a bonafide apprehension of fear of death or grievours hurt (AIR 1952 SC 165; 1957 CRLJ 848; AIR 1969 SC 956= AIR 1975 SC 674; 1975 CrLJ 1479). Where there was mere exchange of words and the deceased did not attack or attempt to attack but the accused inflicted stab wounds resulting in his death, no right of private defnece was held available (1968 CrLJ 1362; AIR 1978 SC 414; 1978 CrLJ 484).

Quarrel held between accused and deceased. Accused receiving injuries during course of occurrence causing death of deceased by gun shot. Accused could be said to have exceeded his right of private defence. Accused not entitled to complete acquittal. Convicted under section 304 Part I and not under section 302 (AIR 1991 SC 1052). Where the accused was attacked by the deceased with a sickle. He snatched it from the accused, it was held that even though the accused initially had the right of private defence yet his having continued giving the blows to the deceased after he had snactched the sickle amounted to exceeding of that right. His case, therefore, fell within exception 2 to section 300. He was convicted under section 304, part I (1984 PCrLJ 2983).

When the accused fired the second and third shot at the deceased he exceeded the right of private defence (1981 SCMR 206). Where the accused, 16 years of age, caused death which defending himself from sexual assault made on him by deceased aged 35 years. He acted in exercise of right of private defence but when he inflicted 28 incised injuries he exceeded that right (1983 SCMR 969). The deceased having picked up quarrel with accused, sat on his chest and gave his fist blows. The accused on finding that he could not prevent deceased from doing so merely by giving him fist blows giving knife blow at the back of the deceased causing his death. It was held that the offence will be culpable homicide not amounting to murder on the ground that death was caused in exercise of right of private defence but by exceeding that right (AIR 1971 SC 1491; 1970 All Cr. R 51).

Where accused received only one simple injury by sharp-edged weapon whereas deceased received seven injuries on his person. Accused acted cruely after disabling deceased and caused large number of injuries on his head and forehead. Accused was held to have exceeded his right of private defenced. Accused was convicted under section 304, Part - I (1984 PCrLJ 2052).

Where the accused, 16 years of age, caused death while defending himself from sexual assault made on him by deceased aged 35 years. He acted in exercise of right of private defence but when he inflicted 28 incised injuries he exceeded that right (1983 SCMR 969).

In all cases where the court comes to the conclusion that the accused person acted in the exercise of the right of private defence of person or property, it is the duty of the court to examine the further essential question whether the right was not exceeded in the particular circumstances of the case. If this is not done, there is a likelihood of a manifest failure of justice (PLD 1960 Lah 774).

Where the accused beat unarmed trespassers mercilessly and killed one of them. They were held to have exceeded that right of private defence, and as they were all acting in concert with each other at that time with the intention, as clearly manifested by the result, which they have produced, of causing grievous injuries to the deceased. Therefore they should be convicted under section 304, Part I (PLD 1971 SC 720=1971 Law Notes 565).

There was a dispute in respect of certain lands. The circumstances probabilised the existence of the following facts; (i) The accused were in actual, effective possession of the disputed land and the crops standing on or lying therein, (ii) The deceased persons were not unarmed. They were drunk at the time of occurrence, (iii) The deceased party went to the field with a determination to remove the Gowara crop from the possession or control of the accused, (iv) The occurrence was not a one-sided affair. There was some fight in the course of which blows were exchanged and both sides received injuries. But the injuries inflicted by the accused party on the deceased persons both in severity and number were for

greater than those received by the accused party. Nevertheless the circumstances showing that the accused had a right of private defence of property which they exceeded could be taken into consideration in extenuation of the extreme penalty (AIR 1978 SC 1538).

Where in the course of an altercation between the appellant and one L, the appellant picked up a stick which was lying there and beat L with it causing him a fracture in the arm, and upon L raising a hue and cry, other villagers came rushing to the scene and they tried to catch hold of the appellant and also assaulted him and the appellant fearing that his life was in danger, took out his knife and waved the same causing the death of one person and injuries to others, it was held that under the circumstances the Trial Court was justified in coming to the conclusion that the accused had the right of self -defence but that he exceeded that right and hence, his convction by the High Court under section 302 was set aside and that of the Trial Court under section 304, Part I was restored (1971 CrLJ 1926 (SC).

Where initially the accused had a right of private defence but last blow was given to deceased when he was lying prostrate on ground and at that time there was no justification for accused to repeat the blows muchless with formidable force which proved fatal. By so doing the accused exceeded right of private defence of his person and his act squarely fell within mischief of section 304, part I Penal Code (1984 PCrLJ 2100).

Where C was in possession of a plot and the mahua trees standing thereon and on the day of the occurrence, on hearing that the prosecution party was committing theft of the mahua fruits he had gone to the plot along with others to prevent the other party from doing so,. and in altercation that followed, two persons from the prosecution party received fatal bhala injuries resulting in their death, and the evidence showed that some members of the accused party were armed with bhalas but it was not possible to say who were so armed and which of them inflicted the fatal injuries on the deceased; it was held that the persons who had caused the deaths had exceeded the right of private defence available to them against the prosecution party, but since it was not possible to identify those persons, none of the accused could be convicted under section 302 (1970 SCC (Cri) 5 SC).

Where no blood marks were found either in the land of the deceased or that of the accused to clinch the issue relating to the place of occurrence, but the accused appellant had made a categorical admission that he had assaulted the deceased with a holanga, after the latter had trespassed into his field and assaulted one of the ploughmen, it was held that the said admission of the accused - appellant taken alongwith other prosecution evidence and the fact that neither the appellant nor his ploughmen had received any injuries would go to show that he had exceeded the right of private defence and would be guilty of culpable homicide not amounting to murder (1978 SCC (Cri) 219).

Where the tractor of the complainant party had trespassed into the field in the possession of the accused persons, who had earlier been served with ex-parte eviction decree from the field in their possession at the instance of the complainant party, and the accused persons attacked and killed one S belonging to the complainant party with the jaillis, and on seeing this, the deceased's brother took his rifle and fired two shots in order to save him and some of the accused were injured, it was held that the number and nature of the injuries found on the deceased showed that the accused persons had exceeded any right of private defence available to them, especially so when the accused had continued to injure the deceased in a vindictive and revengeful spirit even after the deceased had fallen

down. In the result, their conviction was altered from one under section 302/34 to one under section 304, Part I/34 (1971 CrLJ 1411 (SC).

Where the accused grappled with the deceased on some gambling dispute and then without an apprehension of death or grievous hurt stabbed him to death, he for exceeded his right of self defence and as best could apprehend simple hurt at the hands of the accused. By way of abundant caution conviction under section 302 Penal Code, was altered to one under section 304 Part I Penal Code (1981 PCRLJ 324). Where there was tresspass with intent to foricbly take possession of land and cut cane from it. The accused owners hurled sharp edged weapons on tresspassers to defend their possession. Death was caused but no intention to cause death was proved. The accused was convicted under section 304, Part I (PLD 1971 Dhaka 94).

The accused seeing his brother struck on the head by the deceased with a bamboo and felled to the ground, stabbed the deceased which resulted in his death. It was held that the accused was so provoked as to be deprived of the power of self-control and there was no reason to suppose that the accused was actuated by any impulse but that of exercising the right of private defence of the body and that as he had exceeded the right he was guilty of culpable homicide not amounting to murder (1970 SCC (Cri) 491).

Accused apprehending imminent and threatened danger to his life inflicted injuries on vulnerable part of body of deceased namely frontal region resulting in the death of the deceased. Accused could be said to have exceeded right of private defence and was convicted under section 304 Part I, and not under section 302 Pneal Code (Sundaramaruthy vs. State of Tamil Nadu AIR 1990 SC 2007).Where accused had not committed any non-bailable and cognizable offence in presence of deceased and injured prosecution witnesses but they tried to apprehend him. It was held that the accused had got a right of private defence under section 101 Penal code. Accused while causing death exceeded right of private defence. His conviction was converted from section 302 to section 304, Part - I, Penal Code (1986 PCdrLJ 2833 DB).

Where under the circumstances of the cases it could not be said that the deceased was not committing criminal trespass when he entered the shop of the appellant to dissuade the latter from constructing a partition - wall between the shop and the portion occupied by the owner of the building and hence, the appellant would have had the right to throw him out, but the evidence also showed that the deceased was not armed and he had no intention of causing any injury to the appellant and his brother, it was held that the appellant had far exceeded any right of private defence of property by using a churra and inflicting fatal injuries on the deceased, and by virtue of this exception, his conviction must be altered from one under section 302 to one under section 304, Part I (1978 SCC (Cri) 430; 1978 SCC (Cri) 428).

Where of two persons A and B, A was armed with a dang (club) and B with a knife, A tried to strike B and missed the stroke and the two then grappled with each other, in the course of which A was unarmed but threw down B who then struck A with his knife and A collapsed and died under the shock, it was held that B exceeded the right of private defence which he had and that he was guilty under the first part of section 304 (1979 CrLJ 706 SC).

Where the evidence showed that the land in dispute between the parties belonged to one K, who transferred the same to the appellant S and delivered possession of the land to him, and that after taking physical possession of the land, the appellants started cultivating the land and grew chari crops, and the deceased

and another, who were the brothers of K, had expressed their anger at the appellants taking possession of the land which was earlier under cultivation by them in the absence of K and had even gone to the extent of threatening the appellants and on the day of the occurrence, when the deceased's party armed with lathis tried to dispossess the appellants from the land, there was a mutual *marpeet* in which lathis were wielded by the prosecution witnesses and one of the accused was admittedly injured, and the appellants, who were *kahars*, socially and educationally back ward class of people constituting a minority in the village, had mustered courage to assault the deceased and others, who were Rajputs, only because they were forced to do so in order to defend their property and person, it was held that under the circumstances the appellants undoubtedly had the right of private defence. However, as the appellants had exceeded the right of private defence inasmuch as they had caused 72 injuries upon the deceased, some of which were on vital parts of the body of the deceased, their case would by virtue of this exception to section 300 to be taken out of the purview of section 302 and they would be liable to be convicted under section 304 part I for that offence. Their convictions under sections 147, 149 read with other sections were accordingly set aside (1976 CrLJ 1745 SC).

Dispute over possession of land. Accused, in actual possession at relevant time. Both sides were armed at time of incident. Two of the acccused also received gun shot injuries. Plea of self defence by both sides. Plea of accused cannot altogether be ignored. However, accused exceeded right of self defence. Conviction of accused under section 302/149 altered to one under section 304, Part I (AIR 1993 SC 1530).

Where the appellant was the owner of a factory and there had been a dispute between the management and the workmen of that factory in regard to payment of wages during a period of lay off and on the day of the occurrence, the workmen had assembled outside the gates of the appellants' office and were abusive and showered brick bats damaging certain articles within the premises, and apprehending danger the appellant had gone upto the thari and fired from his revolver, thereby causing the death of one of the worker it was held that the appellant's act fell within the ambit of the fourth clause of section 300 but as under the circumstances he had some right of private defence of propoerty and person though not to the extent of causing death and had exceeded it by his act in good faith and without premediation, he could be extended the benefit of this exception and hence, his conviction was altered to one under section 304 Part II (1979 SCC (Cri) 635).

Where the acccused in exercise of their right of private defence of property, use daggars and cause injuries to the members of the other party resulting in death of some of them, not because they felt it necessary to use the daggers for the protection of their person or property but because they were actuated by a desire to punish those who tried to enter upon their land, they exceeded the right of private defence and were guilty under section 304,Part I (1984 PCRLJ 2334; AIR 1942 Mad 58).

Where the deceased came armed and aimed gun at the accused, the accused fired at him in self defence. Deceased was hit by the first shot. The accused exceeded the right of private defence by firing thereafter (1976 PCrLJ 822). Where the deceased fired at the brother of the accused, the accused fired two shots in defence of his brother which killed the deceased, the right of private defence was exceeded (1977 PCrLJ 313). Where the accused received eight injuries one of them on the head. Right of private defence of person accrued to the accused but by giving three successive blows on head of deceased he exceeded the right of private defence and was liable under section 304, part II, Penal Code (1983 PCrLJ 1766).

Accused while under attack by deceased, disarmed him and dealt him three knife blows resulting in his death. Accused exceeded his right of private defence, conviction of accused under section 302 was however altered to one under section 304, Part II (1982 PCrLJ 1279).

12. **Where the right of porivate defence was not exceeded.**- Where peaceful citizens were attacked by a body of men armed with deadly weapons and the citizens in their turn used similar weapons and one of the aggressors died, it cannot be said that the right of private defence was exceeded (AIR 1933 ALL 401= 34 CrLJ 765). There is a right to tern tresspassers out by use of some force (AIR 1979 SC 44= 1977 CrLJ 1729). Where the right of private defence was not exceeded, held no offence was committed (1985 CrLJ 1463).

Where a person tried to drag away the sister of accused from inside their house (PLD 1987 Lah 432) or to rape the sister of the accused, the latter had every right to act in defence of the person and honour of his sister and cause injuries even to the extent of death (PLD 1983 SC). Where abduction of step sister of accused was attempted, the accused had the right of private defence to disrupt the attempt. If he caused death by a single knife blow, the right of private defence was not exceeded (1975 PCrLJ 623). Where the deceased criminally assaulted the wife of accused, the later acted in the right of private defence of the person of his wife in causing his death in the course of rescuing her (PLD 1987 Lah 603).

Where the brother of the accused was surrounded and attacked by the opposite party, the appellant could not be expected to measure his right of defending his brother in golden scales or to modulate his defence step by step. Whether he fired one or two shots, is of no consequence in determing that right if the shots were fired by him under a serious apprehension that his brother would come to serious harm if he did not act to save his life. He was acquitted for having acted in self defence (1971 SCMR 800; 1983 PCrLJ 2531).

There was a grapple between accused and deceased and that during that struggle the accused received injuries at the hands of the deceased with a blunt weapon and apprehending danger to his life inflicted one injury on the neck of the deceased, which proved fatal. Held that the accused did not intend to cause that particular injury, which unfortunately was on the neek causing the cut of carotid artery. Acquittal of accused on the ground of right of private defence was upheld (1993 CrLJ 3135 SC; AIR 1993 SC 2476).

There was a dispute over construction of house and for which deceased filed FIR. On next day prosecution party attacked accused and his brothers cuasing injuries to them and other witnesses by sharp cutting instrument (Tabal) and lathis. Thereafter prosecution party tried to enter into house of accused persons. At this time accused, an army personnel, constrained to fire at crowd resulting in death of deceased. In circumstances it can be said that accused fired shots only in exercise of his right of private defence of his person and his brother and as such entitled to acquittal (AIR 1993 SC 950).

The deceased as well as the appellant inflicted one blow on each other and left the weapon of offence at the same place which were subsequently recovered. Nature of the injuries reveal that the deceased was the aggressor. Appellant did not causing harm more than the situation demanded. Prosecution has failed to prove the guilt against the accused. Appellant is entitled to benefit of doubt (Prem Singh Vs. State of Him Pra 1984 (2) Crimes 299 HP).

13. **Where no right of private defence exists.**- The right of private defence of person extends to the causing of death only if there is a reasonably apprehension

that the assault upon the person would cause death or grievous hurt (PLD 1970 Pesh 6). Therefore no right of private defence of person arises against an unarmed person so asto justify causing his death (PLD 1983 SC 261; 1981 SCMR 329).

Where an aggressor is pursued and killed when he had retreated from the place of occurrence no pela of self defnece can be taken (NLR 1978 Crl 285). Therefore when the deceased received gunshot injuries in his back no case for self defence could be made out by the accused (NLR 1975 SC 607). Where number of injuries were found on deceased and his accompanying person P.W. 9 and injury found as thumb of accused - 1 was superficial are, the plea of accused that they were entitled to right of private defence is not acceptable (Panduring Dnyandeo Hatkar & Anr. Vs. State of Maharashtra 1993 (1) Crimes 656 SC).

Where both the parties are armed and deliberately engage in a trial of strength and none of the parties claim the protection of public authorities, both of them can to claim a right of private defence (1988 SCMR 286; PLD 1962 SC 502). But where the origin of the fight is shrouded in mystry and both sides have suffered casualties, and the possibility of the acused having acted in self defence can not be excluded, the accused may be acquitted (1977 PCrLJ 434; 1972 SCMR 264). Similarly where in a free fight both parties received injuries and as to which of the accused caused fatal injury was not clear, the accused were acquitted of the murder charge and were convicted under section 324 (1975 PCrLJ 1031).

Where lathi blow was given by deceased in the head of the father of acused, accused had a right of private defence irrespective of the fact that his father did not receive any grievous injury or that no sharp edged weapon was used against him (Jaswant Singh Vs. State of HP 1989 (3) Crimes 216 Raj). Accused on his own showing had disarmed the deceased. Location of injury (on the back of chest) to deceased indicated that deceased did not come face to face as such reasonable apprehension from deceased to kill or cause grievous injury to accused did not exist. No one after having been stabbed in the back of chest was expected to cause injury on the back of a person in right of self-defence (Babu Din Vs. State 1991 PCrLJ 1460).

In the case of right of private defence of property the accused must prove that the property in question was his property. When upon evidence it is found that the primary object of the accused was to make a forcibel attempt to snatch away the paddy of the informant party, question of defending such right can not arise (Dilip Vs. State (1991) 43 DLR 269).

Two appellants along with 10 others were convicted under section 147 of the Penal Code and the appellant No 1, Haider Ali along with Munsur Ali were convicted under section 304/34 of the Penal Code and sentenced to suffer rigorous imprisonemnt for 5 years each on this count and the appellant No. 2, Kazi Mia was convicted under section 324 of the Penal Code and sentence to suffer R.I. for 3 years. Accused took the plea that the place of occurrence was the disputed plot Nos. 848 and 849 and invoked the principle of right of private defence in exercise of the bonafide claim of right to the disputed lands. High Court Division elaborately discussed the evidence and found that "their is neither any oral nor any documentary evidence that there was any mark of violence in the field in the disputed lands." Conviction was upheld but the sentences were modified to serve the ends of justice. Appeal dismissed by the Appellate Division (A. Ali Vs. state, BCR 1984 AD 438).

From the evidence it was obvious that accused were armed with fire arms and they were the aggressors. The plea of self defence urged cannot be accepted. A person who is an aggressor and who seeks an attack on himself by his own aggressive

attack cannot rely upon the right of self defence if in the course of the transaction he deliberately kills another whom he had attacked earlier (AIR 1983 SC 867).

Where the deceased fired two blank shots which hit none of the members of appellants party. PWs deposed that before the deceased fired the shots he was hit at his abdomen by appellant Budhai's halanga. He was at once surronded from behind by the appellants who then mercilessly subjected him to indiscriminate assaults and he died within an hour. PW1 and several other persons of his party were also assaulted with ramadaos and halangas. In these facts right of private defence of life was not available since from the side of deceased party the appellants had no reasonable apprehension or death or grievous hurt (Tayet ali Vs. The State 1989 BLD (AD) 10; 41 DLR (AD) 147).

The right of private defence is a legal right which one can exercise for the defence of person and propoerty. But this right is to be exercised under certain restrictions or limitations. The said right in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. In the instant case the accused intended to cause such bodily injury as was likely to cause death. Accused was sentenced to R.I. for 7 years. (1 BSCD 239).

The prosecution has not explained the injuries on the accused. The fact that some incised injuries were found on one of the accused itself shows that one of the members of the prosecution party used the sharp edged weapon. There is also no material to show at what stage of the occurrence the accused No. 1 came to attack the deceased. No doubt some of the prosecution witnesses are also injured but likewise some of the accused persons also received injuries. Accused party could be said to have acted in exercise of right of private defence (AIR 1992 SC 1989).

Where it was clear from the evidence that the respondents had a common object to commit encroachment on the adjacent land belonging to the widowed aunts of the deceased and to cause the death of any person who tried to resist their attempt or stopped the encroachment and in prosecution of the common object they had in fact caused the death of 4 persons and serious injuries to one of the witnesses, the charge under section 302/149 was clearly established against them as well as the charges under section 148 and 147 against particular accused (1982 SCC (Cri) 223).

Where the accused was the aggressor and the deceased attacked him with a knife and the accused stabbed him in return, it was held that the accused was not entitled to claim the right of self defence but was guilty of culpable homicide not amounting to murder (1930 MWN 502).

Where accused was guilty of tresspass to regain possession but when he was thwarted he claimed a right of private defence. It could not be allowed for the simple reason that but for such an initiative and provocation on his part which was not justified, occurrence might not have taken place at all (1986 SCMR 540). There is no private defence against a person acting in private defence (1972 SCMR 77; 1972 SCMR 218).

Where the accused had caused the death of her brother-in-law by squeezing his testicles, and the extent of squeezing done by her would have been possible only if the deceased had fallen down upon being tripped by her, as alleged by the prosecution, it was held that as no foundation had been laid at the time of the trial or upon an earlier complaint to the police of her having acted in the exercise of her right of private defence against an assault by the deceased resulting in injuries to her, the same could not be believed and she must be held guilty of culpable homicide as found by the Trial Court (1975 SCC (Cri) 384).

Where several accused, armed with guns and sticks, entered the field in the possession of the complainant according to a prearranged plan and fired at the complainant and his servants from close quarters killing nine persons, it was held that as the disputed land was in the possession fo the complainant, the accused had no right of private defence of property and as the accused had chased the servants of the complainant, who were unarmed, and fired at them, they had no right of private defence of person either in spite of the fact that the prosecution witnesses did not explain the injuries found on some of the accused (1971 CrLJ 1066 SC; 1971 SCC (Cri.) 73).

Where occurrence took place at the house of complainant in a sudden flare up without premediation on a land dispute. Accused party used fire arms and killed three persons. Complainant party did not use any fire arm but accused sustained minor injuries in the scuffle. Plea of accused that complainant side attacked them in their house and they had a right of self defence could not be accepted (1986 SCMR 1906) An aggressor can not claim a right of private defence (1988 SCMR 935). There can be no right of private defence where the accused attacked and caused death without any immediate provocation even though the complainant party was also armed (PLD 1983 SC 204). Where accused came to the spot determined to commit aggression, the question which party struck first was immaterial. Plea of self defence raised on behalf of accused was repelled (1983 PCrLJ 1148).

When there is a disproportion between the injuries the accused had received which indicated a short lived attack delivered with no great force by the deceased and their companions, and the injuries which the accused and their party caused which indicated that the attack was sustained and carried out with great determination and without regard to the consequences, it was held that the circumstance negalived the plea of self defence (1983 SCMR 1228). Where accused did not suffer any incised injury while he caused a number of incised injuries on two deceased persons. Plea of self defence by accused was incorrect on the face of it (1985 SCMR 423).

14. **Burden of prove right of private defence.**- Under section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal code is upon the accused, and the court shall presume the absence of such circumstances. The right of private defence falls within the chapter of general exception to the Penal Code. This burden, of course, can be discharged by showing the preponderance of probabilities only (1985 (1) Crimes 429(435) Cal). The onus of proving the defence plea of the right of private defence of property and the right of defence of life by the accused of murder is upon him (1989 BLD (AD) 110). But accused need not to prove plea of private defence beyond reasonable doubt (PLD 1981 Kar 184; AIR 1975 SC 2161; 1975 CrLJ 279; AIR 1978 SC 414= 1978 CRLJ 484).

Burden of proof of right of private defence is not heavy on accused. If circumstances of case show likelihood of existence of right of private defence accused will entitle to benefit of such despite provision of section 105 of Evidence Act (1972 SCMR 597, 599). The greatest possible care should be taken by the Court in convincing an accused who is presumed to be innocent till the contrary is clearly established which burden is always in the accusatory system, on the prosecution. The more fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt (AIR 1972 SC 975, 981; AIR 1982 SC 1052; 1982 CrLJ 977).

A plea of self defence has to be established by an accused which, though not specifically urged in trial can be pleaded afterwards (1982 CrLJ 400 (407) Gau). In

the case of right of private defence even if the defenc had failed to prove affirmatively that there existed circumstances which entitled him to a right of private defence but succeeded in proving merely the circumstances which were likely to give rise to a right of private defence it is enough and the accused are entitled to acquittal if they had not exceeded their right of self defence (Jalal Ahemd Vs. State (1969) 21 DLR 164).

It is trite that the onus which rests on an accused person under section 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden, which lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt. It is further well established that a person faced with imminent peril of life and limb of himself or another, is not expected to weigh "in golden scales" the precise force needed to repel the danger. Even if he at the heat of the moment carries his defence a little further than what would be necessary when calculated with precision and exactitude by a clam and unruffled mind, the law makes due allowance for it (AIR 1980 SC 1341, 1345). No doubt it is not necessary for an accused to prove by positive evidence that he acted in the exercise of right of private defence but an accused cannot escape the liability for his assault merely by asserting that he exercised right of private defence. There should be some evidence direct or indirect, indicating either positively or showing at least the reasonable possibility of right of private defence having been exercised by the accused (1976 CrLJ 1242, 1245; 1984 PCrLJ 1312).

The onus of proving private defence is on the accused (8 CWN 714; 1 CrLJ 708). The burden to prove the plea of self defence is not very heavy on the accused and they have simply to show from the evidence or the circumstances that there is a reasonable possibility of the existence of the right of self defence (1984 PCrLJ 1312). Where the accused to be considered is whether the accused had any reasonable apprehension that he would be hurt; and particularly in a case where he has caused death. Where he was under any reasonable apprehension of grievous hurt or death to himself (1978 CrLJ 484 SC). It is his apprehension that is the important point and not the injuries suffered by him (1984 SCC (Cri) 469; 1987 SCMR 385).

Where a person accused of killing another, pleads the exercise of right of private defence he must prove that he was in danger of death or grivous hurt from the deceased. A few scratches on the neck of the accused would not give him the right to cause death (AIR 1936 Pesh 101). Where the defence suggestion by appellants accused of murder is that the incident took place in their land. The suggestion if established would entitle them to the right of private defence of property and the right of private defence of life in that the informants party armed with gun went to dispossess them from their land and also to kill them. The onus to establish this plea is upon them and the Court shall presume the absence of any circumstances which bring their action within the exceptions of the offence of murder. To discharge this onus they did nothing except making a suggestion. They could have led evidence that the incident took plae in their plot. It was the duty of the defence to file as exhibit the complaint petition of their counter case or atleast submit it as part of their statement before the Court. They simply relied upon the omission of the I.O. to seize any alamats from the place of occurrence. In view of this position Courts below rightly rejected this plea (Tayeb Ali Vs. The State 1989 BLD (AD) 110; 41 DLR (AD) 147).

The plea of private defence, if substantiated on the prosecution evidence itself, must be accepted and the benefit of this plea be given to the accused notwithstanding the fact that the accused has not expressly taken up this plea in his

statement (1988 SCMR 388; PLD 1986 Lah 382; PLD 1963 SC 152). Despite the fact that no evidence had been led by the accused to prove a plea of self defence, yet if the plea received support to the extent of being reasonably possible from the circumstances proved by the prosecution evidence, the accused is entitled to acquittal (PLD 1964 Pesh 143). A plea of the right of private defence is open to an accused even though he has repudiated his complicity in the crime, provided such a plea could properly be raised upon the evidence and the surrounding circumstances of the case (PLD 1974 Kar 179; AIR 1962 Cal 85).

Right of private defene is not available to accused who snatched a weapon from deceased and possibility of any imminent danger to his life or of any bodily injury to his person does not exist (1984 PCrLJ 1031=NLR 1984 AC 344 DB).

Where there was an altercation between the accused and the deceased who was armed with a hatchet. The accused first wrested the hatchet from the hands of the deceased and then stabbed him to death while the other accused held the deceased; it was held that the accused were not acting in the exercise of the right of private defence but were guilty of murder (AIR 1941 Lah 45=42 CrLJ 450 DB).

An aggressor cannot claim a right of private defence (1988 SCMR 935; 1982 SCMR 617). There can be no right of private defence where the accused attacked and caused death without any immediate provocation even though the complainant party was also armed (PLD 1983 SC 204=PLJ 1983 SC 135; PLJ 1981 SC 724). Where the murder was committed as a result of premeditation and was preplanned, the appellant is not entitled to the right of private defence (1981 PCrLJ 185 DB; PLD 1975 Presh 52 DB).

Where accused came to the spot determined to commit aggression, the question which party struck first was immaterial. Plea of self defence raised on behalf of accused was repelled (1983 PCrLJ 1148).

Where the accused launched an attack and the deceased caused some injuries to the accused in self-defence. The accused cannot plead self deence on the ground of his injuries (1972 SCMR 77; 1972 SCMR 218).

The right of private defence of person extends to the causing of death only if there is a reasonably apprehension that the assault upon the person would cause death or grievous hurt (PLD 1970 Pesh 6 DB). Therefore no right of private defence of person arises against an unarmed person so as to justify causing his death (PLD 1983 SC 261).

Where both the parties are armed and deliberately engage in a trial of strength and none of the parties claim the protection of public authorities, both of them cannot claim a right of private defence (1988 SCMR 286). Each accused is responsible for individual role attribtued to him (1988 SCMR 286).

15. **Exception - 3.**- Where a public servant, in order to prevent a breach of the peace, fires at and kills a person, unless contrary is proved, it may be held that he, while acting for advancement of public justice, exceeded the power given to him by law, and fired the shot in good faith, believing it to be lawful and necessary for the due discharge of his duty as such public servant (PLD 1963 Dhaka 649). Even when a soldier obeys the order of a superior officer, if the order is obviously improper or illegal, the soldier is not excused even though he may be put in the awkward predicament of choosing whether he will risk being shot by order of a court of Martial for not obeying the order, or being hanged by a Criminal Court for murder for obeying it (AIR 1940 Lah 210).

The application of section 302, cannot be excluded in a case where a police officer, in the zeal of his duty to trace out an offence, commits torture on the suspect and thereby causes his death (AIR 1955 Pepsu 153). Where a policeman fires at and kills a man and his case is otherwise covered by Exception 3, the fact that he inadvertently hit a man other than the one aimed at would be immaterial and the offence would continue to be culpable homicide (AIR 1955 All 379).

16. **Exception 4.- Death caused without premediation in a sudden fight in the heat of possion without taking undue advantage or acting in a cruel manner.-** To bring the case under this exception it must be established that the accused committed the offence (a) without premediation, (b) in a sudden fight, in the heat of passion upon a sudden quarrel, (c) without the offender's having taken advantage or acted in a cruel or unusual manner, and (d) the right must have been with the person killed (AIR 1956 SC 99; 1956 CrLJ 278). The question of the applicability of exception 4 can arise only if after examining the facts of the case it could be found with reasonable definiteness that there was a sudden fight upon a sudden quarrel. If it is possible to determine who the aggressor was then the duty to reach and record that conclusion must be performed (AIR 1967 All 204; 1967 CrLJ 598). In the case of right of private defence of property one accused of murder must prove that the property in question was his property. When upon evidence it is found that the primary object of the accused was to make a forcible attempt to snatch away the paddy of the informant party question of defending such right cannot arise. It was nowhere suggested that the informant party carried any weapon or made any kind of assault on the accused while, on the other hand, the accused were found to have been armed with lethal weapons. In this case thre was certainly premeditation on the side of the accused without which he would not have come armed with lethal weapons (Dilip Vs. State 43 DLR (1991) 269).

In case of a free fight in entering upon conflict each party knowingly and deliberately took upon itself, risk of encounter. Therefore, question of exercise of right of self-defence did not arise (1986 PCrLJ 1845 DB). Exception 4 applies when it is established that the offender has not taken undue advantage or acted in a cruel or unusual manner (AIR 1926 SC 99=1956 CrLJ 278).

Whenever this exception is applicable in the begining of a fight, it cannot necessarily be held that one of the participants has taken undue advantage over the other merely because the letter has turned tail and the former pursued the advantage he has obtained (PLD 1975 SC 607=PLJ 1975 SC 406).

To attract exception 4 it must be shown that the offender did not take undue advantage or act in a cruel or unsual manner (AIR 1956 SC 99; 1956 CrLJ 278). The expression 'undue advantage' as used in exception 4 to section 300 means 'unfair advantage' and can not be limited to a case where the victim is made physically incapable to defend himself. An assailant can not but be said to have taken undue advantage of his victim if the latter is taken completely unawares and is struck when he does not even suspect that he is about to be struck. Furthermore, no reasonable person can expect that a man would whip out knife and strike another on a vital part of the body with it on account of petty quarrel. If the weapon or manner of attack by the assailant is out of all proportion to the offence given, that circumstances must be taken into consideration for deciding whether undue advantage has been taken. In such a case, the assailant must also be held to have acted in an unusual manner (AIR 1954 SC 652). Where the offender did not take undue advantage this exception will apply (AIR 1956 SC 99; 1956 CrLJ 288).

If the defence wanted to plead a case of exception on the ground of the killing having been done out of grave and sudden provocaton the defence had its duty to lay

some evidence in this regard. But defence did not even produce any medical certificate to show the nature of injury, received by accused Wahed Ali. Even it could not be found upon the evidence whether Wahed Ali received the injury first or whether Abu Taher was killed first. It is also to be noted that the defence did not suggest that the appellant Humayun Kabir was at all assaulted or touched by any one to rouse his provocation and we cannot also find what type of injury his grand father had received so as to be satisfied as to any cause of grave and sudden provocation. Upon the evidence we see no reason to hold that the appellant killed Abu Taher out of grave and sudden provocation so as to reduce his offence to one of culpable homicide not amounting to murder and more so when it is clear that the appellant acted with cruelty in killing the victim which deprives him of the benefit of exception 4 to section 300 of Penal Code (Md. Humayun Kabir Vs. The State 1987 BLD 338 Para 26).

Where it can reasonably be concluded that there was a sudden fight in which both the sides used fire-arms, one of them acted more cruelly than the other or took any undue advantage. It being a sudden affair there was no element of common intention. So each person was responsible for his own acts (1982 SCMR 291).

Where two contending parties, each armed with sharp edged weapons, clashed and in the course of a free fight, some injuries were inflicted by one party or the other, it can not be said that either of them acted in a cruel manner (AIR 1957 SC 324; 1957 CrLJ 420). Where on a sudden quarrel, a person in the heat of the moment pick up a weapon which is handy and causes injuries one of which proves fatal, he would be entitled to the benefit of the exemption provided under exception 4 to section 300, Penal Code provided he has not acted cruelly (Surinder Kumar Vs. Union Territory, chandigarh 11989 (1) Crimes 658 SC).

For the application of exception 4 it is not sufficient to show that there was a sudden quarrel and there was no premediation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. It can not be gains aid that if an assailant carries a dangerous weapon like a knife, and uses it on an unarmed person with whom he has a sudden quarrel, it would constitute taking undue advantage of the victim (1981 CrLJ 917). It would be impossible to say that there is no undue advantage when a man stabs an unarmed person who makes no threating gestures and merely asks the accused's opponent to stop fighting (AIR 1956 SC 99 (100).

Regarding the exception 4, it provides that culpable homicide is not murder if it is committed without premediation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. In this case there was certainly premediation on the side of the accused party without which they would not have come armed with lethal weapons from their house in order to launch an attack on the informant party who were not armed. Accused also took undue advantage and acted in a cruel and unusual manner inasmuch as they brutally killed the deceased on the spot by inflicting several deadly wounds with fatal weapons while deceased did not make any attack or assault on the accused. None of the exceptions 2 or 4 is attracted. Conviction of two accused under section 302/34 was upheld (Dilip Vs. State (1991) 43 DLR 269).

To invoke exception 4 to section 300, Penal Code, four requirements must be satisfied namely, (1) it was a sudden fight, (ii) there was no premediation (iii) the act was done in a heat of passion; (iv) the assilant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the

occurrence must have been sudden and unpremediated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where on a sudden quarrel, a person in the heat of the moment picks up a weapon which is hady and causes injuries one of which proves fatal, he would be entitled to the benefit of his exception provided he has not acted cruelly (1989 CrLJ 883(885) SC; AIR 1989 SC 1094; 1989 CrLR 203; 989 (1)Crimes 394=1989 SCC (Cr) 447).

An injury caused without premeditation in a sudden fight in the heat of passion upon a sudden quarrel is covered under section 300 exception 4, Penal code (Krishan Vs. State of Haryana 1993 (1) Crimes 95 P&H). From the testimony of the two eye-witnesses it is clear that the act was committed by the accused without any premediation. In the course of the game of cards there was a sudden quarrel and in the heat of passion the accused inflicted the stab injuries on the deceased. It can not be said that the accused had taken undue advantage or calculately acted in a cruel and unusual manner (1988 CrLR 255 (256) SC).

In an other case according to both sides a wordy quarrel had taken place and the quarrel had led to the use of weapons by both the parties against each other. It is not, therefore, a case where the accused had deliberately attacked the deceased and PW-1 with an intention to kill them. On the other hand, it is case which would fall under exception 4 to section 300, Penal Code (1989 CrLJ 2113, 2118 SC; AIR 1989 SC 1822).

For application of exception 4 to section 300 of Penal Code all the conditions enumerated therein must be satisfied. The act must be committed without premeditation in a sudden fight in the heat of passion; (2) upon a sudden quarrel; (3) without the offender's having taken undue advantage; (4) and the accused had not acted in a cruel or unusual manner. Therefore, there must be a mutual combat on exchanging blows on each other. And however slight the fist blow, or provocation, every fresh blow becomes a fresh provocation. The strike of the blow must be without any intention to kill or seriously injure the other. If two men start fighting and one of them is unarmed while the other uses a deadly weapon, the one who uses such weapon must be held to have taken an undue advantage denying him the entitlement to exception 4. True the number of wounds is not the criterion, but the position of the accused and the deceased with regard to their arms used, the manner of combat must be kept in mind when applying exception 4 (AIR 1993 SC 2426).

Deceased was mercilessly beaten on head by three assailants. Conviction should be under section 302 read with section 34 and not under section 304/34 merely due to absence of premeditation (1993 CrLJ 533 Raj).Possibility of the occurrence having taken place due to sudden fight could not be ruled out. Accused had given a solitary blow to deceased and did not repeat the same and did not take any undue advantage of the helplessness of the deceased. Case of accused was thus, covered by Fourth Exceptionof section 300, Penal Code, conviction and sentence of accused under section 302, Penal Code were consequently set aside and instead he was convicted under section 304, Part I, Penal Code and sentenced to eight years R.I. with fine (Muhammad Iqbal Vs. State 1992 PCrLJ 2561;Abdul Mannan Vs. State 1992 PCrLJ 2468).

Where a person, during the course of a sudden fight, without premeditation and probably in the heat of passion, took undue advantage and acted in a cruel manner in using a deadly weapon there was no ground to hold that his act did not amount to mruder. Thus, where the deceased was unarmed and did not cause any injury to the accused even following a sudden quarrel if the accused has inflicted

fatal blows on the deceased, exception 4 is not attracted and commission must be one of murder punishable under section 302. Equally for attracting exception 4 it is necessary that blows should be exchanged even if they do not all find their target. Even if the fight is unpremeditated and sudden, yet if the instrument or manner or retalisation be greatly disproportionate to the offence given, and cruel and dangerous in its nature, the accused cannot be protected under exception 4. That apart it is not necessary that death must be inevitable or in all circumstnaces the injury inflicted must cause death. If the probability of death is very great the requirement of clause third is satisfied. If there is probability in a less degree of death ensuing from the act committed the finding should be of culpable homicide not amounting to murder. Thus, when the accused inflicted two injuries on a fallen man, it must be held that he intended to inflict those two injuries, though the first injury may be assumed to have been inflicted during the course of altercation and, therefore, the offence is one of murder and the accused was rightly convicted and sentenced to imprisonment for life under section 302, Penal Code (AIR 1993 SC 2426).

For the application of exception 4 to section 300, it is not enough to establish that the attack was unpremeditated and that the act was committed in the heat of passion. It has to be proved further that it was the result of sudden fight without the offenders having taken undue advantage of the victim. Besides, it must also appear that the offender did not act in a cruel or unusual manner. Before an accused can pray in aid the provisions of exception 4 to section 300 all its ingredients must exist (PLD 1975 SC 607). Where the accused gave a fatal blow without premediation in a sudden fight in the heat of passion upon a sudden quarrel and there was no evidence that the accused took any undue advantage or acted in a cruel or unusual manner but merely gave a single stroke on the head of the deceased which ultimately proved fatal, and he did not go on assaulting the deceased despite his falling down unconcious on the ground, it was held that all the elements of exception 4 to section 300 Penal Code were fulfilled. Thus offence committed by the accused was held to be culpable homicide not amounting to murder and punishable under section 304, Penal Code (AIR 969 Ori 138; 981 CrLJ 1136 (1140).

Where incident took place suddenly without premeditation and accused persons did not act in a cruel manner. Court was not justified to record conviction under section 302/304, Penal Code. The case, squarely fell under explanation fourthly to section 299, Penal Code and accused was punishable under section 304 (KLR 1987 Cr. 611). Where the facts showed a struggle and grappling having taken place between the parties. Injuries were undeniably inflicted by accused in the course of a sudden fight without any premeditation when parties, having previous ill will came face to face by chance, or where there was a sudden quarrel between deceased and accused over return of money, resulting in a scuffle and when hatchet blows. Offence committed would fall under section 304 (1), Penal Code (1984 PCrLJ 2813).

Where there was a sudden flare up between parties leading to a free fight in which both parties were injured, accused was not held to have formed unlawful assembly with common object of committing murder of deceased and for causing injuries to witnesses. Requisite intention or knowledge under section 300 Penal Code having not been proved to be present to the mind of accused, conviction of accused was altered from section 302, Penal Code to one under section 326, Penal Code (PLD 1984 Lah 309). Where incident took place without premeditation and suddenly between parties offence committed would fall under section 304, Part I. Conviction of accused under section 302 Penal Code was altered to one under section 304, Part I. (1988 SCMR 1022). Where the accused were firing aimlessly at a

crowd throwing brickbats at each other and death was caused, the offence fell under section 304, Part I (PLD 1974 SC 51).

Exception 4 is meant to apply to the cases in which notwithstanding that a blow or some provocation may have been given in the origin of the dispute, or in whatever way the quarrel may have originated, yet the subsequent conduct of both the parties puts them, in respect of guilt, upon an equal footing. For, there is a mutual combat and blows on each side, and however slight the fist blow, or provocation, every fresh blow becomes a fresh provocation. The blood already heated warms at every subsequent stroke, and the voice of reason is not heard on either side in the heat of passion. Under such circumstances, there cannot be much room for discrimination on the question of commencement of the quarrel. If under such circumstances death is caused, it is not murder but culpable homicide (PLD 1966 Lah 352). Where each side claims that they had been attacked by the other but each side at the same time suppressed or minimised the role played by them. The Court was of the view that the occurrence took place in the form of a sudden fight when the two parties encountered each other, in which dangs and knives were freely used. The case of the appellants was covered by Exception 4 to section 300 and each of them was responsible for his own act (1976 PCrLJ 1354).

Where the trouble originated from a quarrel between womenfolk which is not an uncommon feature in rural society. In final fight both sides inflicted injuries on each other. The complainant and the deceased suffered nine injuries in all while three accused suffering a total of eleven injuries. Cruelty was not involved and weapons used also showed that fight had erupted all of a sudden. The accused were convicted under sections 325/34 and 452/34 Penal Code (NLR 1980 AC 48). Where the quarrel was sudden and there was grappling inside the hotel and the contestants appeared to be drunk. The appellant was already carrying a knife with him and did not purposely pick it up from some place. Exception 4 would apply to such a case (1971 PCrLJ 602).

Where there was a sudden fight between two sides in heat of a pssion upon a sudden quarrel relating to return of wife and daughter of accused. There was exchange of abuses between accused and deceased. It was held that it would not make much difference as to who actually grappled with accused. It could neither be said that accused had taken undue advantage by inflicting a solitary blow on the person who had grappled with him. The accused was convicted under section 304 Part I (1985 SCMR 1766). Where however the accused, who had no cause for anger, sudden or otherwise, attacked the deceased unprovoked, he was not entitled to the benefit of exception 4 to section 300 of the Penal Code 1860(PLD 1960 Pesh 154). The question of undue advantage is quesiton of fact. Where two contending parties each fully armed were engaged in a free fight, each one inflicting injury on the other, it can not be said that any of the parties acted in a cruel manner (AIR 1957 SC 324; 11957 CRLJ 420).

Exception 4 is applied only to cases in which parties to combat were equally matched in point of muscular strength, skill and arms, etc, for where there was no manifestly gross inequality in strength or in other parituclars it would not be considered sufficient circumstance to remove the case from operation of exception 4 to section 300 Penal Code (1986 SCMR 1246). Culpable homicide in a fight is murder unless the fight is unpremeditated, sudden in the heat of passion and on a sudden quarrel; a fight is not *per se* a palliating circumstance, only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide was premeditated, they are responsible for the consequences to their full extent (PLJ

1981 SC 724). But where though both sides were armed and had come prepared to measure strength agianst each other yet they had no intention to cause death. The act of accused killing deceased in a free fight, was not murder but culpable homicide punishable under section 304, Part II (1986 PCrLJ 490).

Where both parties received grievous injuries. On complainant side, one person lost his life and four received injuries with sharp and blunt weapons and on accused side two persons received 8 injuries with blunt and sharp weapons. Place of occurrence was a chowk between residence of accused party and shop of complainant party. Circumstances rendered occurrence a free fight. The case would fall within Exception 4 of section 300 Penal Code. Conviction was altered from section 302, Penal Code to one under section 304, Part I Penal Code (1985 PCrLJ 2953).

The exception does not apply to the case of an accused, who uses a knife, where there is no appreciable risk of even serious hurt to his person (1978 PCrLJ 507). But even in such cases where all the other ingredients of exception 4 are present, and it is found that the accused had used a knife when the other complainant was unarmed and has thus taken unfair advantage of him, he should not be sentenced to death, a sentence of transportation for life is sufficient (PLD 1966 SC 555).

Where a fight between two parties leading to death was a sudden and without premeditation and the prosecution had lead no reliable evidence to determine which party was the aggressor, the aid of Exception 4 to section 300 cannot be invoked for the purpose of recording conviction. The Court has still to decide who started the fight and who was the aggressor. It cannot follow the path of least resistance and convict both parties by holding that the fight was a free one. If the prosecution evidence is unworthy of credence, the onus still lies on the Court to arrive at a finding on the basis of probabilities (AIR 1960 All 567). Where it is established that one party was the aggressor and the other party took the beating passively the exception would not apply (PLD 1960 Lah 339).

It was held that after having murdered two persons by giving them three khanjar blows each of which was fatal the appellant cannot claim the benefit of exception 4 to section 300 Penal Code simply because of three superficial incised injuries found on his person which were either self suffered or caused by a friendly hand (PLJ 1975 Cr. C 66). A mere altercation can not be called a fight. Therefore where the dealing of fatal blows were preceeded by an altercation or quarrel, such an altercation cannot be said to have given rise to any sudden and grave provocation so as to bring the offences committed by them within the ambit of exception 4 to section 300 (13 DLR 256). Even if it is held that the fatal injury was caused in sudden quarrel and without any premeditation yet it cannot be held that the offender did not act in cruel manner or did not take advantage over the deceased. There was no resistance from the deceased or anybody from his side. In the circumstances, there is no ground to interfere with the conviction for murder (Shahidullah @ Shahid Vs. The State 1985 BLD (AD) 10).

Where there was serious wordy ware fare and abuse when temper rose and quarrel ensued and the accused dealt a fatal blow on the deceased, exception 4 was held to be applicable (AIR 1954 SC 652; 954 CrLJ 1676). Accused brother of deceased causing single injury on conversation between them about land leading to quarrel. In jury is one caused without premeditation in sudden fight in heat of passion. No undue advantage taken by accused, nor he acted in cruel manner. Exception 4 to section 300 attracted. Offence punishable under section 304, Part I and not under section 302 (AIR 1992 SC 559).

The querrel had broken out suddenly, but there was no sudden fight between the deceased and the accused. The deceased was unarmed and he did not cause any injury to the accused and his companions furthermore no less than three total injuries were inflicted by the accused with an axe, which is a formidable weapon on the unarmed victim. It was held that the accused were not entitled to the benefit of exception 4 (AIR 1979 SC 33; 1979 CrLJ 49; 1978 SCC (Cri) 428).

The evidence shows that no less than 12 injuries were cuased to the deceased and at least one of them was on a vital part of the body, namely, the parietal region and also the weapons which were used by the accused were lohangis, iron shod sticks, which are clearly lethal weapons. In the circumstances the Court is not in error in convicting the accused of the offence under section 302 read with section 149 of the Penal Code (1971 CrLJ 1605, SC).

In Bhajan Singh Vs. State of Uttar Pradesh, (AIR 1974 SC 1564, 1567) members of an unlawful assembly were armed with deadly weapons, some with gandassa and some with lathis. The members of the assembly knew that by using these weapons death would be caused. Fatal consequence actually ensued as a result of conjoint attack. It was held that accused were guilty of section 302 read with section 49, Penal Code, though the unlawful assembly was formed originally only to beat the deceased.

There was an exchange of abuses between accused and another party, the deceased entervened and asked the parties not to fight. This enraged the accused who took hold of an iron bar and gave only one blow on the head of the deceased with grteat force causing extensive damage to the brain from one end to the other resulting in several fructures. The deceased who was sold fell down as a result of the blow. It was held that the case of the accused fell within the four corners of section 302 and not under section 304, part 1 (AIR 1978 SC 1082; 978 CrLJ 995; 1978 SCC (Cri) 428).

Where the prosecution evidence does not justify the inference that there was any sudden fight and the appellant ccertainly acted in a cruel manner and least that can be said is that he took undue advantage of the deceased, there is no justification for applying exception 4 to section 300 Penal Code (978 CrLJ 578, 582; 1978 SCC (Cri) 573). An unarmed deceased received 3 fatal injuries in a sudden quarrel. Held accused was not entitled to the benefit of exception 4 (978) 3 SCC 330; 1978 CrLJ (SC) 300.

Accused inflicted one lathi blow on the head of deceased in an incident of sudden fight without there being any pre-meditation, the offence would fall under exception 4 to section 300 of Penal Code (Ram Lakhan & Five others Vs. State of Rajashtan 1992 (1) Crimes 1146).

Under section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal code is upon the accused, and the Court shall presume the absence of such circumstances. The right of private defence falls within the chapter of general exception to the Penal Code. This burden,of course, can be discharged by showing the preponderance of probabilities only (1985 (1) Crimes 429, 435 Cal). In the instant case, there had been no fight between the applicant and the deceased although there had been no premeditation on the part of the appellant and in the heat of passion and upon a sudden quarrel, the appellant had killed the deceased. It cannot, however, be said that the appellant had not taken any undue advantage and that he had not acted in a cruel and unusual manner. The appellant first dealt a heavy and fatal blow on the neck of the deceased. He did not halt his assault and

dealt several knife blows on the person of the deceased. Thereafter, in a cruel manner, he dragged the body of the deceased and threw it in front of the deceased house (985 CrLJ 1767, 1768 Ori.).

Where, in the course of a sudden fight, the deceased grappled with the accused from behind, and the accused then struck at him with his pocket knife without any deliberate aim, it was held that the accused did not intend to cause death or to inflict such injury as was likely to cause death, but as he must have known that a blow with a weapon of this kind was likely to cause death, the offence fell under clause 2 of section 304 (1979 SCC (Cri) 632).

Where there was no previous enmity between the parties, and it appeared to be the common case that rounding up and impounding of cattle was the main cause that had made the parties resort to the use of implements and weapons of everyday use, and the deceased,who was unarmed, was assulted in the course of the marpect when blows were reigning free by members of both the parties, and his death was a turn in the events which could not have been intended or expected by any one taking part in the fight, it was held that the accused would only be guilty of culpable homicide not amounting to murder (1976 SCC (Cri) 524).

Once it is accepted that there was a clash between the parties, and the prosecution had not put forth the genesis and the manner of the occurrence of the incident fully, then there is a doubt as to the origin of the fight and the benefit of it must go to the accused (1971 SCC (Cri) 671).

Where the incident was the result of a sudden fight which developed between the deceased's brother and some of the accused persons, and the deceased had gone to the scene of the fight and had attacked two of the accused persons with a knife, and then on finding themselves outnumbered by the accused persons who had collected there at once, the deceased and his brother had taken to heels but were chased by the accused persons, and the deceased was attacked in the hut of one of the witnesses with short spear resulting in his instantaneous death, it was held that this exception applied to the facts of the case and hence, the conviction of the accused was altered from section 302 to one under section 304 part I (1976 SCC (Cri) 249).

The two accused, between whom and the deceased and his son was bad feeling came upon the deceased in the field and setting upon him, beat him with stickes so severely that he died within a few minutes, no less than fourteen ribs being fractured resulting in the rupture of both the lungs and of the spleen. It was held that they were guilty of murder as the intention was clear whether to kill or to cause dangerous injury (1974 SCC (Cri) 169).

Where the appellant had purchased a disputed property from one G, but the deceased was already in possession of a portion of that property and there had been proceedings pending against both the parties under section 107 of the Code of Criminal procedure and it appeared that the appellant took the law into his hand on the day of the occurrence to put up end to his adversary's life by entering the shed where he was sitting and shooting him dead, it was held that there was no question of the application of this exception and the appellant had been rightly convicted under section 302 Penal Code (1976 SCC (Cri) 619). Where during a simple altercation the accused inflicted on the deceased two blows one of which caused the recpture of an enlarged spleen resulting in his death but the abnormal enlargement of the spleen of the deceased was not known to the accused, it was held that the accused was guilty of an offence under section 325 and not under section 302 (AIR 1939 Mad 269; 40 CrLJ 308).

Where in a sudden fight accused inflicted a blow on the head of the deceased causing his death and injuries were sustained by accused also. On evidence benefit of doubt was given (AIR 11974 SC 351; 974 CRLJ 612). Where the accused inflicted three fatal injuries on the deceased with an axe on an unarmed victim he was held not entitled to the benefit of the both exception (AIR 1979 SC 33; 1979 CrLJ 49). The deceased was unarmed. The deceased or his brother were taking their heels. The appellant with dagger in hand closed the fleeing deceased and stabbed him in back and on the left side of the chest. Held, exceptions 2 and 4 to section 300 were not attracted (AIR 980 SC 108).

Sudden fight is that which generally arises out of a chance encounter, squabble, verbal dual, quarrel, where passions having been ignited, the slightest blow or provocation results into a fight and the opposing parties asault and injure each other with or without weapons, causing the death of one or more on either side. The basic feature of a sudden fight is the initial absence of premeditatin to cause death or injuries due to the absence of time for reflection. Where culpable homicide results in such a sudden fight and the offender is not guilty of premeditation or having taken undue advantage or having acted in a cruel or unusual manner, the case is covered by Exception 4 to section 300 and the culpable homicide is not murder (1983 PCrLJ 537). Where a single blow was inflicted without premeditation in a sudden quarrel and intention of assailant to cause death was not shown, offence would be culpable homicide not amounting to murder. The fact that assailant had not taken undue advantage nor had acted in a cruel or unusual manner may also be taken notice of (1985 PCrLJ 2619).

Where one party is the aggressor and the other takes the beating passively, Exception 4 does not apply (1968 PCrLJ 1469). Where the deceased was totally unarmed and had not made even a violent gesture towards the appellant, the latter's act in using a deadly weapon would clearly amount to taking undue advantage of the deceased and also acting in a cruel manner, as a result, it must be held that exception 4 to section 300, Penal Code is not available to the appellant (1983 SCMR 420). If, in the course of a sudden quarrel, one of the parties gives a blow to his opponent and that blow causes death, he cannot avail of the advantage of exception 4, notwithstanding that, after he has given the blow, he is belaboured by the deceased before he dies or by his companions for the simple reason that at the time he gave the fatal blow there was no fight (AIR 1946 Lah 41). Where the accused, who has no cause for anger, sudden or otherwise, attacks the deceased unprovoked, he is not entitled to the benefit of exception 4 to section 300 of the Penal Code (PLD 1960 Pesh 154).

Where there was sudden altercation between the accused and deceased ensuing in a free fight in which each party assaulted the other (AIR 1965 SC 257; (1965) 1 CrLJ 242) with stick, and accused giving only one blow on deceased resulting in his death and injuries suffered by both were evenly distributed, accused receiving several injuries, the accused was held out entitled to the benefit of exception 4 to secction 300 and was guilty under section 304, Part II (AIR 1954 SC 38).

Where a mutual conflict develops and there is no reliable and acceptable evidence asto how it started and as to who was the agressor, the plea of private defence on either side can not be permitted, but it is a case of sudden fight and conflict and has to be dealt with under exception 4 of section 300 (Jumnan Vs State AIR 1959 SC 469; 1957 CrLJ 586; Ram Karan Vs. State 1982 SCC (Cri) 386).

17. **Without premeditation.**- The Penal Code nowhere makes premeditation a necessary concomitant to murder. The sole question for consideration is whether

the act of the accused was done with the knowledge that it would cause death or it was likely to have that effect. If he acted with that knowledge, the crime, unless specially exempted, is murder (1986 PCrLJ 1241 (DB)=3 Suth WR 40 DB).

Exception 4 comes into play only if death is caused without premeditation. But it cannot be said that simply because there is no premeditation on the part of the accused, his act in causing death would be culpable homicide not amounting to murder. The statute having clearly spelt out the ingredients of the offence of culpable homicide as well as of murder, it is the duty of the court to ascertain, in each case, whether the ingredients are present, or whether the case is covered by any of the Exceptions, which would take the offence out of the purview of the definition of murder (1978 SCMR 114).

Where a sudden quarrel respective field. Accused did not come to scene of occcurrence with premeditation or with preconcert to commit murder. Only one injury was caused to deceased which resulted in fracture of scalp and which was sufficient in ordinary course of nature to cause death but no reliable evidence as to who caused injury was available. Conviction of accused was altered from section 302/34, Penal Code to section 325/34 (1986 SCMR 337).

Where accused and complainant side were on visiting and friendly terms and during gambling they fell out and attacked each other. None of the parties was prepared or had any predesign to harm his adversary to such an extent as to cause serious injuries resulting in death. Conviction of accused was altered from section 302, Penal Code to section 304, Part I (1986 SCMR 1246).

Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premediated, they are responsible for the consequences to their full extent (1981 SCMR 482).

Where the facts showed that the accused party went to take possession of a certain piece of land armed and some of them carried hatchets, which showed that they were prepared for a fight, expected resistance by the other party and had made preparation for it (48 CrLJ 590 DB)(Lah), or where there was a fight between two young persons but after a while the accused and his companions came armed with lethal weapons and shouting lakaras, the gravity of the injuries inflicted and the use of a fire arm point not to a sudden fight but to a premediated murder (1979 PCrLJ 275 (DB) Lah).

Where there was a sudden quarrel between children. One party made an armed attack killing one and seriously injuring another in retaliation. Conviction under section 302 was upheld (1975 SCMR 222).

Where a sudden fight took place at the spur of moment and when parties confronted each other in background of motive and provocation provided by complainant party, they indiscriminately fired at each other. Case fell under Exception 4 to dsection 300, Penal Code, conviction was altered from section 302 to section 304, Part I (1986 SCMR 100).

18. **Only one blow given.**- The general rule is that if death is caused by a single blow given in the heat of the moment on a sudden quarrel and the intention to cause death is not proved, the offence is culpable homicide not amounting to murder (1988 PCrLJ 209=1988 PCrLJ 1675 DB). Incident was a sudden affair over a trifling matter without any premeditation. Accused did not take undue advantage of the situation and caused only one injury. Chhuri was readily available on the fruitstall. Accused responsible for causing injury, held was rightly convicted under section 304, Penal Code and the sentence was also considered adequate. Conviction of accused was upheld in circumstances (Babar V State 1990 PCrLJ 1067).

Where after sudden grappling the accused caused a solitary injury in abdomen of the victim. He did not act cruely or in an unusual manner taking undue advantage. His case would squarely fall under Exception 4 of section 300, Penal Code (1988 PCrLJ 209).

Where there was no motive for accused to kill deceased. Occurrence took place suddenly due to rise of temper over some petty quarrel and without any premediation. Accused gave only one blow without any intention of causing death. Offence committed by accused was not murder punishable under section 302, but culpable homicide not amounting to murder under section 304, Part III (1988 PcrLJ 1523=NLR 1988 Cr. 522 DB).

19. 'Unfair advantage and cruel manner.-" In order to bring a case within Exception 4 to section 300, it must be shown that no only was the culpable homicide committed without premediation in a sudden fight in the heat of passon uon a sudden quarrel but also that the offender did not take undue advantage or act in a cruel manner (PLD 1966 SC 566).

Unless all condition were satisfied, Exception 4 to section 300, would not be attracted, notwithstanding the fact, that the act of the accused might not be premeditated and the same might have been due to a sudden fight upon a sudden quarrel. In a case of sudden fight upon a sudden involving mutual abuses, benefit of Exception 4 to section 300, Penal Code, was not allowed because appellants had taken undue advantage and acted in a cruel and unusual manner (1988 SCMR 915).

The mere fact that the accused had done an act which had caused death of another could not necessarily lead to the conclusion that the accused had taken undue advantage or acted in a cruel or unusual manner. If this were so then exception 4 would become meaningless (1985 SCMR 423=NLR 1980 Cr 346 Lah).

20. **Both parties receiving injuries.-** Where the accused and the deceased were both injured. Accused had caused one injury in the chest of the deceased with a knife which proved fatal, keeping in view the seat of injury, weapon used and force with which injury was caused, conviction altered to one under secction 304, Part I (1986 PCrLJ 1904).

Where the parties alterated with one another, grappled and a sudden fight started between them in which both the sides appeared to have used knives. There was an incised injury on the chest of the deceased which proved fatal. In the circumstances, the case of the appellant was covered by Exception 4 to section 300, Penal Code, and he should have been convicted under section 304 (1), Penal Code (NLR 1982 CrLJ 386=1975 PCrLJ 1118 Lah=1975 PCrLJ 747).

Where in a sudden fight, members of both parties received injuries. The circumstnces in which accused used sharp edged weapons was not brought out. Conviction under section 304, Part I was upheld (1984 SCMR 353=1973 SCMR 136).

Where both accused and deceased were armed with their respective weapons and evenly matched and both received injuries. It was a case of sudden fight. Conviction was altered, from secction 302 to section 304 (I), Penal Code (1984 PCrLJ 680).

Where occurence took place all of a sudden and without premeditation during which accused recceiving multiple injuries both with sharp edged and blunt weapon while he caused only one injury to deceased. Injuries sustained by acccused were not explained satisfactorily by eye-witnesses who, claimed to be empty handed at the time of occurrence. Conviction under section 302, Penal Code, was altered to one under section 304(I) (1985 PCrLJ 1050).

Where in a sudden fight respondent fired only one shot after receiving injuries and abstained from firing more shots. The respondent's act, did not amount to taking undue advantage or acting in a cruel manner and the case fell under section 308, Penal Code (1982 SCMR 1186=NLR 1982 AC 298).

21. Killing unarmed adversary.- Where the deceased is not armed but the accused is and he causes grievous hurt to the deceased with fatal results by causing only one wound he is not protected by Exception 4 of section 300, and the offence committed is murder (NLR 1988 Cr 375=1988 PCrLJ 1916 DB), or where ona quarrel over a trivial matter, the accused acted with cruelty when deceased was empty handed, giving three knife blows on a vital part of body. It was a clear case of murder under section 302, Penal Code and not under section 304 -II, Penal Code. Since deceased had quarrelled with accused immediately before occurrence, lesser sentence of life imprisonment was awarded (1986 SCMR 1188).

The accused would be said to act in a cruel and unusual manner and to take undue advantage of his adversary where he gave a blow int he chest of an unarmed victim (1986 PCrLJ 2067 DB= PLD 1967 Pesh 25), or where the accused challenged the deceased to a trial of strength which commenced with bare hands, and while the deceased was acting under the impression that the fight was to continue on that basis, the accused brought it to an end with a pistol shot (PLD 1961 SC 230=13 DLR (SC) 147=1961 PSCR 144), or where the accused attacked the victim, who was lying on his charpoy, witha formidable weapon when he was not armed and was not in a position to defend himself (AIR 1927 Lah 808=28 CrLJ 415 DB), or where the accused ina sudden fight struck an unarmed personwith a sickle, thereby causing his death, and himself received only a few scratches on his back (AIR 1937 Pesh 101=39 CrLJ 142 DB), or where it was found that the deceased who was unarmed and who had not assaulted the accused had as many as six injuries on his head (AIR 1931 Lah 280=32 CrLJ 1254 DB), or where the accused inflicted on an unarmed person two grievous head injuries causing fracture of skull resulting in his death (1982 PCrLJ 431 DB), or where a person without provocation took out a knife and stabbed an unarmed person (AIR 1940 Pesh 1=41 CrLJ 574 DD=1937 Mad WN 1236 DB), or where accused took undue advantage of unarmed adversary and acted in cruel manner by hitting deceased on vital part of his body (1986 PCrLJ 2211).

Where both parties were unarmed when an altercation took place. The accused hurried to his house, he rushed back witha chhuri and immediately gave two thrusts first in the bacck of M and then in the chest of the deceased as the tried to rescue his brother. The accused wantoly wielded a formidable weapon to settle the score. The seriousness of the injury described by the doctor and its situs demonstrated that the thrust was made with full force and the weapon had penetrated deep into the chest cavity. Therefore, two of the main conditions for invoking the fourth exception to section 300 namely that the offender should have assaulted his victim without premeditation and without undue advantage were missing inthe instant case. Conviction under section 302 was upheld (1976 SCMR 36).

Where the accused fired witha shot gun from a short distance at his victim ona vital part, he could well be presumed to have intended to cause death or such bodily injury as was likely to cause death. The act which he committed was so imminently dangerous that he could very well realise that it must in all probability cause death. Therefore it cannot be said that the fight having been sudden the accused was guilty under section 304 (PLD 1971 Pesh 75 DB).

Where it was not the common object of the assembly to kill the deceased nor the appellants could be said be equipped with the knowledge that the victim was likely to be killed but the common object was to cause grievous hurt or at the best

the appellants knew that with the use of the weapons which were carried by four of them, the assault was likely to result in grievous hurt. Conviction was altered to section 325/149, Penal Code and sentence of 7 years R.I. was awarded (1971 PCrLJ 297 (DB) Kar).

Where in sudden fight the accused without taking undue advantage struck one blow at the deceased with a knife and then fled, the case would be covered by this exception and he would be convicted under section 304, Part I (1969 PCrLJ 1291=1969 SCMR 653).

Where in a sudden fight between two parties the accused was hit and he hit back with the back side of the hatchet he was carrying it cannot be said that he acted in a cruel or callous manner (1980 SCMR 225).

Where the deceased was unarmed and did not cause any injury to the appellant, and the accused appellant following a sudden quarrel had inflicted fatal blows to the deceased, it was held that exception 4 did not apply and his conviction under section 302 must, therefore, be confirmed (Bhagwan Munjaji Pawade Vs. State 1978 SCC (Cri) 428).

22. Exception 5 - Consented of death.- The infliction of harm with the consent of the sufferer falls in the general exceptions ot sections 87 to 93 Penal code, but under those sections death can not be consented to. Under this exception if death is consented to then in such a case the person who kills shall be guilty of culpable homicide but not murder. This exception has to be strictly construed. Unless all the facts and circumstances are taken into accounts by the person who consents to be killed this exception can not be invoked. Where a husband being in distress desired to commit the suicide and the wife asked him to kill her first and then commit suicide and he accordingly killed her but was caught before he killed himself, exception 5 to section 300 was applied (AIR 1958 Pat 190).

A doctor pleading consent to an operation that might prove fatal must prove that the patient accepted the risk and was fully aware of it. (ILR 14 Cal 566).

The fifth exception extends to all cases of death occasioned by or resulting from premeditated acts, where the party killed takes the risk of death with his own consent. The fourth exception is an independent exception, applying to all cases of death occurring in the coure of sudden and unpremeditated fight, and does not in any way bind the natural operation of the fifth exception (6 Cal 154).

In order to bring the offence of murder under exception, 5, consent by the deceased must be given unconditionally and without any reservation. It must further be unequivocal consent which does not involve the choice of alternatives to which the persons taking the life more or less has driven the other person (AIR 1956 Mad 97). Where the accused kills a woman above the age of 18 years at her request and with her consent, he is guilty of offence under First Part of section 304 (AIR 1931 Mad 487). Where the accused and the deceased who was his concubine were on affectionate terms and there was no motive whatever for the accused to cause the death of the deceased. In his confession to the Magistrate, the accused stated that he killed the deceased at her own request and with her glad consent, or where the accused killed his stepfather, an infirm old man and invalid, with the latter's consent with the object of getting three innocent men (his enemies) hanged : It was held that the offence was covered by the fifth exception to section 300 and was punishable not under section 302 but under section 304 (AIR 1940 Mad 138; AIR 1918 Lah 145). Where however the conent is not given as a consent but is meant to be a threat, the accused would be guilty of the offence of murder. Where a husband wanted his wife to go back to her parent's house and she said that if her husband insisted on her doing so she would rather be killed and he killed her. It was that the consent was not the type of consent which is contemplated by exception 5 to section 300 and the husband was guilty of murder (AIR 1956 Mad 97).

Where a husband and wife made a pact of die together and the husband killed the wife in pursuance of the pact but before he could kill himself he was arrested by the police; it was held that the wife did not give her consent to be killed under fear of injury or under a misconception of fact and that the case was covered by exception 5 to section 300. The accused was guilty under section 304, First Part, and not under section 302 (AIR 1958 Pat 190).

The accused strangled his beloved aged 16 years to death upon thier decision to die together in despair of the future separation and feeling that they could not live apart. It was held, that this was essentially a case where the spirit if not the letter, of exception 5 may be applied and, though the accused must be convicted of murder, yet the sentence should be transportation for life (AIR 1929 Lah 50).

All murder is culpable homicide but all culpable homicide is not murder. Every act falling within section 290 and not falling under section 300 is culpable homicide not amounting to murder (11 CrLJ 295). The Penal Code recognises no exception to a case of murder other than the five exceptions enacted in section 300 and no court will be justified in reducing a crime of murder into one of culpable homicide not amounting to murder without advertence to those exception (AIR 1954 Trav-co 396). The elements which constitute the offence of culpable homicide are expressed and explained in terms of four explanations enacted in section 300. If an act which an accused person is said to ahve committed does fall within any of those explanations, and does not fall within any of the exceptions, the act is murder, but if it does fall under one or other of those explanations and also falls within any of the exceptions enacted in section 300, the act is one of culpable homicide not amounting to murder (AIR 1928 Oudh 15). Where the evidence did not disclose that there was any intention to cause death but it was clear that the accused had the knowledge that their acts were likely to cause death, the accused can be held guilty under the second part of section 304 P.C. The contention that in order to bring the case under the second part of section 304 Penal Code, it must be brought within one of the exception to section 300 Penal code, is not always correct (AIR 1960 AP 141). An offence may amount to culpable homicide but no murder even though none of the exception in section is 300 is applicable to the case. The clauses of section 300, imply a direct mental intention and a special degree of criminality (AIR 1935 Oudh 239). Therefore if the requirements of section 300 are not fulfilled and the offence does not fall under any one of its four clauses, the court should proceed to ee whether it was committed with the intention mentioned in Part I or only witht he knowledge described in Part II of section 304 (2 Pepsu L.R. 558).

The provisions relating to murder and culpable homicide are probably the most complicated in the Penal Code and are so technical as frequently lead to confusion. Not only does the Code draw a distinction between intention and knowledge but fine distinctions are also drawn between the degrees of intention to inflict injury (AIR 1934 Sind 145). The distinction between culpable homicide and murder is merely a question of different degrees of probability that death would ensue (PLD 1967 Pesh 45). It is murder if such injury is sufficient to cause death in ordinary course of nature, or if death is its most probable result (AIR 1955 Andh 24; PLD 1967 Pesh 45).

An intention to cause death is a part both of section 299 and section 300. But intention is not a necessary ingredient of murder. If the act is done with the knowledge that death is likely to be caused thereby, it is culpable homicide and if it is done with the further knowledge that the act was so imminently dangerous that it must, in all probability, cause either death or such bodily injury as was likely to cause death then that culpable homicide is murder. Thus knowledge is sufficient to establish murder without any inention, whatever, being proved (AIR 1939 Rang 225).

Culpable homicide may not amount to murder, where notwithstanding that the mental state is sufficient to constitute murder, still one of the exceptions to section 300 applies or where the mental state though within the description of section 299, is not of special degree of criminality required by section 300 (AIR 1915 Cal 773).

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

302. Punishment for murder.-Whoever commits murder shall be punished with death, or [imprisonment] for life, and shall also be liable to fine.

Synopsis

1. Charge.
2. Conviction under section 302 read with section 34.
3. Conviction under section 302 read with section 149.
4. Omission to mention section 34, or section 149, effect of.
5. Charge under section 302/149, if recourse can be had to section 302/34.
6. Conviction under section 302/109.
7. Acquittal of co-accused - effect of.
8. Appellate Court can record conviction with the aid of section 34 or 149, not withstanding the acquittal of co-accused.
9. Where charge framed under section 302 with the aid of section 34 or 149 - Whether conviction under section 302 simpliciter legal.
10. Accused liable for his individual act.
11. Alternate charge.
12. Charge under section 302 but punishment for lesser offence.
13. Charge under section 302/34 but punishment under section 201.
14. Evidence and proof.
15. Burden of proof.
16. Benefit of doubt.
17. Proof of site of the offence.
18. Time of death.
19. Motive of murder.
20. *Corpus delicti.*
21. Murder from poisoning.
22. Murder by throattling.
23. Treatment by doctors leading to death of patient.
24. Identification of accused.
25. Plea of guilty.
26. Appreciation of evidence.
27. Reapprasial of evidence by Appellate Court.
28. Publicity through news media not to be taken into account.
29. Credibility of witnesses.
30. Evidence of eye witnessess.
31. Conviction on the evidence of solitary witness.
32. Approver.
33. Delay in recording statements - effect of.
34. Belated disclosure.
35. Post-mortem examination.
36. Ballistic expert evidence.
37. Report of imperial serologist and chemical examiner.
38. Alibi.
39. Fasity of defence - effect.
40. Examination of accused under section 342 Cr. P.C.
41. Disclosure statement of accused.
42. Explanation given by the accused.
43. First information report.
44. Vague or cryptic information if FIR.
45. Delay in lodging FIR.
46. Examination of investigating officer.
47. Improper Investigation.
48. Inquest report.
49. Conviction on confession.
50. Conviction on dying declaration.
51. Circumstantial evidence to convict the accused.
52. Deceased last seen alive with accused.
53. Circumstantial evidence in wife killing cases.
54. Absconding.
55. Recovery of dead body and property of deceased.
56. Recovery of weapon of offence.
57. Blood stained clothes of accused.
58. Evidence of recovery.
59. Injury on accused.
60. Blood grouping significance.
61. Punishment.
62. Death sentence to be awarded in rarest of rare cases.
63. Mitigation of sentence.
64. Age of accused.
65. Sex of accused.

66. Plea of insanity.
67. Lapse of time as a ground for commutation of death sentence.
68. When charge proved against several accused.
69. Sentence of fine.
70. Enhancement of sentence by Appellate Court.
71. Duty of the Court to arrange for defence of the accused.
72. Duty of the prosecutor.
73. Interference by Supreme Court.
74. Order of retrial.
75. Bail.
76. Administration of justice.

1. **Charge.**- The charge should run thus :

"That on or about the ..... day of ..... at you ..... committed murder by intentionally (or knowingly) causing the death of (name of the deceased), and thereby committed an offence punishable under section 302 of the Penal Code, and within my cognizance.

"And I hereby direct that you be tried by the said Court on the said charge."

When the deadbody is found and it is proved to be murder there is no further scope for charge under secton 364 of the Penal Code. The only charge that can be framed against the accused is a charge under section 302 or 302/109 of the Penal Code because as soon as the victim is found to have been murdered the offence of abduction for possible murder under section 364 of the Penal Code does not lie (33 DLR (1981) 97; 29 DLR (1977) SC; 29 DLR 1977 SC).

It is true that in certain circumstances a conviction for liablity under section 34 can be entered even though the charge mentions only section 149. But there can be no doubt that the proper procedure is to put the accused person in notice of the precise ground on which liability is cast upon him (Kreshnan Balkrishnan Vs. State of Kerala AIR 1958 Ker 94; 1958 CrLJ 510). A man charged under section 302 cannot be convicted under section 302 read with section 149 or *vice versa* (Tahsilder Sing Vs. State AIR 1958 All 255(290); 1958 CrLJ 424).

In Surajpal Vs. State of W.P. AIR 1955 SC 419 (422, 423); 1955 CRLJ 1004, a number of accused were charged under section 307 read with section 149 and section 302 read with section 149. As it was found that there was no common object to kill, all the accused were acquitted under section 149. But the evidence disclosed that the appellant had himself made an attempt on the life of one man and had himself shot another dead. Therefore the High Court convicted him under sections 307 and 302 respectively though there was no separate charge under either of those sections. Those convictions were challenged in the Supreme Court. The Supreme Court held that the omission to frame a charge was a serious lacuna but despite that the real question was whether the omission caused prejudice. On the facts, their Lordships reached the conclusion that prejudice was disclosed and henece ordered an acquittal (AIR 1955 SC 274 (276, 280); 1955 CrLJ 721). A conviction under section 302 read with section 34 could be altered to one under section 302 (Karnail Singh Vs. State of Punjab AIR 1964 SC 204). When the charge does not mention that the common object of the members of unlawful assembly was to kill nor that the deceased was likely to be killed in pursuance of the common object, the conviction under section 302 read with section 149 was not maintainable. But as medical evidence showed that deceased had multiple injuries ante-mortem and perforating injuries which could be caused by sharp edged weapon and also resulted in fractures of pariental bones, accused were guilty under section 326 read with section 148 (Teja Vs. State of M.P. 1990 CrLJ 262(MP) DB=1989 MPLJ 506= 1989 CrLR (MP) 49=(1989) 2 CrLC 269).

Murder and causing disappearance of evidence of murder.- Charge under section 302 and 201, Penal Code, it has been held, cannot be combined (In re

Perumal Nadan, 2 Weir 301 where Queen-Express Vs. Dungar, ILR 8 All 252; Torap Ali Vs. Queen-Empress, ILR 22 Cal 638 are referred to; Partapa vs. Crown, 11 PR 1913; but see contra - Emperor v. Ghulam 8 CrLJ 191; Emperor v. Bawa Manghnidas, 11 CrLJ 731; see also Sumanta Dhupi Vs. Emperor 20 CWN 166).

Though the trial of the offence under section 201 and 211 Penal Code, along with section 302, Penal Code, in one case is not barred, conviction was set aside under the former two sections by way of disapproval of such joint trial (Mangala Pardhan Vs State, 1978, Cut, LR (Cr) 191). But there should be no misjoinder of charges if the accused are tried under sections 302 and 201, Penal Code. When the evidence is insufficient to convict the accused of murder and they are acquitted, the presumption is that they are not guilty of murder at all. There is, therefore, no difficulty in convicting them under section 201, Penal Code, if there is evidence as to their being seen with the dead body of the deceased (Sawanta v. Emperor, AIR 1932 All 711, 71=33 CrLJ 283, following Emperor v Har Piari AIR 1926 All 737= ILR 49 All 57 and Begu Vs. Kding-Emperor AIR 1925 PC 130=ILR 6 Lah 226; Durlay Vs. Emperor, ILR 59 Cal 1040; AIR 1932 Cal 297; Sohan Vs. Emperor 1932 ALJ 801).

Five murders in two sets.- A triple murder was committed by the accused in the foresoon and double murder in the afternoon and there was no apparent connection between the two sets of murders. The accused was charged, at one and the same trial with the commission of the five murders and convicted; held, that the trial contravened the provisions of sections 233, 234 and 235 (Fauja Vs. Emperor 17 ALJ 614).

2. **Conviction under section 302 read with section 34.-** In order to attract the applicability of section 34 read with section 302 it is not necessary that each and every one of the accused persons must have inflicted a serious injury. Three accused persons came together,one of them was armed with a gun the other two were armed with iron rods. The person who was armed with the gun opened fire and after the deceased fell down the other two accused were not content but went forward to inflict injuries on the deceased person with the iron rods. There after all of them went away together. The irresistible inference from these circumstances is that the three of them were actuated by the common intention to cause death of the deceased. Merely because injuries inflicted by the two accused were not serious injuries, it cannot be said that they were not actuated by the common intention to cause the death of the deceased (AIR 1979 SC 1347). The accused Mitho actually stabbed the deceased fatally. Simaltaneously, Abdul Jabbar held off the other inmates of the house by pointing a pistol at them and sought to suppress their effort to seek assistance from outside.

Held, this was a sufficient indication that Abdul Jabbar associated himself with the act of murder committed by has co-accused Mitho and it follows that he shared a common intention with him as far as the killing of the deceased was concerned. Section 34, Penal Code, was attracted to the case (Abdul Jabbar Vs. State (1964) 16 DLR (SC) 177).

Prior concert or prearranged plan for proving the common intention is not necessary to be proved if the manner of assault as proved by the prosecution witnesses necessarily lead to the conclusion that the participating accused persons had developed a common intention at the time of occurrence (see Abdur Rahman Mondal Vs. State 29 DLR (SC) 246). It is the essence of section 34 that the accused persons must be physically present at the place and at the time of commission of the crime and the incriminating acts and circumstances must necessarily lead to the

inference of common intention to commit the crime (Nazimuddin Vs. State 26 DLR 22 (Para - 11).

Where the deceased and another person were assaulted at a place which was a narrow open space surrounded by huts on all sides and the attack on the deceased was not unpremeditated and the suddenness of the attack was accentuated by the shout *'maro, maro'* given by the accused -appellant and there was evidence to show that accused No. 1 who was armed with a knife, commenced the attack following the shout. It was held that though the appellant was not armed with any weapon, it was established beyond doubt that he shared the common intention to commit the murder of the deceased and hence he was rightly convicted under section 302/34 (1971 CrLJ 824 SC). Both the accused coming together armed with knives and without the slightest provocation started assaulting the deceased with knives causing serious injuries and leaving together after commission of crime point to a pre-arranged plan and prior concert especially when there is a background of enmity between the parties. Held, appellants committed offence of murder in furtherance of the common intention under section 302/34 Penal Code. (Barka alias Mohammad Sultan & orthers. Vs. State of west Benal 1988 (1) crimes 129 Cal).

Act of having remained hidden in a paddy field being armed with deadly weapons and suddenly emerging out from the place on opportune moment and carrying out assault on the victim, demonstrate clearly the intention of the appellants to kill the victim. It can be said that all the appellants shared the common intention of murdering the victim, in furtherance of common intention of all. In fact, all appellants joined together and abetted each other in comission of the act although some appellants may not assault victim by their own hand (Majibur Rahman Vs. State (1987) 39 DLR (1987) 437 Para - 11).

The fact of all the accused being armed with deadly weapons and their physical presence in the place of occurrence and inflicting of several injuries on the deceased clearly proved common intention of all the accused (Hazrat Ali Vs. The State 1984 BLD 257). But in a case of pre-planned murder no adverse inference should be drawn agianst the appellant from the mere presence at the scene of occurrence alongwith the other accused when there is no evidence to hold that he had shared a common intention with them in the commission of the offence (Rangaswami Vs. State of Tamil Nadu 1989 (1) Crimes 692 (SC).

Deceased was mereilessly beaten on head by three assailants. Conviction should be under section 302 read with section 34 and not under section 304/34 merely due to absence of premediation (1993 CrLJ 533 Raj). Both accused and co-accused shared common intention to beat up or assault victim though not to kill him. Accused, however, suddenly stabbed the victim resulting his death. Co-accused could be convicted under sections 326/34 and not under sections 302/34 (1993 CrLJ 45 (SC)=Shahid Din vs. Stae (1964) 16 DLR (SC) 269).

Where the evidence showed that the appellant aided the other accused, who were armed with deadly weapons, by giving blows to the deceased and also participated in chasing the deceased, it was held that under the circumstances he could be said to share the common intention to cause the death of the deceased with other accused and hence, he was rightly convicted under section 302/34 (1979 CrLJ 1031 SC). It might be that when some persons start with a pre-arranged plan to commit a minor offence they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. The existence or otherwise of such an understanding depends on the facts and circumstances of a particular case. In the absence of such material, the co-accused

can not justifiably be held guilty for every offence committed by the principal culprit (1978 CrLJ 1538; 1986 CrlJ 966).

In the case of an offence involving physical violence, it is essential, for the application of section 34, Penal Code that the person who instigates or aid the commission of crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture (Binode Pandey Vs. State, 1989 C. CrLR 25 (33) Cal).

In order to convict persons vicariously under section 34 or section 149, Penal code, it is not necessary to prove that each and every one of them had indulged in overt acts. There must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly (Rambilas Singh and others Vs. State of Bihar 1989 (2) Crimes 368 SC).

By merely pressing down the victim before the other two accused persons assaulted him, it cannot be held that appellant had shared the common intention of causing the death of the victim (Ram Asrey vs. State of U.P. 1993 (2) Crimes 339 SC). Only accused giving fatal blow on head of deceased convicted under section 304, Part I - Other accused causing simple injuries not laible to be convicted under section 304 Part , when section 34 has not been applied (AIR 1992 SC 1629).

Where both accused were acting in contest and fired shots in furtherence of common intention and they had admitted their involvement in commission of murder, conviction of accused under section 302/34 Penal Code was propet (AIR 1992 SC 2100). In prosecution for the offence under section 302/34, Penal Code, the fact that the accused No. 4 also rushed towards the deceased with the sword drawn and but for the obstruction by P.W. 1 he would have inflicted injuries on the deceased, itself shows that he also shared the common intention. (M.A. Abdulla Kunhi and others. Vs. State of Kerala 1991 (1) Crimes 454 (SC)= AIR 1991 SC 452).

Fact of involvement of accused in incident and his giving barchi blow to grandson of deceased when he tried to go to rescue of deceased, established. Said fact itself is sufficient to convict accused under section 300 read with aid of section 34 Penal Code (AIR 1991 SC 1379). Trial Court acquitted all the co-accused but convicted one under section 302. Sole accused convicted for murder not proved to have caused the fatal injury. Conviction for substantive offence of murder can be sustained with the aid of section 34 Penal Code when involvement of other persons in the crime evident from direct testimony (AIR 1991 SC 1853; AIR 1991 SC 318 Foll).

Out of six accused, A2 was present on the night of the occurrence with a knife along with A1, who was also armed with a knife, and had shared the common intention with A1 of causing bodily injuries to the deceased which were sufficient in the ordinary course of nature to cuase the death of the deceased. Section 34 Penal Code is, therefore, clearly attracted to the case of A-2, even though he did not by himself cause any specific injury to the deceased (AIR 1993 SC 1899). Where each one of the appellants (accused) had caused injuries on the vital parts of the deceased by deadly weapon out of animosity in common against the deceased. Section 34 of Penal Code has to be invoked to convict both the appellants for murder of the deceased (Govindaraj and another Vs. State 1989 (3) Crimes 84 Mad).

Intention and common object are such things which even if not preplanned can be formed at the spur of moment. It is conduct of persons so acting from which it is to be inferred (1985 PCrLJ 2738). In a case of murder in the absence of a fiding

of common intention on the part of several accused persons. Conviction cannot be for anything more than what an accused did individually (PLD 1976 SC 303). None of them can be found to be guilty of murder without finding that he is the man who actually struck the fatal blows (AIR 1930 Sind 99). Where the deceased appeared on the scene unexpectedly, the accused could not possibly have a prearranged plan of murdering him therefore only the main accused who gave the fatal injury can be convicted of murder, the other accused cannot be so convicted (1969 PCrLJ 122). In Keramat Ali Vs. State of Assam AIR 1978 SC 1392 all the four accused participated in the assault on the deceased. It was also established that the four accused had been lying in ambush to pounce upon the deceased in order to assault him. All the four appellants had shared the common intention to kill the deceased. It was held that the High Court was right in convicting the accused under section 304/34 Penal Code.

Where there is no prior concert between the accused persons. Mere presence at the time of occurrence does not make a person liable (1988 PCrLJ 238). In such cases each accused is liable for the offence committed by him (1987 PCrLJ 1294). Where the accused did not share common intention to cause death. One of the accused suddenly caused a fatal injury, the other accused cannot be held equally liable for his act (1987 LN 870). In Jagdeo Singh Vs. State of Maharashtra (1981 CrLJ 166, 168 SC), the attacks on both the deceased and prosecution witnesses were part of the same transaction. That some assailants came in one truck and attacked the deceased and the other assailants came in another truck and attacked. Prosecution witness does not make any difference. It is a clear case where there was prior concert and planning by all the accused. Therefore the appellants have been rightly convicted under sections 147, 148, 302 read with section 34, section 302 read with section 149, section 307 read with section 34 and section 307 read with section 149.

Where the words used by the accused convey two different senses; just as the word 'maro' in Urdu means 'beat' and may also mean 'kill', it is unsafe to allow such slogans to be availed of to serve to provide the clue to the required intention. They are to be treated as as ordinary slogans as are generally raised in such cases without any special significance attached to them unless the circumstances positively warrant a contrary conclusion (PLD 1971 Kar 68). Where A and S went to a fair and there A saw the deceased and took out a pistol form his ajzak and killed him by firing a shot in his back, S only brandished his hatchet to ward off on lookers, and there was nothing to show that they had a common intention to commit the murder, and S may not have known that A was carrying a pistol. It was held that S could not be convicted under section 302. He was acquitted of that charge (PLD 1965 Kar 133).

Where the accused was grappling with the deceased and held him by his hair when another person came and stabbed him. It was held that the two accused acted independently of each other and therefore section 34 did not apply to the case (PLD 1955 Lah 356). In other words where there is a doubt as to whether any assistance at any stage of preparation for or accomplishment of the crime was afforded to or required by the accused actually guilty of killing the deceased, the co-accused cannot be held guilty and saddled with liability (1969 PCrLJ 893).

Where both the accused fought deceased and F inflicted fist and leg blows on his persons and then all of a sudden the accused F caught hold of the deceased and the accused K gave him a knife injury. It was held that like all other ingredients of the offence the burden of proving common intention also lies on the prosecution and not on the accused. It is no doubt correct that in cases where circumstances speak for themselves there will be not much difficulty in coming to the conclusion that the

several accused participating in a crime were acting under a preconceived plan. But as in this case common intention was not proved, conviction of one accused who did not give the fatal blow was altered to section 323, Penal Code (1971 PCrLJ 333). Where the evidence falls short of proving that M when he felled the deceased to the ground was aware of the presence of a knife with A and muchless that he would use the knife with fatal result. Common intention is not to be confused with same or similar intention. Therefore M at best could be held guilty for the offence under section 352, Penal Code (1983 SCMR 420).

Where the accused under sudden and grave provocation caused death by giving blows on his head with butt of gun and co-accused took out a pistol at the spur of the moment and fired at deceased. There was nothing on record to show that accused had knowledge that co-accused was carrying a pistol or that he would use it in the occurrence. Shooting by co-accused being his individual act, accused would not be held constructively liable under section 34. Conviction of co-accused under section 302/34, was altered to that under section 304, Part I, and that of accused from section 302/324 to section 335(PLD 1983 Pesh 37).

Even where the accused does not share the common intention of other accused to cause death he can be convicted of the offence of culpable homicide, if it is shown that he was responsible for any blow which caused the death (AIR 1955 Sau 156). Where it is found that each of the accused is individually guilty of murder, the court is competent to convict each one of them for murder under section 302, notwithstanding that the charge preferred against, them in respect of the murder, is one of the constructive liability, i.e. under section 302 read with section 34 or section 149, Penal Code (1970 DLC 663).Where a common intention of two or more persons to kill the deceased is established, the question as to who gave the fatal blow is wholly irrelevant and once the medical evidence shows that the injuries caused by one or the other of the accused was sufficient in the ordinary course of nature to cause death, that is sufficient to bring the case of the accused within the perview of section 302/34 Penal Code (State of Moharashtra Vs. Kalu Shivram, Jagtap, AIR 1980 SC 879 (880, 881).

Where two or more people band themselves together for the express purpose of taking a man's life, it is not necessary to prove which accused delivered the particular blow which proved fatal, to convict them of murder and to pass death sentence upon them, if the circumstances otherwise merit it (NLR 1978 Cr. 97; PLD 1977 SC 508; AIR 1955 SC 331). Where many accused attacked the deceased and it was known which of them had given which blow so that the court could decide who gave the fatal blow to the accused, the court held them all guilty of murder. Even the accused who had inflicted a minor injury was convicted under section 302/34 (1984 PCrLJ 2105). Where two accused engaged themselves in rendering the victims powerless whilst the other two accused fatally stabbed them; it was held that all the four accused had already decided to follow that course and that they were all actuated by a common intention to commit the crime and from that moment, at the least, the common intention could be inferred. All the accused were, therefore, held guilty of murder. However, the sentence of death of the two accused who did not actually cause any injury to the deceased was reduced to imprisonment for life (PLD 1971 Kar 817).

Even when death is caused by separate acts of two accused persons, they would both be guilty of murder if common intention to cause death is proved (AIR 1928 Mys 225). Thus if two persons fire at a particular individual and a shot hits him with the result that an offence is committed, then the case of both would come within the purview of section 34 provided, of course, there is common intention (PLD 1977 SC

446). Where as many as four injuries were inflicted on the deceased by knives and out of them, one was on the head and three were on the chest, it was held that the common intention of the assailants was to cause the death of the deceased and the accused could, therefore, have been convicted under section 302 read with section 34 (Ashok Kumar Vs. State of Punjab 1977 CrLJ 164 (166) SC).

To saddale accused with vicarious liability some sort of pre-arranged plan must be proved that criminal act was done in concert pursuant to the pre-arranged plan. Direct evidence though was not always expected yet cumulative effect of entire circumstances were to be seen and assessed in order to reach a conclusion that intention was there. Intention being a mental condition could be gathered from circumstances of each case (1987 PCrLJ 1689). Where accused had a strong motive to commit crime and had come prepared for that. Circumstantial evidence lent corroboration to prosecution version as set forth in first information report. accused shared common intention, being closely related to one another. Preconcert and arrangement was apparent from conduct of accused as they came together to village of complainant party at dead of night carrying lethal weapons. Inhuman manner in which accused acted lead to safe presumption that they intended to carry out unlawful design at all costs. Application of section 34, Penal Code therefore was justified in their case and each one of them was constructively liable for the acts of another (1987 PCrLJ 1958).

The inference of common intention can be drawn from the act or conduct of the accused or other relevant circumstances of the case (PLD 1983 Lah 639). When accused and his co-accused proceeded with their respective weapons to scene of occurrence in furtherance of the common intention, accused knew or had reasons to believe that his co-accused who was armed with chhuri, may cause a grievous and dangerous injury. The fact that accused did not restrain or prevent his co-accused from using the said weapon, supported the presumption that the shared liability with his co-accused. Both accused, were, therefore, equally liable for murder (1986 PCrLJ 168). Where accused attacked deceased with hatchets on non vital parts and did not wield weapons with vigour on vital parts. His behaviour and act of causing injuries to prosecution witnesses also showed that he had decidedly formed an intention to cause hurt and not beyond that, conduct of accused viewed along with the resultant effect was not culpable under section 302/34, Penal Code (PLD 1983 Lah 639).

Where dying declaration was corroborated by eye witness account and evidence of motive had proved beyond reasonable doubt that accused attacked deceased and caused him injuries with common intention, conviction was upheld (1987 PCrLJ 440). Where accused was in posession of a rope at inception of attack on deceased. Rope was recovered by inviestigating officer from the spot where he found hands and neck of deceased tied to a tree. Medical evidence also showed that a rope was tied around neck of deceased. accused was brother in law of the co-accused. Accused cannot be completely exonerated of responsibility of sharing common intention with the other accused (1983 SCMR 938).

Where several accused persons attacked the deceased with a common intention and inflicted brutal injuries on him, they were presumed to have acted with the common intention of causing death and were convicted under section 302/34 (AIR 1962 Guj 214). Where upon seeing the deceased one of the accused said, "Here comes the murderer of our uncle" and immediately the deceased was surrounded by all the accused armed with deadly weapons of one form or another, and each of them used the weapon in his hand against the deceased, against the background of the animosity of the assailants towards the deceased their conduct in attacking him so mercilessly regardless of consequences could not be interpreted in

any other light than that they all acted with the common intention of causing his death or causing him such bodily injury as they knew to be likely to cause death (AIR 1952 Trav-Co 365).

Common intention can be formed in course of occurrence without prior conspiracy. Death of deceased due to knife injuries inflicted by other accused persons. accused appellant possessing only lathi had no intention initially to wield it. It was only when other relatives of decesed came to his rescue accused wielded lathi against them. Common intention can be imputed to accused in view of his subsequent conduct (1993 CrLJ 1383 SC). It is not inconceivable that where several persons belonging to a single party are already present at the spot, they might develop common intention or even common object at the spur of the moment and commit an illegal act in prosecution or furtherance thereof (PLD 1973 SC 351). Where therefore, the evidence was that the accused as well as the absconder fired at the deceased in quick succession; it was held that this showed unmistakably that they were acting in furtherance of their common intention to cause the death of the victim (1973 SCMR 69). Where although there was no premeditation yet the way a concerted attack was made on the deceased and the other injured persons clearly indicated that a common intention developed among the accused at the spur of the moment, or where a common intention to commit murders developed when altercation between the parties started and murder of one person was committed. Subsequently happenings including murders were the result of common intention of all the accused and community of intention existed between all culprits, which rendered all of them jointly responsible for causing murders (PLJ 1974 Cr.C 186; PLD 1981 Pesh 23).

Plan can develop on the spot but pre-concernted plan should precede the offence (AIR 1963 SC 1413; 1963 CrLJ 75; (1964) 1 SCR 673; (1963) 2 SCJ 718).To prove common intention it is not necessary to establish a preconcerted plan. It may develop on the spot (1969 UJ (SC) 411; 1969 SCD 859).

While one gave an axe blow in the abdomen and the other an axe blow on the left arm after emerging from darkness, the facts disclosed common intention (1977 CrLJ 238 SC). Accused, husband and in-laws of deceased were unhappy over dowry. Illtreatment and torture to deceased before and on fateful day was proved. None of accused cane to help deceased while she was on fire. All accused absconded after incident. Presence of eye witnesses natural. No reason for them to falsely implicate accused. Their evidence cannot be doubtful for want of their name in FIR. Accused held liable to be convicted under section 300 (AIR 1992 SC 840).

In this case, there is nothing to indicate that the appellants had arrived at the scene with a pre-planned common intention of causing the death of deceased, and the manner of assault as deposed to by the prosecution witnesses does not necessarily lead to the conclusion that all the four appellants had developed a common intention at the time of the occurrence. Giving of two lathi blows by the two appellants who were armed with lathis did not suffice to show the common intention of the other two appellants. But it is clear that each of the two appellants simultaneously gave a blow with great force on the head of deceased resulting in the fracture of his parietal and temporal bones. The facts unmistakebly show that when each of them gave a blow they developed and shared a common intention of causing such injury to him which in the ordinary course of nature was sufficient to cause his death. Their conviction under section 302 read with section 34 of the Penal Code can, therefore, be sustained but not of the other two (1976 CrLJ 201(203) SC= AIR 1976 SC 199). Where there was a long standing and deep rooted amimosity between parties due to claim over certain land.Witnesses gave general statment as to all

accused dragging deceased from compartment. No evidence as to accused other than one causing all injuries being armed with any weapon or assaulting deceased or exhorting accused causing injuries to attack deceased or fisting or kicking deceased. Evidence does not indicate that other accused shared common intention to commit murder (AIR 1992 SC 59).

Where the evidence on record of the case, established that apart from the accused named in the charge, there were at least one or more unidentified persons who participated in the criminal action against the deceased conjointly with A-7 and all of them participated in the fatal assault on the deceased in the manner alleged by the prosecution, accused A-7 was convicted under section 302 read wth section 34 of the Code (1976 CrLJ 1723(1731) SC =AIR 1976 SC 3207).

Out of six accused, A2 was present on the night of the occurrence with a knife along with A-1, who was also armed with a knife, and had shared the common intention with A-1 of causing bodily injuries to the deceased which were sufficient in the ordinary course of nature to cause the death of the deceased. Section 34 Penal code is, therefore, clearly attracted to the case of A-2, even though he did not by himself cause any specific injury to the deceased (1993 CrLJ 2246 SC). Deceased beaten mercilessly by three assailants and hit only on vital part of body i.e. head. In view of multiple injuries and fact that deceased died on spot, accused liable to be convicted under section 302 read with section 34 (1993 CrLJ 533 Raj=1977 CrLR (MP 112).

One of the accused armed with khukhri and the others by lathis dealt blows on the deceased whose ante morten disclosed khukhri and lathi injuries. It was held that all the accused had common intention to cuase death. Conviction under section 302 Penal Code was altered to one under section 302/34, Penal Code (1977 CrLR (SC) 326).

In the instant case, the accused persons were prosecuted under section 302 read with section 34, Penal Code. The evidence of the prosecution was found to be quite acceptable and pointed to the appellants having dealt blows with the weapons attributed to them on the deceased. On account, however, of the doubt which arose by reason of the lathi blow, attributed to one appellant, not being supported by the medical testimony, it was considered appropriate to give the benefit of doubt to the said appellant, though his presence at the scene of occurrence was not disbelieved. held that there can be no doubt that when the appellants attacked the deceased in the manner they did and caused injuries which were sufficient in the ordinary course of nature to cause death, they did so with the common intention of killing; the offence which they committed was one of murder, in pursuance of their common intention to commit the said offence, an offence punishable under section 302 read with section 34 Penal code (1977 CrLJ 1349(1350, 1353) Gau).

The accused caught hold of the deceased as soon as he knocked at the khirki of his house, dragged him to the bamboo grove and dealt as many as 11 blows including 3 fatal blows of great intensity. Another accused "N" was standing outside the house of the deceased with a pistol in his hand and held out threats in order to prevent the eye-witnesses from coming to the help of their brother. The assailants shouted that they had killed the "police agent" and accused"N" fired one shot before they left the place of occurrence. It was held that the assailants, including the accused, committed the murder of deceased in pursuance of a pre-concerted plan in a cold blooded manner (AIR 1978 SC 383; 1978 UJ (SC) 123).

The gist of the offences charged against the appellants and the other co-accused was that they formed an unlawful assembly with the common object of causing the death of the deceased and assaulting his companion and that in

prosecution of such common object they intentionally caused the death of deceased and two of the other co-accused voluntarily caused simple hurt to companion of the deceased. The High Court took the view that the offence was one under section 302 read with section 34, since the injuries caused by the appellants were sufficient in the ordinary course of nature to cause death and the appellants did intend to cause these injuries. It was held that the High Court was right in such view (1976 CrLJ 1888, 1889 SC; AIR 1976 SC 2455).

Where it is clearly established by the eivdence of the witness that the accused assaulted the deceased in pursuance of their common intention to cause his death and accused No. 1 who was armed with a kulbari inflicted serious injuries on the deceased it was held that the other two accused shared common intention with accused No. 1 to cause the death of the deceased. Each of the accused must, therefore, be held to be guilty of the offence under section 302 read with section 34 of the Penal Code (1977 CrLJ 664, 665 SC). In Mohindr Sing Vs. State of Delhi (AIR 1975 SC 1506, 1507), the evidence established that Umed Singh hit Daya Nand with a brick and also with the back side of an axe which he carried as a reuslt of which Deya Nand's skull cracked and he died, though there were other injuries also. The injuries caused by Mohinder Singh were not such as to cause the death of daya Nand.

It was held that while Umed Singh had been rightly convicted of the offence of the murder of Daya Nand, Mohinder Singh could not be so convicted. While the knowledge that the injury he was causing would in the ordinary course of nature lead to Daya Nand's death might be attributed to Umed Singh, it was not possible to attribute such knowlede to Mohinder Singh. It was not, therefore, possible to ascribe to Mohinder Singh a common intention along with Umed Singh to daya Nand such injury as would lead in the ordinary course of nature to his death. Therefore, Mohinder Singh could not be convicted of murder of Daya Nand under section 302, Penal Code, read with section 34. The result would be that he could be convicted only of causing hurt or at the most of grievous hurt to Daya Nand.

Where allegation in FIR against accused was that he caught hold of hands of deceased and said that he would be set right, and there was no evidence to show that he did so far the purpose of aiding the other person in assaulting deceased, it was held that accused's conviction under section 302 read with section 34 could not be sustained (AIR 1978 SC 34). Where the evidence showed that the accused aided other accused who were armed with deadly weapons by giving blows to deceased, it was held that he shared common intention to cause death of deceased (AIR 1978 SC 1529).

The charge specifically mentioned that the murder of C was committed by the three accused. It did not mention that any other persons, known or unknown, were concerned in the commission of the offence. It was held that in view of the unambiguous evidence tendered by the prosecution is the Sessions Court, no prejudice could be said to have been caused to the accused by reason of his conviction under section 302 read with section 34, even though the other two accused specifically named in the charge had been acquitted (1978 CrLJ (SC) 43). When it is satisfactorily proved and established that the murder was committed by an unknown associate of the accused in furtherance of their common intention to murder the deceased, even one of them can reasonably be convicted for an offence punishable under section 302 read with secton 34 Pneal Code even though his associates are acquitted because their identity could not be fully and firmly established (Ramesh Dhobi and others Vs. State of Bihar 1992 (2) Crimes 751).

Where, out of the three accused, two were acquitted of offence of murder under section 302 read with section 34 and the state had not filed any appeal against

them, it was held that in the absence of proof of the particular act of the accused which caused death could not be convicted for murder (1974 CrLJ (SC) 186).

Even though there might be no charge under section 34, it is possible to convict the accused with the aid of section 34. This does not mean that the Court should not indicate in the charge that section 34 would be used against the accused. (1955 CrLJ 550; 1981 CrLR (Raj) 393).

The Courts below have carefully scanned the evidence. All that is said is that Mohan Singh, appellant No. 2 merely caught hold of Mahipal Singh and that he would be set right. There is no allegation whatsoever that when appellant No. 1 opened the banks assault on the deceased, Mohan Singh in any way aided or abetted the first appellant. Thus, there is no reliable evidence to show the participation of appellant Mohan Singh in the assault on the deceased and in these circumsances, therefore, section 34 would have no application so far as appellant No. 2 is concerned and he is acquitted of the charge under section 302/34, Penal Code, for having aided the appellant No. 1 in causing the death of the deceased (AIR 1978 SC 34, (35).

If the broad circumstances of the case go to show that the common intention of the accused was to cause grievous injury to the victim and the prosecution evidence does not indicate as to which one of the accused inflicted the fatal blow on the head of the deceased, none of the accused can be held to be personally liable for the fatal injury and the Court has to alter the conviction of each of the accused from under section 34, Penal Code (AIR 1972 SC 2056, 2058). Where the charge against the accused was under section 302 read with section 149 and therefore, his conviction under section 302 read with section 34 was submitted to be illegal, the Supreme Court held that the findings of the Lower Court clearly show that the appellant had the common intention. The facts proved and the evidence adduced would have been the same if the appellant had been charged under section 302 read with section 34 and that there was no illegality in convicting him under section 302 read with section 34 (AIR 1973 SC 2221, (2223,2224); 1973 CrLJ 1409).

Omission to mention section 34 in the charge is not by itself fatal, if otherwise the court can come to the conclusion that the accused had noticed that they would be laible under section 34 also for after all section 34 is merely an explanatory provision in the code, and does not create any specific offence itself (1956 CrLJ 550; 1990 BLD 309; AIR 1956 SC 171; 1956 CrLJ 338).

Where the two accused persons were armed with sticks, participated equally in the actual assault on the deceased having come together and having gone together there was no room for doubt about the common intention of both the accused to cause the murder of the deceased. The accused were held guilty within the purivew of section 302/34 (AIR 1980 SC 879).

Deceased was raped by more than one persons and then thrown into the well. There was no evidence to indicate complicity of appellant in the actual act of murder. Therefore the appellant cannot be convicted on mere speculation. Fact that the appellant was party to the dragging of the deceased is not sufficient to presume that he committed the murder (1982 CrLJ 386; AIR 1982 SC 70). Where a common intention of two or more persons to kill the deceased was established, the question as to who gave the fatal blow was wholly irrelvant and once the medical evidence showed that the injuries caused by one or the other of the accused was sufficient in the ordinary course of nature to cause death, that was sufficient to bring the case of the accused within the purview of section 302/34, Penal Code (AIR 1980 SC 879).

The three accused persons came together. One of them was armed with a gun, the other two were armed with iron rods. One of them challenged the decdased. Th·

person who was armed with gun opened fire and, after the deceased fell down, the other two accused were not content but went forward to inflict injuries on the deceased person with the iron rods in their hands. Thereafter all of them went away together. It was held that the irresistable inference from these circumstances was that the three of them were actuated by the common intention to cause the death of the deceased, merely because the injuries inflicted by Darshan Singh and Gurmal Singh were not serious injuries, it could not be said that they were not actuated by the common intention to cause the death of the deceased (1978 CrLR (SC) 660 (666).

There is no rule of law which lays down that in every case in which knife blows are inflicted by only one of the accused, the other accused cannot be convicted for having committed the murder with the aid of section 34, Penal code. The question of intention does present some difficulty. Ordinarily; intention is a matter within the personal knowledge of the person whose intention is in question. But according to the principles governing criminal trials, the burden of proving in the sense of establishing a case is always on the prosecution. Intention like any other fact may be proved either by direct or by circumstantial evidence (1982 CrLJ 982 (986-87) All). Where two accused are tried for offences under section 302 read with section 34 and one of them who caused the fatal injuries according to the evidence has been acquitted of the offence of murder, there is no further scope for invoking against the second accused any constructive liability under section 34. To convict the second accused under section 302, there should be evidence that he caused the fatal injuries (AIR 1973 SC 2337 (2340).

Eye witnesses did not clearly state that the accused continued to hold the deceased till the assault was over. All that appeared in the evidence was that the accused caught hold of the deceased and the latter scuffled to get himself released. Immediately thereafter the co-accused, took out a knife and started assaulting the deceased. It was held that from the mere fact that the accused caught hold of the deceased and scuffled with him, while the co-accused took out a knife and commenced the assault, it could not be inferred beyond reasonable doubt, that he shared the intention of co-accused to murder the deceased. at the most, he was vicariously liable for an offence under section 326 read with section 34, Penal code (AIR 1982 SC 1228, (1229); 1982 CrLJ 697 (685) (SC)=(1982 SCC 486 (487)

Where the findings were that the appellants were the aggressors and had opened the assault on the deceased, that there was no common intention on the part of all the accused to cause the death of the deceased or to cause grievous injuries to him which was an individual act of the appellant Ram Sajiwan, it was held that so far as the other appellants were concerned, as their object was merely to assert a supposed or *bona fide* claim of right, it could not be said that they had any common intention to cause grievous hurt (AIR 1977 SC 619 (603, 625).

3. **Conviction under section 302 read with section 149**.- As section 149 stands, the ingredients of the offence have to be made out by the prosecution and not by the accused. It has to be proved by the prosecution that at the time fo the commission of an offence the accused was a member of the assembly. It is true that if once the prosecution has led evidence that the accused was present at the time of the commission of the offence as a member of the mob, it would be for the accused, if he so wishes, to give evidence to rebut the prosecution case. But unless there is some evidence to show that the accused was a member of the unlawful assembly at the time of the commission of the offence, no burden lies upon the defence to prove his innocence. It is for the prosecution to prove every link in the chain of the guilt of the accused beyond any reasonable doubt (PLD 1976 SC 1). Where the prosecution

was not able to prove its case against the accused beyond a shadow of doubt; all of them were acquitted (NLR 1981 AC 227; PLD 1976 SC 1; 1958 CrLJ 72).

In Mahadeo Ganpat Badawans Vs. Stat of Maharashtra (AIR 1977 SC 1756 (1760), the appellants committed the offence in prosecution of the common object of their unlawful assembly or, at any rate, they knew that offence was likely to be committed in prosecution of their common object, for there can be no doubt that they knew that in the prosecution of their common object it was likely that deceased might be so injured as to die as a result of the injuries which had been inflicted on him. They were therefore all guilty of committing the offence under section 302/149 of the Penal Code, and the High court rightly held them guilty of that offence.

Once the court finds that an offence, such as culpable homicide in this case, has been committed by any member of an unlawful assembly in prosecution of the common object of the unlawful assembly, then whether the principal offender has been convicted or not all other members may be constructively liable and convicted for the offence provided they had the intention and knowledge as required in section 149. The only thing to be seen is whether their presence as members of an unlawful assembly at the time of the commission of the offence has been provded (Abdus Samad Vs. State (1992) 44 DLR (AD) (236).

If the injuries that are sufficient in the ordinary course of nature to cause death are traced to particular accused, he will be guilty of an offence under section 302 without the aid of section 149. When the injuries caused are cumulatively sufficient to cause death, it is necessary before holding each of the accused guilty under section 302 read with section 149 to find that the common object of the unlawful assembly was to cause death or that the members of the unlawful assembly knew it to be likely that as offence under section 302, Penal Code, would be committed in prosecution of the common object (AIR 1978 SC 1525 (1527); 1978 CrLJ 1598).

It is settled law that in case of a charge under section 302 read with section 149, Penal Code, the prosecution is not obliged to prove which specific over act was played by which of the accused - appellants. It is sufficient, if it shows that as a participant of the unlawful assembly a particular accused was sharing the common object of the same (1982 CrLJ 2112, (2118) Gau). The question whether a particular member of the unlawful assembly continued to be its member up to the time of the commission of the offence is esentially a question of fact and has to be approached on the same lines as all other questions of facts are approached. In other words, in order to give a finding on that point, all evidence on the record, direct, indirect or circumstantial has to be carefully weighed and appraised and all this has to be done in the light of the normal course of human conduct keeping in view the rules of presumption, if any, applicable to the facts of the case (AIR 1958 Pat 12).

A Court is not to presume that any and every person who is proved to have been present in a riotous mob at any time or to have joined it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated resistance to the organised forces of law and order, that is, the police, or have made up his mind before the riot began to oppose such resistance and overcome such forces as stood in the way of the mob accomplishing its common object (1971 PCrLJ 1230). Before a person can be held guilty of an offence vicariously under section 149 of the Penal Code, there must be some proximate connection between the offence committed and the common object perceived by the assembly (Martin vs. State of Kerala 1991 (3) Crimes 121 Ker). Where common intention was to encroach upon the land of the deceased in furtherance of which the

accused party caused death of 4 persons and seriously injured the other. Held, the accused party being armed with deadly weapons had used guns and spears and therefore their conviction under section 302/149, Penal Code was correct (1983 SC Cr. R. 41 (SC).

Where only some members of the unlawful assembly are armed, unarmed persons cannot be fixed with the intention to kill unless some overt act is proved against them. Only the accused taking part in the commission of murder may be convicted (1968 PCrLJ 645). Where the convicts were found to have not shared the intention to murder any of the members of the complainant party and never acted in prosecution of any such common object they were acquitted (NLR 1981 Cr. 428). Where the accused was present at the riot and he was not only the brother of the principle offender but a sympathizer with the attacking party, but the evidence of actual participation by the use of lathi on the part of the accused, was vague and general, and the evidence showed that the accused was actually kicking the principle offender, saying 'let him off, he will die'. It was held that the accused was clearly excluded from the general liability which may otherwise be imposed upon him by the application of section 149 (AIR 1926 All 340).

Where case of co-accused was distinguishable from accused who had given sota blows on the head of deceased. Conviction of co-accused under section 302/148/149 was altered to one under section 307, and their sentence of imprisonemnt for life was reduced to imprisonment already undergone by them (1987 PCrLJ 1134). But where all the accused persons had pounced upon the deceased and it was no wonder that although some of them had no weapon yet they may have surrounded the deceased in order to facilitate the attack on him by the persons who were armed with weapons. They were members of an unlawful assembly and when anything was done in prosecution of the common object of the assembly all were equally guilty whether they actually assaulted or stood by to render any assistance that might be needed (1971 PCrLJ 297). Accused were armed with deadly weapon for abducting a girl and in course of carrying out their common object one of the accused's made a shot and killed the person. Held, all of the accused persons are guilty of the charge under section 302/149 of the Penal Code (22 DLR (SC) 127).

When the Legislature intentionally avoided the use of the phrase, 'had reason to believer' in favour of the selected expression 'knew to be likely to be committed, it wanted to emphasise a greater amount of cognition and more positive perception on the part of the accused than mere supposition. It would, therefore, not be possible to assume that whenever there is only a possibility one way or the other that the accused should have assumed the likelihood of a certain event then the second part of section 149, could apply to him. But he must be shown to have known through cogent facts and reasoning that the offence charged was likely to be committed. As for the treatment of each individual case it is reiterated that the question of knowledge is one of fact which should be decided only after full application of mind to all the relevant attending circumstances. No general principle can be laid down that if an unlawful assembly was armed with deadly weapons all members composing it had the knowledge that it would commit murder (1987 SCMR 1015).

The question must be decided on facts of each case. In one case it was held that where the accused formed an unlawful assembly, the common object of which was to eject the complainant party by force from the disputed land. For this purpose they brought dangerous weapons like hatchets, and lathis. The minimum that can be presumed in such a case is that they had at least the knowledge that in these circumstances a murder was likely to be committed in the process. They would

accordingly be fully liable for murder by virtue of the second part of section 149 Penal Code (1971 PCrLJ 229).

Where there was reliable evidence as to the three persons who caused specific fatal injuries, it was not a case where benefit of the doubt should have been extended to all the members of the accused party on the ground that the actual assailants could not be differentiated from those who might have been falsely implicated. But the court gave the accused involved in general beating of the deceased benefit of doubt and acquitted them (1987 SCMR 1324).

Where accused held a dang but did not inflict any injury to any of deceased or witness. There was no instigation to co-accused by him. There were reasons to doubt his sharing of common object of unlawfully asembly, as matter of abundant caution, benefit of doubt should be given to him (1986 PCrLJ 2661). But mere uncertainty as to which of the two appellants must have used his weapon so far as effective shots are concerned was no ground for not placing vicarious liability on all of them (1984 SCMR 276).

Where there was an earlier incident between the parties and after a short while both sides got prepared to fight with each other, it was a free fight. The case of each accused will have to be considered separately in the light of evidence against him (1983 PCrLJ 1771). If a fight has taken place between two armed mobs, but there is no evidence as to what actually occurred, a mere suspicion that the accused were present, cannot form the basis for conviction (AIR 1940 Pat 365). Moreover in case of free fight if it is not known who caused the fatal injury, no one can be convicted for murder because principle of constructive liability does not apply to such cases (1979 SCMR 123). Where, however, the person who caused the fatal blow is identified, he is liable to conviction under section 302 whereas other accused are all individually liable for the offences committed by them (1983 PCrLJ 144). If the injuries that are sufficient in the ordinary course of nature to cause death are traced to a particular accused, he will be guilty of an offence under section 302 with the aid of section 149. When the injuries caused are cumulatively sufficient to cause death, it is necessary before holding each of the accused guilty under section 302 read with section 149 to find that the common object of unlawful assembly was to cause death or that the members of the unlawful assembly knew it to be likely that an offence under section 302 Penal Code, would be committed in prosecution of the common object (Sarwan Singh Vs. State of Punjab, AIR 1978 SC 1525, (1527).

There is nothing unlawful on the part of five or more persons in congregating together for exercising a lawful right and resist opposition, if necessary, provided they do not exceed the limits of the right of private defence of their property or persons, and if some one or more of them exceed that right, unless the individuals can be identified, the mere presence of the accused at or near the spot is not sufficient to bring home to them guilt for hte acts of others who exceeded their rights (AIR 1927 Pat 27). It is necessary for the application of section 149 that the accused must be a member of the unlawful assembly at the time of the commission of an offence. Where two of the dacoits were arrested and subsequently a member of the gang fired a short and killed one of the pursuers; it was held that those arrested were not liable for murder as they were no more members of the gang when murder was committed (AIR 1915 Bom 247).

Five or more perons must be involved in the offence : Before section 149 can come into operation, there must be five or more culprits to constitute an unlawful assembly (AIR 1939 Lah 416). Where it is not proved that five persons took part int he assault, the accused cannot be held constructively guilty of murder under section

149 read with section 302 because section 149 only applies where there is an unlawful assembly (AIR 1925 Lah 532). It is however to be noted that where the participation of five or more persons in the commission of an offence is proved, even less than five may be convicted provided it is possible to conclude that though five persons were unquestionably at the place of offence the identity of one or more was in doubt (PLD 1967 SC 18).

Where however the accused are specified and some of them are acquitted and only less than four are convicted, section 149 does not apply (AIR 1939 Lah 416). But even that proposition is not of universal application, because there may be a case in which some of the accused are falsely included in place of the real culprits who in fact had not been identified. The court while acquitting those who in its opinion appear to have been so implicated may yet convict by the application of section 149 those found guilty provided that it be of the definite opinion that the number of the participants could not be less than five and that they formed an unlawful assembly (AIR 1951 Pepsu 152).

In inferring the common object of unlawful assembly, various factors depending upon the facts and circumstances of each case have to be taken into consideration. In the instant case, the accused were found to be armed with fire arms as well as other deadly weapons. They went in a body and participated in the occurrence. In such a situation even section 34 Penal Code, is attracted particularly having regard to the fact that four persons were killed and several others received injuries at the hands of the members of the unlawful assembly. The participation of each of these accused is established. Therefore all of them shared the common object and section 149 is squarly attracted. Accused who were members of unlawful assembly armed with fire arms can not get absolved on ground that they did not use them (AIR 1993 SC 229).

Where accused were armed with weapons and stated as members of unlawful assembly then it cannot be said that as no over act has been assigned to them and they being silent spectators and neither participating nor having any pre-planned meeting of mind so they deserve acquittal. All of them are still liable (Awwadheshwar Singh and others Vs. State of Bihar 1989 (2) Crimes 89 Pat). Where the accused persons exceeded the right of private defence, the charge under section 149, Penal Code, must fail and if one of the accused persons did not assault the deceased, he must be acquitted. Those who took part in the assault can be held responsible for their respective individual acts (Arjuna Pradhan Vs. State of Orissa, 1979 CrLJ 1073, (1074) (SC).

It is now settled law that whenever a Court convicts any person for an offence with the aid of section 149, Penal Code, a clear finding regarding common object of the unlawful assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unalwful. Before awarding a conviction under section 149, the essential ingredients of the same provision of law must be established. Section 149 creates specific offence and deals with the punishment of that offence. There must be a common object (1981 CrLJ 725; (1981) 2 SCJ 246).

All accused persons were member of an unlawful assembly. They were armed with deedly weapons. Each member of the mob knew that a murder can be committed. From evidence, it could therefore be held that they formed an unlawful assembly (AIR 1975 SC 55). Common object of accused was to abduct a girl. Accused were armed with deadly weapons. In course of carrying out their common object one of the accused fired a shot and killed a person. all the accused were held guilty of capital charge under section 302/149 Penal Code (Samman Vs. State 22 (1970) DLR

(SC) 127). Accused, if charge dunder section 302/149, mayd be convicted under section 302/34. The liability under these two distinct heads of offences are almost similar involivng constructing liability. The line of demarcation in these two sections is thread-bare very thin and almist identical overlapping the distinctive features of these two sections (Sawai @ Md. Hussain Vs. The State (1991) 11 BLD 495).

If the injuries that are sufficient in the ordinary course of nature to cause death are treaced to a particular accused, he will be guilty of an offence under section 302 without the aid of section 149. When the injuries caused are cumulatively sufficient to cause death, it is necessary before holding each of the accused guilty under section 302 read with section 149 to find that the common object of the unlawful assembly was to cause death or that the members of the unalwful assembly know it to be liekly that an offence under section 302, Penal Code would be committed in prosecution of the common object. Where there was an unexpected quarrel between the members of the same family over a dispute as to water rights, it was held that it was not possible to hold that offence under section 302 read with section 149 was made out (AIR 1978 SC 1525).

The two appellants were charged and convicted along with five others of having constituted an unlawful assembly and committed murder (section 302 read with section 149). But in the appeal before the High Court the five accused were given benefit of doubt and acquitted. In an appeal before the Supreme Court it was contended that the said five accused having been acquitted, and in the absence of a charge that five other unknown persons constituted an unlawful assembly, the two appellants could not be held members of the unalwful assembly which had the common object. It was held that after reviewing the evidence and weighing the opinion embodied in the judgment of the High Court that there was no scope left for introducing into the case, the theory of the benefit of doubt, that the five accused were wrongly acquitted and that though their acquittal stood that circumstance could not affect the conviction of the two appellants under section 302 read with section 149 (1954 CrLJ 1668; AIR 1954 SC 648).

Where a number of persons go armed with deadly weapons to attack a person or a party, it may be assumed as a matter of common sense that their common intention is at least to cause grievous hurt. If in the course of the commission of that offence, death is caused, the persons so attacking will be guilty of an offence under section 302 read with section 149. Conviction undr section 304 or section 323 read with section 149 is erroneous (1952 CrLJ 738= AIR 1951 All 365; 1977 CrLR (SC) 303).

Where the High Court in appeal acquitted all accused but one of the offence under section 302 read with section 149 and section 147 but there was no finding by the High Court that after the acquittal of those accused the unlawful assembly consisted of five persons or more known or unknown identified or unidentified, the provisions of sections 149 and 147 could not be invoked for convicting the sole accused. His conviction would be illegal in absence of any individual act assigned to him (AIR 1978 SC 1233).

When the charge is laid for an offence like murder with the aid of section 149, offences under section 143 and 147 must always be present but the other two charges need not be framed separately unless it is sought to secure a conviction under them. It is thus that section 143 is not used when the charge is under section 147 or section 148, and section 147 is not used when the charge is under section 148. When the charge is under section 149 read with an offence under Penal Code. Section 147 may be dispensed with. For the validity of the conviction under section

302/149, Penal Code, it is not obligatory that a charge under section 147 or section 148 should have been framed and a conviction under those sections recorded (1966 CrLJ 197; (1966) 1 SCJ 17=(1966) 1 SCR 18= AIR 1966 SC 302).

Even if the accused were originally members of an unlawful assembly with the common object of only beating the deceased, having come forward with deadly weapons, if the members of the assembly, knew that by using those weapons on the deceased death would be caused, they would be all guilty under section 302 read with section 149, Penal Code. Section 149, Penal Code constitute *per se* a substantive offence although the punishment is under the section under which it is being committed by the principal offender in the unlawful assembly, known or unknown (1975 1 SCJ 149; AIR 1974 SC 1564; (1974) 3 SCR 891; 1974 CrLJ 1029; 1974 SCC (Cri) 604).

If the finding on evidence is that the injuries on the deceased were cumulatively sufficient to cause, death, it will be necessary to hold each of the accused guilty under section 302, read with section 149 of the Penal Code to find that the common object of the unlawful assembly was to cause death or that the members of the unalwful assembly knew it to be likely that an offence under section 302 of the Penal Code would be committed in prosecution of the common object (Tejaram Vs State 1989 (3) Crimes 473 (477) MP). Where only one member of the unlawful assembly supplied bullet to another member who fired the fatal shot and none of the rest took part in the assault, it was held that only that member who supplied the bullet could be convicted under section 302 read with section 149. However, as the assembly had gone armed to dispossess the party of the deceased, they were guilty under section 325 (AIR 1979 SC 1504).

From the evidence of eye-witnesses it was clear that the accused were undoubtedly active members of the mob which caused the death of two persons, at any rate, giving the maximum allowance for all the infirmities, if any, contained in the evidence of some of the eye-witnesses the fact that the accused were members of the unlawful assembly and were animated by the common object to murder the two deceased and injure others cannot be disputed. The manner in which the witnesses proceeded to the house of the deceased, which was almost adjacent to the house of lady witnesses, showed that the said accused were armed with deadly weapons which were actually used by all the accused in consequence where of some witnesses were injured and two persons were killed. From those proved facts the irresistible infernece that can be drawn was that whatever, may happen to the charges with respect to individual assault the charge under section 302/149, Penal Code was unassailable (AIR 1983 SC 839; 1983 CrLJ 1112).

In absence of any specific overt act attributed to accused that they as member of an unlawful assembly threw victims into fire on that they were armed, they cannot said to have had a common object to commit murder when two bodies were found charred in burnt houses (Mukteshwar Rai and others Vs. State of Bihar 1991(3) Crimes 444 SC). When there is a genral allegation against a large number of persons, the court hestitates to convict all of them on the theory of constructive liability on vague evidence (Sherey and others Vs. State of U.P. 1991 (3) Crimes 447 (SC).

4. **Omission to mention section 34 or section 149 - effect of**.- Where, though section 34 was not added to section 302 in the charge, the accused had clear notice that they were being charged with the offence of committing murder in pursuance of their common intention to put an end to the life of the deceased, the omission to mention section 34 in the charge had only an academic significance, and had not in any way misled the accused (Rawalpenta Venkalu Vs. State of Hyderabad, AIR 1956

SC 171 (174); 1956 CrLJ 338). Omission to mention section 34 in the charge is not by itself fatal, if otherwise the court can come to the conclusion that the accused had noticed that they would be liable under section 34 also for after all section 34 is merely an explanatory provision in the Code, and does not create any specific offence itself (1956 CrLJ 550; 1990 BLD 309; AIR 1956 SC 171=1956 CrLJ 338).

In Kasim Khan Vs. State of U.P. (AIR 1956 SC 400 (404); 1956 SCR 191; 1956 SCJ 437), the appellant was convicted of the offences of murder and robbery for which alone a chare was framed and there was no mention of these offences having been committed in furtherance of a common intention. the High court, however, found that the appellant along with two others committed these offences, and they shared in the goods robbed. The Supreme Court held that on this finding even if the co-accused were acquitted, the appellant could be convicted by the application of section 34.

The charge in the present case did not mention that the appellants had knowledge that death was likely to be caused in prosecution of the common object. It was contended that the charge was illegal and vitiated the trial. Held, that any omission in a charge was not an illegality but was only an irregularly and was a curable defect, especially in view of the fact that the appellants were defended by counsel in the trial, and were in no way prejudiced by not mentioning in the charge that they knew that death would be a likely result of the prosecution of the common object of the assembly (Brandaban Swain Vs. State, AIR 1957 Ori. 117 (120); AIR 1956 SC 116).

5. **Charge under section 302/149, if recourse can be had to section 302/34 Penal Code.**- Accused, if charged under section 302/149, may be convicted under section 302/34. The liability under these two distinct heads of offences are almost similar involving constructive liablity (Sawaj @ Md. Hussain Vs. State 1991 BLD 495=(1969) 41 DLR 373). Conviction of the accused who were tried for charge under sections 32/149, Penal Code can be converted into one under sections 302/34 of the Code, if the facts proved and the evidence established the common intention of the accused to murder the deceased (Kuppuraj and others Vs. Union Territory of Pondichery 1988 (3) Crimes 387 Mad).

Accused if charged under sectons 302/149 P.C. may be convicted under sections 302/34. The liability under these two distinct heads of offences are almost similar involving constructive liability. It is to be noticed that under section 149 the elements of constructive liability consist of common object and participation in the unlawful assembly whereas under section 34 the elements are common intention and participation in the crime. Common intention or object in both the sections are common as well as joining the unlawful assembly and of joining or participation in the crime are the elements in both the sections constituting constructive liability. The line of demarcation in these two sections is thread bare very thin and almost identical overlapping the distinctive features of these two sections. Therefore, the question of prejudice can hardly be of any importance as accused while facing trial more concentrate their attentions on the broad and substantive features of the offence than on the thread bare line or demarcation of the distinction between the charge. Moreover, the facts that Sujan and Khurshid and other accused armed with weapons trespassed into Sona Mia's land with the common object of taking forcible possession which of failure, they being inspired with common intention, committed the murder of Sona Mia. therefore, under section 237 applying section 236, Cr.P.C. Sujan and Khurshed must be convicted under section 302/34 as prosectuion witnesses have cogently proved the complicity of these two accused in the crime beyond all shadow of doubt and the order of conviction may be altered from the one

under section 302/49 to that under section 302/34 against these two accused appellants (Shawai @ Md. Hussain Vs. State (1989) 41 DLR 373=1991 BLD 495).

Conviction under section 149 can be substituted by section 34 keeping in view the facts of the case (Lachman Singh Vs the state, AIR 1952 SC 167; Karnail Singh Vs. State of Punjab AIR 1954 SC 204). Where there was no charge under section 302 read with section 34 of the Penal Code but the facts of the case were such that the accused could have been charged alternatively either under section 302 read with section 149 or under section 302 read with section 34 and as a result of acquittal of one accused, conviction of the remaining accused was altered from section 302 read with section 149 to section 302 read with section 34 of the Penal Code. In this case according to prosecution story all the accused came out of the house and attakced the victim, two of the accused were armed with spears whereas others were armed with lathis. In the circumstances of the case no prejudice was likely to be caused to the accused whose appeal was being dismissed (Baital Singh vs. State of U.P. AIR 1990 SC 1983).

In Sasi Vs. State of Kerala appellants along with seven others were charge-sheeted for offence punishable under sections 143, 147, 148, 302, 341 and 201 read with section 149. Accused 4 to 7 were acquitted of all offences. Accused 1 to 3 were convicted under section 302 read with section 34. Court held that the mere omission to frame charge under section 34. Penal Codes, did not cause any prejudiced to the appellants in the circumstances of the case (1990) (1) Crimes 113 (Ker); Srikantha Vs. State of Mysore, AIR 1958 SC 670 Relied on)

. Both sections 149 and 34, Penal Code, deal with a combination of persons who become liable to be punished as sharers in the commission of offence. The non-applicability of section 149 is no bar in convicting accused/apellants if the evidence discloses commission of offence in furtherence of common inention of accused persons.Where four out of seven accused were acquitted remaining three can not be convicted applying section 149 of the Penal Code. Manner of attack as disclosed in the instant case by the eye witnesses and number and nature of injuries on the body of deceased appellants made murderous attack on deceased and acted in furtherance of common intention of murdering the deceased. Conviction of appellants converted to one under secton 302 read with section 34 (Nethala Pothuraja Vs. State of AP 1991 (3) Crimes 418 (SC).

It is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. If the common object which is the subject matter of the charge under section 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not, therfore, to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same as if the charge were under section 34, then the failure to charge the accused under section 34 could not result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be formal matter (AIR 1925 PC 1 ; 26 CrLJ 197; AIR 1954 SC 204).

In Jahir Singh and another Vs. State of Punjab (AIR 1968 SC 43), six persons inccluding the appellants were tried for offences under sections 148, 302 read with section 149 of the Penal Code in connection with the murder of one Turlok Singh. There was mistake in the identity of three accused and benefit of doubt was given to another accused. The finding was that the appellants participated in the offence with four other unknown culprits and the material on records showed that murder was committed by six persons including two appellants in furtherance of the common intention of all. The Supreme Court said :

"The charge against the six accused including the two appellants was that they were members of an unlawful assembly whose common object was to commit the murder of Tarlok Singh deceased and that they in prosecution of this common object committed the murder. The materials on the record show clearly that the murder was committed by six culprits including the two appellants in furtherance of the common intention of all. In the circumstances, though the appellants were charged of an offence under sections 302/149. No prejudice was caused to the appellants by the alteration of the charge from an offence under section 302/149 to one under sections 302/34."

In the above decision the Supreme Court further held that even if it was not known which particular persons or person gave the fatal blow, once it was found,that the accused shared a common intention section 34 of the Penal Code is at once attracted (Sasi Vs. State of Kerala, 1990 (1) 121 Ker).

Though section 149 read with section 302 constitutes a separate offence and is different from the substantive offence under section 302 yet the constructive liability under section 302/149 may not in all circumstances be different to that which comes under section 302/34. In other words, the constructive liability udner section 302/149 and that under section 302/34 are to a certain extent overlapping. Under section 34 the two elements that constitute the crime are the common intention and the participation in the crime, while those in the case under section 149 are the common object and the participation in the unlawful assembly. Therefore, in cases where the common object becomes equivalent to the common intention and where participation in the assembly is coupled with the participation in the crime then the two elements of both the constructive liabilities become the same. In such cases, therefore, no separate charge need be framed for each of them as laid down under section 233, Criminal Procedure Code (section 218 of the 1973 Code) and the conviction of the accused may be altered from one under section 302/149 to that under section 302/34 without there being a charge for the latter as provided under sections 236 and 237 of the Code of criminal Procedure (Rahm Nabaf 1957 CrLJ 216; Ram Tahal 1972 CrLJ 227SC; Harihar Paik 1985 CrLJ 432 Ori).

In B.N. Srikantaiah Vs. state of Mysore (AIR 1958 SC 670, the Supreme Court said :

"The omission to mention section 34 of the Penal code in the charge cannot affect the case unless prejudice in shown to have resulted in consequence thereof. The charge was that the appellants and others were members of an unlawful assembly, the common object of which was to murder the deceased. Although there is a difference in common object and common intention, they both deal "with combination of persons who become punishable as sharers in an offence." and charge under section 149 of the Penal code is no impediment to a conviction by the application of section 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all."

Where there is only a charge under section 302, read with section 149 of he Penal Code, in the absence of a charge under section 302 read with section 34 of the Penal Code still some of the accused can be convicted under section 302 read with section 34 of the Penal Code (Kale Balaswamy Vs. State of Andhra Pradesh, 1981 CrLJ 1710 (1712) (A.P).; Karamat Ali Vs State of Assam AIR 1978 SC 1392.

Where there is a charge under section 302 read with section 149 and the charge under section 149 disappears because of the acquittal of some of the accused. a conviction under section 302 read with section 34 is good, even though there was no separate charge under section 302 read with section 34, provided the facts are

such that the accused could have been so charged alternatively either under section 302 read with section 149 or section 302 read with section 34 (Lachman Singh Vs. State, AIR 1952 SC 167(70); (1952) 2 CrLJ 100; 1952 SCJ 230).

Where murder was committed by six accused in furtherance of the common intention of all and they were charged of an offence under section 302 read with section, 149, it was held that they could be convicted under section 302 read with section 34, as no prejudice was caused by the alteration of the charge (AIR 1986 SC 43; 1986 SCC (Cri) 191=1986 CrLJ 1242 SC).

If the fact to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same if the charge were under section 34, then the failure to charge the accused under section 34 could not result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter; the reason is that the object under section 149 was also their intention under section 34 and on the facts of the case there was no difference between the object and the intention with which the offences were committed (Karnail Singh Vs. State of Punjab, AIR 1954 SC 204; 1954 SCJ 209).

In Surajpal Vs. State of U.P. (AIR 1955 SC 419 (422, 423), a number of accused were charged under section 307 read with section 149 and section 302 read with section 149, as it was found that there was no common object to kill, all the accused were acquitted under section 149. But the evidence disclosed that the appellant had himself made an attempt on the life of one man and had himself shot another dead. Therefore, the High court convicted him under sections 307 and 302 respectively though there was no separate charge udner either of those sections. Those convictions were challenged in the Supreme Court. The Supreme Court held that the omission to frame a charge was a serious lacuna but despite that the real question was whether the omission caused prejudice. On the facts, their Lordships reached the conclusion that prejudice was disclosed and hence ordered an acquittal (See also Nankchand Vs. State of Punjab, AIR 1955 SC 274, (276, 280); 1955 SCR 1201; 1955 SCJ 241).

Where the appellants submitted that in the absence of a charge under section 302 read with section 34 of the Penal Code, the three appellants cannot be convicted under section 304, Part II read with section 34, of the Penal Code. In number of cases, it has been held that where there was only a charge under section 302 read with section 149 of the Penal Code, (and in the absence of a charge under section 302 read with section 34 of the Penal Code) still some of the accused can be convicted under section 302 read with section 34 of the Penal Code (AIR 1973 SC 2221; 1973 CrLJ 1409).

It has been held in number of cases that in the absence of prejudice there was no legal bar to the recording of a conviction under section 302 read with section 149 of the Penal code, even when the accused was charged under section 302 read with section 34 of the Penal Code, or vice versa. However, in the instant case, even though seven accused were acquitted still there were three accused. Even applying the ratio laid down in Maina Singh Vs. State of Rajasthan (1976 CrLJ 835) all the three of them could be convicted for offences simpliciter. When there are more than one a conviction under section 302 read with section 34 of the Penal Code against them also on the same reasoning can be recorded. Therefore, there was absolutely nothing illegal about the conviction recorded by the lower Court (1981 CrLJ 1710, (1712, 1713) (AP).

If out of six persons charged udner section 149 of the penal code, along with other offence, two persons are acquitted the remaining four may not be convicted

because the essential requirment of an unlawful assembly might be lacking. Where, however, four persons are prosecuted under section 302 read with section 34, Penal Code, failure of the prosecution to prove that one of them took part in the commission of the offence does not introduce any infirmity in its case against the remaining accused at all. Even if he held, not be present at the scene of the offence, that in law it cannot prevent the prosecution from presenting its case against the remaining accused if the evidence adduced by it is case otherwise satisfactory and cogent (1962) 2 CrLJ 290= 1962 SCD 416= (1963) 1 SCJ 97; AIR 1962 SC 1211).

Accused were charged under section 302/149 but were convicted under section 302/34, Penal Code. The number of convicted accused being less than five, the court held that the absence of specific charge under section 302 read with section 34, Penal Code did not cause any prejudice to the accused. Since the common intenton was established the accused could be convicted under section 302 read with section 34, Penal Code in spite of the absence of specific charge to that effect (1969 SCD 859; AIR 1969 SC 79).

Where the facts of the case are such that the accused could have been charged alternatively, either under section 302 read with section 149 or under section 302 read with section 34, the conviction of the accused under section 302 read with section 149 can be altered by the High Court to one under section 302 read with section 34, upon the acquittal of the other accused poersons (1952 ALJ 437).

The appellants submitted that in the absence of a charge under section 302 read with section 34 of the Penal Code the three appellants cannot be convicted under section 34, Part II read with section 34 of the Penal Code. In number of case, the Supreme court as well as the High Court held that where ther was only a charge under section 302 read with section 149 of the Penal Code (and in the absence of a charge under section 302 read with section 34 of the Penal Code), still some of the accused can be convicted under section 302 read with section 34 of the Penal Code. It has been held in number of cases that in the absence of prejudice there was no legal bar to the recording of a conviction under section 302 read with section 149 of the Penal Code even when the accused was charged under section 302 read with section 34 of the Penal Code or *vice versa*. However, in the instant case, even though seven accused were acquitted still there were three accused (1981 CrLJ 1710; 1976 CrLJ 835; AIR 1973 SC 2221; 1973 CrLJ 1409).

6. **Conviction under sections 302/109.**- In view of the fact that the condemned prisoner did not inflict any injury on victim Hazera, although he was a silent spectator to the cruel and gruesome murder of his wife by his companions, who were acquitted for want of legal evidence, it is reasonable to hold that he could not be convicted under section 302 of the Penal Code but should be found guilty for abetment under sections 302/109 of the Penal Code (Abdul Awal Vs. The State; (1994) 14 BLD (AD) 224).

The conduct of the accused appellants did not show any animus while taking Akal Miah along with them. No evidence is forthecoming to suggest that the intention of the accused while taking the victim along with them was to kill him. No subsequent action does suggest any such animosity pointing to the killing of Akal Miah. The inference that probably the accused might have killed or made over the victim to some killers is a very weak probability and the same does not inspire any conviction as to the involvement of the accused appellants in the case. The facts, evidence and circumstances do not bring the case under sectons 302/109, Penal Code (Soleman Vs. State; 42 DLR (1990) 118 (122) = 1990 BLD 179).

Murder and its abetment - Ingredients of - Mere taking away of the victim from his house without any overt act animus in the form of any hostile attitude or initial

intention to kill will not justify conviction for such offences. The theory of 'last seen' must carry along with it a high degree of probability excluding all other theories save and except the hypothesis of the guilt of the accused (Penal Code (XLV of 1860), section 302/109. (Someman Vs. The State 1990 BLD 179 (20, 23 & 25).

Sections 302/109 - Abetment. To sustain a charge of abetment of an offence it is necessary that there must be some evidence of overt act or omission so as to suggest a pre-concert or common design to commit a particular offence. So long as the desing rests in intention short of overt act directed to the commission of the offence it is not indictable in law (Ali Ahmed Malaker Vs. The State 43 DLR (1991) 401).

7. **Acquittal of co-accused effect of.** - Acquittal of a co-accused will not vitiate the conviction of the appellant in case the evidence adduced aginst him found to be satisfactory and convincing (AIR 1975 SC 2211; 1975 CrLJ 1874; AIR 1977 SC 893; 1977 CrLJ 550). The acquittal of two out of three named accused does not bar the conviction of the third under section 302 read with section 34, if he is shown to have committed the offence with unknown companions (Khem Keram Vs. state of U.P. 1975 L.W. (Cri) 85,86). Merely because some of the accused were acquitted for want of evidence the accused against whom there was legal evidence could be convicted by invoking section 34 and the easy course of acquittal could not be adopted by the court on the ground that co-accused were acquitted (Appu V.State of Kerala 1990 CrLJ 36 Ker DB) Where more than one accused are being tried jointly and the evidence is common against them and if the Trial Court acquits one of them then the other accused can be convicted only if there is some independent corroboration against him (Habibullah V. State 1992 PCrLJ 2489).

In a case where some of the co-accused stand acquitted and the common intention to cause death is not established beyond a reasonable doubt, the prosecution must establish the exact nature of the injuries caused to the deceased by the accused with a view to sustain the convicton of that accused for inflciting that particular injury (193 crLJ 426 SC). Two accused of murder charge were acquitted as eye witnesses though deposing to their participation were found unreliable to that extent. Remaining accused persons can not be acquitted by discarding evidence of eye-witnesses mechanically (1993 CrLJ 1343 (P&H).

Where there is clear evidence to show that it was the appellant who had fired the gunshort on the deceased, his conviction under section 302 must be confirmed even though the other four accused, including the person who was alleged to have ordered the shooting, had been given the benefit of doubt and acquitted by the Trial Court (Hazari Parida Vs. State 1979 CrLJ 1080 SC).

Eye-witnesses are natural witnesses. There are cogent and convincing reasons for accepting their evidence. Trial Court acquitld one accused giving him benefit of doubt. Same does not affect the evidence of the eye witnesses who are the most natural witnesses. Conviction of the appellants was upheld (1993 CrLJ 1056 (SC). Benefit of doubt was given to some accused on some grounds. Same grounds also available to two more accused. Case of these two accused is not distingnishable from others who were given benefit of doubt. They are also entitled to benefit of doubt (1993 CrLJ 2246 SC).

An act was alleged to have been committed by a number of specified persons, five or more in number, in furtherance of the common intention of all of them. They were prosecuted for rioting and for the commission of the alleged act in view of the provisions of section 149 of the Code. The Court acquitted all except the appellant

giving them the benefit of doubt. At the same time its definite finding was that the appellant was associated with some at least of those acquitted poersons in the commission of the alleged act. It accordingly convicted the appellant of the commission of the alleged act applying the provisions of this section. It was held that such a conviction could be upheld (AIR 1975 SC 2211= 1975 CrLJ 1874). Where an accused is charged with a substantive offence invoking secton 34, there is no bar to his conviction for the substantive offence unless prejudice is caused and it is incumbent upon the accused to show that it misled him, causing failure of justice (AIR 1974 SC 778).

Where the accused was charged with co-accused under section 34 and the co-accused was acquitted, it was held that conviction of accused under section 302 simpliciter or section 325 was possible if no prejudice was caused (1968 All LJ 50).

In Maina Singh Vs. State of Punjab; 1976 (3) SCR 651, the appellant in that case and four others were charged with offences under section 302/149, Penal Code, the appellant with having shot at the deceased and the other accused with giving blows to the deceased with a sharp-edged weapon. The Trial Court acquitted the four accused and convicted the appellant under section 302 read with section 34, Penal Code. The High Court dismissed the appeal of the state against the acquittal as also the appellants appeal against the conviction. In the appeal before the Supreme Court it was contended for the appellant that it was not permissible to take the view that a criminal act was done by the appellant in furtherance of the common intention of other co-accused when those accused who had been named had all been acquitted and that all that was permissible for the High Court was to convict the appellant of an offence which he might have committed in his individual capacity. The head note in the report brings the rato of the judgment correctly and that may be quoted.:

"In a given case even if the charge disclosed only the named persons as co-accused and the prosecution witnesses confined their testimony to them, it would be permissible to conclude that others, named or unamed, acted conjointly with one of the charged accused if there was other evidence to lead to that conclusion, but not otherwise.

The charge in the present case related to the commission of the offence of unalwful assembly by the appellant along with four named co-accused, and with no other person. The trial in fact went on that basis throughout. There was also no direct or circumstantial evidence to show that the offence was committed by the appellant along with any other un-named poerson. So when the other four co-accused had been given the benefit of doubt and acquitted, it would not be permissible to take the view that there must have been some other person along with the appellant in causing injuries to the deceased. The appellant would accordingly be responsible for the offence, if any, which could be shown to ahve been committed by him without regard to the participation of others." (K. Nagamalleswara Rao Vs. State of A.P., 1991 (1) Crimes 412 (415) SC).

In Brathe Vs. State of Punjab, the appellant and his uncle were tried under section 304/34 penal code. The Trial Court acquitted the appellant's uncle but convicted the appelalnt under section 302 Penal Code. The Punjab High Court on a reappreciation of the evidence held that the fatal blow was given by the appellant's uncle and since the appelant was charged under section 302/34, he could not be convicted substantially udner section 302 Penal Code. The High Court came to the conclusion that the acquittal of the appellants uncle was erroneous but since there was no appeal preferred by the state it could not interfer with that order of acquittal.

It, however, came to the conclusion that the crime was committed by the appellant and his uncle in furtherance of their common intention and accordingly maintained the conviction of the appellant under section 302, Penal Code with the aid of section 34 Penal Code. Indian Supreme Court confirmed the conviction of the appellant under section 302, Penal Code, but with the aid of section 34, Penal Code (Brathi Vs. State of Punjab 1991 (1) Crimes 74; Follwed in Khujji @ Surendra Tiwari Vs. State of MP 1991 (3) Crimes 82).

The acquittal of two out of three named accused does not bar the conviction of the third under section 302 read with section 34, if he is shown to have committed the offence with unknown companions (Khem Karan Vs. State of UP 1975 LW (Cri) 85,86). Where on the reappreciation of the evidence the Appellate Court comes to the conclusion that the appellant and the acquitted acucsed were both involved in the commissionr of the crime, the appellate court can record a conviction with the aid of section 34 notwithstanding the acquittal of the co-accused (Brothi Vs. State of Punjab 1991 (1) SCC 519; 1991 (1) Crimes 74 SC). The acquittal of two out of three name accused does not bar the conviction of the third under section 302, read with section 34 if he is shown to have committed the offence with unknown companions (AIR 1974 SC 1557(1569).

There are series of decisions where the view held by the Indian Supreme Court is that when a definite number of known persons were alleged to have participated in the crime and all except the appellant were acquitted, the appellant can not be convicted under section 34, Penal Code, and he would be liable only for his individual act of assault (Prabhu Babaji Vs. State of Bombay; AIR 1956 SC 51; Krimshna Gavind patil Vs State of Maharashtra; (1964) 1 SCR 678; Baul Vs. State of U.P; (1968) 2 SCR 454; Maina Singh Vs. State of Rajasthan; (1976) 3 SCR 651; Karnail Singh Vs. Stat of Punjab; AIR 1977 SC 893; Plara Sing Vs. State of Punjab (1980) 2 SCC 401).

The argument that co-accused having been acquitted and one of the other brothers being dead and one having absconded, it can not be said that prosecution has established common intention was not accepted in the instant case and it was held that for the application of section 34 Penal Code, there must be evidence involving several accused persons either specifically named or some specifically named and others unnamed in the charge. Where charge specifically mentions named individuals, of whom all are acquitted except one, his liability has to be established individually and not conjointly. Where, however, the charge mentions that particular act was committed by some named individuals and all are acquitted except one but evidence is led as aginst the named persons as well as the unknown perons, his joint liability with the unknown persons can still be established by invoking section 34 (1976 CrLJ 250(254, 255) Ori).

In Amar Singh V. State of Punjab; 1987 (1) SCC 679, seven accused were charged for murder under section 302 read with section 149 Penal Code. Two out of the seven accused were acquitted by the Trial Court and on appeal the High Court acquitted one more accused. However, the High court convicted four of the accused under section 302 read with section 149 Penal Code and sentenced them for life imprisonment. The four convicted accused appealled to the Supreme Court and it was contended on their behalf that after the acquittal of three accused persons out of seven, the appellants who were remaining four cannot be held to have formed an unlawful assembly within the meaning of section 141, Penal Code and accordingly the charge under section 149 was not maintainable. Accepting this contention it was observed :

"As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141 Penal Code. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under section 148 or section 149 Penal Code for any offence, for, the first condition to be fulfiled in designating an assembly an unlawful assembly is that such assembly must be of five or more persons, as required under section 141 Penal Code. In our opinion, the convictions of the appellants under sections 148 and 149 Penal Code cannot be sustained."

When the two accused A and B were individually charged under sections 302 and 436, Penal Code, they were convicted only udner the alternative charges under section 302 read with section 34 and section 436 read with section 34, Penal Code, by the Sessions Judge. Consequently, A's conviction can be sustianed only if the High Court had sustained the convictions awarded to accused B also. Inasmuch as the High Court had given the benefit of doubt of accused B and acquitted it follows that A's conviction for the two substantive offences read with section 34, Penal Code, cannot be sustained because this is a case where the co-accused is a named person and he has been acquitted and by reason of it the appellant cannot be held to have acted conjointly with any one in the commission of the offences. This position of law is well settled (Sukhram Vs. State of Madhya Pradesh, 1989 CrlJ 838 (841 SC); AIR 1989 (SC) 772).

When accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of doubt to them, the result in law would be the same; it would mean that they did not take part in the offence. The effect of the acquittal of accused 1, 3 and 4 is that they did not conjointly act with accused 2 in committing the murder. If they did not act conjointly with accused 2, accused 2 could not have acted conjointly with them (AIR 1963 SC 1413 (1417).

Conviction of one accused under section 302 and other two under section 302 read with section 34 by Trial Court, acquittal of accused convicted under section 302 by Supreme Court on ground that circumstantial evidence did not prove his guilt beyond reasonable doubt. Opportunity to commit murder available equally to all accused, not enough to hold them guilty of crime. Accused alleged to have taken prominent part in committing crime, acquitted. Rest two accused entitled to acquittal. They could not be held accessories to crime before occurrence took place nor inference that murder was committed in furtherance of common intention of all could be drawn. Dead body put inside a truck recovered from house of two accused. No proof that they put the body inside the truck. The said two accused could not be convicted under section 201 (AIR 1991 SC 2257).

Mere fact of acquittal of co-accused or the fact that co-accused at whose instnace the accused committed the crime was given benefit of doubt would not vitiate the conviction. (AIR 1979 SC 1344; 1979 UJ (SC) 312). Acquittal of a co-accused does not bar conviction of the accused for an offence under section 302 provided that the facts warranted it (1983 All CrR 355 (SC)=1983 CrLR (SC) 367; 1983 CrLJ 1356 (SC); AIR 1983 SC 867; (1983) 2 CrLC 363). Where one of the accused persons is acquitted; the other accused whose case is at par with him convicted on the same evidence, must be given the benefit of the doubt and acquitted (1985 SCMR 1791).

But that it is not so where the case of the other accused is distinguishable from the acquitted accused (1988 SCMR 66). When the principal accused in the case had

been acquitted the presumption in the circumstances of the case, would be that the co-accused did not conjointly act with the principal accused in committing the murder (Muhammad Aslam Vs. Muhammad Zafar PLD 1992 SC 1). Evidence showing that accused inflicted a blow of knife which along with injury caused by another accused proved fatal, accused cannot be acquitted on ground of acquittal of co-accused. However, in view of injuries caused to accused with knife he could be held to have exercised his right of self-defence. Conviction altered from section 300 to 304 Part I (AIR 1992 SC 2199).

In case, where large number of persons are involved and in the commotion injuries are caused to the prosecution witnesses and others, it becomes the duty of the Court to determine the common intention which could be attributed to those accused who stand convicted, where some of their co-accused stand acquitted and the state chooses not to file any appeal agawsdinst their acquittal (Nadodi Jayaraman etc. Vs. State of Tamil Nadu 1992 (2) Crimes 286, 287). Even though the other accused stands acquitted and even though there is no evidence that Subash caused one of the fatal injuries, he cannot escape conviction under section 302, read with section 34, Penal Code, when his participation with three other assailants in the attack on deceased has been established beyond reasonable doubt by the prosecution (Subash and Shiv Shankar Vs. State of U.P. 1987 CrLJ 1991 (996) SC= AIR 1987 (SC) 1222).

Where there is more than one accused the mere fact that one accused is acquitted on untenable evidence would not call for reopining of the case of the convicted accused by the Supreme Court (PLD 1977 SC 508=1977 SCMR 540=PLJ 1977 SC 407).

8. Appellate Court can record conviction with the aid of section 34 or 149, notwithstanding the acquittal of co-accused.- The Appellate Court has full power to review the whole evidence. It is entitled to go into the entire evidence and all relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused (Brathi @ Sukdev Singh Vs. State of Punjab; 1991 (1) Crimes 74 SC). Where on reappreciation of the evidence the Appellate Court comes to the conclusion that the appellant and the acquitted accused were both involved in the commission of crime, the Appellate Court can record conviction with the aid of section 34 or 149 Penal Code, notwithstanding the acquittal of the accused (Khujji @ Surendr Tiwari Vs. The State of MP 1991 (3) Crimes 83 SC; Brathi Vs. State of Punjab 1991 (1) SCC 519= 1991 (1) Crimes 74 relied on).

Evidence examined by the Appellate Court unmistakenly proves that the appellant was guilty under section 34 Penal Code, having shared a common intention with the other accused who were acquitted and that the acquittal was bad, there is nothing to prevent the Appellate Court from expressing that view and giving the finding and determining the guilt of the appellant before it on the basis of that finding (Brathi @ Sukhdeve Singh vs. State of Punjab 1991 (1) Crimes 74 SC).

In the case of Brathi @ Sukdev Singh Vs. State of Punjab; 1991 (1) Crimes 74 (SC)d it was held : "when several persons are alleged to have committed an offence in furtherance of the common intention and all except one are acquitted, it is open to the Appelalte Court to find out on a reappraisal of the evidence that some of the accused persons have been wrongly acquitted, although it could not interfere with such acquittal in the absence of an appeal by the state. The effect of such a finding is not to reverse the order of acquittal into one of conviction or visit the aquitted person with criminal liability. The finding is relvant only in invoking against the convicted person his constructive criminality.

Further held : The evidence examined as a whole may show that the appellant is guilty under section 34 of the Penal Code having shared a common intention with the other accused who are acquitted and the acquital of these persons was bad. There is nothing in law to prevent the Appellate Court from expressing that view and recording that finding. The conviction of the appellant in such a case could be maintained on the basis of that finidng. This is the correct legal approach to prevent miscarriage of justice. A wrong and erroneous order of acquittal though irreversible in the absence of an appeal by the state would not operate as a bar in recording constructive liability of the co-accused when concerted action with common intention stands proved. "

The principle of vicarious liability does not depend upon the necessity to convict a requisite number of persons. It depends upon proof of facts beyond reasonable doubt which makes such a principle applicable. The essential constituent of the vicarious criminal liability prescribed by section 34 is the existence of common intention. If on the evidence, the High Court can unmistakably arrive at the conclusion that the appellant and acquitted person had acted in furtherance of their common intention, the conviction of the appellant with the aid of section 34 is legal(Ibid).

Where the accused were not charged under section 149, the Appellate Court would require strong reasons for using that section, even if it was possible to convict under that section in the absence of a specific charge without occasioning a failure of justice (1971 CrLJ 559 Goa).

In Dalip Singh Vs. State of Punjab (1954) SCR 145), Indian Supreme Court has held that before section 149 can be applied, the Court must be satisfied that there were at least five persons sharing the common object. It has also been held that this does not mean that five persons must always be convicted before section 149 can be applied. If the Judge concludes that five persons were unquestionably present and shared the common object, though the indentity of some of them is in doubt, the conviction of the rest would be good.

In Marachali pakku Vs. State of Madras AIR 1954 SC 648, two appellants were charged and convicted along with five others for having constituted an unlawful assembly and committed murder under section 302 read with section 149 Penal Code. In appeal before the High Court, five accused were given the benefit of doubt and acquitted. Before Supreme Court in appeal, it was contended that the said five accused having been acquitted and in the absence of a charge that five other unknown persons constituted an unlawful assembly, the two appellants could not be held members of the unlawful assembly which had the common object. Supreme Court after reviewing the evidence and weighing the judgment of the High Court held that there was no scope left for introducing into the case the theory of benefit of doubt and the High Court was in error in acquitting accused 3 to 7, and that though the acquittal stands, that circumstance could not have affectd the conviction of the appellants under section 302 read with section 149. Where in very firm language a finding has been given that seven persons took part in the crime, the convicton of the two appellants for murder under section 302/149 was held fully justified.

Where the accused was charged under section 302 read with section 34, Penal Code, along with his two brothers who have been acquitted and revision against them has also been rejected by the High Court and acquittal has become final, it was held that in such circumstances the accused alone could not be convicted under section 302 read with section 34 Penal Code (1985) 22 ACC 95, (100, 101).

In Sukh Ram Vs. State of U.P. 1974) 2 SCR 518, it was held that in view of the unambiguous evidence tendered by the prosecution in the Sessions Court, no prejudice can be said to have been caused to the appellant by reason of his conviction under section 302 read with section 34, Penal Code, even though the two other accused specifically named in the charge had been acquitted. The High Court was certain that there were three culprits and the appellant was one of them. It is clear that not withstanding the charge, the acquittal of the two accused raised no bar to the conviction of the appellant under section 302 read with section 34 Penal Code.

9. **Where charge framed is under section 302 with the aid of section 34 or 149 whether conviction under section 302 simpliciter legal.**- If a charge is framed under section 302 with the aid of section 34 or 149, the conviction and sentence can be made under section 302 alone. Where it is found that each of the accused is individually guilty of murder, under section 302, notwithstanding that the charge preferred against them, in respect of the murder, is one of constructive liability, i.e., under section 302 read with section 34 or 149 Penal Code. If on evidence, the Court is satisfied that each of the accused appellants is individually liable for murder, it can convict and sentence them straight under section 302, Penal Code. Notwithstanding that the charge framed against them in respect of murder was under section 302 read with section 149 Penal Code. Provisions in sections 236 and 237 Cr. P.C. permit such conviction (State Vs. Idris Pandit, (1973) 25 DLR 233); Sadar Ali Vs. The Crown 9 DLR (FC) 7). Whether conviction udner section 302 simpliciter permissible.- Section 34, Penal Code, does not create an offence, it merely enunciates a principle of joint liability for criminal acts done in furtherance of common act of the offender. The object of a charge is to warm the accused person of the case he has to answer. The basic requirment in every criminal trial is that the charge must be so framed as to give the accused person a fairly reasonable idea as to the case which he has to face. However in Ambaram Vs. State of M.P. (1989 CrLJ 199), the charge as framed against the accused was not as clear as it might have been, inasmuch as section 302, Penal Code, as a substantive offence has not been mentioned in the charge. But no prejudice can be said to have been caused to the accused by reason on the defect in the charge as to the intent of the accused. He was fully aware of the case made by the prosecution and has full opportunity of rebutting the evidence given against him. The accused knew that the case against him was that he, along with three others, was one of those, who on 4th August, 1984 around 7.00 p.m. committed the murder of one Gangaram. He is proved to have struck the fatal blow. Witnesses, who deposed to this effect have been fully cross-examined and have in fact been confronted with the accused's right of self defence. He was fully informed of the date, time and place of murder of Gangaram. He was charged with murder and nothign short of. Although it was stated in the charge that the offence was committed by him in furtherance of a common inention, shared by three others (since acquitted), if the evidence failed to prove that the offence committed by him was in furtherance of a common intention, it would be nonetheless his offence, namely, murder, if his act in law amounted to murder. The law does not require in such a case that a separate charge for murder should be framed, because the charge of murder, though in furtherance of common intention, was already on record. The contention advanced by the accused's counsel cannot be accepted in view of the foregoing discussion (Abaram Vs. State of MP, 1989 CrLJ 199 (202) (MP).-

There is no illegality in convicting the appellant under section 302 Penal Code (Simpliciter) though there was a constructive charge against all the four accused inclusive of appellant under section 302 read with 34 Penal Code (Hemraj Vs. The State (Delhi Admn.) 1990(3) Crimes 222 (SC)=Brathe Vs. State of Punjab AIR 1991 SC 318).

Conviction of an accused cannot be rendered illegal *per se* for want of an alternative charge under section 302 Penal Code, when he was charged under section 302 with aid of section 34, Penal code only unless prejudice is shown to have been caused to him (Nechhattar Singh Vs. State of Punjab, 1993(1) Crimes 884 P&H).

In the case of Khushali Vs. State of U.P. 1991 (3) Crimes 18, Allahabad High Court observed : "The law is well settled that the convction .under section 302 Penal Code, can be converted to one under section 302/34 Penal Code and *vice cersa*, if no prejudice is caused to the accused appellant, vide W.Slaney Vs. State of MP (AIR 1956 SC 137). In the present case in the charge as well as in the statement under section 313 (342 old) Cr. P.C. it was specifically put to the appellant that he had stabbed the deceased and the evidence is also to the effect that he alone had stabbed the deceased. Hence conviction of the appellant is altered from section 302 read with section 34 Penal Code, to section 302 Penal Code simpliciter and his sentence of life imprisonment is confirmed ".

The Court can convict one of the accused out of many facing charge of murder with common intention, when there is clear and specific evidence of causing the fatal injury by that accused couple with that the evidence on record do not make out a case of common intention of the other (Hazrat Ali Mondan Vs. State of Assam 1988 (2) Crimes 654 Gau). Where five people were charged for murder in furtherance of common intention, four were acquitted, it would not be proper to convict the fifth without any specific evidence to make him responsible for committing murder (Hazrat Ali Mandal Vs. State of Assam 1988 (2) Crimes 654 Gau).In the case of state Vs. Idris Pandit (1973) 25 DLR 232, although charge under section 302/34 Penal Code failed, the Court held that accused appellants Anu Mia and Idris Pandit were individually responsible for murder of deceased Shamsul Haque and they were convicted straight under section 302 Penal Code.

The appellant and two others were charged for an offence under sections 302 and 201 read with section 34, namely common intention to commit the offences and A-2 and A-3 were aquitted of the charge under section 302/34, Penal Code and that there was no independent charge under section 302, Penal Code. If, from the evidence, it is established that any one of the accused have committed the crime individually, though the other accused were acquitted, even without any independent charge under section 302, the individual accused would be convicted under section 302 of the Penal Code simplicitor. The omission to frame an independent charge under section 302, Penal Code does not vitiate, the conviction and sentence under section 302, Penal code (Kishore Chand Vs. The State of Himachal Pradesh 1990(3) Crimes 341(349) SC). Where an accused is charged with a substantive offence invoking section 34, there is no bar to his conviction for the substantive offence unless prejudice is caused and it is incumbent upon the accused to show that it misled him, causing failure of justice (AIR 1974 SC 778).

Where the accused was charged with co-accused under section 34 and the co-accused was acquitted, it was held that conviction of accused under section 302 simpliciter or section 325 was possible if no prejudice was caused (1968 All LJ 50). Finding that one of the accused persons alone inflicted injuries on deceased and participation of remaining accused disbelieved, accused inflicting injuries on deceased could alone be convicted under section 302 simpliciter (Hem Raj Vs. State (Delhi Admn.) AIR 1990 SC 2252).

The accused, along with two others, was charged under section 302 read with section 34 for committing a murder. The Trial Court acquitted the other two, but

convicted the accused under section 302 Penal Code. It was held that the accused was rightly convicted, as there was no legal bar to the conviction of an accused under the substantive offence simpliciter, when he was charged under it with the aid of section 34 unless some prejudice is shown to be caused to him (1987 CrLJ 1027 Gau).

Where the appellant and two others were charged for an offence under sections 302 and 201 read with section 34, namely common intention to commit the offences and A-2 and A-3 were aquitted of the charge under section 302/34, Penal Code and that there was no independent charge under section 302, Penal code. If, from the evidence, it is established that any one of the accused have committed the crime individually, though the other accused were acquitted, even without any independent charge under section 302, the individual accused would be convicted under section 302 of the Penal Code simpliciter. The omission to frame an independent charge under section 302, Penal Code does not vitiate, the conviction and sentence under section 302, Penal Code (Kishore Chand Vs. The State of Himachal Pradesh AIR 1990 SC 2140 (2146).

After a quarrel had started over the picking of mangoes in the mango tope, the two appellants had come from different directions. In the circumstances in which they had been placed and from their acts and conduct prior to at the time of and subsequent to the occurrence, it may not safely be said that both the appellants had been actuated by the common intention to commit the murder of the deceased. But in view of the clear and direct evidence that the appellant had, with the intention of causing the death of the deceased, caused injuries sufficient in the ordinary course of nature to cause death, by firing from a gun, he can be convicted under section 302 of the Code although charged with the other appellant under section 302 read with section 34 of the Code, even if the other appellant is acquitted of this charge. The order of conviction passed against the appellant under section 302 read with secton 34 of the Penal Code, is set aside and in lieu thereof, he is convicted under section 302 of the Penal Code and the sentence to under go imprisonment for life passed against him is maintained (Magata Panda Vs. State, (1986) 61 CLT 511 (522-23)(17) (SC).

A person charged for an offence under section 302 penal code read with section 149 can not be convicted of the substantive offence under section 302 Penal Code, without specific charge having been framed against him as envisaged by law (Subram @ Subrumanian Vs. State of Kerala 1993 (2) Crimes 15).

The Indian Supreme Court, dealing with the law in the case of Subramanian (supra) has observed at page 19 in paragraph 11 as follows :

"Since, appellant No. 1 Subran had not been charged for the substantive offence of murder under section 302 Penal Code, even the Trial Court, which tried the six accused persons, was not justified in recording a conviction against him for the substantive offence of mruder punishable under section 302 Penal Code after framing a charge against him for the offence under section 302 read with section 149 Penal Code only. A person charged for an offence under section 302 Penal Code read with section 149 cannot be convicted of the substantive offence under section 302 Penal Code without a specific charge having been framed against him as envisaged by law. Conviction for the substantive offence in such a case is unjustified because an accused might be misled in his defence by the absence of the charge for the substantive offence under section 302 Penal Code. Appellant No. 1, Subram was never called upon to meet a charge under section 302 Penal Code simpliciter and, therefore, in defending himself, he cannot be said to have been called upon to meet that charge

and he could very well have considered it unnecessary to concentrate on that part of the prosecution case during the cross-examination of the proseccution witnesses. Therefore, the conviction of the first appellant for an offence under section 302 was not permissible."

Held in paragraph 12 :

"On a consideration of the circumstances of the case the type of weapons with which they were armed and nature and seat of the injuries, it is not possible to hold that all the four appellants shared the common intention of causing such bodily injuries on the deceased as were likely to cause the death of suku or were sufficient in the ordinary course of nature to cause his death. The apellants would, therefore be liable to the offence committed individually by each one of them".

A charge for substantive offence under section 302, Penal Code, is for a distinct and separate offence from that under section 302 read with section 149 Penal Code. In Taga and Lakha Vs. State of Rajsthan (1976 RLJ 589 (600), there was no direct and individual charge against the accused appellants for speccific offence punishable under section 302, Penal Code. They were charged under section 302/149. It was held that this convicction under section 302 simpliciter could not be maintained. But in the case of state of Haryana Vs. Prabhu, AIR 1979 SC 1019, the Indian Supreme Court has held that where it has been satisfactorily established on the medical evidence that S was responsible for the fatal injury on the person of K, the High Court is not quite right in refusing to convict him under section 302 simpliciter on the ground of absence of a charge under section 302, the charge being under the said provision of read with section 149.

A charge for substantive offences under sections 302, 324 and 447 is for distinct and separate offences from those under sections 302, 324 and 447, read with section 149. Where there was no direct and individual charge against the accused-appellants for the specific offences under sections 302, 324 and 447, it was held that the absence of specific charge was a serious illtegality which had materially prejudiced the accused and the contention that it was only an irregularity which was curable under sections 537/535, code of criminal Procedure, 1898, could not be accepted (1973 CrLJ 1079 Raj).

10. **Accused liable for his individual act.**- Where accused persons coming together armed with weapons and asking one of them to call deceased and attack him as soon as he comes out of his house. First blow with iron rod on head of deceased given by one accused turned out to be fatal. Assaults made by other accused were on thigh and left shoulder of deceased. Held, accused who gave fatal blow was guilty udner section 302 and other accused persons under section 326/34, there being common intention to kill (1993 CrLJ 378).

When the incident flared up all of a sudden negativing any pre-planning resulting in death of a person, the co-accused cannot be convicted with the help of section 34 of the Penal Code, for murder. He can be held guilty only for his individual act, if any (Ram and others. Vs. State of U.P. 1989 (3) Crimes 233 (All). In pandurang Vs. State of Hydarabad AIR 1955 SC 216 (223); 1955 CrLJ 572, Section 149 did not apply as there was no common object and there was no evidence from which a common intention embracing the appellant could be deduced. The appellant was therefore liable only for what he did. His conviction under section 302 was set aside and he was convicted under section 326 for an act which endangered life.

11. **Alternate charge.**- Where the facts of the case are such that the accused could have been charged alternatively, either under section 302 read with section 149 or under section 302 read with section 34, the conviction of the accused under

section 302 read with section 149 can be altered by the High Court to one under section 302 read with section 34, upon the acquittal of the other accused persons (Lachhman Singh Vs. State of Allahabad, 1952 ALJ 437 (SC).

Conviction of an accused cannot be rendered illegal *per se* for want of an alternative charge under section 302 Penal Code, when he was charged under section 302 with aid of section 34, Penal Code only unless prejudice is shown to have been caused to him (Nachhattar Singh Vs. State of Punjab 1993 (1) Crimes 884 P&H).

Where there was some enmity between the parties and the complainant party was alleged to have been attacked by the respondent party on the day of the occurrence in the course of which the lathi injuries inflicted on the deceased by the respondent proved fatal, it was held that the evidence clearly showed that the common object of the assembly was clearly to give a beating to the complainant party. Under the circumstancces, in the absence of a charge under section 302, simpliciter, the conviction under section 302/149 could not be altered to one under section 302 without there being proof of the respondent's assault being the one which had caused the fatal injury. In the result, as the evidence was not clear as the respondent's participation in the assault, his aquittal was maintained and appeal dismissed (State Vs. Prabhu 1979 SCC (Cri) 949).

Before the Trial Court, the appellant along with others took his trial under section 396, in the alternative under section 302, Penal Code. According to prosecution, there was no actual commission of dacoity though there was an attempt for it. The High Court considering the above facts and the evidence proving that it was the appellant who caused the death of the deceased and that he was specifically charged of committing murder. Held, that the appellant can not be said to have been prejudiced by the alteration of the conviction in view of the specific alternative charge under section 302 (AIR 1990 SC 1180).

It is not at all usual, nor is it desirable,that persons should be charged at the same trial with both murder and causing disappearance of evidence of the murder committed by them. If the case against the accused shows that he disposed of the dead body or tried to conceal the crime by causing evidence of its commission to disappear, it is always possible to convict him alternatively udner section 201 even though he has been charged only with the offence of murder (Mandayan Mathari Vs. Emperor, 1941 M.CrC 140; In the Kalisperumal, AIR 1954 Mad 1088 (1090).

Where a person is convicted both under section 302 and section 201, it is undesirable to pass separate sentences for both offences (AIR 1912 Mad 275 ; 43 CrLJ 543).

An accused charged under section 302, Penal Code, can be convicted under section 201, Penal Code, though there was no specific charge under the latter section if the facts justify it (AIR 1957 Andh Pra 611 (619).

12. **Charge under section 302 but punishment for lesser offence.-** Under section 236 and 237 of the Cr. P.C. a person, charged witha graver offence, may be acquitted thereof, but may be convicted under a minor offence, and furgher that a person charged with one offence may be convicted for another offence under certain circumstances and on fulfilment of certain requirements (Abdus Samad vs. State 44 (1992) DLR (AD) 235. Where a number of accused participated in beating a man to death under circumstances which amount to murder under section 302/149 of the Penal Code, the conviction should be under some lesser section than 302 (Abdus Sobhan Vs. State 19 (1967) DLR 927).

The Court of revision is competent to interiere with the order of conviction under secctions 324/34 Penal Code, and alter conviction to one under section 326/34 Penal Code. In view of the provisions in section 221 (2) cr. P.C. a person charged with offence can be convicted of a minor offence, although he is not charge with it. The opposite parties nos. 1 to 4, though charged under section 302/34 Penal Code, have, accordingly, been convicted of a minor offence under section 324/34 Penal Code (Mustafa Shaik Vs. Lalehand Sheik, 1985 CrLJ 1183 (1185-86) Cal).

Both accused and co-accused shared common intention to beat up or assault victim though not to kill him. accused, however, suddenly stabed the victim resulting his death. Co-accused could be convicted under sections 326/34 and not under sections 302/34 (1993 CrLJ 45 (SC). If a man is charged under section 302 of the Penal Code and he comes to be convicted for a lesser offence, viz offence punishable under section 304 of the Penal Code, it would necessarily by implication mean that he has been acquitted of the offence punishable under section 302 of the Penal Code. If the convict files an appeal against the order of conviction under section 304, in the absence of an acquittal appeal filed by the state, the High Court wll not be in a position to convict him of the offence punishable under section 302 of the Penal Code (Mohadeve Mopta Vs. State of Gujrat 1975 Guj LR 473, (480). In the case of Kripal Vs. State of U.P. (AIR 1954 SC 706), the facts were that out of the three assailants, Sheroraj beat Jiraj with a lathi causing no visible injury; Kripal stabbed Jiraj witha spear without any penetration causing a simple injury and Bhopal stabbed deep with a spear on the jaw of Jiraj, which caused Jiraj's death at once. Indian Supreme Court found that having regard to the nature of their earlier assaults on two other persons, the parts of Jiraj's body on which the assaults of Kripal and Sheoraj were aimed and the actual results of these assaults, the common intention to kill Jiraj could not reasonably be attributed to the assailants. A common inention to beat Jiraj and cause only grievous injuries was attributed and in this view, Sheoraj and Kripal were held to be guilty under secton 326, Penal code and Bhopal alone was held to be guilty under section 302, Penal Code. The concluson was that Bhopal's act exceeded their common intention.

In a case when the accused and deceased had lived together as members of one and the same family over a number of years and looking to the party nature of the quarrel in which the accused had lost control and had given a blow to the deceased with an axe, resulting in the instantaneous death, conviction under section 302, Penal Code is not sustainable as the case fall within the purview of section 326 of the Code (Kashinath Kisan Bhoye Vs. State of Maharashtra 1992(2) Crimes 633). Charge was framed under secction 302 read with section 149 but conviction was founded on section 304, Penal Code. Conviction is valid in view of sections 236 and 237 Cr. P.C. (Ahmed Ali Vs. State 12 DLR 1960 (365).

In view of the express recital in the first information report and the evidence of the witnesses that not merely the appellant but another person was also responsible for causing the spear injury on the chest of the deceased, it would be difficult to sustain the conviction of the appellant under section 302 of the Penal Code. His part would be no greater than that of others who have been convicted under section 326 of the Penal Code. Accordingly, the convicction of the appellant under section 302 was set aide and he was convicted under section 326 read with section 149 of the Penal Code and he was sentenced to suffer rigorous imprisonment for a period of five years (Bajrang Singh Vs. State of U.P. 1982 CrLJ 511 SC).

Where the accused persons, while under influence of liquor came to the house of informant without being armed with any weapon and assaulted informant with kicks and fists only, there could not be said an intention on their part to kill any

body. Conviction altered from 302/34 to one under section 323/34 Penal Code (Baidya Nath Mumar Vs. State of Bihar 1991 (2) Crimes 662 (Pat).

When the accused, a young man of 28 years, had, on the spur of the moment on being enarged by the hurling of abuses in an unparliamentary language by his wife, the deceased and in a sudden quarrel and heat of passion, caused, grievous hurt resulting in death, by dealing with one blow on the flank on the deceased, the ends of justice would be squarely met with, if the accused is punished with the sentence of rigorous imprisonment for one year and a fine of ten rupees for the offence under section 325, Penal Code (Annadurai Vs. State 1989 (2) crimes 315 Mad).

After having examined the two versions in juxtaposition, version put forth by accused of having acted in self-defence and in defence of saving the abduction of his daughter was found to be more probable and nearer to truth and its acceptance appeared to be a safe course for administration of justice. Conviction of accused under section 302, Penal Code was consequently set aside and he was instead convicted under section 304, Part - I, Penal Code, and sentenced to five year's R.I. with fine and benefit of section 382-B, Cr. P.C. (Mubarak Ahmad Vs. State 1991 PrLJ Note 14).

Where all the eye-witnesses have stated that all the dacoits were firing and they have also stated that the accused was also firing and had they seen the accused firing from his gun it cannot be definitely said that it was the bullet fired from the gun of the accused appellant alone which hit the deceased and resulted into his death, it was held that the accused appellant as such could not be held guilty for the offence of section 302, Penal Code, and the only section under which the accused, in the circumstances of the case could be found guilty, was section 394 Penal Code (1985 CrLR 193 (198) Raj).

Where the weapon used is an ordinary pen knife and the same canot be stated to be a lethal weapon. The accused had not chosen to inflict any injury on the vulnerable portions, namely, chest, abdomen, etc. of the deceased. Taking into account the place chosen by the accused in inflicting the injuries and the weapon used, it cannot be stated that the accused had the requisite intention or knowledge to cause the death of the deceased. From the nature of the injuries sustained by the deceased it is but legitimate to infer that the accused intended or knew himself to be likely to cause grievous hurt. As such he can be mulcted with the liability for the offence under section 326, Penal Code, and not under section 302 Penal Code (1989 CrlJ 2050 (2054) Mad).When the accused has been proved to a have caused only one injury from reverse side of axe and the medical evidence did not indicate that injury so attributed was sufficient in the ordinary course of nature to cause death, then conviction of accused under section 302 Penal Code is liable to be set aside and to be altered to under section 325 Penal Code (Major Singh Vs. State of Punjab 1993 (2) Crimes 55 P&H).

All the three accused had acted independent of one another in inflicting injuries on deceased. Motive as set up by prosecution had not been established. Fatal injury was attributed to co-accused who was convicted and sentenced under section 324, Penal Code. Accused did not itend to cause death of deceased as he had inflicted only a single simple injury with Chhur on deceased. Conviction and sentence of accused under section 302, Penal Code, were consequently set aside and he was instead convicted under section 324, Penal Code and sentenced to two years' R.I. with fine and benefit of section 382-B, C. P. C (Abdul Sattar Vs. State 1991 PCrLJ 103; 1991 PCrLJ 412).

In the case of Vadivalu, in re (1989 CrlJ 2248, (2250) Mad), despite possession of lethal weapon, accused did not opt to wield and use the same for

inflicting injuries on the person of the deceased. He threw away lethal weapon and seized wooden frame lying there and inflicted certain injuries on the deceased. His act of throwing the lethal weapon, an aruval and seizing a wooden frame readily available in the scene is indicative of his intention in not doing away with the deceased. His overt act in inflicting injuries on the deceased with the use of wooden frame consists of his giving a hit on the left forehead besides his beating on the hip and thigh of the deceased. The evidence available on record in the shape of prosecution witnesses clinches the issue of the overt acts of accused 1 in this regard. Therefore the sentence of imprisonment for life imposed by the Trial Court was set aside and instead accused were liable to be punished only for the offence under section 326 Penal Code.

In the instant case the accused had come to the scene during the course of the quarrel, probably to help his brother. It is in that context that he had given one stab injury on the right thigh of the deceased, which is not a vital part. If accused had intended to cause the death of the deceased, one would expect him to cut on the vital part like head, chest or neck. *Mens rea* that could be attributed to accused would be, only to cause grievous injury to the victim. Accused was accordingly acquitted of the offence under section 302 read with section 34, Penal Code but instead convicted under section 326, Penal Code (1989 (1) Crimes 729 (732) Mad).

Where the accused were armed with hard and blunt object, such as, lathis and caused injuries on the hands and feet of the deceased and the other accused, who was armed with a spear, caused injuries (incised wounds), on the upper part of his right arm and no injury as per medical opinion was fatal, it was observed by the Supreme Court that none of these accused could be convicted for causing injuries individually which could make out an offence under section 302. At least they could only be convicted under sections 325 and 326, respectively, conviction under section 302, Penal Code was accordingly altered from sections 302 to 325 and 326, Penal Code, respectively (Ratan Singh Vs. State of Punjab 1989 CrLJ 287 SC); AIR 1988 SC 2147; 1988 SCC (Cr) 708; 1988 All Cr. C 225; 1988 CrLR 776 SC).

Accused gave fist and kick blows to deceased. Possibility that while deceased was being given fist bows trachea got pressed as a result of the same. Accused was not armed with deadly weapon nor he caused any injury on vital part of body of the deceased. Intention to kill was negatived and accused could not be burdened with knowledge that by giving fist blows deceased was likely to be killed. No offence under section 302, Penal Code, or 304, Penal Code thus was made out. Conviction of accused was altered to one under section 325, Penal Code and he was sentenced to seven years R.I. with fine of Rs. 1,000 (Gharib Alam Vs. State 1991 PCrLJ 1477).

It is settled view that in order to attract section 34 it is not sufficient to prove that each of the participating culprits had the same intention to commit a certain act. What is the requisite ingredient of section 34 is that each must share the intention of the other. Where the appellants were in the company of the principal culprit but were shown to be unarmed and they have pelted only stones, it was held that the conviction of the appellants for an offence under section 302 read with section 34 of the Penal Code could not be sustained and they could be convicted for an offence of section 326 read with section 34 of the Penal Code (Delya Moshya Bhil Vs. State of Maharashtra, (1985) 1 Mom. Cr 413 (415) 417 (SC).

Appellant had given two fist blows to the deceased resulting in the latter's death. Inner condition of the deceased was found to be highly diseased during the course of autopsy. His heart was enlarged. Heart valve was thinner than normal. Liver was enlarged and was double of the normal size. appellent was not aware of the

internal disease of the deceased. It was found that the rupture of the heart was not on account of intentional blow on the chest and the appellant had therefore, no knowledge that the death of the deceased would be caused because of his giving the fist blow on his chest. Chest injury was found to be simple by the doctor. Conviction of the appellant under section 325 was unwarranted and he was held to be guilty under section 323 of the Penal Code (Bashisht Singh Vs. State 1990 (2) Crimes 276 (Pat). Appellant had given two fist blows to the deceased resulting in the latter's death. Inner condition of the deceased was found to be highly diseased during the course of autopsy. His heart was enlarged. Heart valve was thinner than normal. Liver was enlarged. Appellant was not aware of the internal disease of the deceased. He had no intention to kill. By giving two fist blows, no knowledge could be attributed to the appellant. Chest injury was found to be simple. Conviction under section 325 not unwarranted. He is to be held guilty only under section 323 of the Code (Rashisht Singh Vs. State; 1990 (2) Crimes 276 (Pat). death of deceased, a heart patient, (Unknown to accused) as a result of push and pull by the accused squarely falls under section 323 of Penal Code not under section 304. (Vijayan V. State of Kerala 1991 (2) Crimes 305(Ker).

13. *Charge under section 302 but conviction under section 201.*- If the case against the accused shows that he disposed of the dead body or tried to conceal the crime by causing evidence of its commission to disappear, it is always possible to convict him alternatively under section 201 even though he has been charged only with the offence of murder (AIR 1954 Mad 1088 (1090). In Kalu Vs. State 1981 BCR (AD) 129; 45 DLR (1993) AD 161) accused appellants were charge under section 302/34 Penal Code, but Trial Court found them guilty under section 201 Penal Code. High Court Division upheld the conviction by reffering to sections 236 and 237 of the Cr. P.C. Appellate Division found no illegality in the observation and finding of the High Court Division.

Offence under sections 302 and 201 of the Penal Code are distinct offences and on the proof forthcoming of any of these two offences, in respect of which the accused was charged, criminal liability can be fastened upon him for the proved offence (Mani @ Moolikutty Mani And another Vs. State; 1990(1) Crimes 239 Mad). An accused charged under section 302 Penal Code, can be convicted under setion 201 Penal Code, though there was no specific charge under the latter section if the facts justify it (AIR 1957 AP 611(619); 1957 CrLJ 1071).

Prosecution failed to prove case of mruder. Persons said to be murdered were not traced. But participation of accused persons in taking away deadbody was proved. Conviction under section 302 was set aside but under section 201 was confirmed (Peken Bind Vs. State of Bihar 1988 (1) Crimes 740 Pat). In the case of Begu and others Vs. Emperor, 26 CrLJ 1050 (PC) the judicial committee of the Privy Council after referring to the provisions of sections 236 and 237 of the Code of Criminal Procedure upheld the conviction of the appellants under section 201 of the Penal Code though they were charged for offence under sections 302/34 of the Penal Code. Where a person is convicted both under section 302 and section 201, it is undesriable to pass separate sentences for both offences. (Rama Goundan AIR'1912 Mad 275; 43 CrLJ 543).

14. **Evidence and prooft**.- The points requiring proof are :

(i) Death of a human being.

(ii) That it was caused by the accused.

(iii) That the act by which the accused caused it was done -

(a) with the intention of causing death; or

(b) with the intention of causing such bodily injury as the accused knew to be likely to cause the death of the person to whom the harm was caused; or

(c) with the intention of causing bodily injury to the deceased person and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death; or

(d) with the knowledge that the act was so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any execuse for incurring the risk of causing death or such injury as aforesaid.

Where multiple injuries were caused on vital parts of a pregnant woman with a fatal weapon which were found sufficient in the ordinary course of nature to cause death of the deceased the offence committed would be under section 302 and not under section 304 Penal Code (State of Karanataka Vs. Jameer Pasha 1988 (2) Crimes 86 (Kar).

The prosecution is requried to give satisfactory proof of the *corpus delicti*, that is, it must prove that the deceased was murdered. The prosecution has then to prove that the accused is the person who murdered the deceased and no one else (AIR 1967 Goa 21 (56). In a case of murder, the Court has to be satisfied not merely of the probability, but of a reasonable certainty of the guilt of the accused (32 I.C. (All) 838). In order to convict a person of the charge for which capital sentence is provided, there should be evidence of unimpeachable character bringing home the guilt of the accused beyond reasonable doubt. Suspicion, however strong it might be, is not the substitute for evidence (Tareque Habibullah Vs. The State (1991) 11 BLD 146).

The minimum evidence, which is necessary to prove in a criminal case that a person is dead, would consist of either the dead body being available or somebody's statement, who knew the deceased, that he had seen the dead body, or, at any rate, some statement of some witness to the effect that he had seen the deceased being done to death. In the absence of any evidence of this kind it is impossible to hold merely from the fact that certain person has not been seen for a certain period of time that he or she is dead. It may be that from the circumstances, about which the prosecution has led evidence, some suspicion might attach to the accused in this connection; but if there is no evidence to prove that the person is dead, the charge of murder or the charge of disposing of the dead body is clearly unsustainable (1955) RLW 140).

When the husband having suspected the fidelity of his wife had deliberately thrown the grinding stone on her head, when she was sleeping resulting in her death, the offence would be punishable under section 302, Penal Code (Radhakrishnan Vs. State (Mad) 1989 (1) Crimes 721 Mad).

Conviction under section 302, Penal Code, 1860 cannot be upheld when the accused came to the scene during the course of the quarrel, probably to help his brohter and had given one stab injury on the right thigh which is not a vital part of the deceased (Devan and another Vs. State (Mad) 1989 (1) Crimes 729 Mad).

Where the evidence showed that the respondents had some motive for committing the crime and blood stained shirt and dhoti were seized from the person of accused and dhartas were seized from the houses of accused, the Indian Supreme Court held that these circumstances are wholly insufficient for sustaining the charge of murder (Narsinbhai Harbhaj Prajapati Vs. Chaharasinh, 1977 CrLJ 1144 (1145) (SC).

Deceased died as a result of the injuries on his head inflicted by the appellants. No evidence of any premeditation, prior concert or prior meeting of mind. No evidence to show who inflicted the fatal injury. The spades used by the appellants for attack were heavy and highly dangerous weapons. Injuries were inflicted on a vital part of the body. Attack was made without any provocation on the part of deceased. Appellants attacked one by one with spade on the head of deceased. These circumstances indicate prior meeting of mind. All the appellants shared the common intention to commit murder of deceased (Sasi and Orther Vs. State of Kerala; 1990 (1) Crimes 114 (Ker).

Argument that deceased was disorderly person and had many enemies, he might have been done to death, by someone else, could carry weight, if the prosecution had failed to establish the identity of the accused (Muhammad Hanif Vs. State PLD 1993 SC 895). Accused alleged to have hit deceased with iron crowbar and fled. Evidence of prosecution witness that they saw accused running away with weapon from scene of occurrence. However, informant who was nephew of deceased not mentioning this fact in FIR nor deposing that he saw accused running away. Evidence of other witness in this respect rendered doubtful. It is not safe to convict accused on basis of such inconsistent evidence (AIR 1993 SC 1670). Recovery of dead body in decomposed condition after 14 days of death. Dead body could not be identified. Eye-witnesses were child witnesses deposing against their mother, accused. Possibility of their being influenced and tutored by close relations not ruled out. Their evidence was not reliable. Recovery of weapon 3 days after arrest of main accused and from open place, not sufficient. Acquittal of accused not liable to be interfered with (1993 CrLJ 636 (P&H).

Suspicions, however strong furnish no legal grounds for the conviction of an accused on a charge of wilful murder. Where there is no eye-witness to the actual commisison of the murder (1985 SCC (Cri) 387; 1985 CrLJ 1859 (SC) or the version of the eye-witness is disbelived (1973 SCC (Cri) 880; 1983 SCC (Cri) 325; AIR 1972 SC 1776; 1972 Cril LJ 828), or the case is based on the testimony of highly interested, inimical and partisan witnesses (1981 Cri LJ 484 (SC); 1991 Cri LJ 736 SC), that the fact that there is very strong suspicion attaching to the accused in respect of the murder is not sufficient to convict him.

Where the relaltionship of the deceased with his wife and children were strained, and on the night of the occurrence the appellant, the deceased's son, was alleged to have entered to room of his father by lifting the chic hanging outside the door, called out his father's name and fired two shots at him and then escaped, but no such chic was mentioned in the FIR or the seizure list or in the site plan, and the shooting by entering into the room itself looked improbable as it could have been done by inserting the barrel of the gun through the chic without the appellant revealing his own identity and being caught by the witnesses who were allegedly sitting with the deceased at the relevant time, it was held that in the circumstances the conviction of the appellant under section 302, as found by the Lower Court, must be set aside as mere suspicion or suspicious circumstances could not relieve the proseccution of its primary duty of proving its case against an accused person beyond reasonable doubt (1974 CrLJ 908 SC). Where in a case on charge of murder, the prosecution did nto explain how blood was found from near the tubewell of the accused and no blood was found from the spot where according to them the incident occurred and in addition to that there was factum regarding the delay in lodging of the FIR and the suspicion that it was delayed with the view to concocting the prosecution case and further the delay in forwarding the special report to the Magistrate as well as the case papers to the hospital showed that the investigation

was not above board and the fact of finding of blood in the aforesaid manner which supported the defence version that the incident occurred near the tubewel of the accused was not explained defence version could not be rejected (AIR 1991 SC 1317).

Accused inflicted murderous assault without any provocation by the deceased. Evidence was adduced to the effect that accused had threatened deceased and his brother with dire consequences prior to the incidence. Plea that the injuries, were only accidental was not sustained, conviction udner section 302 was held proper (AIR 1993 SC 1376).Where there is clear evidence of rioting leading to causing of grievous hurt. Edven if it is difficult to find out who exactly are the persons to cause hurt but since there was rioting and the convicted accused persons have participated and evidence has been accepted the accused should be convicted only under section 325/149 (Jharu and others. Vs. State of Madhya Pradesh, AIR 1991 SC 517).

For judging the question in cases of bilateral clash the question as to which party is the aggressor cannot be determined on basis of the number of injuries found on the side of the complainant or the accused person. For purpose of recording a finding as to whether the prosecution party or the accused party was the aggressor, all the evidence adduced on behlaf of the parties and relevant circumstances have to be taken into consideration. It need not be pointed out that in such cases it cannot be urged that there are two parallel versions of the occurrence before the Court. The real onus is on the prosecution party to prove its case, including the manner of occurrence beyond all reasonable doubts; the accused has only to raise a doubt in the mind of the Court or to satisfy the Court that the defence version disclosed by the accused was a probable version of the occurrence (1993 CrLJ 3540 SC).

Where none of the accused had any intention to kill any particular person on the side of the porosecution party and both the parties were itching for a confrontation and a clash and in a sense, prosecution party and accused came to a clash and had a free fight which was apparent from the fact that only one assailant gave gandasi blows on the head of deceased and none of the remaining accused were alleged to have given any below to him from the weapons held by them, it would not be safe to record a finding that the accused had any common object to commit the murder of the deceased (193 CrLJ 3540 (SC).

Witness residing in locality near place of occurrence. Presence of spot, is natural. Place of occurrence sufficiently illuminated, witness identified all accused in his examination-in-chief. Contradictory statement made in his cross-examination. Held evidence of witness was reliable as regards time, place, manner of incident and identity of accused. Statement made in cross-examination was an attempt to wriggle out (AIR 1991 SC 1853). Where in the heat of the altercation between the deceased on the one hand and the accused and his comrades on the other, the accused seized a jelli and thrust it into the chest of deceased. It would be noted that that was preceded by his remark that the deceased must be beaten to make him behave. Only one blow was struck by the accused at deceased. On the evidence it did not appear that there was any intention to kill the deceased. Therefore, the conviction under section 302 cannot be sustained and that on the contrary, the facts made out an offence under second part of section 304 (1983 CrLJ 346, 347= AIR 1983 SC 185). Death after one and half year of marriage of deceased, due to strangulation and 95 percent postmortem injuries. Evidence of Doctor conducting autospy is reliable and consistent with medical jurisprudence. Death was homicide and not suicide. Husband of deceased convicted under section 300 and 201 in view of his unnatural conduct after incident and fact that death took place in his bed room. AIR 1992 SC 1175).

Where there was some verbal altercation as a result of which the deceased had caught the hand of the accused, whereupon the accused assaulted the deceased with a knife with very great force according to medical evidence. In view of the medical evidence and injuries received by the deceased the case squarely falls within four corners of section 302 Penal Code. It cannot be contended that the case fell under section 304 Part II, because there was nothing to show that the altercation was of such a serious nature which could cause sudden provocation. Secondly, the nature of injury, namely, the stab on the chest which resulted in the fracture of the 6th rib and injured the heart and the lunge and which according to the doctor was given with great force showed that it was most cruel and therefore the case squarely fell under section 302 Penal Code (1983 CrLJ 693, 694; AIR 1983 SC 361(1).

In the case of Mohinder Singh Vs. The State (AIR 1953 SC 415), the Supreme Court of India observed :

"In a case where death is due to injuries or wounds caused by a lethal weapon, it is always the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of the case."

In the case of Ram Narain Vs. State of Punjab (AIR 1975 SC 1727), it was observed as under :

"Where the direct evidence is not supproted by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. If the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expart, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case."

In the case of Mohar Singh and other Vs. State of Punjab (AIR 1981 SC 1578), it was observed as under :

"The evidence of these witnesses also cannot be relied upon. They are in direct conflict whith the medical evidence. While both the witnesses categorically state that the appellants assaulted the deceased with spades with which the earth was being dug out either from the sharp or the blunt side, the Doctor (P.W. 1) who held the autopsy of the deceased has clearly stated that the injuries could be caused only by a Kassi. No queston was put by the prosecution to the doctor whether any or all of the injuries on the deceased could be caused in the manner alleged by the witnesses, i.e. by a spade.

In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to maintain the conviction of the appellants on such evidence."

According to the dying declaration made by the deceased in the instant case the two appellants appear to have forcibly administered lethal dose of endrine poison which ultimately resulted in the death of the deceased. The oral dying declaration is fully supproted by prosecution witnesses who stated in their evidence that the deceased had clearly mentioned that endrine poison was forcibly administered to her. The deceased was taken to the hospital, but as she was not fully conscious, no statement could be recorded at the hospital. The doctor who examined the deceased and performed post mortem examination sent the viscera for chemical analysis and

according to the report, the viscera did contain endrine poison. The dying declaration received intrinsic support from the number of injuries found on the person of the deceased which show that both the appellants used force. The conviction was upheld (AIR 1979 SC 1947). Conviction under section 302, Penal Code, 1860, can be based solely on the basis of a true and voluntary dying declaration when the person making the declaration had opportunity to observe and identify the assailant and when his capacity to remember the facts had not been impaired at the time of making statement (Ajai Pal Singh Vs. State of U.P. 1988 (3) Crimes 716 All).

There is no legal bar for entering a conviction solely on the basis of a dying declaration if it is comoplete, categoric and reliable. It is now settled law that a Court is entitled to convict an accused on the sole basis of a dying declaration, if it is found to be true and reliable. A dying declaration cannot be equated with the evidence of an accomplice which requires corroboration, as a rule of prudence. It stands on the same footing as any other piece of evidence and has to be judged in the light of the surrounding circumstances and with reference to the principles governing the weighing of evidence. In order to pass the test of reliability a dying declaration has to be subjected to the strictest scrutiny and the closest circumspection. If a Court of fact is satisfied that the declarant was in a fit state of mind to make a statement, that he had sufficient opportunity to observe and identify his assailant and that he had made the statement at the earliest opportunity without any influence or as a result of tutoring and that the dying declaration is a truthful version as to his assailant and without insisting on corroboration and without any hesitation, a conviction can be entered on the sole basis of a dying declaration. On the other hand, if the Court, after subjecting the dying declaration to the test of reliability and examining the same in allits aspects, comes to the conclusion that the dying declaration is not reliable by itself and that it suffers from an infirmity, then the Court has to insist on corroboration, as without corroboration such a dying declaration cannot be made the basis of a conviction. The value of a dying declaration depends upon the circumstances under which it is made (1981 CrlJ 1165(1167-68) Ker; 1979 CrLR 633 (635)(SC).

The dying declaration which is not recorded by a Magistrate has to be scrutinised closely, but it is well settled that if the Court is satisfied on a close scrutiny of the dying declaration that it is truthful, it is open to the Court to convict the accused on its basis without any independent corroboration (1958 S.C. R. 552 = A.I.R. 1958 S. C. 22; A. I.R.1979 S.C. 190 (192). It is well settled by a catena of decisions of the spreme Court that if after searching serutiny the Court is satisfied that the dying declaration represents a truthful version of the occurrence in which the deceased received injuries which led to his death then even in the absence of any independent corroboration a conviction can be founded thereon (1979 Cr. L. R. (S. C.) 633 (635) ; A. I. R.1983 S.C. 164).

It is the settled law that when in capliatal case the prosecution demands a conviction of accused primarily on the basis of the confession, the Court must apply double tests, (i) whether the confession is perfectly voluntary and (ii) if so, whether it is true and trustworthy. Satisfaction of the first test is a *sine qua non* for its admissibility in evidence , and if the confession appears to the Court to have been caused by any inducement, threat or promise such as is mentioned in Sec. 24 of the Evidence Act, it must be excluded and rejected. In such a case the question of proceeding further to apply the second test does not arise. The act of recording confession under Sec. 164 Cr. P. C. , is a solemn act, and in discharging his duties under the said section, the Magistrate must take care to see that the requirements of law under Sec.164 Cr. P.C. must be fully satisfied. It would be necessary in every

case to put the questions prescribed by the High Court circular, but the questions intended to be put should not be allowed to become a matter of mere mechanical enquiry and no element of casualness should be allowed to creep in. The Magistrate should be fully satisfied that the confessional statement which the accused wants to made is in fact and in substance vol,unraty. The whole object of putting questions to an accused who offers to confess is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise , having reference to the charge against the accused, as mentioned in Sec. 24 of the Evidence Act (1981 Cr. L. J. 1408 (1412, 1413, 1414) (Gau); A.I.R. 1978 S. C. 1544).

Where the confessional statements were voluntary and true they are not to be discarded merely because they have been retracted at the trail (1981 Cr. L.J. 1452 (14 57) (Orissa).

Appellate Division has renently held in the case of Amir Hossain Howlader vs. The state 1948 BLD (AD) 193, that the statement of a co-accused does not fall within the definition of evidence as it is not made on oath in presence of the person effeected and its veracity is not tested by cross- examination.

Though admissible , it is much weaker than the evidence of an approver. It is the established rule of evidence as well as rule of prudence that confessional statement of co-accused shall not be used as the sole basis of conviction in the absence of independent corroborative evidence (Emran Ali v. State (Mustuafa Kamal, J.) 37 DLR (1985) 1 (2) .

While other, evidence adduced in the case is meager lacking independant corroboration, confession of a co-accused can not be basis of conviction of the accused (1983 BCR (AD) 298). Confessional statement of the co-accused can be used only in support of other evidence for corroboration but it can not be made foundation for conviction if there is no other reliable evidence (39 DLR (AD)117; 1987 BLD (AD) 212). Confeesion when proved against confessing accused can be taken into consideration against co-accused in same offence (39 DLF (AD) 194).

In Pyara Lal Bhargava v. State of Rajasthan (1963) Supp. 1 S. C. R. 689), the Supreme Court of India observed:

" A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base conviction on such a confession without corroboration. It is not a rule of law, but is only rule of prudence . It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction will be made without corroboration, for a Court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration , but it may be laid down as a general rule of pratice that it is unsafe to rely upon a confession, much less on a retracted confession , unless the Court is satisfied that the retracted confession is true and voluntarily made and had been corroborated in material particulars."

Investigating officers are keenly interested in the fruition of their efforst and though no assumption can be made against their veracity it is not prudent to base the conviction on a dying declaration made to an investigating officer (A.I.R. 1974 S. C. 2165 (2175) .

Some litigations were pending between the deceased on one side and the accused on the other side. While the deceased was going to Court on 12th September, 1968 he was surrounded by the accused on the way and assaulted by them with kantas and lathis. Defence of the accused was that they had been falsely

implicated due to enmity. All the prosecution witnesses were to some extent interested and inimical because they belonged to the faction headed by the deceased. But their evidence was corroborated by the dying declaration which was recorded by a doctor. Unfortunately however, the doctor who was transferred immediately after recording dying declaration forgot to send the dying declaration to the police and it got mixed up in his papers. It was only when the case reached the trial stage that the dying declaration was summoned from the doctor , who also appeared and proved its contents. The dying declaration was a very short and straightforward statement which had a ring of truth. It was held that the accused were liable to be convicted . The fact that the dying declaration was produced for the first time at the trial must be ignored (A.I.R. 1980 S.C. 4433 (443) .

The appellant initially abused the deceased by holding his collar and brandishing the Knife. When the deceased could over-power the appellant, the co-accused at the call of the appellant, injured the deceased and when the deceased had to release the grip, the appellant without any provocaion dealt a very sever Knife blow on the stomach of the appellant who was unarmed. Such Knife blow caused severe injuries to vital parts of the body of the deceased resulting this death in a very short time . It can not therefore, be held that the appellant had no intention to cause a murderous assult on the deceased without any intention whatsoever to cause death as sought to be contended. Conviction under section 302 Penal Code upheld (1993 CrLJ 2619 (S.C.).

It is now well settled that in order to sustain a conviction on the basis of a confesional statement it is sufficient that the general trend of the confession is substantiated by some evidence which would tally with the contents of confession. General corroboration is sufficient (1913 Cr. L.R. 337 (339) (S.C.).

Where the admissibility of any evidence is in question, it is the duty of the Judge to decide the point forthwith. He cannot allow the evidence to go on the record, and reserve his decision till the conclusion of the case (1918) P.L.R. 98: 50 I.C. 481). Where the exclupatory part of a confessional statement is inherently improbable the Court can accept the inculpatory part of it and pierce the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime. (A.I.R. 1969 S. C. 422 (430).

In Ram Ashit V. State of Bihar (1981 Cr. L.J. 484 (486, 487 -88) (S.C.)., it has been held that where all the material witnesses of the prosecution either interrelated or otherwise interested before their testimony can be safely acted upon, it has to pass the test of close and severe scrutiny. It would be extremely hazardous to convict the accused on the basis of the testimony of higly interested, inimical and partsan witnesses, particularly when it bristles with improbable version and material infirmities.

Where the witness kept quiet for about six month and did not disclose the incident to anybody and the excuse he puts forward is that he was threatened by the accused persons not to disclose what he had seen and apart from that even from his evidence , it appears that he has made wholly discrepant statements which are irreconcilable, it was held that having regard to the number of infirmities appearing in his evidence it was wholly unsafe to found the conviction of accused on the sigle testimony of the single witness (1980 Cr. L.J. 189 (189) (S.C.).

Where the assualt was continued jointly be the accused and his father, even if the part played by the accused in the assult was a limited one but the beating was accomplished by him and his father in fruthereance of the common intention of both, it was held, that the accused was thus properly held liable for the offence of

murder punishable under section 302 of the Penal Code (1981 Cr. L.J. 360 (362) (S.C.).

Where there were three victims of the attack , of whom two died on the spot and the number of victims and the number of injurises received by them clearly indicate that many more than three persons participated in the attack and the High Court took a broad view of the facts and acquitted everyone about whose participation there was any possible doubt, it was held that there was no scope for rejecting wholesale the evidence of injured witness and for acquitting the other accused also (1981 Cr. L.J. 624 (625) (S.C.).

Where the appellant and others were on inimical terms with the complainant party owing to some land dispute and on the day of the occurrence, during an attempt on the life of the complainat, his daughter who came to rescue him was killed by gun shot injuries, it was held that the appellants conviction under section 302/ 34 was proper and that the non-examination of disinterested neighbours would not affect the case as there was no evidence that any person other than those examined by the prosecution saw the occurrence (1973 SCC (Cri) 789) .

When it is manifest from the facts proved on record that both the accused participated equally in giving beating, blows, kicks, thrashing and battering to the deceased, it becomes irrelevant as to who inflicted the head injury which had caused the death of the deceased and it can be safely held that both the accused shared common intention to cause the death (Chaman Lal & Anor . v. State of H.P. 1991 (3) Crimes 563 (H.P.). Seven accused persons armed with lethal weapons like axes, dharias and spears are alleged to have mercilessly assaulted the deceased causing as many as 15 injuries. Medical evidence on the record clearly believed the evidence of the eye - witnesses. Genesis of the prosecution case is not clear. In such circumstances it would be risky & hazardous to seal the fate of as many as seven accused persons belonging to the same family with transportation of life. Conviction recorded is not legally sustainable (Lilubha Mahobatsinh & ors. V. State of Gujarat; 1991 (2) Crimes 372 (Guj.).

Where the deceased died in circumstanes which admit of either disease or homicide by poisoning, one must look at the conduct of the accused both before and after the death of the deceased, that the *corpus delicti* could be held to be proved by a number of facts which render the commission of the crime certain, and that the medical evidence in the case and the conduct of the accused unerringly point to the conlusion that the death of the deceased was the result of the administration of some ungrecognise poison or drug which would act as a poison and that the accused was the person who administered it (1960) 2 SCR 460 =62 Bom LR 471).

Where the evidence did not show that the appellant had inflicted the lathi blow on the head of the deceased, it was held that his conviction under section 302, simpliciter could not be sustained and the State not having filed an appeal against the acquittal of the co- accused under section 302/34 , he could be convicted only for the offence under section 325 read with section 34 of which the co-accused were convicted (Sohan Lal V. State, 1971 SCC (Cri) 206) .

Defence case that in free fight between accused party and deceased party but of gun of accused was broken by axe blow because of which it went off killing deceased . Evidence of Ballistic expert that axe blow on but could not move forward safety loc of gun so that gun could go off. Gun injuries on deceased also indicating that gun was not fired from close range thus rulling out defence case of participation of deceased in fight. Abrasions found on deceased attributable to fall due to gun injury. Plea of accidental firing not tenable. Conviction for murder proper (AIR 1993 2567 = 1993

Cr.L.J. 3658 (SC).Accused had a quarrel with the deceased just before the incident and nature of injuries received by deceased showed that the blows had been inflicted by accused with an element of vengeance. No injury had been received by accused from the pistol from which deceased was alleged to have fired a shot at the accused. Fact that the deceased allowed the accused to pick up a hatchet and inflict blows with the same on him when he was himself armed with a pistol clearly suggested that no serious danger to the life of accused existed. Conviction and sentence of accused were maintained in circumstances (Muhammad Ilyas V. State 1992 PCrLJ 1234).

Where in a murder case there was medical evidence in the form of post-mortem report, that the immediate cause of death of victim was short supply of blood to kindneys and that short supply could be on account of multiple injuries received by the Victim, the proximate cause of death could be said to be established by the prosecution and mere statement by the Pahologist in his report that short supply of blood to the Kidneys can be on various grounds would not be fatal to the prosecution case (AIR 1993 (S.C)2604).

There were serious misunderstan ins between deceased and Girja Shankar Misra because of the illicit relationship between Girja Shankar Misra and P.W. 54, wife of the deceased P. W. 54 herself has amitted about the illicit relations between her and Girja Shandar Msra and how the deceased objected and deprecated the same. It can be accepted that there were serious misunderstandings between the accused Girja Shankar Misra and the deceased and therefore it is probable that Girja Shankar Misra had a motive. But motive by itself cannot be a proof of conspiracy (AIR 1993 SC 2618 (2621) .

The sound method of appreciation of evidence in a criminal case is that the prosecution case cannot be disbelieved merely because it suffers from inconsistencies and discrepanices here and there. The main thing to be seen is whether those inconsistencies, etc, go to the root of the matter of pertain to insignificant aspects therof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence but in the latter, no such benefit may be available to it (1981 SCC (Cri) 669).It appears that the appellate Court proceeded on a mistaken idea that the presence of Shariatullah, "on the spot" was not challenged by the defence. There can be no question of his presence on the spot when the very defence case is that he was the actual killer who, in conspiracy with others, killed the old woman for the purpose of falsely implicating his enemies. The contradictions and omissions in his own evidence clearly support the defence suggestion that Halima Khatun was not killed in the manner as he has deposed to. The evidence of Shariatullah and his bhaira is not worthy of any credit. The defence case appears to be more probable than the prosecution as it fits in human nature and conduct, and as such, the appellants are entitled to acquittal as a matter of right in the facts and circumstances of the case (Abdul Kashem Vs. State 41 DLR (AD)152(155)=1989 BLD(AD) 122).

The inability of the prosecution to satsifactorily explain the injuries on the accused would lead to the conclusion that the prosecution has concealed the genesis of the occurrence and the accused was liable to be acquitted (1981 Chand Cr C 158 (P & H) .In a criminal case, a conviction must rest on proof so strong that the court must be conviced that what it concludes must necessarily have happened and is not reasonably explicable in any other way (1974 Cr LJ 780 (S.C.).

Conviction can be based on solitary statement of a single witness in a murder case if that statement is considered reliable (1986 Cri LJ 433 (Ori). But where a single witness has obviously changed (his statement) there is no guarantee about

the truthfulness of his statement unles there is corroboration of the prosecution case from other quarters (1985 Cri LJ 1173 (SC), or where the solitary witnes is a child who is unable to give clear answer in the Court (1986 Cri LJ 1363 (Ori), or where the Prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court is left with no reliable and trustworthy evidence upon which the conviction of the accused may be based (1973 SCC (Cri) 962).

In murder case when the circumstances consistent only with the hypotheis of the guilt of the accused have been cogently and firmly established by the prosecution which,taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none elase, the conviction under section 302,Penal Code has to be confirment (Laxmi Raj Shetty Vs. State of Tamil Nadu 1988 (2) Crimes 108 (SC) : Earadhadrappa v. state of Karnataka 1983 (2) S.C.C. 330 relied on).

Where the accused was seen running away from the scence of murder with blood -stained clothes and a knife in his hand, it was held that this evidence along with his subsequent conduct was sufficient to prove his guit (1974 Cr LJ (SC) 36).

Discovery of dead body at the instance of accused is not conclusive of offence of murder (AIR 1966 SC 821 = 1966 Cr LJ 605). Where two close neighbours corroborated prosecution evidence and the weapon of offence was recovered from the accused; it was held that conviction was correctly done (1977 Cr LR (SC) 409).

The deceased though was profusely bleeding on account of several cuts, there was no material on record to show that the accused were stained with blood . The witness claimed that they snatched weapons and held the accused. It was held that their evidence could not be rejected because of absence of blood -stains of their clothing or on their hands from the fact that the weapons were blood-stained, it could not be said that the clothing of the witness should also have been blood -stained (AIR 1979 SC 1831).

Mere presence of serious injuries on accused is no ground for acceptance of defence version (AIR 1979 SC 1828).

Where the accused beat his wife for one or two hours till she became silent, the only inference that could be drawn from his act was that he leliberately intended the murder of the deceased (1977 UJ (SC) 442). The nature of the weapon used by the accused, the vital parts of the body which were attacked and the number and nature of the injuries, all indicate that the intention of the accused when he stabbed the deceased, was to cause his death (1972 SCC (Cr) 558 = AIR 1972 SC 2574=1972 UJ (SC) 773; (1963) 1 Cr LJ 536 = 1963 Mad LJ (Cr) 183).

Common intention is a question of fact and is to be gathered from the facts of the parties. The conduct of the accused, the ferocity of the attack, the weapons used, the situs of the injuries and their nature together with the fact that there was preconcert established that the common intention of the accused was to murder the deceased (1959 SCR 49 6). Husbad and son of the injured were killed on account of gunshot injuries. Statement to Police given by the injured in the hispital contained satsifactory description of the accused. It was held that the description could not be rejected merely because the injured person did not state at that time that assailant was wearing a turban. Her explanation that she could not make a mention of the turban in the statement because of 'anguish' could not be said to be unsatisfactory (AIR 1978 SC 1204 = 1978 Cr LJ 1137).

Where the deceased appeared to have received as many as 12 incised wounds on various parts of the body, it was held that this could not have been done by the

accused alone unless he was accompained by other friends and that the prosecution had not proved the case against the accused beyound reasonable doubt (1979 Cr LR (SC 715). In the statement under Section 342, Cr. P.C. 1898, the accused deposed that after the deceased fell down he ran out of fear and he did not see if the deceased was stabbed, that there was enmity between them that in a direct question put to accused he denied that he stabbed the deceased or caused him fatal injury. There was no corroborative evidence also. It was held that the accused could not be covicted for committing murder (AIR 1979 SC 1414).

The sole ground of discrepancy in the timings regarding receipt of message in a police station and admission of the deceased in the hospital does not render the evidence liable to be rejected (AIR 1979 SC 1831). Where the witness also secured infuries at the hands of one accused that witness would be most compentent to depose against the accused, though disbelieved in relation to all other accused (AIR 1979 SC 1507).The circumstances that the identity of the assailants was unknown until police arrived at the scene is clear indication that the prosecution witness or her children had not identified the assailant at the time of occurrence (Gurja Bedia Vs. State of Bihar, (1990) 3 SCJ 222).

Conduct of accused in buying box, packing dead body of his wife into that box and throwing it from running train left no doubt that he committed her murder. The story of suicide by hanging by wife when her husband and 2 years old child were present in the home was incredible particularly when no rope was found in the house and medical evidence also did not show that deceased hanged herself . In viwe of illicit relationship of accused with nurse, the motive was proved. The conviction for murder was upheld (AIR 1948 SC 49 = 1983 Cr LJ 1731 =1983 Cr LR (SC) 641).

Where injuries are found on the accused it is obligatory on the part of the prosecution to explain the injuries so as to satisfy the Court as to the circumstances under which the occurrence orginated. Before that, however, two conditions must be satisfied:

1. that the injuries on the person of the accused must be shown to be very serious and not superficial; and

2. that the injuries must be shown to have been caused at the time of the occurrence.

Where none of these conditions were satisfied, the conviction of the appellant was confirmed (1979 SCC (Cri) 436).

The contention, that it is not safe to base a conviction for murder on the testimony of a single witness, cannot be accepted. Even if there has been only one solitary witness, the conviction cannot be said to be bad, provided that evidence was considered to be trutful, honest and acceptable (A.I. R. 1973 S.C. 944 (945-46).

The evidence of a single eye- witness cannot be rejected as unreliable, especially when it has got corroboration of evidence emanating from the medical officer who had conduced authosy as well as from the evidence that had emanated from the person who had actually come to the place of occurrence soon after the inflication of stab injuries on the deceased (1981 L.W. (Cr.). 237 (241) (Mad).

If a witness, who is only witness against the accused to prove a serious charge of murder, can modulate his evidence to suit a particular prosecution theory for the deliberate purpose securing a conviction, such a witness cannot be considered as a reliable person and no conviction can be based on his sole testimorny (1976 B. Cr. C. 39 (44) (S. C.).

Where a particular accused along with other accused also proceeded to the house of deceased and was member of the unlawful assembly till the deceased was dragged out from her house, but there is no further evidence that he continued to remain a member of the unlawful assembly thereafter, it was held that the accused could not be convicted with the aid of Sec. 149 of the Penal Copde (1981 Cr. L. J. 729 (732-733) (S.C.).

The maxim *falsus in uno falsus in omnibus* is not a sound rule for the reasons that hardly one come sacross a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments (A.I.R. 1954 SC 31 : 1954 Cr . L. J. 323= A.I.R. 1972 S. C. 2029 (1972) Cr. L. J. 1302).

In such a situation, a cautious scrutiny of the prosecution evidence appears to be necesaary and the substratum of prosecution case or material part of the evidence has to be judged to find out whether the disbeliveing part of the prosecution version affects the reliability of the main, plank of the prosecution version. If after scrutiny of the prosecution version, the remaining part can be believed,there will be no bar to its acceptance (A.I.R. 1975 SC. 1453 = 1975 Cr. L. J. 1201).

Where the description given by the injured person about his assailant in the statement to the police is satsifactory , there is no justification why it should be rejected merely because the injured person did not state at that time that her assailant was wearing a turban. His explanation that he could not make a mention of the truban because of anguish cannot be said to be unsatisfactory (A.I.R. 1978 S.C. 1204 (1209).

Omission of minor details in the statement of eye witnesses to occurrence before investigating officer does not affect the trustworthiness of the witness on the salient feature of the occurrence when the evidence is quite consistent with the medical opinion about the cause, nature and location of injuries and the witness had nothing to gain by giving a wrong descripton of the occurence in which her husband met with death (1981 Cr. L. j. 1787 (1789) (Orissa).

15. **Burden of proof.**- The burden to prove the prosecution case is on the prosecution alone which never shifts (38 DLR (AD) 75). The onus of proving guilt of accused beyound reasonable doubt is always on the prosecution (AIR 1944 Pat 308 = AIR 1980 SC 1382 =1980 Cr LJ 965). Prosecution to prove every link in the chain of evidence to connect the accused with the crime (42 DLR 89) .

In a criminal trial the charge brought against the accused shall be proved by the prosecution; the accused is not required to prove his innicence. But if he takes any special plea, then the onus is upon him to prove it (BCR 1986 AD 239).It is settled principle that in a criminal case the prosecution is to prove its case by satisfactory, cogent and reliable evidence against the accused beyond all reasonable doubt.The prosecution must bear the responsibility for all its laches and lapses be they be default or by design (1990 BLD (AD) 251).

The fundamental principle of criminal trial is that the accused shall be presumed innocent and that he is not required to adduce evidence to prove his ennocence, but the entire burden of proof of his suilt lies on the prosecution alone (38 DLR (AD) 311= 1987 BLD (AD) 1). The defence case need not be proved by examinig witnesses; if some indication in their favour is available from cross-examication of the prosecution witnesses then this may be sufficient for their acquittal. The manner of incident as alleged by the prosecution must be proved by the prosection alone; that burden never shifts. If the manner of the incident is not proved, the prosecution must fail no matter the defence version of the case has not

been proved either (Shamsul Haque v. State 1986 BCR (AD) 63 =38 DLR (1940) AD 75; Aftab Zaman V. State 1991 PCrLJ 76).

In Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat (AIR 1964 SC 1563), it is observed :

"It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in section 299 of the Penal Code. The general burden never shifts and it always rests on the prosecution. But, under section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the exception lies on the accused; and the Court shall presume the absence of such circumstances. Under section 105 of the Evidence Act, read with the defination of 'shall presume' in section 4 thereof, the Court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existnce was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the Court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would a act upon them. He accused has to satisfy the standard of a 'prudent man', the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind or a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in section 299 of the Penal Code."

It is needless to stress that the onus of proof of criminal cases is much more on the prosecution than the onus on the plaintiff in a civil case. It may be that when both the parties lead evidence in civil cases, the question of onus of proof may not remain material . But in criminal cases even if defence also adduces evidence in support of its version and that evidence may not be reliable, question of burden will be on the prosecution to prove its case beyond reasonable doubt. In criminal case burden never shifts, though the burden may be on the accused to prove the same particular fact. In that case too defence has not to prove the same by conclusive evidence (Jodh singh vs State of U.P. 1992 (3) Crimes 845 (849) All). Prosecution has to prove its case against accused beyond shasow of reasonable doubt and prosecution cannot take denefil of weakness of defence plea (Munawar Ali v. state PLD 1993 SC 251).

The prosecution must prove (1) death as a result of the voluntary act of the accused and (2) malice or motive of the accused. However, it also cannot be ignored that if the accused set up a special plea, the onus of proof (not the burdern of proof) is shifted to the accused, although the standard of proof is not like that of the prosecution (Pateswar Basumatari v state of Assam 1989 Cr. L.J. 196 (198) (Gau).

The general burden of establishing the guilt of accused is always on the prosecution and it nevr shifts. Even in respect of the cases covered by S. 105 the prosecution is not absoved of its duty of discharging the burdern. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or, he can indirectly introduce such circumstances by way of cross examination and also rely on

the probabilities and the other circumstances. Then the initial presumption against the accused regarding the non-existence of the circumstances in favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The accused can also discharge the burden under section 105 by preponderance of probabilities in favour of his plea. In case of general exceptions,special exceptions, provisions contained in the Penal Code or in any law defining the offence , the Court, after due consideration of the evidence in the light of the above principles, if satistied, would state, in the first instance, as to which execption the accused is entitled to, then see whether he would be entitled for a complete acquittal to the offence charged or would be liable for a lesser offence and convict him accordinly (Vijayee singh v. State of U. P. AIR 1990 SC 1459).

The phrase " burden of proof" is not defined in the Act. In respect or criminal cases, it is an accepted principle of criminal jurisprudence that the burden is always on the prosecution and never shifts. This flows from the cardinal principle that the accused is presumed to be innocent unless proved guilty by the prosecution and the accused is entitled to be benefit of every reasonable doubt. (Vijayee Sigh V. State of U. P. AIR 1990 SC 1459).

The maxim that the prosecution must prove its case beyond reasonable doubt is a rule of caution laid down by the Courts of Law in respect of assessing the evidence in criminal cases. Section 105, Evidence Act, places ' burden of proof on the accused in the first part and in the second part we find a presumption which presumption is alwasys rebuttable. Therefore, thaking the Section as a whole the " burden of proof" and the presumption have to be considered together. It is axiomatice when the evidence is sufficient as to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to displace the presumption which may affect the prosecution case or create a reasonable doubt about the existence of one or other ingredients of the offence and then it would amount to a case where prosecution failed to prove its own casse beyond reasonable doubt. The initial obligatory presumption that the Court shall presume the absence of such circumstances gets lifted when a plea of exception is raised. More so when there are circumstances on the record (gathered from the prosecution evidence, chief and cross- examination, probabilities and circumstances, if any. introduced by the accused, wither by adducing evidence or otherwise) creating a reasonable doubt about the existence of the ingredient of the offence. In case of such a reasonable doubt, the Court has to give the benefit of the same to the accused . The accused may also show on the basis of the material a preponderance of probability in favour of his plea. If there are absolutely no circumstances at all in favour of the existence of such an exception then the rest of the enquiry does not arise in spite of a mere plea being raised. But if the accused succeds in creating a reasqnable doubt or shows preponderance of probability in favour of his plea, the obligation on his part under S. 105 gets discharged and he would be entitled to an acquittal" (Vijayee Singh v. state of U.P. AIR 1990 SC 1459 1460).

The accused who pleads self -defence is not required to prove it beyond reasonable doubt. It is enough if the accuse establishes facts which stand the test of preponderance of probabilities making his defence acceptable (1975 Cr LJ 292 ; 1975 Cr LJ 1865 =1975 SCC (Cr) 512 ; (1975) SCC 245 =AIR 1975 SC 2161).

The burden of establishing the guilt of the accused throughout is on the prosecution and it must prove every link in the chain of evidence and also every ingredient of the offence beyond reasonable doubt. Where vital link in the long chain of evidence is snapped resulting in the chain being broken into several pieces, the

accused cannot be convicted (1990)42 DLR 89 (92) . The accuseds are not required to prove their innocent, it is the duty of the prosecution who is to prove the charge against accused beyond reasonable doubt. (Abu Taher Chowdhury V. State 1991 BLD (AD) 2=42 DLR (AD) 253). In a criminal trial it is for the prosecution to estatbish by true and trustworthy evidence that the appellant had committed the murder of the deceased. It is not for an accused person to say, much less to establish that some one else had commited the murder. The appellant might have taken a plea that her husband had committed suicide owing to her nervousness or because a part of the body was banging with a rope fixed to the roof. A false or weak defence cannot by itself, establish the case of the prosecution and may be only an additional link if there be sufficient other evidence pointing to the guilt of an accused person (1985) (1) Crimes 734) (Orissa)

The onus is on accused to give explanation when the aternative theory of the guilt is a remote possibility (43 I.C 605). Accused has to prove that his case comes within the exception only after the prosecution has estabtised its case (AIR 1947 Bom 38). It is to be remembered that if the plea of alibi is not belieed, it does not necessarily follow that the prisoner committed the murder. The prosecution is to prove the guilt of the accused and failure on the part of the defence to substantiate any plea taken by it does not necessarily prove the guilt of the accused. According to the settled principle of law the burden to prove the guilt of the accused is primarily and principally upon the prosecution (Abdur Rashid V. The State (1975) 27 DLR (AD) 1).

Accused should prove exception on which he relies (48 Cr LJ 168; AIR 1947 Bom 38). Burden is on accused to establish circumstances justifying exercise of right of private defence (AIR 1927 Lah 786). When an accused is found at midnight in the house of another the onus is on him to prove that he went there with honest intentions (37 All 395). The prosecution has to stand on its own leg even if defence version is not proved or more so when defence version is more provable (Ram Kishan & Ors V. State of U. P. 1992 (3) Crimes 139, 1983 BCR 35.)

The murder taking place while the accused was living with the victim, the wife, in the same house was under an obligation to explain how the wife was killed. In the absence of any explanation coming from his side it seems none other than the husband responsible for causing the death of wife (1990 BLD 375 .

It is true that the burden of proving a plea of alibi or any other plea specifically set up by an accused husband for absolving him of cirminal liability lies on him. But this burden is some what lighter than that of the prosecution. The accused could be considered to have discharged his burdern if he succeeds in creating a reasonable belief in the existence of circumstances that would absolve him of criminal liability. But the prosecution is to discharge its burden by establishing the guilt of the sccused. An accused's burden is lighter, because the Court is to consider his plea only after, and not before, the prosecution leads evidence for sustaining a conviction. When the prosecution failed to prove that the husband was in his house where his wife was mudered , he can not be saddled with any onus to prove his innocence (State vs Mofazzal Hussain Promanid; (1991) 43 DLR (AD) 65 =1991 BLD (AD) 302). It should be remembered that if the plea of alibi is not believed, it does not necessarily mean that the accused committed the murder. The Prosecution to prove the guilt of the accused. The settled principle of law is that the burden of proof of the guilt is primarily and principally upon the prosecution (27 DLR (AD) 16).

Ordinarily an accused has no obligation to account for the death for which he is placed on trial. The murder having taken place while the condemned prisioner was living with his wife in the same house he was under an obligation to explain how his

wife met with her death. In the absence of any explanation coming from his side it seems none other than the husband was responsible for causing death in question (State Vs. Kalu Bepari (1991) 43 DLR 279=Dipak Vs. State (1988) 40 DL 139).

The burben of establishing guilt of accused is throughout on the prosecution and it must prove every link in the chain of evidence (PLD 1988 Kar 350 (DB); 1984 P.Cr. L. 496), and also each ingredient of the offence beyond reasonable doubt (PLD 1956 SC 417 ; 1980 P. Cr. L. J. 245). Fate of a criminal case does not depend on weakness of defence evidence. Prosecution case, had to stand on its own legs (1986 P. Cr. L.J. 1283 =NLR 1986 Cr. 495), though evidence of disinterested witnesses (PLD 1986 Pesh . 150 = KLR 1986 Cr. C. 678). The burben never shifts on to defence. Where motive was alleged but was not established by prosecution. Defence was not expected to show that there was any motive to implicate them in the case (1986 P.Cr. L.J. 637).The Court must subject the evidence to critical analysis with a view to excluding every other reasonable hypothesis compatible with innocence of the accused. Where many vital links in a long chain forged by use of circumstantial evidence snapped resulting in he chain being broken into several pieces the accused could not be convicted (PLD 1979 SC 53).

Death of human being can occur invarious wasys- it can be natural, suicidal or accidental as well. In a case of culpable homicide, it is of utmost importance that the person who is alleged to have heen killed by the person charged, met with unnstural death caused with intention or knowledge as mentioned in Sec. 299 of the Penal Code. Once this basic circumstace is established there would be still other circumstaces which would require to be proved to bring home the charge. These would include evidence showing the complicity of the person charged (1979 Cr. L. J. 1290 (1293).

Under section 300 the prosecution has to prove that the act by which death was caused was done with a ceratin intention or knowledge and so long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal and there is no onus on him to take or prove any special plea of accident or necessity. Whereas in the offence of murder, intent or knowledge is an ingredient of the crime, there is no onus on the accused to prove that the act was accidental (1979 P. Cr. L.J.).

Where one-sided version was given by each party , entire truth was not disclosed by either of them. Even prosecution did not give correct version of occurrence. Accused was given benefit of doubt and acquitted (1988 SCMR 388). The burden is on the prosecution to explain the injuries received on hehalf of the accused (Mohd . Ayud Kdan & orsl. V. State of U. P. 1991 (3) Crimes 113 (All).

The onus always lies on the prosecution to prove the guilt to any statutory exception that may exist. This statutory exception exists in section 105, Evidence Act. The proposition however is correct if it means that the prosecution can not claim a verdict of guilty because the accused puts forward a false defence. The guilt must be datermined on the strength of the prosecution evidence alone, but where the accused puts forward a plea that he had committed the offence charged, but in circumstanes that execused or mitigated, the prosecution in such cases can show that no such circumstance exist and so the claim is averted, with the rejection of the defence version however, the duty of the prosecution does not end and they have still to show that the accused caused death in circimstances which makes the offence murder and in this sence the onus never shifts from the prosecution (1935) A.C. 462 ; 1983 Cr. L. J. 432; AIR 1940 Lah 54 ; 1983 (I) Crimes 671) .

It is true that the burden on accused person to establish the plea of self defence is not as onerous as the one which lies on the prosecution and that while

the prosecution is required to prove its case beyond reasobale doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross examination of prosecution witnesses or by adducing defence evidence (1979 Cr.L. J. 323 (327, 328, 329). It is for the accused to prove that right of private defence as set up by him by at least preponderance of probabilities available in the case of the prosecution (1989 (2) Crimes 616 (619) (Mad.).

The burben of proof is heavy on the prosecution. The prosecution cannot take advantage of the weakness of the defence or cannot take advantage of the inconsistent stand taken by the accused from time to time . The prosecution must stand on its own legs basing on the evidence that has been let in by it (1993 Cr. L. J. 558 (577). It is well established principle of law that the accused persons are under no obligation to substantiate their defence version. They are simply to come forward with a probable and plausible version which fits in with the circumstance of a particular case (1993 Cr. L.J 1622).

Onus lies heavily on prosecution to establish its case beyond reasonable doutd independent of weaknesses of defence (1985 P. Cr. L.J. 2857 (DB); 1984 P. Cr. L. J. 1057 (DB). But where prosecution failed to prove its case beyond any reasonable doubt. Truthfulness or otherwise of defence plea, would not be gone into as onus to prove its case was no prosecution (1987 P.Cr. L. j. 1157=PLJ 1987 Cr. C. 272 (DB) .

Prosecution is burdened with onus to prove criminal charges beyond any reasonable doubt. Stage of establishing any special plea raised by accused would come only when a *primafacie* case is made out against accused. it is then and only then that burden shifts to accused to prove the plea that he chooses to advance (NLR 1983 U.C. 505 (DB). If the defenceputs forward a theory which could be directly supported by factual evidence, then it would be legistimate to expect the defence to supply the necessary factual base (PLD 1985 Quetta 133= PLD 1974 SC 265).

The general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burben to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosection to prove the ingredients of the offence; indeed, the evidence though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence (1961) 64 BomLR 488 (SC).

An accused's plea if an exception may reach one of the three following not sharply demarcated, stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of a prudent man weighing or balancing probabilities carefully. These stages are: firstly, a lifting of the initial obligatory presumption given at the end of section 105, Evidence Act; secondly, the creation of a reasonable doubt about the existence of an ingredient of the offeence, and thirdly, a complete proof of the exception by a preponderance of probability', which covers even a slight tilt of the balance of probability in favour of the accused's guilt. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to acquittal by obtaining a bare benefit of doubt .At the third stage, he is undoubtedly entitled to an acquittal by reason of the exception proved (AIR 1941 All 402 FB).

If wife is murdered, onus is not on accused to prove that no offence has beer committed (AIR 1940 Mad 1=41 Cr LJ 369).

The burden of proving the alibi is always on the accused and it is not incumbent upon the prosecution to prove the negative (AIR 1955 NUC (Mad) 3941). Where the accused's plea was that he was hospitalised on the date of occurrence but the nurse making entries in hospital's indoor register was not examined it was held that *alibi* was not proved (1981 Cr LJ 667 ; (669); 1981 Rajdhani LR 68 (Delhi).

It is for the accused who pleads *alibi* to prove it (AIr 1972 SC 109; 1972 Cr LJ 22). Onus is on the accused to substantiate the plea of alibi and make it resonably probable (AIR 1978 SC 1917) . It is well settled that the plea of *alibi* must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence (AIR 1984 SC 63).

The burden of proving the plea of private defence is on the accuse though the responsibility of the prosecution to prove their case is in no way diminished. After confessing the killing of the deceased it was for the accused to have shown some evidence or circumstace to shift this onus back to the prosecution. A mere assertion in the statement of the accused or a suggestion in cross- examination on this behalf is not enough (PLD 1978 BJ 55).

The plea of the accused may not be established and yet it may create a reasonable doubt with regard to his guilt. it cannot be said that because under Section 105 of the Evidence Act, the burden of proof is one the accused and he has not discharged that burden but has only raised a reasonable doubt, the court has to convict him in spite of the existence of such a doubt. The decision has to be taken on the entire evidence and not on the special pleading (1972 SCMR 579).

In Rishi Kesh Singh's case (1970 Cri LJ 132 (All) the majority held that if the material put forward by the accused is sufficient to show that the plea of private defence is more probable than the prosecution case, the plea will be taken as proved and the acused will be entitled to accquittal on the ground that he has discharged the onus laid on him by Section 105, Evidence Act. Alternatively, if this material (read in conjunction with other evidence on record) is found to create a reasonable doubt in the mind of the Court regarding something (for example, *mens rea* in a majority of cases) that is required to be proved by the prosecution in order to establish the accused's guilt, the accused will then be entitled to acquittal on the ground that the prosecution has failed to discharge the primary burden that lies on it in all criminal cases. A person who inflicts harm in a lawful manner in order to protect his person or property is clearly deviod of *mens rea*; and if the material relied upon the accused creates a doubt as to whether he acted in the exercise of the right of private defence, a doubt will simultaneouly arise as to whether he had the *mens rea* that must be proved in order to make his act a punisable offence . In such circumstances he will have to be given the benefit of doubt regarding the essential pre-requsites of the prosecution case and will be entitled to acquittal.

Where injuries are found on the accused it is obligatory on the part of the prosecution to explain the injuries so as to satisfy the Court as to the circumstances under which the occurrence orginated. Before that, however, two conditions must be satisfied:

1. that the injuries on the person of the accused must be shown to be very serious and not superficial; and

2. that the injuries must be shown to have been caused at the time of the occurrence.

Where none of these conditions were satisfied, the conviction of the appellant was confirmed (1979 SCC (Cri) 436).

The contention, that it is not safe to base a conviction for murder on the testimony of a single witness, cannot be accepted. Even if there has been only one solitary witness, the conviction cannot be said to be bad, provided that evidence was considered to be truthful, honest and acceptable (A.I. R. 1973 S.C. 944 (945-46).

The evidence of a single eye- witness cannot be rejected as unreliable, especially when it has got corroboration of evidence emanating from the medical officer who had conduced authosy as well as from the evidence that had emanated from the person who had actually come to the place of occurrence soon after the infliction of stab injuries on the deceased (1981 L.W. (Cr.). 237 (241) (Mad).

If a witness, who is only witness against the accused to prove a serious charge of murder, can modulate his evidence to suit a particular prosecution theory for the deliberate purpose securing a conviction, such a witness cannot be considered as a reliable person and no conviction can be based on his sole testimorny (1976 B. Cr. C. 39 (44) (S. C.).

Where a particular accused along with other accused also proceeded to the house of deceased and was member of the unlawful assembly till the deceased was dragged out from her house, but there is no further evidence that he continued to remain a member of the unlawful assembly thereafter, it was held that the accused could not be convicted with the aid of Sec. 149 of the Penal Copde (1981 Cr. L. J. 729 (732-733) (S.C.).

The maxim *falsus in uno falsus in omnibus* is not a sound rule for the reasons that hardly one come sacross a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments (A.I.R. 1954 SC 31 : 1954 Cr . L. J. 323= A.I.R. 1972 S. C. 2029 (1972) Cr. L. J. 1302).

In such a situation, a cautious scrutiny of the prosecution evidence appears to be necesaary and the substratum of prosecution case or material part of the evidence has to be judged to find out whether the disbeliveing part of the prosecution version affects the reliability of the main, plank of the prosecution version. If after scrutiny of the prosecution version, the remaining part can be believed,there will be no bar to its acceptance (A.I.R. 1975 SC. 1453 = 1975 Cr. L. J. 1201).

Where the description given by the injured person about his assailant in the statement to the police is satsifactory , there is no justification why it should be rejected merely because the injured person did not state at that time that her assailant was wearing a turban. His explanation that he could not make a mention of the truban because of anguish cannot be said to be unsatisfactory (A.I.R. 1978 S.C. 1204 (1209).

Omission of minor details in the statement of eye witnesses to occurrence before investigating officer does not affect the trustworthiness of the witness on the salient feature of the occurrence when the evidence is quite consistent with the medical opinion about the cause, nature and location of injuries and the witness had nothing to gain by giving a wrong descripton of the occurence in which her husband met with death (1981 Cr. L. j. 1787 (1789) (Orissa).

16. **Benefit of doubt**. - In a criminal case, it is the duty of the court to reveiw the entire evidence that has been produced by the prosecution and the defence. It after an examination of the whole evidence, the court is of the opinion that there is a reasonable possibility that defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances,the accused is entitled to benefit of doubt not a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt

(Safdar Ali Vs. The Crown 5 DLR (FC) 107). Accused person being favourite child of law, was entitled to benefit of slightest doubt not as a matter of course or concession, but as a matter of right (Muhammad Ramzan Vs. State 1992 PCrLJ 1727; 1991 PCrLJ 2275). The benefit of doubt to which the accused is entitled is reasonable doubt the doubt which rational thinking men will reasonably, honestly and concientiously entertain and not the doubt of a timid mind which fights shy though unwittingly it may be or is afraid of the logical consequences, if that benefit was not given .The maxim that the prosecution must prove beyond doubt the guilt of the accused or otherwise he is entitled to the benefit of doubt does not mean that the prosecution evidence must be so strong as to exclude even a remote possibility that the accused could not have committed the offence. On the contrary once the guilt of the accused is established the mere fact that there is only a remote possibility in favour of the accused is itself sufficient to establish the case beyond reasonable doubt (AIR 1972 S. C. 975).

Where two possibilities, one of commission of crime and the other of innocence are reasonably possible , accused entitled to benefit of doubt (Sharad Birdhi Chand Sarda v. State of Maharashtra 1984 (4) S. C.C. 116). When any fact asserted by the prosecution turns doubtful, the benefit should go to the accused , not to the prosecution (Ibid).Even if there may be elements of truth in the prosecution case against the accused, that by itself is not sufficient for conviction. Between 'may be true' and 'must be true' there is inevitably a long distance must be convered by the prosecution by legal and reliable evidence (Dula Mia @ Nurul Islam and others vs. The State; (1994) 14 BLD 477).

" Where there are two possibilities open upon the evidence the possibility which is more favourable to the accused must be accepted, if it otherwise fits in with the facts and circumstances of the case. As we have endeavoured to show the possibility of the injuries, found on the deceased, being caused by a single shot , is supported not only by the medical evidence but also by the recovery of only one empty cartridge and the number of pellets normally contained in such a cartridge. It cannot, therefore, be said with certainty that the injuries were caused by two shots and not by one . The benefit of this doubt must go to the accused and not to the prosecution " (1971 SCMR 357).

In criminal case it is the duty of the Court to review the entire evidence that has been produced by the prosecution and defence. If after an examination of the whole evidence , the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such view reacts upon the whole prosecution case (Tenu Miah vs the State (1991) 11 BLD 169).

In the case reported in 1970 (3) S. C. C. 26, correct approach has been made as to how the prosecution case vis-a-vis the defence plea of alibi is to be considered which runs as follows:

" In the case , as generally in most cases, the prosecution evidence and the evidence of alibi is not to be considered in compartments. The evidence on one part will have impact on the other and the court has to consider the entire material on the record as constituting on complete picture ."

When two views of the evidence are reasonably possible, one supporting the acquittal and the other indicating conviction, the High Court should not reverse the order of acquittal (Tara Singh v. State ; 1981 S. C.Cri 375; State v. P. Ananeyulan, AIR 1982 S. C.1558= 1983 Cr LJ 153.). Where on the evidence two possibilities are possible, one goes in favour of the prosecution whereeas the other benefits the

accused.it is well settled that the accused, under such circumstances, is entitled to the benetif of doubt (Sharad v.State AIR 1984 S C. 1622=1984 Cr LJ 1738).

If the defence put forward on behalf of the accused there is reasonable possibility of being true accused is entitled to a verdict of benefit of doubt (1993 BLD 277 (278); 38 (1936) DLR 184; 5 (1953) DLR 64 FC). Where two inferences are possible, one in favour of the accused and the other in favour of the prosecution the rule which applies in the case of circumstantial evidence is that the denefit of doubt, if any, would have to be given to the accused (Binode Pandey v. State 1989 Cal . Cr. L. R. 25 (34) (Cal). When the prosecution case is full of infirmities and the accused's plea and version appear to be probable, the benefit of doub thas to be given to the accused (Dinesh Kumar v. State of Haryana 1991 (1) Crimes 605 (P & H). Prosecution witness had not only given one sided version but had also suppressed the injuries sustained by accused. Evidence of witnesses even otherwise was replete with grave doubts and material discrepancies. Benefit of such circumstances, held, could not be denied to accused (Abdur Rahman Vs. Fida Hussain 1989 PCrLJ 2028).

In the present case, the falsehood and the truth, if any,are so intermingled that it is not possible to separate truth from the falsehood or grain from the chaff and it will be unsafe to rely on such evidence to convict the accused appellants for an offence u/s. 302 Penal Code. It is not a case there are number of accused persons. Accused persons have claimed both right of private defence with regard to property as also person and it is very difficult to ascertain as to which accused person is responsible for the death of the deceased persons, and therefore, none of the accused appellants could be convicted u/s 302 Penal Code, or u/s. 302/34 Penal Code, as has been observed in State of Hihar v. Nathu Pandey and others (AIR 1970 SC 27). It is just possible that some of the accused persons may be responsible for the death of the six persons from the side of the complainat party but it is not safe to act on surmises and conjectures so as to believe the prosecution case against each of the accused persons beyond reasonable doubt, and if there is any doubt, benefit of doubt is to be given to the accused person. It is no doubt a matter of regret that a foul cold blooded and cruel murder should go un-punished.There may aslo be an element of truth in the prosecution stroy against the accused persons. The prosecution story may be true, but between ' may be true' and 'must be true', there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted (Chandee, v State of Rajsthan 1988 (3) Crimes169 Sarwan Sinah v. State of Punjab AIR 1957 SC 637 relied on).

In order to convict a person charged with murder, there should be unimpeachable evidence of reliable witnesses bringing home guilt of the accused beyond reasonable doubt. if the court finds that the proof adduced at best leads to strong suspicion but falls short of the requisite standard, the Court should give benefit of the doubt to the accused (NLR 1980 Cr. 695 ; 1979 P.Cr. L. J. 475 (DB). The consequence of the doubt must be reflected in the finding and not in the sentence (PLD 1961 Lah . 451). Where the prosecution has failed to prove beyond any reasonable doubt the place of occurrence and the manner in which the deceased was injured by his assailants and that the deceased had actually made any dying declaration. Assuming that the declaration was made, the prosecution has further failed to prove the contents of the declaration. It was further found that the witnesses are not altogether disinterested their evidence alone could not afford a safe basis for the conviction of the appellants . Benefit of the doubt must be given to the accused (1975 SCMR 263).

Canvassing high probabilities in a case against the accused can never be a ground to hold him guilt (PLD 1979 SC 53), because no person can be convicted merely on the ground that the case for the prosecution is more probable than that of the defence or because the defence theory is less likely than the prosecution case (1981 SCMR 389). The defence plea even though not established as truthful must nevertheless be read in conjunciton with prosecution evidence . Where examination of the entire evidence created a soubt and revealed the possibility of the defence plea being true, benfit of the doubt would go to accused (1979 P. Cr. L. J. 415 (DB) (Kar) . Where plea of alibi got support from F. I . R. at least doubt as to presence of accused in his house at time of death of deceased was created and conclusion of trial court about his presence was based on presumption. Benefit of doubt was given to accused (1985 P. Cr. L. J. 1812).

An accused person has to create reasonable doubt about his guily, and if he suceeds in doing that, he need not actually establish his innocence (1975 SCMR 337).

The onus of proving the guilt beyond reasonable doubt is on the prosecution and every circumstance which may tend to establish the defence by bringing the case within any of the exceptions has to be explained and the guilt of the accuse established beyond all reasonable doubt. If the Court is left in doubt regarding the guilt of the accused, the denefit of doubt has to go to the accused. The position under the English law is stated by Goddared C. J. in (Regina;, 1957 1 QB 547). No inference of guilt can be drawn from the conduct of the accused or suspected accused running away from the place and wording in another place in another name. Evidence has to be weighed and not counted where there are eye-witnesses, their evidence cannot be doubted even if they happen to be the relatives of the deceased (AIR 1964 Trip 54).

It there are two theories, one compatible with the defence story and the other with prosecution story, the theory compatible with the defence story shall have to be accepted (1988 SCMR 857; 1985 SCMR 1810).There are two verisons brought forward by prosecution and defence and each side claimed that the other was the aggressor. There was a posibility of defence version being true, accused were entitled to acquittal (1988 SCMR 857). Where one- sided version was given by each party. Entire truth was not disclosed by occurrence.Accused may be given denefit of doubt and acqitted (1988 SCMR 388 (DB).

"The accused need not establish their right beyond all reasonable doubt. It is enough if a reasonable doubt arises on examination of the probabilities of the case. in the instatt case we have seen that the accused persons received fairly number of injuries. Some of them were on vital parts. The prosecution has no plaushble explanation. In such a situation , the plea put forward by the accused appears to be quite probable and therefore, it cannot be rejected. The next question is whether they have exceeded the right of private defence. Only one overt act is attributed to A-1. It is clear that the inflicted only one injury and dealt one blow on his head.Therefore, in such a situation, it cannot be said that the act of A-1 is not in conformity with the limitations laid down in section 100, Penal Code . In the result we give the benefit of doubt to all the accused as such . we are of the view that they have not exceeded the right of self -defence" (1993) Cri L J. 2603 (S.C.).

Where one of the accused persons is accquitted; the other acused whose case is at par with him convicted on the same evidence, must be given the benefit of the doubt and acquitted (1985 SCMR 1791).But that is not so where the case of the other accused is distiguishable from the accused (1988 SCMR 66) .

When there are major contradictions of material particulars of the case stated by various sets of witness which create a reasonable doubt as to the authenticity of the prosecution version, the accused are entitled to the benefit of doubt (State of Himachal Pradewsh v. Bhawani Singh & Anr . 1991 (3) Crimes 579(H. P.).

If the defence put forward on behalf of the accused has a reasonable possibility of being true accused entitled to a verdict of benefit of doubt (38 DBR (AD) 311). If on examination of the entire evidence on record the Court is of opinion that there is a reasonable possibility that defence put forward might be true, it is clear that such view re-acts on the whole prosecution case and the appellant is entitled to benefit of doubt (Jamal v. State 38 DLR 284).When evidence showsthat murder was not caused in a way suggested by prosecution, accused is entitled to benefit of doubt (1993 CrLJ 551 All).

Where the accused charged for murder was not assigned any role by the eye-witnesses in their statements under Section 161, Criminal P. C. however, at the time of trial the eye-witnesses deposed that the accused gave injuries by a lathi, there would be suspicion so far as the presence of that accused was concerned, and he would be entitled to be acquitted on benefit of doubt . It was more so when he was 60 years of age at the time of occurrence which took place in the year 1974 , and itis common tendency in the faction ridden villager to rope in all the members of the adversary family (Baital Singh v.State of U. P. AIR 1990 SC 1982).

Where it is found that one of the two persons must have committed a murder but it was not found as to which of the two committed it. It was held that in the absence of proof or presumption that both of them committed the offence, neither could be convicted of murder (1978 P. Cr. L. J. 380 (DB). Where only one person took part in the fight and there was no reliable evidence that the person charged had given the fatal blow. It was held that he could not be convicted of the offence and must be acquitted. (NLR 1983 Cr. L. J. 532 = 1983 P. Cr. L. J. 1771).

Where the weapon of offence recovered from one of the accused was not found to be smeared with blood, his having taken part in the fight became doubtful and he was acquitted (1979 P. Cr. L.J. 286 (DB). When two accused were allegedly armed with hatchets, distinguishable from those of the other three who were armed with guns.The outstanding fact operating in favour of those two appellants was that no incised injury caused by a sharp-edged weapon was discovered on the bodies of the deceased. Even the two eye witnesses did not assign any definite part to them. The hatchets were not recovered either. Therefore, their participation in the transaction was doubtful (1976 SCMR). Similarly where there was a doubt about the accused's liability regarding the fatal shot which killed the deceased,benefit of the doubt must be given to the accused (1979 P. Cr. L. J. 234 (DB). Where plea of *alibi* set up by the accused was quite plausible. Eye-witnesses had not observed with certitude as to whether both accused and absconding accused had given one dagger blow each to the deceased or both blows were inflicted by absconding accused and this possibility was accentuated by his abscondence which apparently smacked of his guilt. Prosecution case against the accused was held not free from doubt. Accused was given benefit of doubt and acquitted (1984 P.Cr.L.J. 2923 (DB).Where three persons were charged with murder but according to medical evidence it was likely that all the injuries were caused by firing by one of them, benefit of the doubt was given to the other two and they were acquitted (1983 PCr. L.J. 1487).

In the case of group rivalries and enmities, where the prosecution case is mainly based on the evidence of relation witnesses , the Courts have to be careful and if after a close scrutiny of the evidence, the reasonable doubt arises with regard to the participation of any of those who have been raped in, the Court would be obliged

to give the benefit of doubt to them (Budhwa alies Ramcharan & ors. v. State of M. P. 1990 (3) Crimes 434 (SC).

Where injured victim named all the accused but did not name those who murdered brother and out of them A-5 and A-6 were not named in FIR as murderer then A-5 and A-6 get benefit of doubt for their conviction under section 302 Penal Code, but their conviction under section 307 Penal Code is justified (Appabhai & another v. State of Gujarat 1988 (1) Crimes 606 (SC) .

When the Trial Court comes to the finding that the prosecution totally fails to prove the charge then the user of the expression " benefit of doubt" in acquitting the accused is improper and illegal (Amarnath Pande v. State of M. P. 1988 (1) Crimes 616 (M. P.)

In the evidence of the witnessed for the prosecution is totally inconsistent with the medical evidence, this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case and benefit of doubt goes to the accused (1987 Cr. L. J. 706 (708) (S.C.) = A. I. R. 1987 S. C. 826).

It is very significant to note that according to the medical opinion bodies were recovered about three month after the death. the bodies were found disintegrated. It was difficult to indentify. The disintegration has gone to such an extent that the bodies could not be removed and sent for post-mortem and therefore medical expert was called to the sopt to perform the post-mortem. The prosecution did not examine any one of the relatives to indentify the dead bodies. It was held that the charge against the accused cannot be said to have been proved beyond doubt and the conviction of the accused cannot be sustained (1989 East Cr. C. 156, 159) (S. C.).

17. **Proof of site of the offence.-** The failure of the police to send the blood found on the site of the crime for chemical examination in a serious case of murder must be deprecated. In such cases the place of occurrence is often disputed. However, such an omission need not jeopardise the success of the prosecution case where there is othere reliable evidence to fix the sence of the occurrence (1974 Cri LJ 453 (SC) = AIR 1974 SC 463). In almost all murder cases or offeces of serious nature, the bloodstained earth found from the place of occurrence is invariably sent to the chemical examiner and his report along with the earth is produced in the Court. If this procedure is departed from, it may under certain circumstace invite the Court to believe that the defence version may be true (AIR 1976 SC 2263).It is in the evidence of P.W. 14 the Investigating Officer that he could not produce blood stained earth from the place of occurrence as he did not get any blood stained earth there. It is also in evidence that he visited the place of occurrence after an expiry of three days of the occurrence and so the possibility of there being no existance of any blood on the spot at that time cannot be altogether ruled out. In such circumstnce from the mere failure the investigating officer to recover blood stained earth from the scene it cannot be inferred that the occurrence had not taken place at the place as alleged by the prosecution (Md. Mofazzel Hossain Vs. state 1987 BLD 406 Para - 9).

Evidence of prosecution witnesses on main story was found to be truthful and of quality which could safely be relied upon. Discrepancy in evidence of such witnesses on point of place of occurrence, was insignificant and such as were bound to occur in statements of truthful witnesses (1983 P. Cr. L. J. 898 (SC AJ & K). From the failure of the investigating officer to recover blood stained earth from the seene of occurrence it is not possible to inter that the occurrence had not taken place in front of the house of the deceased. Where the presence of the injured witness was not disputed and his evidence was corroborated by the other witnesses and the

discrepancies were not very material and the occurrence took place in front of the house of the deceased and his family memberes were the natural witnesses, it was held that the conviction could be justified and the evidence of the witness could not be rejected on the ground of minor discrepancies (RamAvtar vs. State U. P. 1985 A. L.J. 41 (243):1993 CrLJ 772).

According to the learned counsel, the absence of blood on the spot near the Herash stores, the absence of blood on the weapon seized throws doubt on the credibility of the investigation. The failure to examine non-Harijians witnesses is also commented upon amounting the suppression of matrial evidence. The nature of the injuries sustained by the deceased and the medical evidence justify the inference that there would not have been the possibility of any blood stain remaining on the spot for the injured was immediately removed from there and the place is one trampled upon by the public. It is quite possible that a large crowd gathered at the scene immediately after the occurence and if no blood could be detcted by the inspector, it is not possible to infer that the incidence did not happen at the spot. The presence of blood on the weapon is also of no consequencce and no incriminating statement has been made by the accused on the production of the same . In a case where there is direct evidence, even the seizure of the weapon is not very material (AIR 1992 SC 885). Non- examination of impartial witnesses and failure to seize blood stained earth from the place of occurrence and wearing apparel of the accused raises an adverse presumption against prosecution case (1988 BLD 100) .

Overwhelming oral evidence that occurrence took place inside the bus. Fact that ivestigating officer did not remember to take sample of blood stains from inside bus is not sufficient to throw doubt on said evidence (1993 Cri L.J. 1943). Site plan is not a substantive piece of evidence (Mist. Shamin Akhtar v. Fiaz Akhtar PLD 1992 (SC) 211); Sultan Muhammad V. State 1991 PCrLJ 56).

Filure to send the blood stained earth for chemical examination is no ground to doudbt the prosecution case when there is clinching evidence both oral and circumstantial establishing the place of occurrence (Ramesh Chander V. State (Delhi Administration, 1992 (2) Crimes 1169).

18.**Time of death**.- Opinon of a doctor about time of occurence, is never certain but generally conjectural specially when doctor himself used the word " about "while giving time of occurrence (1983 P. Cr. L. J. 2462). The age of an injury cannot be ascertained with any certainty and the error of a few hours is possible either way (1972 P. Cr. L. J. 107 (DB) (Kar); 1980 SCMR 889).But it is difficult to believe that competent doctor would be wrong in his estimate of probable time of death by seven or eight hours (1980 SCMR 889) .

Medical evidence is not a perfect as yet to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last account (AIR 1985 SC 1715 (11716) . As to the time of death, medical evidence is not conclusive. Accuracy is inversely proportional to the time elapsed since the death to the time of post -mortem examination (1982 Cr. LJ 2123 (Del). Opinion of doctor as regards timing of taking of meals would be approximate. Aprroximation in consonance with the time of incident, would land support to the prosecution case (Ahmad Khan V. State 1991 PCrLJ 301). The doctor while holding the post mortem examination did not record the age of the injuries. In a case of murder the age of injuries is an important fact to determine the approximate time of occurrence (Abdur Rashid Vs. The State: (1975) 27 DLR (AD) 1). Medically it is not possible to fix the exact time lag between the injuries and death. There can always occur a margin of a few hours (1986) 2 Crimes 487 (492) (

Delhi). The time of occurrence of a prosecuuon case is to be decided on the basis of direct and other evidences on record and not on the basis of the medical evidence which may cast doubt on the prosecution case (Abu Taher Chowdhury V. State 1991 BLD (AD) 2=(1990) 42 DLR 253).

A medical evidence in respect of time of death in a murder case can not be regarded as conclusive . The possiblity of error in time factor can not be eliminated. The time of death can not be pinpointed with mathematical precision, more so after the onset of decomposition and putrefaction (1982 Cr. L . J 2123 Delhi).

The Supreme Court of India in a case reported in 1969 (1) S.C.C. 48 held that the time of occurence of a prosecution case is to be decided on the basis of direct and other evidence on record and not on the basis of the medical evidence which may cast doubt on the prosecution case. The learned Judges of the Spreme court observed in that decision as follows :-

"The question of time had to be decided on the basis of direct and other evidence on record . We concur in that view and find it difficult to accept that the question of time should be decided only by taking into consideration the fact that facal matter was found in the intestines of the deceased. This may be a factor which might have to be considered along with other evidence but this fact alone cannot be decisive."

In the case of Masji Tata Rawool and others vs. State of Maharashtra reported in 1971 (3) S.C. C. 416 .The Supreme Court of India observed as follows:

"We do not consider it necessary to express any considered opinion with respect to the contents of the stomach found at the time of post-mortem because that would be a matter of speculation, in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of ."

Description of injuries given in the medical report corroborated the statements of all the eye-witnesses. Timings given in doctor's report with regard to the receipt of the dead body were not to be taken with exactitude but were normally approximate timings. Contradictory statement of doctor and eye-witness with regard to timing of receipt of dead body by itself was not sufficient to discredit the statement of all the eye-witnesses in circumstances (Muhammad Usman V. State 1992 SCMR 489).

In the case of Lachhman Singh vs. The State, reported in A.I.R . 1952 SC 167, Mr. Fazl Ali , J: while delivering the judgment in a murder case on behalf of the Court observed as follows :-

"The learned counsel for the appellants pointed out that the doctor who performed the post -mortem examination of the corpses, found partially digested rice in the stomach of the two deceased persons, and he urged that from this it would be inferred that the occurrence must have taken place sometime at night after the deceased persons had taken their evening meals together. This argument again raises a question of fact which the High Court has not omitted to consider. It may however, be stated that reference to books on medical jurisprudence shows that there are many factors affecting one's digestion, and cases were cited before us in which rice was fully digested even though considerable time had elapsed since the last meal was taken . There are also no date before us to show when the two deceased person took their last meal, and what article of food, if any, was taken by them along with rice. The finding of the doctor therefore does not necessarily affect the prosecution case as to the time of occurrence."

Hence, the existence of semi-disgested food as found by the Medical officer in the stomach of deceased Zafar Ahmed Chowdhury, unsupported by any data, cannot necessarily affect the time of the prosecution case. This existence of semi-digested food leads one to nowhere in determine the time of occurrence (Abu Taher Chowdhary v. State 1991 BLD (AD) 2 (48) . Semi digested food in the stomach of the deceased is inconclusive and insufficient to contradict evidence. stomach contents cannot determine with precision the time of death inasmuch as the power of digestibility may remain in abeyance for a long time in states of profound stock and comma (Abu Taher Chowdhury and others V. State (1993 BLD (AD) 2 Para 117). It is absolutely unsafe to draw any conclusion with regard to the time of death of deceased or of the occurrence from the state of digestion of the food contents of the stomach and also from the evidence of time given by illiterate village people (Ibid).

19. **Motive**.- The discovery of the true motive for a crime is not imperative in every case (A.I.R. 1973 S.C. 337 (342-343).

Motive is a double-edged weapon. If motive could prompt the accused to commit the mruder of the deceased, it could also offer grounds to the complainant party to implicate the accused on account of suspicion and enmity (Bashir Ahmed V. State 1992 PCrLJ 1187).

Motive though is a piece of evidence and may not be a *sine qua non* for bringing offence home to accused yet it is relevant and important on the question of intention. The existence of motive has a great signifieance in a criminal trial (40 DLR (1988) 58) Motive need not be necessary to prove murder,but if established it would be a corroborative circumstances leading to the entranglement of the accused in the offence (45 DLR (1993)306).

It is an established principle that nobody can be convicted for a crime simply one proof of motive nor can an offender be let off simply for want of motive. In a case where otherwise there is clinching evidence against a person connecting him with the commision of crime, absence of evidence about motive will make no difference (1956 (2) Crimes 328 (331) (Dhlhi). Where there is absence of clear proof of motive,the other evidence bearing on the guilt of the acused has to be scrutinised thoroughly (1979) 401 Cut L. T. 111 (120). It is not essential for the prosecution to establish motive against the accused in all cases, but at the same time it cannot be gainsaid that without adequate motive , speaking normally, none is expected to take the life of another human being (A.I. R. 1969 Tripura 57 (60).

In Abdur Rashid v. State, 27 DLR (1975) (SC) 16, it was held that the prosecution is not bound to offer any motive . If, however, any motive is offered, the Court may consider it but failure to prove motive does not necessarily affect the prosecution case. On the other hand in Tawhid Alam v. State, 38, DLR (1986) 289, it was held " Tough motive is normally relevant in a criminal case, but the question of motive in this case which it based on circumstantial evidence is an important one."

In cases of circumstantial evidence motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive . The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction . When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case (AIR 1992 SC 1175).

In a murder case, motive of murder does not play a very important part. Where , however, prosecution seeks to import and ascribe a motive, preceeding the act of murder, the prosecution must aslo explain and prove in all fairness of the matter the material particulars of that motive itself so that a Court of law can well understand and appreciate that the murder was committed under a natural and intelligible set of circumstances (1986) (1) Crimes 187 (191) (Cal).

Motive for the crime is not always visible except to the person influenced by it. The experience shows that some of the gravest and the most atrocious crimes have been committed from some of the flimsiest and most frivolous considerations. The motives of men are often so deep seated as to be unfathomable, the devil itself knoweth not the mind of man , and if law required proof of motive in every cases, and adequate motive too, the task of bringing offenders to justice would be so great as to defeat the very object for which penal laws are enacted. The Penal Code, therefore, does not insist on motive as an ingredient for any offence (1980 Jab .L. J. 250 (267-268).

True it is, absence of any motive would not necessarily lead to failure of every prosecution story. Motive is a mental phenomenon and at times it may not be essay to prove what was the motive behind. Motive has to be inferred from the attending circumstaces. But once a motive is introduced in a case, it is the duty of the prosecution to satisfy the conscience of the court that such motive did exist empelling accused persons to embark on such a ghashtly crime (Huresh Chaudhary & ors . v. State Bihar (Patna) 1988 (1) Crimes 756 (Pate).

The Supreme Court of India in the case of Molu v. State of Haryana (A.I.R. 1976 S. C. 2499 = (1976) Cr. L. J. 1895), observed in paragraph 11 as follows.

" It is well settled that where the direct evidence regarding the assault is worthy of credence and can be believed the question of motive becomes more or less academic. Sometimes, the motive is clear and can be proved and sometimes, however, the motive is shrouded in mystery and it is very difficult to locate the same. It, however, the evidence of eye witneses is creditworthy and is believed by the Court which has placed implicit reliance on them,the question whether there is any motive or not becomes wholly irrelevant (1981 Cr. L. J. 1120 (1125) Delhi). "

It is well settled that where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance (See AIR 1956 SC 460 : (1956 Cri. L. J. 827), Gur Charan Singh v. State of Punjab; AIR 1971 SC 1956, N.N. Naik v. State of maharashtra; 1986 A Cr R 490 =(1986 Cri L. j. 1903) (SC) , State of A. P. V. Bagam Chandraith) (1993 Cr L. J. 3421) (All). Motive is taken as a piece of corroborative circumstance. Absence of motive or failure on the part of prosecution to prove alleged motive would not be fatal to a case in which prosecution otherwise had brought on record sufficient convincing evidence to prove prosecution case to the hilt (Ahmad Khan Vs. State 1991 PCrLJ 301).

Motiveless muders are not necessarily acts of man and unhigned people. Prosecution is often unable to collect satisfactory evidence on the motive behind crime (1975 (2) U. P. Cri C (SC) 239= (1975 Cri LJ 1212). The inadequacy of motive is not relevant nor the presence of motive is conclusive and the guilt has to be established by pressure of direct probabilities and direct evidence as has been held in the case of Bishan Das v. State of Punjab, 1975 SCC (Cri) 145= (1975 Cri LJ 461) (1993 Cri L.J. 3421).

It is, therefore, the settled position of law that prosecution is not bound to prove motive for a crime. If evidence for proof of motive of the crime is adduced it has to be considered. In the absence motive other evidence, direct and

circumstantial, has to be considered and if upon such consideration it is found that the offence against the accused is established, then absence of motive will not affect such finding. Motive is a thing which is only known to the perpetrator of the crime and at times it may be difficult to establish the same. It is, howeveer, necessary that to satisfy the judicial mind, in a case where there is no evidence for proof of motive, the Court, should scrutinise the prosecution evidence with greater care and caution. In the aforesaid view of the matter, in the instant case, becuse motive has not been established by the prosecution, its case cannot be thrown over-board for that reason only. It is necessay to scrutinise the other evidence on record led by the prosecution with due care, caution and circumspection. As to the question of motive, absence of proof of motive is immaterial if the evidence is clear and cogent against an accused person and if the evidence is not of that character, motive, however adequate, cannot sustain a crimical charge. As has been laid down by the supreme Court in Atley v. State of Uttar Pradesh (A. I. R. 1955 S.C. 807), Where there is clear proof of motive for the crime that lends additional supprot to the finding that the accused is guilty, but the absence of clear proof of motive does not lead to the countrary conclusion and has this effect only that the other evidence bearin gon the guilt of the accused has to be very closely examined (1985 (1) 957 (960, 962) (Orissa).

In a criminal case if motive as circumstance it put forward be fully established like any other incriminative circumstace (AIR 1972 SC 656). Failure of the prosecution to prove motive on the part of accused does not necessary destory the prosecution case (1956 Ker LT (SC) 26= 1959 Ker LJ 1118).

Proof of motive or previous ill will is not necessary to sustain a vonviction for murder in a case where a person is cool by and barbarously put to death (1932) 11 Pat 280), or where the offender is cought red-handed while committing murder (31 Cr LJ 765). Where the faet of murder has been clearly established it is by no means incumbent on the prosecution to show what particular motive actuated the criminals mind and induced him to commit the particuler crime (1981 SCC (Cri) 669; 1976 SCC (Cri) 636).

The existence of a strong motive is often an enlightening factor in a process of presumption reasoning. In estimating the probabilities of a case, motive cannot be left out of account, it is a material consideration. It may furnish strong corroboration (1956 Mad LJ (Cri)348: AIR 1971 Mad 194).

Where there is direct evidence for implicating an accused in an offence the absence of proof of motive is not material (42 DLR 1990 (AD) 31).It is not necessary for the prosecution to prove by any affirmative evidence the motive which impelled the offender to commit murder (1956 Pat LR 434 (436) DB) : PLD 1967 SC 443=19 DLR (1967) (SC) 465).

The failure of the prosecution to establish the motive for the crime committed by the accused does not mean that the entire prosecution case has to be thrown overboard. It only casts a duty on the Court to scrutinise the other evidence, particularly of the eye-witnesses with greater care (AIR 1975 SC 118 (121)= 1978 Cr LJ (NOC) 285); AIR 1987 SC 1268= 1987 Cr LJ 1119) .It is not correct to say that in a murder case once the motive alleged by the prosecution is found to be false, the entire case of the prosecution should be disbelieved (1986 Cr LJ 1986 (Pat). Often times, a motive is indicated to lighten the probability that the offence was committed by the person who was impelled by that motive. But if the crime is alleged to have been committed for a particular motive it is relevant to enquire whether the pattern of the crime fits in with the alleged motive (1974 Cr LJ 1274 (SC).

Where there is direct evidence of an acceptable nature regarding the commission of an offence, the question of motive cannot loom large in the mind of the court (AIR 1986 SC 1899). Be that as it may, the failure of the prosecution to establish the motive for the crime does not mean that the entire prosecution case has to be thrown overboard. It only casts duty on the Court to scrutinize the other evidence particularly of the eye-witnesses, with greate case (A.I.R. 1975 S.C. 118 (120-21).

Motive alone, however strong it may be, cannot be made the basisfor convictionunless it receives corroboratio from other sources (1973 Cr. L. J. 165 (1658) ; 1979 Cr L. J. 236 (234) (All).

Where in a case there were several accused but some of them were acquitted and the evidence regarding motive was common to all the accused, it was held that the case of appellant was not distiguishable from the acquitted accused person and the High Court erred in taking the view that he was entitled to acquittal (1975 Cr. L. J. 1574 (1576, 1577) (S.C) = A.I.R. 1976 S.C. 242 = (1976) 3 S.C.C. 570 : 1976 S.C. (Cr. R.)402).

Even if the motive is not proved if the evidence of eye-witnesses is accepted the question of motive places into insignificance and becomes absolutely academic . There are a very large number of cases resulting in serious disputes culminating in murder over small land disputes. Various persons react differently in similar circumstinces and cannot, therefore, exclude the possibility of an accused having reacted very sharply against what he considered to be an inequitable distribution of the property. This would undoubtedly provide an adequate motive for the murder of the father (1977 Cr. L. J. 273 (285) (S.C.).

Priniciples laid down in criminal cases are always founded on facts and cricumstances of each case and cannot be loosely applied in an omnibus manner. Proof of motive or previous ill-will is not necessary to sustain convictions under section 302 Penal Code. Even in case of unaceptable motive ocular testimony of quality alone was sufficient to establish guilt and absence of motive would not cloud such testimony-Accused and complainant parties inter-related and belonging to feudal class. Held: in feudal background of parties it was reasonably probable that there might be some concealed grievance or jealousy in heart of accused against deceased although outwardly it was not visible e.g. in the case the accused might have been jealus of deceased for reasons like his better status, education, participation in election as well as deceased's proposed marriage within family of a landed gentry. Ocular testimony if convincing is enough to sustain conviction and no corrobration was necessary (PLD 1987 SC 467).

Proof of motive or previous ill-feeling is not necessary to sustain conviction when Court is satisfied that appellant's are assailants of the victim. When positive evidence against the accused is clear , cogent, and reliable, motive is of no importance. Failure to prove motive does not throw overboard the entire prosecution case. It only casts duty on Court to scrutinise evidence particularly of eye-witnesses with great care. So absence of proof of motive can not effect merit of the case (39 DLR (1987) 437; 31 Cr L. J 765).

Where three different motive were alleged against three different gorund among six accused persons and the motive was not proved . It was held that the evidence of eye-witnesses must be examined in such cases with special care because there is always a danger of the whole case being fabricated at the instance of witnesses desiring to wreak their revenge (PLD 1967 SC 443=19 DLR (1967) SC 465).

In absence of other evidence conviction can not be based on motive alone (1983 SCMR 350).The question of motive may no doubt be irrelevant if there is direct evidence establising the murder. But in weighing the evidence of the prosecution witnesses motive has an important role to play (1969 SCMR 542=1969 P. Cr. LJ 1072).

Once the prosecution sets up a particular motive then onus lies on it to prove it. The factm of its non-proof of having it proved false, throws a shadow of doubt on the entire prosecution version and the Court has to scrutinise the remaining evidence more cautiously (1984 P. Cr. LJ 2536 (DB); 1971 SCMR 432) and it becomes all the more necessary to scrutinise the credentilas of the witnesses who by their evidence direct or indirect speak about the guilt of an accused person on the premises of a false motive (PLD 1969 SC 127 -21 DLR (SC) 88). In a case depending on circumstantial evidence, motive assumes some importance (AIR 1955 N.U.C. 5485). Bitter political rivalry was held to be adequate motive for murder of the opponent (PLD1979 SC 53).

Clear proof of motive lends additional support to the finding of guilt . Absence of proof of motive has this effect only the the other evidence bearing on guilt has to be very closely examined (AIR 1955 SC 807 : AIR All 177 ; AIR 1969 Raj 219.).

Although proof of motive is a material consideration. It certainly is not indispensably essental in every case (AIR 1949 PC 103; 1977 Cr LR (MP) 133).The prosecution is not bound to prove motive of any offence in a criminal case, inasmuch as motive is known only to the perpetrator of the crime and may not be known to others. If the motive is proved by prosecution, the Court has to consider it and see whether it is adequate (1981 Cr. LJ7/14 (716) (S.C.).

Proof of motive or ill-will is unnecessary to sustain the conviction where there is clear evidence, that the accused has caused a fatal injury on vital part of the body of the deceased. If the blow was given on a vital part like the head and was given in a manner and under the circumstaces which would suggest that the assailant has taken undue advantage and acted in cruel manner, intention to kill must necessarily be attributted to him (1973 Cr. L. J. 1978 (1383) ; A.I.R. 1983 S.C. 187=1983 Cr. L. J. 437).

Where the deceased had drawn the accused in a long litigation involving thousands of rupees as a result of which he had to attend the Court on various date and the sequence of cricumstaces under which the deceased was murdered clearly shows that there could not have been any other motive but the institution of the suit and there are independent witnesses and against whom on animus has been established by the accused and there is no any reason to disbelieve their evidence, it was held that the question of motive became more or less academic (A.I.R. 1975 S.C. 1252 (1257, 1258).

The motive behind a crime is a relevant fact of which evidence can be given. The absence of motive is also a circimstance which is relevant for assessing the evidence . The circumstaces which prove the guilt of the accused are, however, not weakened at all by the fact that the motive has not been establised. (AIR 1966 SC 1322= 1966 Cr LJ 960= 1986 CrLJ 220 (Cal). Where the motive established by the prosecution was apparently inadeguate it was held that the direct evidence of the witnesses compled with the extra judicial confession alleged to have been made by the respondents to one of the witnesses and the recovery of the weapons at the pointing out of the respondents were adequate to hold that that the guilt of the respondents for the offence under section 302/34 had been established by the prosecution beyond all reasonable doubt (1981 Cr LJ (SC) 714; (1987) 2 SCC 357).

While the prosecution is not bound to prove the motive of an occurrence, it is necessary for the Court to consider the matter carefully when, in fact, the prosecution suggests a motive (AIR 1958 Cal 118 (120)= 1958 Cr LJ 362 (DB); AIR 1981 SC 1021 (1023)=1981 Cr. LJ 714 CR. LJ 1274; AIR 1974 SC 1740). If motive is sought to be established by the prosecution by evidence on record and the same is found to be false on consideration of evidence , then it may have some effect on the prosecution case sought to be made out. But because no motive has been proved that will not itself affect the prosecution case (1975 Cr LJ 354 (Gau)= 1981 Cut LR (Cr) 7; 1971 SCMR 432 : PLD 1969 SC 127).

In criminal cases evidence of motive becomes immaterial when direct and credible evidence of an eye-witness is available. It assumes importance in the absence of such evidence and where the case rests upon circumstantial evidence (AIR 1954 Hyd 196 : AIR 1956 SC 460 =1958 Cr LJ 827; 1969 SCMR 542 = 1969 Pcr LJ 1072).

Absence of clear proof of motive does not necessarily lead to the conclustion that the accused is not guilt . It has the effect that the other evidence bearing on the guilt of the accused has to be very closely examined (AIR 1955 SC 807 =1955 Cr LJ 1653) . Prosecution is entitled to call evidence in support of an alleged motive even if such evidence suggests a crime other than that for which the accused is charged (AIR 1946 PC 187 =73 Ind App 195).

Ordinarily, when there is sufficent direct and circumstantial evidence connecting the accused with the commission of the offecne the proof of motive become unimportant (1975 Cr LJ 66 (SC); 1976 SCC (Cri) 636; 1981 Cr LJ 1278 (SC); 1986 Cr LJ 1903 (SC). But where the entire prosecution case rests on circumstantial evidence, motive undoubtedly plays an important part in such cases to tilt the scale against the accused, and if as in the instant case, the prosecution has failed to prove sufficient motive for the murder of his newly weded wife on the part of the accused, and the circumstances relied upon by the prosecution appeared to be equivocal and not conclusive of his quilt, the acquittal of the respondent must be upheld (1979 Cr LJ 1057 (SC).

In a murder trial, where the prosecution had established a motive for the crime and the conduct of the accused immediately before and after the incident was shown to be unreasonable and unnatural and the accused had refesued to participate in an identification parade or to give the specimen of his foot prints it was held that all those circumstances would have a bearing on the guilt of the accused (1974 Cr L J 1171 (SC).

The motive behind a crime is a relevant fact of which evidence can be given. The absence of a motive is also a circumstance which is relevant for assessing the evidence . The circumstance proving the guilt of the accused are however not weakened at all by the fact that the motive has not been established. It often happens that only the culprit himself knows what moved him to a certain course of action (A.I.R. 1966 S.C. 1822 (1234).

The fact that the deceased was subjecting his wife to crüelty cannot carry the case of the prosecution very far beyond suggesting a motive on the part of the wife to retaliate, but the fact that there was such motive does not mean that the motive translated itself into the murder of the deceased by the wife, which is to be established by the prosecution by other evidence which brings home the guilt to the accused beyond reasonable doubt (A.I.R. 1966 Mys. 199 (201).

Motive alone, however strong it might be, cannot be made the basis of conviction of an accused person unless it receives corroboration from other sources.

In the instant case there are undisputedly a large number of houses in the vicinity. The failure of the prosecution to find any independent witness, out of the residents of those house, to support its case is a circumstance which indicates that most probably no independent resident of the village was prepared to support the prosecution story because it was concocted one. There are indications in the prosecution evidence to the effect that most probably the deceased was done to death by unknown persons and the appellants have been falsely implicated due to enmity . Instead of it, there were contradictions in the F.I. R . and inquest report, therefore, the conviction was not justified (1979 Cr. L. J. 236 (242, 243) ; 1983 (1) Crimes 458).

It is not incumbent on the prosecution to establish the existence of any motive for the crime with which the accused may be charged. However, it cannot be gainsaid that there must exist a motive for every voluntary act. It may also be stated without fear or contradiction that in a criminal trial failure to prove the motive does not necessarily imply that there was no motive for the crims. the proof of motive is not necessary to sustain a conviction on a murder charge when there is clear evidence that the person had been done to death by the accused. In other words, when the facts establishing the charge are clear it is immaterial that the motive has not been proved . The reason is that the motive of an act may be known to the perpetrator and to none other and the investigator may not have been able to collect any information in regard thereto (AIR 1969 Tripura 53 (56); A.I.R. 1963 All. 501 (504).

20. Corpus delicti.- The *Corpus delicti* of a crime is the body or the substance of the crime charged. It involves two elements -(1) injury to a specifice person; and (2) criminal agency of some one in producing that injury. Proof of the accused's connexion with the crime as the operative agent, although essential for conviction, is not part of the *corpus delicti*. The *corpus delicti* may be proved by circumstantial evidence. If direct evidence exists, however, it must be produced. In law a conviction for an offence does not necessarily depend upon the *corpus delicti* being found (1974 Cr LJ 43 (46, 47); 27 DLR 79).

In a case of murder recovery of the dead body is necessary, but non -availability of the dead body cannot stand in the way of proving a charge of murder in all cases. There may be situations in which it becomes impossible to recover the dead body which might be concealed or even destroyed altogether by the interested person to shield the offender .In such cases, strong evidence is necessary to arrive at a finding of murder. To remain on the safe side, conviction in such cases is not recorded for murder but is recorded under lesser sections, but in no case non-availability of the dead body can be a ground for acquitting the accused altogeher if there are direct evidence against them (State V. Fazal; 39 DLR (AD) 167).

Even if the *corpus delicti* was not found or traced, if there were compelling circumstances cogently established by the prosecution, pointing a finger at the accused and accused alone as the murderer of the missing person, the Court could on totality of those circumstances convict the said person under section 302 Penal Code (1982 Cr LR (Guj) 173). But where a homicidal death is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the conclusion that the victim had met with a homicidal death (AIR 1981 SC 738= 1981 SC (Cri) 197).

The discovery of body of the deceased is not necessary where there is direct evidence against the accused (39 DLR (AD) 56). In law a conviction for an offence

does not necessarily depend upon the *corpus delicti* being found. There may be reliable evidence, direct or circumstantial, of the commmission of the murder though the *corpus delicti* is not tracable (AIR 1957 SC 381= 1957 Cr LJ 559).

In a trial for murder it is not an absolute necessity or an essential ingredient to establish corpus delicti. The fact of death of the deceased must be established like any other fact. corpus delicti in some cases may not be possible to be traced and the dead body was thrown into flowing tidal river or stream or burnt out. It is unlikely that the dead body may be recovered. In recovery of the dead body therefore, is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed etc. and would afford a complete immunity to the guilty from being punished and would escape even when the offence of murder is proved. what, therefore, is required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offfence of murder, like any other factum, of death was committed and it must be proved by direct or circumstantial evidence , altoough the dead body may not be traced (Sevaka Perumal etc. V. State of Tamil Nadu: 1991 (2) Crimes 518 (SC).

When the dead body of the victim could not be traced, other cogent and satisfactory proof of the homicidal death is admissible. such proof may be by the direct ocular account of the eye-witness, or by circumstantial evidence or by both. In case the homicidal death is sought to be proved by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that victim really met with a homicidal death. The *corpus delicti* or the act of homicidal death, therefore can be proved by estalishing all inculpating cirumstances which definitely lead to the conclusion that within all human probability the victim has been murdered by the accused (AIR 1981 SC 738= 1981 Cr LJ 298; AIR 1981 SC 765= 1981Cr LJ 325).

If the cause of death is absolutely certain and beyound the pale of doubt or controversy. it is unnecessary to have the post-mortem done by medical officer (1989 Cr .L.J. 1 (81) (SC) = A.I.R. 1988 S.C. 1883= 1988(3) Crimes 209). A case where there is no proof of *corpus delicti*, must be distinguished from another where that it proved. In the absence of proof of *corpus delicti*, a confession alone may not suffice to justify conviction (AIR 1957 SC 381). Where the dead body does not appear and the factum of death is established by nothing but a retracted confession, sentence of imprisonment for life may be awarded instead of the heavier sentence (AIR 1925 All 627= 26 Cr LJ 1431).

In a murder case where the dead body has not beeen recovered, there must be some other circumstance or evidence to connect the accused person with the crime. A conviction can no doubt be based only on the ocular testinoney, but this ocular testimony must be of an absolutely unimpeachable character (PLD 1974 SC 37 ; PLJ 1974 SC 12). At the trial on a charge of murder, the mere fact that the body has not been found is no ground to acquit the accused. But in a case like that, strongest prssible proof of murder must be insisted upon (Ramchandra V State AIR 1957 SC 381). Such proof may be given by the direct ocular account of an eye-witness or by circumstantial evidence or by both. But where the fact of *corpus delicti* i.e, 'homicidal death' is sought to be estabished by circumstantial evidence only, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death (Ramanad V. state, AIR 1981 Cr LJ 298).

The mere fact that the body of the murdered person has not been found is not a ground for refusing to convict the acused person of murder. To reccognise any such condition precedent, as being absolutely necessary to conviction in all cases.

would be to afford complete immunity and certain escape to those murders who are cunning or clever enough to make away with or destroy, the bodies of their victims. Such a principle once admited would in some instances render the administration of justice impossible (1953 Cr LJ 1038; 1981 SCC Cri 197= AIR 1981 SC 738). But when the body of the person said to have been murdered is not forthcoming, the strongest possible evidence as to the fact of the murder should be insisted on before an accused is convicted (31 Cr LJ 230= AIR 1929 All 710). The absence of the dead body makes the onus upon the prosecution much heavier than in ordinary cases (AIR 1928 Pat 473 = 29 Cr LJ 913).

It is very significant to note that according to the medical opinion bodies were recovered about three months after the death. The bodies were found disintergrated .It was defficult to identify. The disintegration has gone to such an extent that the bodies could not be removed and sent for post- mortem and therefore medical expert was called to the spot to perform the post mortem. The prosecution did not examine any one of the relatives to identify the dead bodies. It was held that the charge against the accused can not be said to have been proved beyond doubt and the conviction of the accused can not be sustained (1989 East Cr. C 156(158, 159) SC). The dead body (skeleton) which was identified by the witnesses was that of the deceased. Widow of the deceased after seing the salwar, shirt, jacket, turban, bag, trousers, spectacles and rubber shoes said that those were the articles which were used by her husband and he was wearing them when he went to partabgarh. It was held that her testimony could not be disregarded solely on the ground that the poor women could not give any distinguishing marks of identification (1976 R.L W 291 (295).

Where only the skulls of the two small children were found but the other circumstances clearly indicated that they belonged to the deceased children murdered by accused, the accused was convicted on the basis of such evidence (1963 Ker LJ 228= (1964) MLJ (Cr) 102).

Where a dead body severed into two parts was found contained in two bags and kept drowned with the aid of heavy stones inside a tank and the dead body was indetified by the son of the deceased and one of the witnesses who actually brought out one of the bags from under the water and he too has indentified the dead body as that of his father -in-law and the doctor said that the body was in a high state of decomposition , it could not be said that the prosecution ought to have taken phtographs of the dead body and that the phatographs should have been identified in Court (1985 Cr LJ 367 (372) Cal).

Where there was death of a person in the police custody while he was detained there for interrogation and his dead body was not traced, however the evidence of other witnesses who were also beaten up and injured by police, categorically established that the deceased became unconscious on receipt of the injuries inflicted by police and died susequently, an irresistible inference can be drawn that the police personnel who caused his death must also have caused the disappearance of the body. A case cannot be thrown out merely on the ground that the dead body is not traced when the other evidence clinchingly establishes that the deceased met his death at the hands of the accused. It may be a legitimate right of any police officer to interrogate or arrest any suspect on some credible material but such an arrest must be in accordance with the law and the interrogation does not mean inflicting injuries. It should be in its true sense and purposeful namely to make the investigation effective. Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal

order forbid. If police officer who have to provide security and protection to the citizens indulge in such methods they are creating a sense of insecurity in the minds of the citizens. It is more henious than a gamekeeper becoming a poacher (AIR 1992 SC 1689).

Law does not require that the dead body of the murdered man must necessarily be produced; all that is necessary is that the murder and, therefore, the death of the person should be established. The fact of such a death is of course a question of fact which has to be proved as any other question of fact by admissible evidence (KLR 1982 CrC 59). Therefore when the dead body is not discovered. Other cogent and satisfactory proof of homicidal death of the victim must be adduced by the prosecution. Such proof may be by direct ocular account of an eye witnes, or by circumstantial evidence or by both. But where the fact of corpus delicti is sought to be established by circumstantial evidence alone, the circumstances must be a of a clinching and definitive character unerringly leading to the inference that the victim concerned has met homicidal death. However, this principle of caution cannot be pushed too far as requiring absolute proof. The *corpus delicti* by the fact of homicidal death, can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned. Where the only difference between the prosecuton version and the defence version was as to whether the deceased committed suicide or had been killed and the story of suicide set up by the accused was disbelieved and there was circumstantial evidence leading rationally and irresistibly to the conclusion that the deceased was murdered, the conviction recorded by the High Court was maintained despite the fact that the identity of the body found in the river could not be established beyond doubt (AIR 1982 CrC 59). In such cases conviction can be based on ocular testimony corroborated by evidence of medical and ballistic experts (PLD 1978 Kar 476). In such case ocular testimony must be of an absolutely unimpeachable character (PLD 1974 SC 37).

Where the evidence was supported by chhuri and blood stained clothes of the accused coupled with injuries on accused, conviction of the accused was upheld (PLD 1978 Lah 414). The murderers having been found, the mere circumstance that the body of the unfortunate victim had been effectively made away with by them should not influence the court in not passing the sentence of death (AIR 1958 All 514).

21. **Murder from poisoning.**- To establish murder by poisoning the prosecution has to establish three propositions : (i) death took place by poisoning, (ii) accused had the poison in this possession and (iii) accused had the opportunity to administer poison to the deceased. Though those three propositions must always be kept in mind, the sufficiency of the evidence, direct or circumstantial, to establish murder by poisoning will depend on the facts of each case. If the circumstantial evidence, in the absence of direct proof of the three elements is so decisive that the Court can unhesitatingly hold that the death was a result of administration of poison must have been administered by the accused persons, then the conviction can be rested on it (Ayesha Khatun Vs. State (1967) 19 DLR 818; 1986 CrLJ 848; AIR 1984 SC 1622; 1984 CrLJ 1738; AIR 1960 SC 659; 1960 CrLJ 1011).

In a charge of murder by poisoning it is essential for the prosecution to prove, firstly, that the person alleged to have been murdered died of poisoning and secondly, that the accused person or persons administered poison with intent to commit murder (Monoruddin Vs. State 30 DLR (282). If the accused had himself administered poison to his wife he would not be eager to take her to the hospital

taking the risk that his wife after regaining consciousness might implicate him. The conduct of the accused is thus mere consistent with his innocence (AIR 1977 SC 1164; 1977 CrLJ 955; 1979 SC 1708= 1979 SC CR. 920).

In a conviction for murder by poison prosecution should prove clear motive, death by poison, possession of poison by accused and that he had an opportunity to give it to deceased. Mere death by poison caused by eating cooked rice given by accused, who was step sister, would not be sufficient to maintain the conviction (Bhagyawati Bai Vs. State of M.P. 1988 (2) Crimes 445 (MP); Shard Birdichand Sarma Vs. State of Maharashtra AIR 1984 SC 1622 relied on). In a poison murder case the accused cannot be acquitted solely on the ground that the prosecution has failed to prove that the accused has the poison n his possession (Bhupinder Singh Vs. State of Punjab 1988 (2) Crimes 665 SC). In case of poisoning when there is no direct eivdence of administering poison to the deceased and the evidence is circumstantial the fact that the accused had motive to cause death though relevant, is not enough to dispense with the proof of certain facts which are essential to be proved in such case. The prosecution must establish three prepositions (i) that death took place by poising, (ii) that the accused had poison in the possession and (3) that the accused had an opportunity to administer poison to the deceased. It is only when the motive is there and these propositions are proved that the Court may be able to draw the inference, that poison was administered by the accused to the deceased resulting in his/her death (1988 PCrLJ 1399).

"A case of murder by a administration of poison is almost always one of secrecy. The poisoner seldom takes another into his confidence, and his preparations to the commission of the offence are also secret. He watches his opportunity and administers the poison in a manner calculated to avoid its detection. The greater his knowledge of poisons, the greater the secrecy, and consequently the greater the difficuluty of proving the case against him. What assistance a man of science can give he gives, but it is too much to say that the guilt of the accused must, in all cases, be demonstrated by the isolation of the poison, though in a case where there is nothing else such a course would be incumbent upon the prosecution. There are various factors which militate against a successful isolation of the poison and its recognition. The discovery of the person can only take place either through a post-mortem examination of the internal organs or by chemical analysis. Often enough the diagnosis of a poison is aided by the information which may be furnished by relatives and friends as to the symptoms found on the victim, if the course of poison has taken long and others have had an opportunity of watching its effect. Where, however, the poison is administered in secrecy and the victim is rendered unconscious effectively, there is nothing to show how the deterioration in the condition of the victim took place and if not poison but disease is suspected, the diagnosis of poisoning may be rendered difficult." (AIR 1960 SC 500).

It is not considered that there should be acquittal on the failure of the prosecution to prove the poossession of poison with the accused. Murder by poison is invariably committed under the cover and cloak of secrecy. No body will administer poison to another in the presence of others. The person who administers poison to another in secrecy will not keep a portion of it for the investigating officer to come and collect it. The person who commits such murder would naturally take care to eliminate and destroy the evidence against him. In such cases, it would be impossible for the prosecution to prove possession of poison with the accused. The prosecution may, however, establish other circumstances consistent only with the hypothesis of the guilt of the accused. The Court then would not be justified in

acquitting the accused on the ground that the prosecution has failed to prove possession of the poison with the accused (1989 SC CR. R. 22 (30).

In a number of cases where the deceased dies as a result of poisoning, it is difficult to successfuly isolate the poison and recognize it. Lack of positive evidence in this respect would not result in throwing out the entire prosecution case if the other circumstances clearly point to the guilt of the accused. Reference in this context may be made to the books on medical jurisprudence by different authors wherein it has been stated that the pathologist's part in the diagnosis of poisoning is secondary and that several poisons particularly of the synthetic hypnotics and vegetable alkaloids groups do not leave any characteristic signs which can be noticed on post-mortem examination(AIR 1972 SC 1331 (1340).

As rats had become a nuisance in the house of the accused there was nothing wrong in the appellant trying to secure rat poison for killing the rats. The necessity of securing poison to kill the rats was both real and genuine and could not be dismissed as a mere excuse for securing poison to kill the deceased. Furthermore the mere fact that there were no holes in the house could not exclude the possibility of the rats being there. For these reasons, therefore, this circumstance does not either singly or cumulatively raise an inference of guilt against the accused. It merely shows that the accused had secured parathion poison which is meant for killing rats and which was present in the house at the time when the deceased died. This is the only inference that can be drawn from this part of the evidene and it is not possible to go further than that (1977 CrLR 173 (177-178) SC).

The quantum of circumsintial evidence must be such as to lead to the inference that the guilt of the accused is established beyond reasonable doubt and that the circumstances are wholly incompetible with the innocence of the accused. Where, therefore, there is (i) unimpeachable evidence that the viscera and chatni contained oleander poison, (ii) the unchallenged testimony of the doctor that death was due to oleander poisoning, and (iii) full corroboration from the finding on the chemical tests and the medical opinion of the statements made by deceased at three different stages that the chatni served to him by the accused tasted bitter. It was held that the chain of circumstantial evidence was complete and no link was missing to come to a conclusion beyond reasonable doubt that the deceased died of poisoning arising out of the service of the chatni by the accused (1965) 1 CrLJ 321=AIR 1965 Ori 38).

Whether the deceased died of the poison in question, the decision depends upon the evidence of the doctor who made the postmortem examination and the report of the Chemical Examiner. His report is admissible in evidence under section 510, Criminal Procedure Code, 1898. (AIR 1934 Oudh 62; 35 CrLJ 700). The report of the chemical examiner should be full and complete and take the place of evidence which he would give if he were called as a witness (34 CrLJ 754; AIR 1933 All 394; AIR 1934 Oudh 62; 35 CrLJ 700).

In a case of murder by poisoning, merely because there was no corrosion in the oral cavity or the oesophagus, the case of the prosecution cannot be discarded when the viscera report clearly shows that the death was due to Potassium Cyanide poisoning (Prakashkuma Jayantilal Gandhi. Vs. State of Gujarat 1991 (3) Crimes 135 Guj.)

In case of murder by poisoning, even if the medical evidence and chemical evidence are negative in character, yet conviction can be based on clinging circumstantial evidence (AIR 1960 SC 500; AIR 1972 SC 1331).

If the prosecution wishes to establish by means of chemical examiner that the deceased died of arsenic poisoning the chemical examiner must be called, sworn,

and offered for cross-examination. By his evidence he must prove that at least two grains of arsenic were administered to the deceased before death. He can do this by proving the discovery of this amount in the body of the deceased, or by accounting for its absence in part. He may attribute the loss to vomitting, purging, or the natural elimination of the poison from the body before the death taking into consideration the lapse of time between the hour arsenic had been taken and the hour of the death (35 CRLJ 189; AIR 1933 Oudh 382).

The most important proof of poisoning is the detection of poison in the excreta (vomit, urine, etc.) and blood during life, and in the contents of the stomach and bowels, and in the tissues of the body after death. The finding of poison in food, medicine or any other suspected substance is corroborative, but not conclusive proof; for the poison may have been added to any of these substances just to substantiate a false charge against an enemy. In cases of feigned poisoning it is advisable to elicit from the patient the poison he suspect to have been administered to him, so as to note if the symptoms complained of are referable to the same poison. The medical practitioner should also preserve for chemical analysis only the portions of the vomit, urine and faces ejected in his presence.

When poison has been detected in the stomach contents, the defence pleader may argue that it may have been introduced after death, or the contents may have been preserved in an unclean vessel. But these arguments are quite futile and worthless; if the poison has also been detected in one or more of the solid viscera, such as the liver, spleen, kidneys; and if clean china plates and glass bottles, free from contamination, have been used for examining and preserving the stomach and other viscera.

It is not necessary to lay any stress on the amount of poison actually recovered except in those cases where it is alleged that the poison may have been administered as a medicine, that it may have been present owing to the deceased being habituated to its use, that it may have been a natural constituent of the body or a normal constituent of some article of food, or that it may have been produced in the body during the process of decomposition, e.g. laucomaines and ptomaines.

It is possible that a person may die from the effects of a poison, and yet none may be found in the body after death, if the whole of the poison has disappeared from the lungs by evaporation, or has been removed from the stomach and intestines by vomiting and purging, and after absorption has been detoxified, conjugated and eliminated from the system by the kidneys and other channels. Certain vegetable poisons may not be detected in the viscera, as they have no reliable tests, while some organic poisons, especially the alkaloids and glucosides, may, by oxidation during life or by putrefacton after death be split up into other substances which have no characteristic reactions sufficient for their identification (Modi's Medical Jurisprudence, 20th Ed., p. 474).

In a charge of murder by poisoning it is essential for the prosecution to prove, firstly, that the person alleged to have been mrudered died of poisoning and secondly, the accused person or persons administered poison with intent to commit murder. Evidence of the Chemical Examiner is of little value unless there is clear proof of the identity of the matters examined by him. Prosecution must lead clear evidence to show the identity of the matters meant for chemical examiner so that there may not be any scope to doubt the identity of the matters at any stage. It is of the greatest importance in a case of poisoning that the substance found by chemical examiner must be connected with or traced back to the articles removed or taken from the dead body of the person in the case (30 DLR 282, AIR 1933 ALL 394; 34 CrLJ 754).

In many poisoning cases it is difficult to isolate the poison successfully and recognize it. This circumstances would not militate against the conclusion that the death was due to poisoning. Several poisons, particularly, synthetic hypnoties and vegetable alkaloids groups, do not leave any characteristic sign so as to be detected in post-mortem examination of the deceased. Under such circumstance if there is no direct evidence, the court can even held that death was as a result of administration of poison if the circumstantial evidence on this point is decisive and that poison must have been administered by the accused (AIR 1972 SC 1331= 1972 CrLJ 760). But where the evidence of motive to murder and the administration of poison by the accused or its possession at the relevant time is lacking, the Court cannot infer the guilt of the accused (AIR 1972 SC 656; 1972 CrLJ 473).

Endrin, a poison was detected in the viscera of the deceased but the doctor could not opine that death was due to poison. Held, that there was no evidence to hold that death was due to poison (AIR 1973 SC 944; 1973 CrLJ 687= 1973 SC Crl 372). Even in insecticide poisoning death may result from asphyxia (AIR 1982 SC 1217= 1982 CRLJ 1572). Even then when the P.M. report reveals that death was caused by asphyxia due to throttling, the court is not justified to put reliance on his own medical knowlede that asphyxia is also possible in case of poisoning and that possibility has not been ruled out by the medical evidence (AIR 1972 SC 1797; 1972 CrLJ 570).

The fracture of the tyroid cartilage and extravasaton of blood in the sub-cutaneous tissues underneath the wound and also in the surrounding muscles of the neck could not be due to insecticide poisoning, rather than external injuries on the throat suggests that death was due to throttling or strangulation (AIR 1982 SC 1217= 1982 CrLJ 1572).

Where the accused was proved to have put some powder in the food, which was found by the Chemical Examiner to contain poison, but there was no statement or evidence of the quantity of poison found in the food, or of the probable effect on any one who might have eaten it, it was held the accused could not be regarded, under the circumstances, to have intended to cause anything more than hurt and could only be convicted of attempt to commit an offence under section 328 (1957) CrLJ 930).

Before a person can be convicted of murder by poisoning, it is, essential to prove that the death of the deceased was caused by poison, that the poison in question was in the possession of the accused, and that the poison was administered to the deceased by the accused (1984 SCC (Cri) 487; 1972 CrLJ 473= AIR 1972 SC 656; (1972) 4 SCC 625). In the case of a murder by administering poison, the prosecution has, along with the motive, also to establish that the deceased died to a particular poison said to have been administered that the accused was in possession of that poison and that he had the opportunity to administer the same to the deceased (AIR 1960 SC 659; 1960 CrLJ 1011; 1968 CrLJ 848).

In a case of murder by administration of arsenic based on circumstantial evidence, if the purchase of arsenic and its giving are found to be fabricated and false, the accused are entitled to benefit of doubt (Sattanject Vs. State of H.P. 1993 (1) Crimes 640 SC). Where the accused who had contracted illicit relations with a man and was delivered of a child was charged with having put the infant to death and it appeared that she was in possession of opium four days before the child's birth and the death of the child was found to be due to opium, it was held that the only reasonable inference was that the accused had caused the death of the child by administering opium to it (33 CrLJ 448; AIR 1932 Lah 297).

In case of murder by administration of poison the Court musts can evidence and determine the following four important circumstances, which alone can justify conviction :

(1) There is a clear motive for an accused to administer poison to the deceased;

(2) that the deceased died of poison said to have been administered;

(3) that the accused had the poison in his possession; and

(4) that he had an opportunity to administer the poison to the deceased (AIR 1984 SC 1622= 1984 CRLJ 1739).

From the report of the chemical examiner in the case, the Court found, that the report which is evidence of its own contents under section 510, Cr.P.C. proved that the parcel of the hatcher related to the present case which contained the number and the date of the FIR of the case and that the sealing of the parel was done in compliance with the rules. Held, this was sufficient to establish the identity of the hatcher (8 DLR (FC) 40).

The report of chemical examiner should be full and complete and take the place of evidence which he would give if he were called as witness (34 CrLJ 754; AIR 1933 All 394). If the prosecution wishes to establish by means of chemical examiner that the deceased died of arsenic poisoning the chemical examiner must be called, sworn, and offered for cross examination. By his evidence he must prove that at least two grains of arsenic were administered to the deceased before death. He can do this by proving the discovery of this amount in the body of the deceased or by accounting for its absence in part. He may attribute the loss to vomitting, purging, or the natural elimination of the poison from the body before the death taking into consideration the lapse of time between the hour arsenic had been taken and the hour of death (AIR 1933 Oudh 382; 35 CrLJ 189).

22. **Murder by throtling.**- Resistance by the deceased resulting in injuries to the assailant is not a necessary feature of every act of throtting. Different victims can act differetly and it would depend upon a variety of circumstances as to whether they were or not in a position to offer reistance. The absence of injuries on the person of the accused would not go to show that he was not the person who had throttled the deceased to death (AIR 1972 SC 677 (684).

Strangulation is a violent form of death, which results from constricting the neck by means of a ligature or by any other means without suspending the body. It is called throtting, when construction is produced by the pressure of the fingers and palms upon the throat. Strngulation may also be brought about by compressing the throat with a foot, knee, elbow or some other solid substance. None of the symptoms which are usually to be seen in the case of death by throttling was present in the instant case. The only symptom that was present was congestion of the trachea. Held this was only one of the many symptoms of death by strangulation. But the absence of other symptoms raise a good deal of doubt whether at all the death was caused by throttling as alleged by the prosecution. The benefit of this doubt must necessarily go to the accused (1974) 40 Cut. LT 1206 (1211-12). According to Modi's Medical jurisprudence 'stangulation' is violent form of death, which results from constricting the neeck by means of a ligature or by any other means without suspending the body. It is called throating when constriction is produced by the pressure of the fingers and palms upon the throat. Strangulation may also be brought about by compressing the throat with a foot, knee, bend of elbow, or some other solid substance. This is known as mugging (strangle hold)".

He has further observed that appearences on the neck vary according to the means used. Ligature Mark is a well defined and slightly depressed mark corresponding roughly to the breadth of the legature. The marks are multiple if the ligature is twisted several times round the neck. If the fingers are used (throttling) marks of pressure by the thumb and finger tips are usually found on either side of the wind pipe. When both hands are used to grasp and compress the throat, thumb marks of one hand and the finger marks of the other hand are usually found on either side of the throat. Sometime, both thumb marks of one hand and the finger marks of the other hand are usually found on either side of the throat. Sometime, both thumb marks are found on one side and several fingers marks on the opposite side. If the throat is compressed between two hands, one being applied to the front and the other to the neck, bruises and abrasions may be found on the front of the neck, as well as on its back. Besides these marks there may be abrasions and bruises ont he mouth, nose, cheeks, forehead, lower jaw or any other part of the body, if there has been a struggle. Similarly fractures of the ribs and injuries to the thoracic and abdominal organs may be present, if the assistant kneels on the chest or abdomen of his victim while pressing his throat.

In the present case, there is also statement of P.W. 1 Achhayraj that appellant Manraj had sat on the chest of the deceased and then pressed his neck even then any of the aforesaid injuries were not found in the postmortem report and that further belies his testimony (Man Raj V. State of UP 1990 (2) Crimes 497 All).

Where post mortem speaks of death by asphyxia due to throattling, court is not justified in drawing on its own medical knowledge that asphyxia is also possible in case of poisoning to reject the medical evidence (AIR 1972 SC 1797).

In case of death by throttling the absence of injury on the person of the accused is of little value because resistance offered by the deceased resulting in injuries to the accused, is not an essential feature of every act of the throttling for different victims may react in different ways (AIR 1972 SC 677). Where medical evidence disclosed that considerable force was applied by the assailants while stangulating the victim, and the hyoid bone was fractured resulting in death due to asphyxia, came under section 302 and not 304 of the Penal Code (AIR 1979 SC 1711).

Fracture of the thyroid cartilege extravasation of blood in the subcutaneous tissues undrneath the neck and also in the surrounding muscles of the neck unerringly pointed to the conclusion that death was due to throttling or strangulation which necessarily rules out the possibility of death having been caused by insecticide poisoning (AIR 1982 SC 1217).

Prosecution story was that the respondent caused the murder of his wife by throattling. Respondent contended that it was suicide caused by insecticides. Trial Court found him guilty. High Court Division set aside the conviction on the reasoning that chemical examination of the liquid contained in bottle produced before thana and viscera of deceased was not done. Appellate Division held that in the face of sufficient evidence to lend support to the prosecution chemical examination of the liquid and viscera was not at all necessary (State Vs. Altazur Rahman 1982 BCR (AD) 264).

23. **Treatment by doctors leading death of patient.**- Any person, whether licensed or unlicensed, who deals with the life or health of another person is bound to use competent skill and sufficient attention; if the patient dies for want of either, the person is guilty of manslaughter (1916) 25 Cox 598).

24. Identification of accused.- Evidence of identification *per see* is a weak type of evidence. No doubt conviction can be based on the identification evidence alone if

it is established beyond doubt that the witness correctly recognised the accused (1986 BDL 18). There can be no conviction unless the identity of the accused is established (1958 SCMR 373; 1974 PCrLJ 74 DB). Evidence of identification is a weak type of evidence and chance of an honest error could not be excluded even from an independent witness (1987 PCrLJ 643). It is not safe to accept statement of a witness about complicity of an accused in a crime if witness did not describe the accused by name or other particulars during investigation and was also not made to identify him out of a group (1982 SCMR 129). Where the other witnesses were not supporting the complainant on the question of identity of the appellant, it would not be expedient in the interest of justice to rely on the word of the complainant alone without other corroboration. Accused was acquitted on benefit of the doubt being given to him. (1973 PCrLJ 105 (DB) Kar).

Where the accused was not properly identified mere productionof bloodstained weapon of offence was not sufficient for his conviction (1975 PCrLJ 1315 DB). The fact that a murder was committed at accused's house raises a strong suspicion of guilt against him but any amount of suspicion cannot take the place of proof. Without reliable and convincing evidence that accused actually took part in the assault or was in any way responsible for it, he cannot be held liable for murder (AIR 1956 Pepsu 69; ILR 1953 Patiala 435).

Where much depends on evidence of identity the Court is justified in looking for confirmatory circumstances in support of the evidence. Recovery of crime empties fired from the gun of the accused as well as of a shoe belonging to the accused was held to be sufficient confirmatory circumstances for accepting evidence of identification by an eye-witness (1968 SCMR 161).

The contention that some witnesses had not named some of the accused persons is not of much consequence, when each of the accused persons has, in fact, been named and identified as a participant in the incident by a number of witnesses, including some disinterested persons (1970 SCMR 691).

Where there was bright lght of the moon and the accused were known to the witnesses and therefore, being fully aware of their features and familiar with their voices, there could not be any mistake in their identification from a close distance, and the Judges also relied on the further fact that the 'eye' sight of the people living in the villages, not used to bright light, is stonger than the people living in the city (1977 SCMR 347; 1984 PCrLJ 1243 DB), or where the incident took place on 21st of lunar month and parties were known to each other, (NLR 1979 Cr 94 DB) (Kar), or where occurrence admittedly took place on 8th night of lunar month and witnesses who previously knew the accused had no difficulty in identifying him, the identification evidence was relied upoon (1980 SCMR 803). However, it must be noted that identification in moonlit night and torch light was a very weak type of evidence which should not be relied upon in absence of confirmatory circumstances (1984 PCrLJ 1850 DB). Even the best known person cannot be identified in clearest moonlight beyond a distance of 17 years. Even where eye-witnesses are reliable, chance of honest error in indentification from a distance of 20 yards cannot be excluded. Accused was given benefit of the doubt (1983 PCrLJ 983). Where occurrence took place at night when it was quarter moon. Witness who according to site plan was shown to have seen the occurrence from a distance of 100 Karams, could not have identified the accused (1983 PCrLJ 979; NLR 1983 CrLJ 247 (DB).

Identity of accused at night of a kerosine lamp cannot be free from doubt (1983 PCrLJ 1227 (DB). Where it was contended that prosecution witness identified assailants in the light of a lantern and came to know of their names and addresses afterwards. The plea that natural witnesses had opportunity to witness occurrence

and to identify accused was repelled. it was held that such an identification without an identification parade which could link it with the accused would not be sufficient (1988 SCMR 302).

Non-mention of the kupi, the only means of recognition of the assailants, in the FIR report riases reasonable doubt about the veracity of the witness (BCR 1986 AD 64).

Torch light identification by.- Conviction based merely on evidence of identification of accused by torch light is unsafe unless corroborated by some other independent evidence (1988 PCrLJ 1736 DB; 1986 PCrLJ 1654). It is not the case of prosectuion that there was any other light in the house of either Babulal or Sukhdeo Mahton, where dacoity was committed. None of the witnesses had any torch with him to facilitate identification. Identification in the torch flashed by the accused in the present case, and in the manner as stated by the witness do not inspire confidnece. In the circumstances both the appellants are entitled to benefit of doubt. In the result the appeal succeeds. The order of conviction and sentence passed against them by the Court below is set aside. (Shyamdeo Singh Vs. State of Bihar 1988 (1) Crimes 124 Pat).

Where a prosecution witness made an averment that he had seen accused in moonlight inflictng hatchet blow to deceased on the fateful night. On the night of incident it was 24th day of lunar month. Averment made by prosecution witness, was held to be false (1984 PCrLJ 2727 DB).

In the undernoted case witnesses correctly identified the accused in parade, but the Court took into consideration the fact that nearly four months had elapsed between the date of the occurrence and the date of the identification proceedings. It was also observed that neither the identification memo shows nor the statments under section 161 Cr. P.C. record any descriptive particulars of the accused given by the witness. It was held that it would not be safe to act upon such identification evidence (Deo Singh Vs. State of U.P. 1989 (2) Crimes 515(520) All).

The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has indentified that accused person as having taken part in the crime which is being investigated. It merely means that the witness happens to know that accused person. The principal evidence of identification is the evidence of a witness given in a Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused played in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, but otherwise the evidence of identification furnished by an identificaton parade can only be hearsay except as to the simple fact that a witness was in a position to show that he knew a certain accused person by sight (1985 SCMR 721). Where eye-witnesses and witness of Vajtakkar did not know accused earlier but they gave his description which held good in the case of accused. Accused was correctly identified by such witnesses at the identification parade. The contention that accused had scar marks on his face but they were not covered before he was exposed to identification and, therefore, his identification was of no consequence, was repelled (1987 PCrLJ 1646 DB).

Identification of a person by a witness for the first time in Court without being tested by a prior test identification parade is valueless (State of Orissa Vs. Bholanath Nayak 1990 (2) crimes 28 Ori; 27 DLR 79). Identification, in court itself without there being any test identification parade is not of much value (Sunder Vs. State of Haryana 1988 (2) Crimes 603 P&H).

Identity of the accused who is a stranger to the witness, in Court, as a general rule requires corroboration in the form of identification proceedings (Jaimal Singh Vs. State of Haryana 1988 (3) crimes 442 P&H).

Value of identification evidence .- It has been held that :

1. the substantive evidence with regard to identification of the accused is the statement of a witness made in the Court;

2. since such evidence from its very nature is inherently of a weak character it is a safe rule of prudence to look for corroboration in the form of earlier test identification unless a particular witness in such as his testimony can be safely relied upon without such corroboration;

3. test identification belongs to investigation stage and is generally held during investigation in order to satisfy the investigating officer of bonafides of the witnesses and to provide corroboration later at the trial;

4. such test identification should be held without much delay and the witness must have had no opportunity of seeing the accused after the commission of the crime and before test identification;

5. the number of persons mixed with the accused should be reasonable large and their bearing and general appearance not glaringly dissimilar; and

6. the identificaton is a statement of a witness either express or implied that the person pointed out by him was concerned in the crime;

7. any person can conduct a test identification but when conducted by a police officer, it would be governed by section 162, Criminal Procedure Code but if conducted by a Magistrate, then by section 164, Criminal Procedure Code;

8. if a person is identified by some and not identified by some others, there is no set off and it can not be deemed that he was identified by none (AIR 1970 SC 1321= 1970 CrLJ 1149; 1982 SC CR R 205= 1982 SCC (Cr) 115).

The evidence of test identification is at best supporting evidence. It can be used only to corroborate the substantive evidence given by the witness in court regarding identification of the accused as the doer of the criminal act (1981 CrLR (Raj) 217).

The identification of the accused in Court without anything else should not be taken into consideration in order to convict him. The value of identification of a person for the first time in Court is valueless (1982)53 Cut LT 342; 1982 Cut LR (Cr) 71).

Where the incident took place in a cloudy night when there was drizzling and the indentification was not accepted (AIR 1980 SC 551; 1980 CrLJ 406). In cases where it is claimed that the culprits were seen in the light of torch, torch light should be produced and identified in trial (1982 SC Cri. 356). Recognising previously known accused in the moon light from 100 cubits distance is possible as the incident took place not in the bamboo-clump but onthe path by the side of it (Nowsher Ali Vs. State (1987) 39 DLR (AD) 194 Para 6).

No provision of law provides for holding of identification proceedings where crime is committed by a person unknown to witness or for that matter in any type of cases. Identification test by itself has no independent vlaue. If identity of accused is proved by other convincing evidence, direct or circumstantial, absence of identification test proceedings is immaterial (1982 SCMR 129). Where the accused is known to witnesses, identification test is superfluous (1977 SCMR 347). Where the accused was not named in FIR an identification test held a year and a half after

the incident, cannot be relied upon for conviction of accused (1984 PCrLJ 297).Identification by voice calls for extra circumspection by the Court. Where the accused was identified by voice by a solitary witness and there was no incriminating recovery from the accused. Conviction was setaside (1973 PCrLJ 428).

Delay in test indentification.- The object of an identification parade would be largely frustrated if they are held a long time after the accurrence. to get the best results there should be no delay in such matters. The sooner the identification proceedings are conducted, the better it is. It is not desirable to delay identification proceedings because delay may affect the abilty of a witness to identify an accused (AIR 1942 All 339; 43 CrLJ 867). Identification could not safely be relied upon when it was held twelve months after the occurrence and seven months after arrest without any explanation why it was not promptly held or why the accused was not put up at a test identification in respect of other co-accused held 22 days earlier (1979 CrLJ 715 SC).

No importance can be attached to indentification if the test identification is conducted long after the arrest of the accused. There is very possibility of committing mistake by a witness if the identification proceedings are held after an inordinate delay (AIR 1971 Raj 184; 1971 CrLJ 974; ILR (1970) 20 Raj 439). It must be stressed that whenever a test identification is discovered to have been held with delay, the prosecution should explain it, and that the absence of a reasonable explanation will detract from the value of the test (AIR 1961 ALL 153 DB; AIR 1972 SC 283).

The value of identification is very much minimised if the identification proceedings are held long after the occurrence because human memory is fallible. It is sometimes difficult to identify a person not very well known, whom one sees with a rather different appearance about 15 months later (AIR 1952 All 59; 1952 CrLJ 265). Identification parades should never be delayed so far as the cirumstances of the case permit and that all available witnesses should be asked to attend the very first parade (36 CrLJ 121; AIR 1934 Lah 641).

Delay of 9 months, held, not safe to convict (1973 All Cr R 388). Delay of 15 months, held, no credibility can be lent to the performance of the witness and conviction based only on evidence of identification can not stand (1972 All CR.R 526).

Whenever a parade is held with delay, the prosecuiton should explain it and absence of reasonable explanation will detract from the value of the test (AIR 1961 All 153). But to lay down any hard and fast rule, that it is always unsafe to accept the testimony of witness who went to the identification parades after the lapse of a period of some months from the date of the commission of the offence, will be a dangerous proposition not warranted either by law or common sense. The question whethr or not a certain set of witnesses who say that they had identified a particular accused or a group of accused persons should be believed is a question depending upon the facts and circumstances of each case. To say the least, if such were a rule it would be the easiest thing for a culprit to avoid his arrest for a certain period of time and then turn up with confidence that he can go with impunity because of the lapse of the requisite period of time. There is no law of limitation within which identification proceeding must be held (49 CrLJ 287; (1964) 1 CrLJ 378). Each case has to be judged on its own particular facts. Where a long period elapses between the arrest of the accused and their identification and it has not been conclusively shown that the witnesses had any opportunity of seeing the accused before the test identification parade, no ground is made out for discarding such evidence (34 CrLJ 379; 1966 CrLJ 1332).

The absence of a test identification would not be necessarily fatal where there were other corroborative circumstances pointing to the guilt of the accused (1975 CrLJ 1553 SC). Where the test identification parade was held about four months after the date of occurrence and the eye witnesses had not given any descriptive particulars of the accused either in the FIR or in their statements during investigation, it would be unsafe to base the conviction solely on such identification and the accused was entitled to a benefit of doubt (AIR 1987 SC 1222; 1987 CrLJ 991).

Identification in Court for the first time.- It is well settled that where a witness identifies an accused who is not known to him in the Court for the time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his power of observations (1977 CrLJ 319(332); 1982 Raj Cr 221; 1979 CrlJ 919 (920) SC). the evidence of identification of an acucsed for the first time in the dock is inherently weak and more specially so when it is done after a lapse of considerable time (1977 CrLJ 319 (332) Ori; 1983 CrLJ (NOC) 3 Delhi).

25. **Plea of guilty**.- A plea of guilty means that the accused had admitted all the facts on which a charge has been founded. Where the accused has pleaded guilty to charge under section 302, a conviction of culpable homicide is illegal (10 CrLJ 5). It is settled practice not to accept a pela of guilty in a murder case unless the Court is fully satisfied that the accused was fully made aware of the implications there under (46 CrLJ 357). In capital cases where there is any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty it is advisable for the Court to take evidence and to convict solely on the plea of the accused (Abdul Kader Allarakhia Vs. Emperor, AIR 1947 Bom 345; 38 CrLJ 329; AIR 1945 Nag 492).

There is nothing in the law that bars a conviction on basis of a plea of guilt, however serious is the offence committed and however grave is the sentence provided in law (Tyron Nazareth vs. State 1988 (1) Crimes 590 Bom).

But it is not the usual practice to accept a plea of guilt in a murder case, especially where the accused is an ignorant person, unless the Court is satisfied that the accused knew exactly what implied by the plea of guilty and its effect (46 CrLJ 357; 36 LJ 324; AIR 1934 Sind 204; 23 CrLJ 609; 30 CrLJ 508).

There is no reason why, if proper safeguards are taken, the plea of guilty should not be accepted. Such safeguards must include the accused's representation by counsel who must be in a position to answer the questions of the Court, with regard to whether the accused knows what he is doing and the consequence of his plea and also a medical report or medical evidence upon him (AIR 1947 Bom 345; 48 CrLJ 329).

It is a settled practice not to accept the plea of guilty in a murder case, unless the Court is satisfied that the accused knew exactly what was implied by his plea of guilty, and its effect (46 CrLJ 537 DB), and that he understood and admitted facts bringing the offence within the definition of murder and that he did not plead any of the exceptions set out in the Penal Code (AIR 1919 Upp. Bur. 23). The trial of an accused person does not necessarily end if he pleads guilty. Even in case of plea of guilty evidence may and should be taken in case of murder as if the plea had been one of not guilty and case, should be decided upon the whole of the evidence including the accused's plea (AIR 1928 Cal 775 DB).

Where on a clear and definite plea of guilty the Sessions Judge convicted the accused without recording any further evidence, and in the petition of appeal it was urged that the conviction should have been under section 304 and not section 302. The High Court ordered retrial and directed that the whole evidence in the case should be heard (AIR 1925 All 467 DB).

26. **Appreciation of evidence.**- A criminal trial is not like fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with question as to whether the accused arriagned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is product of interplay of the different human emotions. In arriving at conclusion as to guilt of the accused charged with commission of the crime, Court has to judge evidence by yardstick of probabilities, its inherent worth and animus of witness (The State vs. Md Ali Kibria 1991 BLD 336). Cardinal principle of law for assessment of evidence, in the case of two versions is that both the versions are put in juxtepositon and the Court then on the basis of record has to find out which version is more probable, natural and nearer to truth subject to the condition that burden of proof always remains upon prosecution (Abdul Hameed V. State 1991 PCrLJ 786; Asal Khan Vs. State 1990 PCrLJ 437).

It is well settled that in the matter of appreciation of evidence it is not the number but the quality of evidence and its intrinsic worth which counts. It is not an uncommon tendency to avoid involving oneself in any, village controversy or feud by giving evidence for one side and people are reluctant to come forward to give evidence (1985 CrLJ 1248 (1252) All). If the witnesses who have already been examined can be believed, the case cannot be thrown out on the ground that some other independent witnesses who were mentioned in FIR or who were on spot and witnesses the incident were not examined (Ram Gulam And anothers vs. State 1988 (2) Crimes 151 (All).

Evidence of persons falling in the category of interested witness must be closely scrutinised. They should not be accepted on their face value. Their evidence cannot be rejected outright simply because they are intrested witnesses (Nowabul Alam Vs. State(1993) 35 DLR (AD) 1993 (140); Hamida Bano Vs. Ashiq Hussain 15 DLR (1963) SC 65; Ali Ahmed Vs. State 14 DLR 91962) SC 81; Masalti Vs. State of U.P. AIR 1965 SC 202 and Nazir Vs. State 14 DLR 1962 SC 159 relied on). Testimony of prosecution witnesses who were not only related and interested with the deceased, but were inimical to the acccused had to be assessed with care and caution required to be kept in mind in cases of such background (Swans V. State 1992 PCrLJ 2141). Manner, time and place of incident had been established by prosecution witnesses. Testimony of eye-witnesses could not be discarded merely on account of their inter-relationship and interest with the deceased as the accused was also closely related to them who had no grudge or immediate motive to involve accused but of mulice or concoction. Ocular account was also supported by medical evidence and other circumstantial evidence Conviction and sentence of accused were maintained in circumstances (Muhammad Amin V. State 1992 PCrLJ 604).

It is well settled that the prosecution case is never proved by suggestions made by the defence to prosecution witnesses. The Court cannot accept what is favourable to the prosecution and ignore the true purpose of suggestion (Nowabul Alam Vs. State 45 DLR (1993) AD 140).

"It is true that in the average murder case from the rural areas, a major complication in the evaluation of the evidence is generally introduced by the difficulty of obtaining persons to testify against the accused other than those who are in ties of relationship with the complainant or have personal animus against the accused. The Courts duty it is to adopt careful principles for the safe dispensation of justice act with perfect propriety when they scrutinize the evidence of persons falling in this category with care, and they accept such evidence as sufficient to establish, beyond reasonable doubt, that the accused person is guilty of a capital offence (Hamida Bano Vs. Ashiq Hussain and ors. (1963) 15 DLR (SC) 65).

The principle that is to be followed is that the evidence of persons falling in the category of interested, interrelated and partisan witnesses must be close and critically scrutinised. They should not be accepted on their face value. Their evidence cannot be rejected outright simply because they are interested witnesses for that will result in a failure of justice, but their evidence is liable to be scrutinised with more care and caution than is necessary in the case of disinterested and unrelated witnesses. An interested witness is one who has a motive for falsely implicating an accused person and that is the reason why his evidence is initially suspect. His evidence has to cross the hurdle of critical appreciation. As his evidence cannot be thrown out mechanically because of his interestedness, so his evidence cannot be accepted mechanically without a critical examination (Nowabul Alam Vs. State 45 DLR (1993) AD 140 (145). If witnesses related to deceased were injured or the complainant being present at the spot was in a position to identify the offender and there was no possibility for substitution, then their statements could be accepted without corroboration. If, however, there was exaggeration in the statements of such witnesses and their veracity was doubtful, then for the safe administration of criminal justice it would be proper to insist on independent corroborative evidence (Yar Muhammad V State 1992 SCMR 96).

"Prudence, of course, requries that the evidence of an interested witness should be scrutinised with care, and conviction should not be based upon such evidence alone unless the Court can place implicit reliance thereon (Ali Ahmed Vs. State 14 DLR (SC) 81).

The rule that the evidence of interested witnesses requires corrobroation is not an inflexible one. It is a rule of caution rather than an ordinary rule of appreciation of evidence. The Supreme Court of Pakistan spelt out the rule in the case of Nazir vs. State, 14 DLR (SC) 159 as follows :

"..... we had no intention of laying down an inflexible rule that the statement of an interested witness (by which expression is meant a witness who has a motive for falsely implicating an accused person) can never be accepted without corroboration. There may be an interested witness whom the Court regards as incapable of falsely implicating an innocent person. But he will be an exceptional witness and, so far as an ordinary interested witness is concerned, it canot be said that it is safe to rely upon his testimony in respect of every person against whom he deposes. In order, therefore, to be satisfied that no innocent persons are being implicated along with the guilty the Court will in the case of an ordinary interested witness look for some circumstances that give sufficient support to his statement so as to create that degree of porobability which can be made the basis of convicction. That is what is meant by saying that the statement of an interested witness ordinarily needs corroboration".

Mustafa Kamal, J- observed in the case of Nowab Alam Vs. State (1993) 45 DLR AD 140) as follows:

"The High Court Division found that all the eye-witnesses described the main occurrence consistently and without any discrepancy and contradiction. That again at times (as, it will be seen, in the present case) is a halmark of interested testimony and should not be accepted on its face value. PW 2 Pilu was nearest to the occurrence and his version of the events will be more detailed as he had the occasion to observe the events at more close quarters, but P.W.s 3,4 and 5 were about 200/250 yards away from the place of occurrence and they were hiding themselves in the Kashban for fear of being attacked by the assailants, but the description of occurrence by P.Ws. 3,4 and 5 is parrot like, undistinguishable from that of PW 2. They did not miss anything from 200/250 yards away, even though

their opportunity to see from a longer distance from hiding in the Kashban and in a state of fright must have been much more less than that of PW 2. Nabaganga river is about 500/600 yards in breadth and PW 6 Abdul Malek and PW 7 Sobhan, two boatmen who are alleged to have seen the occurrence from the middle of the river, about the same distance from where PW s 3-5 had allegedly seen the occurrence, were disbelieved by the Trial Court and the High Court Division on the ground that the occurrence cannot be witnessed properly from such a distance. By the same token the parrot - like evidence of PWs 3-5 ought to have been subject to a critical review, more so when the vision of PWs 3-5 were clouded by the lush growth of Kashful around them where they took refuge".

Witness is not expected to notice minute details of the occurrence like distance which is given as a guesswork and can never be exacct if measured in terms of feet (Sohail Azam V.State 1989 PCrLJ 1570).

In the case of Nazir and others Vs. State reported in PLD 1962 SC 269, Kaikaus, observed as follows :

"This is what is meant by saying that the statement of an interested witness ordinarily needs corroboration. For corroboration it is not necessary that there should be the word of an independent witness supporting story put forward by an interested witness. Corroboration may be afforded by anything in the circumstances of a case which tends sufficiently to satisfy the mind of the Court that the witness has spoken the truth. What circumstances will be sufficient as corroboration it is not possible to lay down. But, as the question before the Court would be whether some innocent persons had not been implicated in addition to those who were guilty the circumstance relied upon must have a bearing on this question. In the case of an interested witness the corroboration need not be of the same probative force as in the case of an accomplice for the two do not stand on the same footing".

In the case of Karnail Singh and another Vs. State of Punjab reported in AIR 1954 SC 2 it was observed :

"The corroboration that is required in such cases is not what would be necessary to support the evidence of an approver but what would be sufficient to "lend assurance to the evidence before them, and satisfy them that the particular persons were really concerned in the murder of the deceased. Vide - Lachman Singh Vs. State 1952 AIR (SC) 167 (169) (B), Karnail Singh was arrested on the spot with a spear and a bloodstained pyjama and these are pieces of evidence which would support the inference that he was concerned in the crime".

The same view has also been expressed in the case of Lachman Singh and others Vs. State reported in 1952 AIR (SC) 167, wherein it was observed as follows :

"By adopting this standard the appellate Court does not condemn the oral evidence outright but as a matter of prudence and caution it decides not to convict an accused person unless there were some circumstances to lend support to the evidence of the eye-witnesses with regard to him. The corroboration required is not that corroboration which one requires in the case of an approver or an accomplice, but corroboration by some circumstances which would lend assurance to the evidence before the court and satisfy it that particular accused persons were really concerned in the offence".

"There is no general rule that the evidence of the relations of the deceased must be corroborated for securing the conviction of the offender. Each case depends on its own facts and circumstances. In the present case the straight forward nature of the deposition of these two witnesses and the fact that they were undodubtedly in a position to identify the assailants of their father coupled with the recovery of

bloodstained earth from the place of occurrence leave no reasonable doubt about the guilt of the accused persons" (State of U.P Vs. Paras Nath Singh AIR 1973 SC 1073).

"There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence, whether or not evidence strikes the Court as genuine, whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would inevitably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated. Judicial approach has to be cautions in dealing with such evidence, but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct" (Masalti Vs. State of U.P. 1965 SC 202). Where witness was interested and also inimical and had falsely implicated an accused, reliance on his evidence could be place in respect of other accused provided it was corroborated by strong and unimpeachable circumstances or evidence (Muhammad Usman Vs. State 1992 SCMR 489).

For safe administration of justice, Courts have to follow the following principles namely (i) accused is presumed to be innocent till he is proved guilty, (ii) prosecution has to prove its case on the strength of its own evidence, (iii) accused being a favourite child of law is given a licence of tellin lies, he cannot be punished for his flaws or falsities and his failure to prove the plea taken by him shall not strengthen prosecution case or absolve it of its duty to prove case beyond a shadow of doubt, and (iv) in case of any doubt, not being an artificial doubt, the accused shall get its benefit as a matter of right (1983 PCrLJ 172). It must however be noted that the appreciation of evidence in a criminal case is not governed by a mathematical formula and no hard and fast rules can be laid down in that report as in each case the witnesses are differnt and the circumstances vary, appreciation of evidence cannot be subjected to settled formula. It depends upon the intrinsic value of witnesses deposition in the light of the peculiar circumstances of each case as to whether their testimony should be relied upon or not (1987 PCrLJ 1728).

The duty of the prosecution in proving the guilt of the accused in grave offences like murder and the responsibility of the Court in assessing and arriving at the truth is very onerous, much more so, when a number of persons are implicated. The evidence will have to be carefully sifted and, if the circumstances raise a reasonable doubt as to whether all the accused participated or some alone participated in the occurrence and who among them participated, all the accused will have to be acquitted, being given the benefit of doubt. Where several persons are implicated, the question is, not one of mere arithmetic, acquitting some and convicting the rest, but whether the evidence, which has been rejected as false or insufficient as against the accused who had been acquitted, is sufficient and convincing to make out the guilt of the other accused; as against the latter, the Court should have no doubt whatever. As often said, motive operates as a powerful influence for the commission of the crime; equally, motive operates as a powerful force to falsely implicate the hostile group. The fact that the parties and the witnesses belong to rival factions and are on terms of pronounced enmity and hostility is a circumstance in favour of the accused, in a case where several persons are implicated (1972 MLJ (Cr) 638 (642).

Where witnesses were examined by the prosecution but none of them could be said to be wholly reliable witness. The deceased was an accused in two cases of his own village. The survivors of the victims of those cases were still alive. The deceased had also enmity with another man. There was no dearth of his enemies. The possibility of murder having been committed by some unknown persons in the early hours of the morning and the false implication of the accused on account of the enmity suggested by the prosecution itself could not be ruled out (1976 U.P Cr. C 238 (242) All).

If part of the story is found doubtful, it would not necessarily falsify the whole account, but in that case the rest of the story told by the alleged eye-witnesses must then be examined carefully before it is relied on (1981 CrLJ 1000, (1001) SC). If a statement made in cross examination contradicts the statement made in the chief the entire evidence of the witness should not be left out of consideraion. Even if any part of the evidence of a witness is believed that part can be taken into evidence and considered and for disbelieving another part of his statement the entire evidence of the witness should not be excluded from consideration simply on ground of contradictory statement. The Court may take into consideration that part of his evidence which gets support from other evidence and attending facts and circumstances of the case (Nurul Islam Vs. State 40 DLR (1988) 122; Nazrul Islam Vs. State 27 DLR (1975) 671 and 29 DLR (1977) AD 221 Rlied on).

In 1981 CrLJ 645, the only point argued was that as there is no mention of the torchlight in the FIR or in the statements of the witnesses before the police, the presence of torch was not proved and hence it would not have been possible to identify the appellants. The Supreme Court held that even if this omission is there, it loses its significance in view of the direct testimony that when they reached the spot they found the torch burning.

Where entire story put forward by witnesses who claimed to be eye-witnesses was highly improbable and inconsistent with ordinary course of human nature, and the evidence of recovery of knife from the appellant was far from satisfacotry, it was held that the evidence led on behalf of the prosecution was wholly unsatisfactory and it could not be regarded as sufficient to found the conviction (AIR 1976 SC 170 (1973). There is no law which says that in the absence of any indpendent witness, the evidence of interested witnesses should be thrown out or should not be relied upon for convicting an accused. What the law requires is that where the witness are interested, the Court should approach their evidence with care and caution in order to exclude the possibility of false implication. The evidence of interested witnesses is not liek that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence. In a faction ridden vilalge it will really be impossible to find independent persons to come forward and give evidence and in a large number of such cases only partisan witnesses would be natural and probable (AIR 1985 SC 1384; 1985 CrLJ 2009; AIR 1975 SC 1985; 1975 CrLJ 1739).

Conviction under section 302/34, Penal Code based on the statement of solitary eye-witness is not legally sustainable when the testimony, in so far as the role assigned to the accused is concerned, is suspect and cannot be accepted in the absence of dependable corroboration (Mahendra Singh Vs. State of Rajasthan 1989 (1) Crimes 394 (SC).

In the case of Abdur Rashid Khandakar vs. Chandur Masters and others, 16 DLR 1964 (SC) 605, the Supreme Court upheld an order of acquittal by the High Court of the accused persons who were convicted under section 326 Penal Code on the basis of direct eivdence of witnesses including the complainant. In that case the

complainant, while passing by a jungle was attacked by some miscreants, one of whom threw him down, took out both of his eyes with a knife and blinded him for ever. He claimed to have recognised his assailants and was corroborated by other witnesses, but he was disbelieved when it was found that to one witness at least, who was held to be trustworthy, he had, immediately after the occurrence, stated that his condition of losing his eyes was due to his bad luck, meaning that he could not recognise his assailants in the darkness, but later on, the accused were implicated by guess and suspicion.

In Chanan Singh Vs. State of Harayana AIR 1971 SC 1554, the Indian Supreme Court set aside the conviction because of the abnormal conduct of the sole witness who ran away from the place of occurrence even though he was not chased or threatened by any of the assailants and did not report the incident to the relatives of either of the two deceased persons.

Prosecution had failed to examine any disinterested witness despite admitted presence of 150 to 200 persons at the place of incident which reflected adversely on the prosecution case. Recovery of crime weapon from the accused was not established. Eye witnesses had concealed very material facts including the injuries suffered by accused and, therefore could not be believed in absence of any corroborative evidence. Ocular evidence disbelieved by Trial Court in respect of acquitted co-accused could not be relied upon for the conviction of the accused. Investigating Officer whose examination in the case was necessary had been examined. Prosecution had thus failed to prove the charge against accused beyond reasonable doubt. Accused was acquitted in circumstances (Muhammad Iqbal Vs. State 1992 PCrLJ 2092).

Many persons were present in room where incident took place but none tried to apprehend accused. Non-interference by eye-witnesses, held, did not make their presence doubtful because often unarmed people on such occasions are taken by surprise and out of fear of injuries stay away and few mustard courage can interfere on such occasons (1986 PCrLJ 1362). Though complainant was son of deceased and other eye witness was partisan witness yet none of them suffering any injury. As accused were heavily armed, it was, held, believable that eye-witnesses kept themsleves out of their way to save themselves. Bone of contention where the appellants were concerned, was deceased, the king pin and source of their worries and not his son (complainant). Thus, the absence of injuries on eye witness, would not lead to any unequivocal inference that they were not present (1986 PCrLJ 1354). The Appellate Court proceeded on a mistaken idea that the presence of PW 4 on the spot were not challenged by the defence. There was no question of his presence on the spot when the very defence case is that he was the actual killer. The contradictions and omissions in his own evidence makes the defence case more probable and as such the appellants are entitled to acquittal as a matter of right (1989 BLD (AD) 122).

Manner of occurrnce, according to prosecution, is that while Nurul Islam was sleeping after having been nicely entertained with a dinner, he was treacherously attacked and killed on the chowki. But the investigating officer found the lungi of the victim put on in malkocha fashion. A person while going to sleep does not put on malkocha. A malkocha indicates preparation for facing impending assault, offensive or defensive. In the case of the deceased Nurul Islam there was no occasion for either as he was sleeping. The malkacha rather than tends to support the defence case that Nurul Islam and his men forcibly entered the hut and tried to take away his estranged wife (38 DLR (AD) 75).

Whenever interested persons claiming to be eye witnesses of an occurrence charged persons against whom they have some motive for false implication with the commission of the offence the first question to be considered is whether in fact they saw the occurrence and were in a position to identify the culprits. If there be no reason to doubt that they in fact witnessed the occurrence and were in a position to identify the offenders, the further question arises as to whether they can be relied upon for convicting the accused without corroboration (12 DLR (SC) 289).

Prosecution case should not be rejected if there is a ring of truth in the main. Invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to detroy confidence in the witnesses. It is necessary to remember that a judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the judge has to perform (State of U.P. Vs. Anil Singh 1988 (3) Crimes 367 SC).

When the discrepancies, contradictions, omissions and improvements in the testimony of eye-witnesses do not appear to be honest or innocent but have been deliberately made with the oblique motives to fit in the incident witht he medical report, no reliance can be put on that testimony (Shersingh and other Vs. State of rajasthan 1989 (1) Crimes 284 Raj).

It is the duty of the court to scrutinise the evidence carefully. The court cannot, however, disbelieve the substratums of the prosectuion case or the material part of the evidence and reconstruct a story of its own out ofthe rest. The prosecution witnesses in the instant case, have given distorted version of the incident and have changed the entire version by making gross improvements in the version from that which had been given in the first information report. Where truth and falsehood are so intermingled as to make it impossible to separate the truth from falsehood the evidence has to be rejected inits entirety (State of Rajsthan Vs. Gunnel Singh 1989 (2) Crimes 586(594) Raj). It is true that the courts must separate truth from falsehood in the testimony of witnesses, but where the two were so intermingled as to make it impossible to separate them, the evidence must be rejected in its entirety (1970 CRLJ 363 SC; 1981 CrLJ 23 SC).

In a criminal trial, whole of evidence in-chief and cross-examination are to be read together for correct appreciaton to find out the truth there from (Shri Badhna Kharia Vs. The State of assam 1988 (2) crimes 651 Gau).

If any part of the evidence of a witness is believed that aprt can be taken into evidence and considered and for disbelieving another part of his statement the entire evidence of the witness should not be excluded from consideration simply on ground of contradictory statement. The court may take into consideration that part of his evidence which gets support from other evidence and attending facts and circumstances of the case (Nurul Islam Vs. State 40 DLR (1988) 122; Nazrul Islam Vs. State 27 DLR (1975) 671 and Ekabbar Khan Vs. Stat 29 DLR (1977) AD 221 relied on).

The court instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution versiona nd then search for the suggest of truth with due regard to probability, if any, suggested by the accused. The court, however, must bear in mind that witnesses to a serious crime

may not react ina normal manner. Nor do they react uniformly. The horror stricken witnesses at a destardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner (Appabhal Vs. State of Gujrat 1988 CrLJ 848 (851) SC; AIR 1988 SC 696).

Minor discrepancies in the version of a witness would not justify rejection of his testimony. Different persons who had seen an event might give varying accounts of the same. That by itself might not go to show that any of them was making a false statement. Difference in the description of the event do occur because of variance in the perceptiveness of every individual. A recount of the same incident is usually at variance to a considerable extent. That does not provide a ground for rejection of the evidence. On the other hand, in some cases such variation, if within reasonable limits, may add to the quality of the evidence of being nearer the truth (Basanta Dutta Vs. State of assam 1989 (3) Crimes 599 (602) Gau; 31 DLR (AD) 101).

Minor contradictions are bound to appear when ignorant and illiterate women are giving evidence. Even in case of trained and educated persons, memory sometime plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence. It would not, therefore, be right to reject the testimony of witnesses merely on the basis of minor contradictions (1976 Bihar Cr. C 75(78) SC).

A minor variation here and there is witness's evidence, that too on an insignificant point, would hardly matter in appreciation of his evidence (Dhundriya and another vs. State of M.P. 1991 (3) Crimes 518 MP; 31 DLR (AD) 101).

Minor variations, whicha re sometimes called contradictions, are natural when a number of witnesses see the occurrence and then depose in a court of law after a pretty long time (Amar Singh Vs. State of H.P. 1990(1) Crimes 498 HP).

It is natural to have a slightly different version of every situation that people see and observe. It depends on the power of observation and memory of every individual while narrating the incident. There is always a propensity to either suppress or to exaggerate a perticular incident according to one's attitude (Anthony Fereandes Vs. State of Goa 1991 (1) Crmes 327 Bom).

Eye-witnesses giving dramatic account of the incident with minute details of attack on each victim. Witnesses themselves admitting in their cross examination that they were attacked simultaneously. Witnesses can not be relied (AIR 1981 SC 1230, 1232; 1981 CRLJ 736). The rule of careful scrutiny applies only to inimical or interested witnesses but not to independent witnesses (AIR 1981 SC 1241, 1242; 1981 CRLJ 752). Description of occurrence by the eye-witness consistently and without any discrepoancy and contradiction at time is a hall mark of interested testimony and should not be accepted on its face value and their parrot like evidence should be subjected toa critical review (Nowabul Alam Vs. State 45 DLR (1993) AD 140 (Para 148).

In the matter of observation, perception and memorisetion, different witnesses differ from each other. So is weight to be given to those which are of consensus as to the substance of their evidence. The standard of rural witness should not be comparable to that of urban witness in the matter of exactitude and consistency. consideration in narration can not militate against the veracity of the core of

testimony provided that there is an impression of truth and conformity in substantial fabric of the testimony so delivered. It is settled principle that when injured witness marked assailants it can not be said that he would give up real assailant and falsely implicate person with whom there was no enmity (Ataur Rahman Vs. State 43 DLR (1991) 87).

The mere fact that one of the prosecution witness (PW 2) had acceeded in escaping unhurt or that there were discrepancies in the statements of two prosecution witnesses (PW 2 and PW 3) as to whether they had gone to a place with the decesed on the very day of occurrence or a day earlier was held not ground for jumping to the conclusion that PW2 was not in the company of the deceased or near about the scene of occurrence when deceased and PW 2 were shot dead. it was further held that discrepancies in regard to collateral or subsidiary facts or matters of detail occured even in the statement of truthful witness, particularly when they were examined to depose to events which happened long before then examination and that such discrepancies were hardly ground to reject the evidence of the witnesses when there was general agreement and consistency in regard to the substratum of the prosecution case (AIR 1981 SC 697).

If there is contradiction of a substantial kind or a big difference as to time as given by witnesses and proved by other circumstances, then the time as to the occurrence may become doubtful and the court can disbelieve the prosecution case. The opinion of the doctor has been so narrowly construed as would betray even ordinary common sense. Considering all aspects of the matter, there has been a manifest disregard of the accepted principles of appreciation of evidence and consequently a miscarriage of justice (State Vs. Abdus Sattar 43 DLR (1991) AD 44).

It will highly prejudice an accused if the trial court makes out a new case by picking up some of the facts from the evidence after prosecution fails to prove its case which is unfalded in trial (Haznat Ali Mandal Vs. State of Assam 1988 (2) Crimes 654; AIR 1975 SC 1962 relied on).

Every person who witnesses a murder reacts in his own way. Soem are stunned, become spechless and stand rooted to the spot, some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as for removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counterattacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaciton. To discard the evidence of witnesses on the ground that he did not react in any particular manner was to appreciate evidence in a wholly unrealistic and unimaginative way (AIR 1983 SC 680).

In Budha Vs. state of MP (AIR 1991 SC 4), it is held as under :

"Held that the conviction of the appellants accused, was principally based on the evidence of the deceased's mother and sister. Though their evidence is not to be discarded as interested, the necessary caution has to be observed in accepting the evidence of these witnesses. It is an accepted proposition that in the case of group rivalries and onmities, there is a general tendency to rope in as many person as possible as having poarticipated in the assault. The courts have, therefore, to be very careful and if after a close scrutiny of the evidence, the reasonable doubt arises with regard to the participation of any of those who have been roped in the court woudl be obliged to give the benefit of dodubt to them."

Evidence of close relations of the victim cannot be discarded more particularly when close scrutiny does not impair the same (Subedar Vs. State of U.P. 1992 (1) Crimes 824, 825)d. Straight forward evidence givne by witnesses who are related to

deceased can not be rejected on sole ground that they are interested in porosecution (Sahadevan Rajan and others. Vs. State of Kerala 1992(2) crimes 256).

Evidence of relation witnesses, duly corroborated by the medical evidence can form the basis of conviction of appellants under section 302, Penal Code 1860 (Kewal Singh and another Vs. State of Punjab 1988 (3) Crimes 321 P&H).

There is no reason to disbelive the circumstantial evidence of murder when the son and wife testified as to the calling away of the deceased after which he was not found till recovery of his dead body in the absence of any reasonable explanation as to the departure of the deceased from the company of the accused (Anisur Rahman Vs. State 1986 BLD (AD) 79).

Medical evidence is corroboration to show that injuries were caused ina particular manner with particular weapon and even it can supply corroboration to the fact as to how many assailants there were and whether number of injuries is commensurate with number of assailants or not, but medical evidence can never be used as corroboration qua accused to show that particular accused has caused these injuries. Question of medical evidence an corroboration came up for consideration before this court in the case of Machia and others Vs. State PLD 1976 SC 696 and it was observed that medical evidence by itself and without more cannot throw any light on the identify of the assailants, but in case of inimical evidence, it is this aspect of the ocular evidence which requires corroboration, because danger in relying on ocular evidence in such cases is that the witnesses may falsely implicate their enemies. At the highest, therefore, the fact that medical evidence is consistent with the ocular evidence, may furnish some limited corroboration of the ocular evidence if it can lead to the inference that the eye witnesses have spoken the truth. In the case of Shamsheream Vs. State 1985 SCMR 34 it was held that medical evidence is merely corroborative evidence but conviction cannot be recorded merely on basis of presence of injuries on dead body without there being any evidence on record that accused had caused the same (Munawar Ali Vs. State PLD 1993 SC 251).

"It has been contended that evidence of 7 prosecution witnesses who claimed to ahve seen the actual assault should not be relied upon in view of the discrepancy into the nature of injuries found in the body of the deceased Aftabuddin. Two of these witnesses, added that besides Lathi belows accused joynal had struck the victim with a sword. But P.W.8, the Mediela Officer said that he did not find any incise or penetrating wound likely ot ahve been caused by a sword. Among these witnesses one is the wife of the deceased and another is his son and they have stated that Aftabuddin was assualted by these five accused perons in his house. In the circumstances,the statement that a sword was also used may be due to a bonafide mistake or a simople exaggeration which cannot be interpreted as a circumstances sufficient to reject the direct evidence that they saw these accused causing the fatal injuries. It may be noted that though some of the witness stated that a sword was used they did not say that any incised penetrated injury was seen by them int he dead body of Aftabuddin. In the circumstances, the contention that there is serious divergence betweent he expert evidence of the doctor and the direct evidence of the witnesses has been rightly rejected" (Jonal Abedin Vs. State 37 DLR (AD) 113, 114).

It is not the quantity of the evidence that is necessary to establish the charge, but the quality, with which the court is to be satisfied, as regards its truthfulness and reliability (1987 PCrLJ 2476). Therefore, prosecution is under no legal compulsion to produce all eye witnesses (1986 PCrLJ 1520). The evidence produced by the prosecution may appear impressive because of the number of witneses examined and the documents produced, but the question is whether it is sufficient to prove the

guilt of the accused (PLD 1979 SC 53). Even in a murder case conviction can be based on the testimony of a single witness, if the court is satisfied that he is reliable (PLD 1980 SC 225). Reliability of such witnes would depend on various factors e.g., whether the presence of the witness at the time of occurrence is natural; his statement is consistent, the version of incident given by him is natural; his character is above suspicion; he has stood the test of cross-examination and his testimony is unimpeachable (PLD 1986 SC 477).

Where a solitary eye witness was corroborated by medical evidence, recoveries and retracted judicial confession. Conviction was upheld (1982 PCrLJ 986). Where there was only one reliable witness of locality. Other P.W.s were chance witnesses and were found to be not reliable. Conviction was based on the evidence of the single reliable witness (1975 PCrLJ 21). Where the sole eye witness was independent and disinterested, and there was nothing on record to detract from his veracity and there was no reason for him to falsely substitute accused for the real culprit. Evidence of the witness was also corroborated by medical evidence. Mere fact that such witness had appeared as a witness in some robbery case on behalf of complainant, would not make him an interested witness (PLD 1983 Pesh 37). Where evidence of one prosecution witness was not considered. Testimony of two other prosecution witnesses, both indpendent, was held, sufficient to sustain conviction of accused (1983 SCMR 1211).

It is well established rule governing the administration of criminal justice that evidence should not be considered in isolation as so many bits of evidence but the whole of it should be considered together and its cumulative effect must be weighed and given effect (PLD 1976 SC 44). But while examining each piece of evidence their infirmities and weakneses cannot be ignored (1988 PCrLJ 1727).When once the presence of a witness at the scene place is probable and acceptable and there was no motive for him to depose against the accused and there is no improbability in his evidence, his evidence cannot be rejected merely on the ground that he is obliged to the police as he was involved in a prohibition case (Packiam and orthers Vs. State 1992 (1) Crimes 454 (458).

Mere fact that the eye witness is a polcie constable, by itself is not sufficient to discredit his evidence (Packiam and others Vs. State 1992 (1) Crimes 454(458).

Suspicion even though strong, cannot be accepted by itself as incriminating proof (PLD 1964 SC 81; 16 DLR SC 177). The oral evidence of an independent witness as to possession cannot be brushed aside unless there are strong reaons for doing so (1969 PCRLJ 701 DB). Where the witness is not an interested witness, conviction can be based on his testimony alone 9PLD 1962 SC 102; 14 DLR (SC) 81). Mere fact that some of accused were acquitted on same evidence, held would not mean that entire evidence could be rejected outright court fee to accept that much of evidence which was trustworthy and corroborated from other evidence (1985 PCRLJ 131; 1982 SC MR 57 and PLD 1959 SC 109 rel.).

It is a primary principle of criminal law that the onus of proving the general issue, i.e. everything essential to the establishment of the charge against the accused, rests upon the prosecution and never thifts, and it lies upon the prosecution to establish, on the whole case, and beyond reasonable doubt, the guilt of the accused (PLD 1968 Lah 694).

The court must carefully examien the prosecution evidence and find the accused guilty only if it is reliable and proves the guilt of the accused to the hilt. When a judge did not consider it necessary to scrutinise or even examine the prosecution evidence and without the slightest hesitation, proceeded on the

assumption that the story put forward by the prosecution was true and that it was fully supported by witnesses, such an approach to a case is ground for setting aside the conviction (PLD 1961 Pesh 137).

There may be an element of truth in the prosecution story against the accused and considered as a whole the prosecution may be true, but between "may be true" and must be true", there is invariably a long distance to travel and whole of this distance must be dovered by prosecution by legal reliable and unimpeachable evidence before an accused can be conviction. The guilty of the accused is to be established by the prosecution beyond the possibility of any reasonable doubt on the basis of legal evidence and material on the record (AIR 1974 SC 284(286); AIR 1974 SC 775; 1974 CRLJ). The prosecuton case 'must be true' and not 'amy be true'. Considered as a whole the prosecuton story may be true but between may be true and must be true there is inevitably a long distance to travel and the whole distance must be covered by legal, reliable, and un-impeachable evidence. It is to be born in mind that uncertainty in evidence before the court is due to nature and quality of that evidence. Ina criminal trial presumption of innocence is a principle of cardinal importance and so guilt of the accused must eb proved beyond reasonable doubt. Probability however strong and suspicion howevr grave can never take polace of proof (Mad Ali Haider Vs. State 40 DLR 97).

When the discrepancies in the testimony of eye-witnesses are comparatively of minor character, they do not go tot he root of prosecution story (1981 CrLJ 630, 631 SC).

Where all the material witnesses of the prosecution are either interrelated or otherwise interested in the prosecution before their testimony had safely acted upon has to pass the test of close and severe scrutiny (1982 SCC R 63 (66).

There is no doubt that when a criminal court has to aprpeciate evidence given by witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence onthe sole ground that it is interested would invariably lead to failure of justice (AIR 1991 SC 318).

A murder took place near about midnight inside the house. Near relations living practically in the same house cannot eb said to be partisan or interested witnesses. They are very natural witnesses (AIR 1980 SC 184).

Where it was clearly mentioned in the FIR that some of the prosecution witnesses were near relations and it was also mentioned that the deceased made an oral dying delcaration it was held that the conviction was justified (1979 CrLJ 1129 (1130); AIR 1979 SC 1497).

The mainstay of the prosecution case in the instant case was the ocular account given by the two injuried persons. They had gun shot injuries which were the hall marks of their presence at the scene of occurrence. True, they were interested witnesses, related to the deceased. Far from undermining in the circumstances of the case, it guarantees the truth of their testimony. Being relations, they would be the least disposed to falsely implicate the appellant, or substitute him in place of the real culprit. In short, the murder charges had been proved to the hit against the appellant (1980 crLJ 832, 834 All).

A witness may be the brother of the deceased and therefore an interested witness by this is not sufficient to demolish his testimony. His evidence is reliable when there is nothing in his cross-examination to shake his credit (1976 U.P. Cr.C 103 (110) All).